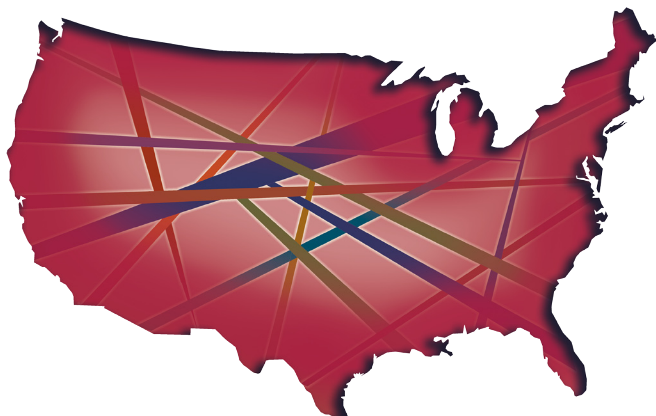

National Cooperative Highway Research Program
Selected Studies in Transportation Law

Volume 2
Eminent Domain

TRANSPORTATION RESEARCH BOARD
OF THE NATIONAL ACADEMIES

Introduction — Cover, Title Page, and Project Committee Information

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Selected Studies in Transportation Law

Volume 2

EMINENT DOMAIN

Larry W. Thomas, Esquire

Transportation Research Board

Selected Studies in Transportation Law

Volume 2

EMINENT DOMAIN

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SECTION 1

INTRODUCTION TO THE LAW OF EMINENT DOMAIN

Wherever there is sovereignty, whether in the old world, where it is held in trust for the people by things called kings, or in this country, where the people wear it upon their own shoulders, two great and fundamental rights exist: the right of eminent domain in all the people, and the right of private property in each. These great rights exist over and above, and independent of all human conventions, written and unwritten.[1]

[1] Proprietors of the Spring Grove Cemetery v. Cincinnati, Hamilton & Dayton R.R. Co., 1 Ohio Dec. Reprint 316 (Ohio Super. Ct. 1849), *rev'd on other grounds*, 1 Ohio Dec. Reprints 343 (Ohio 1850) (*quoted in* City of Norwood v. Horney, 110 Ohio St. 3d 353, 361, 2006 Ohio 3799, at *P*33, 853 N.E.2d 1115, 1127 (2006)).

A. HISTORICAL EVOLUTION OF THE POWER OF EMINENT DOMAIN

Eminent domain is an "exercise of the inherent power of the sovereign…to condemn private property for public use, and to appropriate ownership and possession thereof for such use upon paying the owner a due compensation."[2] As noted in a 2006 report by the General Accounting Office (GAO) to Congress, "[a]n inherent right of sovereignty, eminent domain is a government's power to take private property for a public use while fairly compensating the property owner."[3] However, the power of "eminent domain engenders great debate. Its use, though necessary, is fraught with great economic, social, and legal implications for the individual and the community."[4] Moreover, "property rights are integral aspects of our theory of democracy and notions of liberty."[5] However, as the GAO Report found, "[d]espite its fundamental significance, little is known about the practice or extent of the use of eminent domain in the United States. The matter of eminent domain remains largely at the level of state and local governments that, in turn, delegate this power to their agencies or designated authorities."[6]

The right of eminent domain thus is an inalienable right of government; it is inherent in the sovereign.[7] "The power of eminent domain exists as an attribute of sovereignty—not granted, but limited by the [F]ifth [A]mendment."[8] It is the right of the people or government to take property for public use.[9] The right to take private property for a public use is usually vested in both federal and state governments even if the purpose ultimately is to transfer property to private entities.[10] Although eminent domain is an inherent power of the sovereign, the power remains dormant until the legislature speaks,[11] and specific entities such as municipal corporations do not have inherent authority to delegate the power of eminent domain.[12]

The government's power to take private property "predates modern constitutional principles" and at the time of the adoption of the United States (U.S.) Constitution "was so familiar that '[i]ts existence…in the grantee of that power [was] not to be questioned.'"[13] Indeed, "[t]he Founders recognized the necessity of the takings power and expressly incorporated it into the Fifth Amendment to the United States Constitution."[14] However, when America had an abundance of unclaimed land and there was limited government activity, there was "little controversy over the use of eminent domain to develop land and natural resources."[15] Eventually, however, "[t]he indisputable right of the United States to exercise the power of eminent domain by proceedings brought in the federal courts was clearly recognized and definitely asserted for the first time in 1875 in…*Kohl v. United States*…."[16]

Eminent domain as a phrase "was completely unknown at common law," but the sovereign power to take property was recognized "in several of the original state constitutions" without mentioning the term eminent domain.[17] Colonial governments and later the state and local governments had financial resources in the form of undeveloped land rather than revenue from taxes. Land for internal improvements such as wharves, dams, or bridges was obtained frequently by reservation of public

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[2] R.I. Econ. Devel. Corp. v. The Parking Co., L.P., 892 A.2d 87, 96 (R.I. 2006) (*citing* 26 AM. JUR. 2D *Eminent Domain* § 2 at, 418 (2004)), *appeal after remand,* 2006 R.I. LEXIS 157 (R.I. Oct. 24, 2006). *See also* Zografos v. Mayor & City Council, 884 A.2d 770, 778, 165 Md. App. 80, 94 (Eminent domain is the "inherent power of a governmental entity to take privately owned property…and convert it to public use.") (*quoting* J.L. Mathews, Inc. v. MD-National Capital Park and Planning Comm'n, 368 Md. 71, 87, 792 A.2d 288 (2002) (*quoting* BLACK'S LAW DICTIONARY 541 (7th ed.) (County Comm'rs of Frederick County v. Schrodel, 577 A.2d 39, 320 Md. 202, 215 (1990) (internal quotation marks omitted)). C.f. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 439, 102 S. Ct. 3164, 3178, 73 L. Ed. 2d 868, 885 (1982) (stating that "the government does not have unlimited power to redefine property rights").

[3] GOVERNMENT ACCOUNTABILITY OFFICE, EMINENT DOMAIN: INFORMATION ABOUT ITS USES AND EFFECT ON PROPERTY OWNERS AND COMMUNITIES IS LIMITED 44 (Nov. 2006), hereinafter cited as the "GAO Report," available at http://www.trb.org/news/blurb_detail.asp?id=7068.

[4] City of Norwood v. Horney, 110 Ohio St. 3d 353, at 354–55, 2006 Ohio 3799, at *P3, 853 N.E.2d 1115, at 1122 (2006).

[5] *Id*. at 362, 2006 Ohio 3799, at *P34, 853 N.E.2d at 1128. *Id*. at 362, 2000 Ohio, etc., as is.

[6] GAO Report, *supra* note 3, at 44.

[7] Reg'l Transit Auth. v. Miller, 156 Wash. 2d 403, 128 P.3d 588 (2006); McCabe Petroleum Corp. v. Easement & Right-of-Way Across Twp., 320 Mont. 384, 87 P.3d 479 (2004).

[8] Note, John H. Leavitt, *Hodel v. Irving*: *The Supreme Court's Emerging Taking Analysis—A Question of How Many Pumpkin Seeds Per Acre*, 18 ENVTL. L. 597, 634 (1988).

[9] Dep't of Highways v. Sw. Elec. Power Co., 243 La. 564, 145 So. 2d 312 (1962).

[10] NJ Housing & Mortgage Finance Co., 215 N.J. Super. 318, 521 A.2d 1307 (1987).

[11] Dep't of Transp. v. Stapleton, 97 P.3d 938 (Colo. 2004); City of Midwest City v. House of Realty, Inc., 2004 OK 56, at *P19, 100 P.3d 678, 685 (2004).

[12] Shapiro v. Bd. of Dirs., 134 Cal. App. 4th 170, 176, 35 Cal. Rptr. 3d 826, 829 (2005) (citing City of Sierra Madre v. Superior Court, 191 Cal. App. 2d 587, 590, 12 Cal. Rptr. 836 (1961)).

[13] City of Norwood v. Horney*,* 110 Ohio St. 3d at 363–64, 2006 Ohio 3799, at *P39, 853 N.E.2d at 1129 (citations omitted).

[14] *Id.*

[15] *Id*. at 366, 2006 Ohio 3799, at *P45, 853 N.E.2d at 1132.

[16] 1 NICHOLS ON EMINENT DOMAIN § 1.24[4], at 1-89-90 (*citing* Kohl v. United States*,* 91 U.S. 367, 23 L. Ed. 449 (1876)).

[17] 1 NICHOLS ON EMINENT DOMAIN § 1.12[2], at 1-16.

rights in proprietary land grants and sales. Private donations of land for public facilities also were common. Legal rules and procedures were required to assure that property rights were adjusted equitably when private parties built bridges, ponds, or dams for mills. National policy favored laws that facilitated the release of private enterprise for economic development.

> A novel development of nineteenth century public policy was the delegation of eminent domain to private enterprises, generally in the field of communications and water power development. The power was particularly essential to completing the purchase of a right of way without hindrance or blackmail by individual property owners. Resort to eminent domain might stretch promoters' capital by saving them from paying high prices for land. Conversely, whatever the courts' vague formula meant in practice, they meant at least that the law deprived the property owner of his ordinary right to set his own price; neither the distinctive value of the property to the owner nor to the taker should measure compensation, but some figure ultimately set by a legal agency under a flexible more or less objective measure of "fair market value." The unfailing care with which promoters included the eminent domain privilege in any charter which they deemed of sufficient public interest to warrant it attests to the estimation in which the power was held.[18]

Turnpike roads, railroads, and canal companies shared in the advantages of these early 19th century laws and charters.[19]

As the 19th century ended, pressure to equate injury to property with the taking of property was clearly on the rise. Moreover, by the beginning of the 20th century there was visible improvement in the financial condition of state and local governments. In urban areas, streets were narrow and often laid out in unplanned patterns. Realignment, reconstruction, widening, and paving increasingly caused disturbance of access. The increased investment in urban property meant that adapting to street changes became more costly. Thus, the evolution of the law of eminent domain in the United States is mostly a phenomenon of the 19th century.[20]

Prior to the adoption of the Fourteenth Amendment the federal courts had held that the Fifth Amendment did not apply to the states.[21] However, "[b]y the end of the 19th century, the federal courts had established that the Due Process Clause of the Fourteenth Amendment endowed them with authority to review state takings."[22] Nevertheless, the courts' broad interpretation of the meaning of public use "eventually dominated and became entrenched in early 20th century eminent domain jurisprudence."[23]

B. CONSTITUTIONAL REQUIREMENT OF COMPENSATION FOR THE EXERCISE OF EMINENT DOMAIN

As stated, the federal and state governments have the right to condemn by virtue of their sovereignty. However, state and local governments' power of eminent domain is constrained not only by state constitutions and statutory provisions but also by the Takings Clause of the Fifth Amendment to the U.S. Constitution. The clause—"Nor shall private property be taken for public use, without just compensation"—in the Fifth Amendment "is made applicable to the states by the Fourteenth Amendment of the Constitution."[24] State constitutions grant the power both to states and their political subdivisions to exercise the power of eminent domain. State statutes identify those entities within the state that are authorized to exercise the power.[25] Although the federal government and the states have the inherent authority to exercise the power of eminent domain,[26] "[p]rivate individuals and corporations, like state agencies, have no inherent power of eminent domain, and their authority to condemn must derive from legislative grant."[27]

Because the power of eminent domain is inherent in sovereignty, the Constitution describes it indirectly in terms of the guarantee of just compensation. The right to compensation arises in two situations, the first of which is when a governmental agency or other properly

[18] JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 63 (1956).

[19] *See Law of Turnpikes and Toll Bridges: An Analysis*, HIGHWAY RESEARCH BOARD SPECIAL REPORT NO. 83, at 28 (1964).

[20] H. Schwartz, PROPERTY RIGHTS AND THE CONSTITUTION; WILL THE UGLY DUCKLING BECOME A SWAN?, 37 AM. U. L. REV. 9, 24 (1987) (*quoting* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 64 (1977).

[21] Barron v. Mayor & Baltimore City Council, 32 U.S. 243, 250–51, 8 L. Ed. 672 (1833).

[22] City of Norwood v. Horney, 110 Ohio St. 3d at 367, 2006 Ohio 3799, at *P50, 853 N.E.2d at 1132–33 (*citing* Mo. Pacific Ry. Co. v. Nebraska, 164 U.S. 403, 17 S. Ct. 130, 41 L. Ed. 489 (1896)).

[23] *Id.* at 367–68, 2006 Ohio 3799, at *P51, 853 N.E.2d at 1133.

[24] Kelo v. City of New London, Conn., 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005) (*citing* Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897)).

[25] *See, e.g.,* County of Wayne v. Hathcock, 471 Mich. 445, 684 N.W.2d 765 (2004) ("Wayne County is a 'public corporation' as the term is used in this statute [MCL 213.23]." See 684 N.W.2d 773).

[26] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 106 S. Ct. 2321, 81 L. Ed. 2d 186 (1984).

[27] As for examples of legislatively granted rights of eminent domain, *see* McCabe Petroleum Corp. v. Easement & Right-of-Way Across Twp., 320 Mont. 384, 87 P.3d 479 (2004); Reg'l Transit Auth. v. Miller, 156 Wash. 2d 403, 128 P.3d 588 (2006). *See also* Friends of the Parks v. Chicago Park Dist., 203 Ill. 2d 312, 786 N.E.2d 161 (2003) (Illinois Sports Facility Authority); Sw. Ill. Dev. Auth. v. Nat'l City Envt'l, L.L.C., 119 Ill. 2d 225, 768 N.E.2d 1 (2002) (Southwestern Illinois Development Authority).

authorized entity brings a condemnation action to take property. As for takings of property, the U.S. Constitution, unlike the constitution of some states, has no clause concerning compensation for the *damaging* of property as distinct from a *taking* of property.[28] However, there is little distinction between a constitutional taking clause and a taking and damaging clause, "because the definition and interpretation of a taking [came to include] damage to property."[29]

The Fifth Amendment to the U.S. Constitution forbids private property from being "taken for public use, without just compensation." In 16 states the constitutional provision also is that private property shall not be taken for public use without just compensation; in 23 states the constitutional language requires compensation for property damaged as well as taken.[30] Two states, Kansas and North Carolina, have no express constitutional provision that requires compensation to be made when private property is taken for public use;[31] however, it is settled that private property in these states may not be taken without payment of just compensation.[32] The remaining nine states have some variation of the taken or taken or damaged clauses, such as "appropriated to," "taken or applied to," or "taken, damaged or destroyed for, or applied to."[33]

As stated, the existence of the term "damaging" in the takings clause of state constitutions does not appear to have had any significant impact on the law regarding what constitutes a taking,[34] except possibly, according to some commentators, in those cases involving change of grade.[35] Nevertheless, a taking or damaging clause as exists in some state constitutions arguably protects property interests to a greater degree than the Taking Clause in the Fifth Amendment. The Supreme Court of South Dakota has stated that

> the damage clause of our constitution provides a remedy additional to that provided by the federal constitution….
>
> [T]he damage clause of the South Dakota Constitution allows a property owner to seek compensation "'for the destruction or disturbance of easements of light and air, and of accessibility, or of such other intangible rights as he enjoys in connection with and as incidental to the ownership of the land itself.'"[36]

The second situation in which the right to compensation may arise is when public works or other governmental activities are undertaken that injure an owner's property and the owner brings an "inverse condemnation" suit to recover damages. The constitutional basis for inverse actions in federal cases is the same as for condemnation actions—the Fifth and Fourteenth Amendments.[37]

Finally, although specific state statutes concerning eminent domain are included to the extent that a specific statute is at issue in one of the cases discussed herein, it may be noted that some states have adopted provisions of the Model Eminent Domain Code.[38]

C. THE RIGHT TO JUST COMPENSATION

C.1. Constitutional Requirements

The exercise of the right of eminent domain under the American legal system gives property owners whose property has been taken a right to just compensation. These rights arise out of natural law[39] and constitutional guarantees.[40] As a California court has stated, "'[t]he principle behind the concept of just compensation is to put the owner in as good a position pecuniarily as [the owner] would have occupied if his property had not

[28] *See* United States v. Willow River Power Co., 324 U.S. 499, 65 S. Ct. 761, 89 L. Ed. 1101 (1945); *but see* United States v. General Motors Corp., 323 U.S. 373, 65 S. Ct. 357, 89 L. Ed. 311 (1945).

[29] Central Puget Sound Reg'l Transit Auth. v. Coco's Restaurant, Inc., 2004 Wash. App. LEXIS 1140, at *8, 121 Wash. App. 1608 (Wash. App. 1st Div. 2004), *review denied,* 153 Wash. 2d 1016, 108 P.3d 133 (2005).

[30] *See* App. 1.

[31] *See* App. 1.

[32] *See* Butler County Rural Water Dist. No. 8 v. Yates, 275 Kan. 291, 297, 64 P.3d 357, 363 (2003) and Dep't of Transp. v. Rowe, 353 N.C. 671, 676, 549 S.E.2d 203, 208 (2001), respectively.

[33] *See* App. 1.

[34] *See* Annotation, 42 A.L.R. 3d 13, 23 (cases involving access).

[35] William B. Stoebuck, *The Property Right of Access Versus the Power of Eminent Domain*, 47 TEX. L. REV. 733, 758 (1969).

[36] Hall v. State, 2006 S.D. 24, *13, 712 N.W.2d 22, 27 (2006) (citation omitted).

[37] Harms v. City of Sibley*,* 702 N.W.2d 91, 2005 Iowa Sup. LEXIS 110 (2005).

[38] The Uniform Eminent Domain Code (UEDC) was adopted as a model code in 1984 (*see* Model Eminent Domain Code 1984). *See* Uniform Eminent Domain Code, 1974 Act, §§ 1003-05, 13 ULA 100, 101-02 (Master Ed. 1975). Numerous judicial opinions have cited to the UEDC as persuasive authority. In some cases in which a party relied on the UEDC, the courts observed in response that the legislature had the power to enact the UEDC but had not. Some states have adopted provisions of the UEDC. *See* ALA. CODE § 18-1A-2 (2006); CAL. CODE CIV. PROC. §§ 1245.040, 1245.060, 1263.270, and 1263.510; WYO. STAT. §§ 1-26-801 (1977) and WYO. STAT. §§ 1-26-713 (1988). *See* Bd. of County Comm'rs v. Atter, 734 P.2d 549, 553 (Wyo. 1987) (In drafting the Wyoming Eminent Domain Act, "the legislature relied extensively on the California Eminent Domain Law and the Uniform Eminent Domain Code. *See Wyoming Eminent Domain Act: Comment on the Act and Rule 71.1 of the Wyoming Rules of Civil Procedure,* 18 LAND & WATER L. REV. 739 (1983). It appears that the language in Indiana Code §§ 32-11-1-10, 32-11-1-8.1 is nearly identical to the UEDC, although the Indiana Code did not explicitly adopt the UEDC. *See* Garrett v. Terry, 512 N.E.2d 405 (Ind. 1987) and Harding v. State, 603 N.E.2d 176 (Ind. App., 4th Dist. 1992).

[39] As for the theory of natural law in the context of eminent domain, *see* 1 NICHOLS ON EMINENT DOMAIN § 1.14[1], at 1-23.

[40] U.S. CONST. amends. V, XIV.

been taken.'"[41] Just compensation is measured by the loss to the property owner caused by the appropriation; however, both the property owner and the public paying the compensation must be treated fairly.[42] To award the property owner "less would be unjust to him; to award him more would be unjust to the public."[43] However, in determining value "it is proper to consider all those elements which an owner or a prospective purchaser could reasonably urge as affecting the fair price of the land."[44] The issue of just compensation is "an equitable one rather than a strictly legal or technical one."[45] One authority states that "[t]he payment of compensation is not an essential element of the *meaning* of eminent domain, [but] it is an essential element of the *valid exercise* of such power."[46]

Natural law is fundamental to the belief that individuals have inherent rights that are superior to constitutions or statutes. Decisions of American courts in the 19th century reflected the view that application of the Fifth Amendment to eminent domain cases did not create any new principle but "simply recognized the existence of a great common law principle, founded on natural justice…and which derived no additional force…from being incorporated into the constitution."[47] Thus, independent of the Constitution, a simple taking by the sovereign of property from an owner and giving the property to another violates natural law.[48]

C.2. Valuation and Just Compensation

The fair market value of the property taken, most often based on sales of comparable properties, is the standard by which one must determine the value of that which was taken.[49]

> A "condemnation award is based on the property's *fair market value*….Generally, fair market value is measured by the property's '*highest and best use*' for which it is 'geographically and economically adaptable….' That determination may reflect a 'special use' to which the property is presently being put[,] but it cannot be measured by the condemning entity's *projected* or *hypothetical* 'special purpose' unless the entity's proposed use is also the 'highest and best use' in the hands of a private property owner…. In other words, the 'market' for determining 'fair market value' is ordinarily the *private marketplace*—i.e., 'what willing, knowledgeable non-governmental buyers and sellers would pay for property to be used for a non-governmental purpose.'"[50]

One method of valuation that has been used when evidence of comparable sales is lacking is the cost-less-depreciation approach in an attempt to provide compensation when fair market value cannot be ascertained. Both federal and state courts now consider the cost of replacement when fair market value is not ascertainable.[51] The approach, of course, introduces the concept of depreciation into the calculation.[52] One court held that if a cost approach is employed, then depreciation must be considered.[53] Another approach is illustrated by *United States v. Des Moines Iowa County,*[54] in which the United States took roads for a military base from Des Moines County and offered money as just compensation. The roads, however, were essential to the level of service being provided to the residents of Des Moines County. The Court of Appeals for the Eighth Circuit held that "[i]f it is necessary for the appellees to provide substitute roads in order to readjust their system of highways, they are entitled to the cost of constructing substitute roads whether that be more or less than the value of the roads taken."[55] More recently, in *Commissioner of Transportation of Connecticut v. Duda,*[56] both the comparable sales and the replacement cost-less-depreciation approaches to valuation were used to ascertain proper compensation.[57] Methods of valuation are discussed more fully in Chapters 6 and 7, *infra*.

In a partial taking, compensation may be recovered for any damages caused by the appropriation to the remainder, in which case the "[d]amages…are measured by determining the difference between the value of

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[41] Redevelopment Agency of the City of San Diego v. Attisha, 128 Cal. App. 4th 357, 366, 27 Cal. Rptr. 3d 126, 133 (Cal. App. 4th Dist. 2005) (*quoting* City of Carlsbad v. Rudvalis, 109 Cal. App. 4th 667, 678, 135 Cal. Rptr. 2d 194 (2003), r*eview denied,* Redevelopment Agency of San Diego v. Attisha, 2005 Cal. LEXIS 8379 (Cal. July 27, 2005).

[42] *Attisha*, 27 Cal. Rptr. 3d at 133.

[43] *Id. (*citation omitted).

[44] Comm'r of Transp. of the State of Connecticut v. Duda, 2006 Conn. Super. LEXIS 456, at *3 (2006) (*quoting* Ne. Conn. Econ. Alliance v. ATC P'ship, 256 Conn. 813, 822–29,776 A.2d 1068 (2001)).

[45] *Id* at *6.

[46] 1 NICHOLS ON EMINENT DOMAIN § 1.11, at 1-10 (citations omitted) (emphasis in original).

[47] Young v. McKenzie, 3 Ga. 31, 44, 1847 Ga. LEXIS 70 **28 (1847). *See also* Henry v. Dubuque etc. R.R. Co., 10 Iowa 540, 543, 1860 Iowa Sup. LEXIS 91 (1860).

[48] Manufactured Hous. Cmtys. v. State, 142 Wash. 2d 347, 400–01, 13 P.3d 183, 210 (Wash. 2000).

[49] GAO Report, *supra* note 3, at 15.

[50] Redevelopment Agency of the City of San Diego v. Attisha, 128 Cal. App 4th at 365, 27 Cal. Rptr. 3d at 133 (citations omitted); *see also Duda*, 2006 Conn. Super. LEXIS 456, at *6–7.

[51] State v. Bd. of Educ. 116 N.J. Super. 305, 282 A.2d 71 (1971); State Road Comm'n v. Bd. of Park Comm'rs, 154 W. Va. 159, 173 S.E.2d 919 (1970); Town of Clarksville v. United States, 198 F.2d 238 (4th Cir. 1952), *cert. denied*, 344 U.S. 927, 73 S. Ct. 495, 97 L. Ed. 714 (1953).

[52] Mashetec v. Cleveland Bd. of Educ., 17 Ohio St. 2d 27, 244 N.E.2d 745 (1969).

[53] Comm'n of Transp. v. Bakery Place L.P.*,* 2005 Conn. Super. LEXIS 3645, at *15, 925 A.2d 468 (2005).

[54] 148 F.2d 448 (8th Cir. 1945).

[55] *Id*. at 449 (8th Cir. 1945).

[56] 2006 Conn. Super. LEXIS 456, at *10-11 (acknowledging that no valuation method is exclusively used in Connecticut).

[57] For a description of the replacement cost methodology, *see* United Techs. Corp. v. East Windsor, 262 Conn. 11, 18–20, 807 A.2d 955 (2002).

the entire parcel of land with its improvements as it was prior to the taking to the value of the land remaining thereafter. In this way severance damages to the remainder are included."[58]

However, depending on the jurisdiction in a condemnation proceeding, there may be an issue of whether benefits to the remainder resulting from the governmental improvement may be offset against an owner's claim for severance damages. That is, in a partial taking there may be benefits to the remaining property because of "specific improvements such as better access and changes in available uses, which are known as special benefits."[59] Special benefits may include availability for new or better uses; facilities for ingress and egress; or improved drainage, sanitation, and flood protection.

The majority view appears to be that general benefits to the remainder resulting from a public project may not be offset.[60] For example, in *Justmann v. Portage County*[61], the court held that the language of Wis. Stat. section 32.09(6) (2001-02) (damages are to be based on "the fair market value of the remainder immediately after the date of evaluation…without allowance of offset for general benefits") meant that severance "damages are available only under a 'before and after' method of compensation," apparently excluding any benefits to the remainder.[62] However, in *State ex rel. State Highway Comm'n. v. Tate*[63], the court stated that in Missouri "special benefits to the residue of a landowner's property may be set off against the award of compensation for a taking in a condemnation suit, but general benefits may not be set off."[64]

> Notably, most of the states that do not permit an award of compensation for property taken to be reduced by the amount of special benefits to the remaining property have statutes to that effect, which supports the principle that it is the General Assembly's prerogative to provide the method for calculating just compensation.[65]

However, both federal law and a substantial minority of states allow compensation for property taken to be reduced by the amount of *special benefits* to the remaining property.[66] As stated in a 2005 case, *City of San Diego v. D.R. Horton San Diego Holding Co.*,[67]

> "[w]hen property acquired by eminent domain is part of a larger parcel, in addition to compensation for the property actually taken, the property owner must be compensated for the injury or damage, if any, to the land that he retains, reduced by the amount of benefit to the remainder."…Such "severance damages" are typically measured by comparing the fair market value of the remainder before and after the taking. …"In other words, 'The value of the remaining property taken as a part of the whole, described as the "before condition," must be compared with the value that portion has as a result of the take and the construction of the improvement in the manner proposed, described as the "after condition." Damages are computed simply by subtracting the market value of the remainder in its after condition from the market value of the remainder in its before condition.'"[68]

Similarly, in *Central Puget Sound Regional Transit Authority v. Eastey*[69], an appellate court stated that although a "condemnee is entitled to be put in the same monetary position as he would have occupied had his property not been taken," the "[c]ompensation is…for damage 'caused to the remainder by reason of the taking,' *offset by any special benefits* accruing to the remainder by virtue of the project which necessitated condemnation."[70]

Thus, it has been held that just compensation does not mean in every case the payment of compensation in cash.[71] For example, Colorado law requires the trial court "to apply special benefits not only to reduce the amount of damages to the landowner's remaining property *but also* to reduce the landowner's compensation for the property taken."[72] The Colorado Supreme Court held, *inter alia*, that the statute "does not conflict with the just compensation guarantee of our constitution

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[58] *Duda*, 2006 Conn. Super. LEXIS 456, at *7-8.

[59] E-470 Pub. Highway Auth. v. Revenig, 91 P.3d 1038, 1039 (Colo. 2004) (en banc).

[60] See, e.g., State v. The Enter. Co., 728 S.W.2d 812 (Tex. Ct. App. 1986) (disallowing a reduction in compensation for property taken by the amount of special benefits to the remaining property under the "adequate compensation" guarantee of the Texas Constitution); Kane v. City of Chicago, 392 Ill. 172, 175, 64 N.E.2d 506, 508 (Ill. 1946) (reasoning that "the rule has been long settled" in Illinois that compensation for property taken may not be reduced by the amount of special benefits to the remaining property).

[61] 278 Wis. 2d 487, 692 N.W.2d 273 (Wis. App. 2004).

[62] *Id.* at 277.

[63] 592 S.W.2d 777 (Mo. 1980).

[64] *Id.* at 778 (emphasis supplied).

[65] E-470 Pub. Highway Auth. v. Revenig, 91 P.3d 1038, 1044 n.7.

[66] *Id.* at 1045 (emphasis supplied) (*citing* Bauman v. Ross, 167 U.S. 548, 574, 570, 574–75, 17 S. Ct. 966, 976, 42 L. Ed. 270, 283 (1897) (holding that the compensation for property taken may be reduced by the amount of special benefits under the Fifth Amendment's guarantee of just compensation because a landowner "is entitled to receive the value of what he has been deprived of, and no more"); State *ex rel.* Chicago B. & Q. R. Co. v. City of Kansas, 89 Mo. 34, 14 S.W. 515 (Mo. 1886) (holding that an award of compensation for property taken may be reduced by the amount of special benefits to the remaining property)).

[67] 126 Cal. App. 4th 668, 24 Cal. Rptr. 3d 338 (Cal. App. 4th 2005).

[68] 126 Cal. App. 4th at 680–81, 24 Cal. Rptr. 3d at 346 (citations omitted) (emphasis supplied).

[69] 135 Wash. App. 446, 144 P.3d 322 (Wash. App. 1st Div. 2006).

[70] *Id.*,144 P.3d at 326 (emphasis supplied, citations omitted).

[71] E-470 Pub. Highway Auth. v. Revenig, 91 P.3d at 1045 (*citing* Bauman v. Ross, 167 U.S. 548, 570, 574–75, 17 S. Ct. 966, 42 L. Ed. 270 (1897)).

[72] *Id.* at 1039–40 (emphasis supplied) (*citing* COLO. REV. STAT. 38-1-114(2)).

because the landowner receives the value of which he has been deprived."[73]

In Florida, "full compensation" must be paid for property taken by eminent domain. In *Florida, Department of Transportation v. Armadillo Partners, Inc.,*[74] the Florida Supreme Court stated that the court previously had

> recognized that "[t]he central policy of eminent domain is that owners of property taken by a governmental entity must receive *full and fair compensation*…." When less than the entire property is being appropriated, "full compensation for the taking of private property by eminent domain includes both the value of the portion being appropriated and any damage to the remainder caused by the taking…."[75]

Louisiana appears to have a very broad rule regarding the scope of just compensation. The Louisiana Constitution, amended in 1974, provides that "the owner shall be compensated to the full extent of his loss."[76] As explained in *City of Baton Rouge v. Broussard,*[77]

> the owner is no longer limited to the market value of his property, if such does not fully compensate his loss; *rather, the loss of business and replacement costs are compensable* items of damages in expropriation cases…. Also, the *cost of relocation, inconvenience and loss of profits* is compensable under this provision….
>
> The determination of what amount will compensate a landowner to the full extent of his loss must be made on the basis of the facts of each case and in accordance with the uniqueness of the thing taken….[78]

Even if there is no provision in the state's statutes concerning condemnation, interest also may be recoverable as "[t]he right to interest in eminent domain actions does not depend upon statutory authority."[79] It has been held that the award of interest is a judicial function[80] and that the court may apply a statutory rate of interest "to a claim for just compensation if that rate is deemed reasonable by the court."[81] Attorney's fees and other expenses also may be recoverable. For example, in Montana the state's constitution provides that "[p]rivate property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner. In the event of litigation, just compensation shall *include necessary expenses of litigation* to be awarded by the court when the private property owner prevails."[82]

Valuation principles and other costs that may be recoverable are discussed more fully in Sections 6 and 7, *infra*.

D. WHETHER REGULATORY ACTIONS ARE COMPENSABLE AS TAKINGS

D.1. Inherent Power of the Sovereign

The police power is inherent in government for the purposes of regulating the "health, safety, morals, and general welfare, and the burdens imposed incidental to such regulations are not takings unless the burdens manifest [themselves] in certain, enumerated ways."[83] The Tenth Amendment to the Constitution, providing that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," also serves as a basis for the states' police power.

As stated in *Lincoln Federal Labor Union v. Northwestern I. & M. Co.*,[84] the

> "[p]olice power is the exercise of the sovereign right of a government to promote order, safety, health, morals, and the general welfare of society, within constitutional limits…. As applied to the powers of the states of the American Union, the term is also used to denote those inherent governmental powers which, under the federal system established by the constitution of the United States, are reserved to the several states."[85]

In *Eggleston v. Pierce County,*[86] the court distinguished the power of eminent domain from the police power in these terms: "Eminent domain takes private property for a public use, while the police power regulates its use and enjoyment, or if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health and general welfare of the public."[87]

Whenever there is an injury or damage to property because of an exercise of the police power (that is, a regulation of the use of private property rather than a taking or damaging for a public use in the course of a public improvement), then no compensation is recoverable.[88] The issue is when has an otherwise noncom-

[73] *Id.* at 1040.

[74] 849 So. 2d 279 (Fla. 2003).

[75] *Id.* at 282–83 (citations omitted) (emphasis supplied).

[76] LA. CONST. art. I, § 4.

[77] 834 So. 2d 665 (La. App. 1st Cir. 2002).

[78] *Id.* at 667–68 (citations omitted) (emphasis supplied).

[79] Comm'r of Transp. of Conn. v. Duda, 2006 Conn. Super. LEXIS 456, at *12–13 (*citing* 3 NICHOLS EMINENT DOMAIN § 8.63).

[80] United States v. New River Collieries Co., 262 U.S. 341, 343–44, 43 S. Ct. 565, 567, 67 L. Ed. 1014, 1017 (1923).

[81] *Duda*, 2006 Conn. Super. LEXIS 456, at *13 (*citing* Miller v. United States, 223 Ct. Cl. 352, 620 F.2d 812, 837 (1980); Leverty & Hurley Co. v. Comm'r of Transp., 192 Conn. 377, 380, 471 A.2d 958 (1984)).

[82] MONT. CONST. art. II, § 29 (emphasis supplied).

[83] Eggleston v. Pierce County, 148 Wash. 2d 760, 767, 64 P.3d 618, 622–23 (2003) (citations omitted).

[84] 149 Neb. 507, 31 N.W.2d 477 (1948).

[85] Lincoln Fed. Labor Union No. 1912 v. NW Iron and Metal Co., 149 Neb. 507, at 523; 31 N.W.2d 477, 487 (1948) (quoting 16 C.J.S., *Constitutional Law* § 174, at 537).

[86] 148 Wash. 2d 760, 64 P.3d 618 (2003).

[87] *Id.* at 767, 164 P.3d at 623 (citations omitted) (internal quotation marks omitted).

[88] On the difference between eminent domain and the police power, *see* 1 NICHOLS ON EMINENT DOMAIN § 1.42.

pensable exercise of the police power become a compensable taking of private property for public use. The general rule, as stated in Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon*,[89] is that although "property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[90]

As explained by the Supreme Court of Texas,

> [c]ompensation is not required to be made for damage or loss resulting from a valid exercise of the police power…. The absence of a cause of action does not, however, reduce the loss which individuals are often required to bear or make their injuries any less real. When the benefits to be gained by the public are not commensurate with the burdens imposed upon private persons, the law will not be permitted to stand…. Individual hardship is thus to be weighed by the courts against the public advantages of a measure in determining whether the statute is a valid exercise of the police power. These factors are also to be considered by the Legislature in making its determination as to the manner in which such power may and should be exercised. It would be quite strange then to say that the lawmakers have no choice except to act not at all when they conclude that a particular measure is essential to the public welfare but will be unduly burdensome to private citizens. If they decide to reimburse the latter for part or all of their actual loss or expense, the payment is not transformed into a mere gratuity simply because it may appear to the courts that the Legislature has not exerted the full measure of its power. Our fundamental law does not contemplate or require that every private injury and loss which may be necessary to protect or promote the public health, safety, comfort and convenience must always be borne by individuals and corporations.[91]

The exercise of police power by states may bring about a correlative restriction on individual rights either of the person or of property. Various restrictions have been held to be incidents of the exercise of the police power and to be of negligible loss to the individual property owner when compared to the benefits accruing to the community as a whole.[92] In such cases the right of the individual may have to yield to the police power.[93] The legislature may authorize or delegate the authority to a particular administrative agency, such as a transportation department, to make reasonable rules and regulations to carry out the police power.[94]

D.2. Physical Takings Versus Regulatory Takings

It is necessary to distinguish physical takings of property from other forms of takings that nevertheless may necessitate the payment of just compensation even though the government has not initiated an eminent domain proceeding. The most recognizable form of a taking is when there is a physical invasion of private property by a condemning authority. Even a minimal physical invasion may not be sufficient to categorize the government's action as the mere exercise of its police power. For example, the U.S. Supreme Court held in *Loretto v. Teleprompter Manhattan CATV Corp.*[95] that the requirement that television cables be installed on a landowner's property without compensation pursuant to a statute permitting such installations was in fact a taking of property and not the exercise of governmental police power. Other courts have held that if a government entity either directly or indirectly physically intrudes upon private property without compensation, there is a physical taking of property.[96] A temporary obstruction of access because of road construction is not a compensable taking unless there is a substantial loss of access,[97] provided such obstructions are not the result of negligent acts.[98] If a temporary restriction to access were to be severe, then it may constitute a compensable taking.[99]

In 2005, in *Lingle v. Chevron USA Inc.*,[100] the U.S. Supreme Court clarified in some detail the distinctions between physical and regulatory takings under the Fifth Amendment. As the Court explained, "[t]he paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of pri-

[89] 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922) (*questioned by, cited by,* Southview Assocs. Ltd. v. Vt. Envtl. Bd., 980 P.2d 84 (2d Cir. 1992)).

[90] *Id.*, 260 U.S. at 415.

[91] State of Texas v. City of Austin, 160 Tex. 348, at 356; 331 S.W.2d 737, at 743; 1960 Tex. LEXIS 584 (1960) (holding that a state statute based on a federal statute providing for compensation for relocation of public utilities was constitutional and that municipal corporations and the Respondents were entitled to reimbursement for relocation costs in connection with improvements and construction of Interstate highways).

[92] *See* Schmidt v. Bd. of Adjustment of the City of Newark, 9 N.J. 405, 88 A.2d 607 (1952).

[93] Graybeal v. McNevin, 439 S.W.2d 323 (Ky. 1969).

[94] Dep't of Highways v. Sw. Elec. Power Co., 243 La. 564, 145 So. 2d 312 (1962); State Roads Comm'n v. Jones, 241 Md. 246, 216 A.2d 563, 565 (1966).

[95] 458 U.S. 419, 435-31, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982); *on remand*, *see* 58 N.Y.2d 143, 446 N.E.2d 428, 459 N.Y.S.2d 743 (1983) (Although not determining the measure of damages (*see* 446 N.E.2d at 431), the New York Court of Appeals observed that "so far as the record discloses…the amount recoverable by any single owner is small…." 446 N.E.2d 434).

[96] Town of Clinton v. Schrempp, 2005 Conn. Super. LEXIS 92, at *7–8 (2005) (*citing* Eamiello v. Liberty Mobile Home Sales, Inc., 208 Conn. 620, 640, 546 A.2d 805 (1988); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-31, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982)).

[97] *See* USA Independence Mobilehomes Sales, Inc., v. City of Lake City, 908 So. 2d 1151 (Fla. App. 1st Dist. 2005).

[98] Thompson v. City of Mobile, 240 Ala. 523, 199 So. 862 (1941).

[99] *See* Thomas A. McElwee & Son, Inc. v. SEPTA, 896 A.2d 13 (Pa. Commw. 2006) (involving severely restricted access to a business for a period of 3 years), *appeal granted*, 592 Pa. 776, 926 A.2d 444 (2006).

[100] 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

vate property."[101] However, as the U.S. Supreme Court also held in *Pennsylvania Coal Co. v. Mahon,*[102] "while private property may be regulated, if regulation goes too far, it will be recognized as a taking."[103]

The *Lingle* Court identified two kinds of regulatory takings that are "deemed *per se* takings" under the Fifth Amendment.[104] The first type is when "government requires an owner to suffer a permanent physical invasion of her property—however, minor—it must provide just compensation."[105] The second category involves "regulations [that] completely deprive an owner of '*all* economically beneficial use' of her property…."[106] Under the second (or *Lucas*) test, "the complete elimination of a property's value is the determinative factor."[107]

As for other regulatory takings outside the parameters of the first two categories, the *Lingle* Court reaffirmed that such takings are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*.[108] The *Penn Central* factors are the "principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules."[109] The *Penn Central* test "turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests."[110]

A special category of *per se* takings has arisen in land-use "exactions" involving the application of the "doctrine of 'unconstitutional conditions'" in which the government requires a person to give up a constitutional right to just compensation when property (e.g., an easement) is taken "'in exchange for a discretionary benefit by the government where the benefit has little or no relationship to the property.'"[111] Two such examples are the cases of *Dolan v. City of Tigard*[112] and *Nollan v. California Coastal Commission.*[113] In *Dolan,* a permit to expand a store and parking lot was conditioned improperly on the dedication of the relevant property for a "greenway," including a bike/pedestrian path. In *Nollan,* a permit to build a larger residence on beachfront property was conditioned improperly on the landowner's dedication of an easement allowing the public to cross a strip of the property.[114] Although state courts recognize that a *regulatory* taking may be compensable under the Fifth Amendment as a taking,[115] in *Wisconsin Builders Association v. Wisconsin Department of Transportation,*[116] the Court of Appeals held that the transportation department's set-back restrictions were not easements in the *Nollan* and *Dolan* sense, did not deprive the landowners of the right to exclude others, were not a *per se* physical taking,[117] and thus were not a taking.[118] The foregoing principles concerning regulatory takings are discussed in more detail in Section 4, *infra*.

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[101] *Id.,* 544 U.S. at 537, 125 S. Ct. at 2081, 161 L. Ed. 2d at 887.

[102] Pa. Coal Co. v. Mahon, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

[103] *Id.,* 260 U.S at 415.

[104] 544 U.S. at 538, 125 S. Ct. at 2081, 161 L. Ed. 2d at 887.

[105] *Id.* (*citing* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982) (holding that a state law requiring landlords to permit cable companies to install cable facilities in apartment buildings was a taking)).

[106] *Id.* (*quoting Lucas*, 505 U.S. at 1003, 1019, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) (emphasis in original). The *Lucas* court held that the government must pay just compensation for such "total regulatory takings," except to the extent that "background principles of nuisance and property law" independently restrict the owner's intended use of the property. *Lucas,* 505 U.S. at 1030, 125 S. Ct. at 2901, 161 L. Ed. 2d at 823.)

[107] *Id.* 544 U.S. at 539, 125 S. Ct. at 2082, 161 L. Ed. 2d at 888 (*citing Lucas*, 505 U.S. at 1017, 112 S. Ct. 2886, 120 L. Ed. 2d 798).

[108] 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978); in *Lingle*, the Court said:

> Primary among [the Penn Central] factors are "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." In addition, the "character of the governmental action"—for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good"—may be relevant in discerning whether a taking has occurred. The *Penn Central* factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules.

Id., 544 U.S. at 538–39, 125 S. Ct. at 2081–82, 57 L. Ed. 2d at 888 (citations omitted).

[109] *Id.* at 539, 125 S. Ct. at 2082, 57 L. Ed. 2d at 888 (citations omitted).

[110] *Id.* at 540, 125 S. Ct. at 2082, 57 L. Ed. 2d at 889.

[111] *Id.*, 544 U.S. at 547, 125 S. Ct. at 2087, 57 L. Ed. 2d at 894 (*quoting* Dolan v. City of Tigard, 512 U.S. 374, 385, 114 S. Ct. 2309, 2317, 129 L. Ed. 2d 304, 316 (1994)).

[112] 512 U.S. 374, 385, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) (the Court reversing the Oregon Supreme Court's ruling that the city's decision to grant a permit to the landowner conditioned on the owner's dedication of her land was not a taking).

[113] 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987) (the Court reversing the appellate court's ruling that the Coastal Commission could condition the grant of a building permit on the owner's transfer of an easement across its beachfront property).

[114] *See* discussion in *Lingle*, 544 U.S. at 546–47, 125 S. Ct. at 2086, 161 L. Ed. 2d at 892–93.

[115] *See, however,* Harms v. City of Sibley*,* 702 N.W.2d 91 (2005) (denying an inverse condemnation action against a city where it rezoned land and the subsequent lessor of that land caused damage to the plaintiffs' property).

[116] 285 Wis. 2d 472, 702 N.W.2d 433 (2005).

[117] *Id.* at 502–03.

[118] *Id.* at 505.

D.3. Noncompensable Uses of the Police Power

Most often the police power is exercised by regulatory measures, such as by requiring a permit before a property owner rebuilds a billboard on his or her land.[119] Although the courts have held that the police power is "broad and comprehensive,"[120] it has been difficult for the courts to fix the boundaries of the police power in a definitive way.[121] The scope of the police power changes from time to time to meet the changed conditions of society.[122] Because the police power has been interpreted elastically, prior acts that were once recognized as valid exercises of police power may now result in compensable takings.[123]

A claim that there has been a de facto taking of property may arise if the governmental agency takes all economically-viable uses of an owner's property, physically invades an owner's property, destroys one or more of the fundamental attributes of the ownership of the property, or seeks to increase the value of public property.[124] A temporary taking, just as a permanent one, constitutionally may require the payment of compensation.[125] An exercise of the police power may involve a physical taking or damaging of private property as when, for example, it is necessary to destroy or damage buildings or other property to protect other property or the public.[126] The exercise of the police power, however, is most often concerned with a diminution in the value of property because of governmental prohibitions or regulations.

One of the methods of exercising the police power is through prohibition.[127] A moratorium to maintain the status quo of property surrounding Lake Tahoe to permit environmental research to be included in a future growth plan was held to be a valid exercise of the police power.[128] A state may exercise its police power by prohibiting certain activities such as by precluding construction in areas prone to flooding.[129]

Thus, not all takings are physical ones, as there may be takings by governmental agencies based on regulations that limit or affect the use of private property. For example, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles California,*[130] an interim ordinance enacted by Los Angeles County prohibited landowners from constructing any buildings on their property after the original buildings were destroyed by a flood along Mill Creek. As a consequence, an owner brought an inverse condemnation action against the county. The U.S. Supreme Court reversed the California Court of Appeals that had upheld the ordinance on the basis of the Supreme Court's holding in *Agins v. City of Tiburon.*[131]

The Court, in *First English Evangelical Lutheran Church of Glendale*, in reversing the California courts, overruled its decision in *Agins* that had held "that a landowner who claims that his property has been 'taken' by a land-use regulation may not recover dam-

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[119] *See* Viacom Outdoor, Inc. v. City of Arcata, 140 Cal. App. 4th 230, 44 Cal. Rptr. 3d 300 (Cal. App. 1st Dist. 2006).

[120] Robinson v. Crown Cork & Seal Co*.,* (251 S.W.3d 520 at 529) 2006 Tex. App. LEXIS 3717, at *19 (Tex. Ct. App. 14th Dist. 2006), (*quoting* City of Coleman v. Rhone, 222 S.W.2d 646, 648 (1949)).

[121] *See* First Nat'l Benefit Soc'y v. Garrison*,* 58 F. Supp. 972, 981–82 (C.D. Calif. 1945), *aff'd* without opinion, 155 F.2d 522 (9th Cir. 1946):

> The police power, however, has its limits and must stop when it encounters the prohibitions of the Federal Constitution. The police power is the least limitable of the exercises of government; and its limitations are hard to define; are not susceptible of circumstantial precision; cannot be determined by any formula; and must always be determined with appropriate regard to the particular subject of its exercise.

[122] Consol. Rock Prods. Co. v. City of L.A*.*, 57 Cal. 2d 515, 20 Cal. Rptr. 638, 370 P.2d 342 (Cal. 1962), *appeal dismissed*, 371 U.S. 36, 83 S. Ct. 145, 9 L. Ed. 2d 112 (1962).

[123] Eggleston v. Pierce County, 148 Wash. 2d 760, 772–73; 64 P.3d 623, 625–26 (2003).

[124] *See* Manufactured Hous. Cmtys. v. State, 142 Wash. 2d 347, 355, 13 P.3d 183, 187 (2000) (*citing* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992); Loretto v. Teleprompter Manhattan CATV Corp*.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982); Presbytery of Seattle v. King County, 114 Wash. 2d 320, 330, 787 P.2d 907 (1990); and Orion Corp. v. State, 109 Wash. 2d 621, 651, 747 P.2d 1062 (1987)). Note also that a police regulation may be unconstitutional if it violates substantive due process. *See Manufactured Hous. Cmtys.*, 142 Wash. 2d at 355-56, 13 P.3d at 187 (*citing* Guimont v. Clarke, 121 Wash. 2d 586, 121 854 P.2d 1 (1993); Margola Assocs. v. City of Seattle, 121 Wash. 2d 625, 649, 854 P.2d 23 (1993)).

[125] Comm'r of Transp. v. St. John, 2005 Conn. Super. LEXIS 3610 (2005); *Schrempp*, 2005 Conn. Super. LEXIS 92, at *9, (*citing* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987); United States v. General Motors Corp*.*, 323 U.S. 373, 382, 65 S. Ct. 357, 89 L. Ed. 311 (1945); Comm'r v. Gillette Motor Transport, Inc*.*, 364 U.S. 130, 135, 80 S. Ct. 1497, 4 L. Ed. 2d 1617 (1960)). *But see* City of Hollywood v. Mulligan, 2006 Fla. LEXIS 1476, at *23, n.7 (2006) (distinguishing a city's vehicle impoundment ordinance from a temporary taking because the power lies under the state's police power, not its eminent domain power).

[126] *See* 1 NICHOLS ON EMINENT DOMAIN § 1.43[2], at 1-842; *see also* Rose v. State of California, 19 Cal. 2d 713, 730, 123 P.2d 505, 515 (1942).

[127] *See* Adams v. Tanner, 244 U.S. 590, 37 S. Ct. 662, 61 L. Ed. 446 (1917).

[128] Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002).

[129] *See* City of Dover v. City of Russellville, 215 S.W.2d 623, 2005 Ark. LEXIS 606 (Ark. 2005).

[130] 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987).

[131] 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 106 (1980) (open-space zoning plans are legitimate exercises of a city's police power to protect its citizens from the ill effects of urbanization), *overruled on other grounds,* First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987) (*criticized by, cited by,* Lingle v. Chevron USA Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005)).

ages for the time before it is finally determined that the regulation constitutes a 'taking' of his property."[132] The Court noted that the ruling in *Agins* did "not require compensation as a remedy for 'temporary' regulatory takings—those regulatory takings which are ultimately invalidated by the courts."[133] That is, the issue was whether a property owner "may not recover damages until the ordinance is finally declared unconstitutional, and then only for any period after that declaration for which the county seeks to enforce it."[134] The Court, in an opinion by Chief Justice Rehnquist, held that the Court "must assume that the Los Angeles County ordinance has denied appellant all use of its property for a considerable period of years" and proceeded to hold that "invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy."[135] Moreover, the Court declared that "temporary takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings for which the Constitution clearly requires compensation."[136]

As discussed, *infra*, in Section 4, in 2005 the U.S. Supreme Court rejected another aspect of the *Agins* case in *Lingle v. Chevron U.S.A., Inc.*[137] In *Lingle*, involving a challenge to a state-imposed cap on rent that oil companies in Hawaii could charge dealers leasing company-owned service stations, the Court held that the *Agins* test of a regulatory taking—namely, whether the regulation "substantially advances legitimate state interests," was no longer a valid method of discerning whether private property has been taken.[138]

Another use of the police power is in cases of emergency (e.g., a fire or flood), when private property may be used temporarily or damaged or even destroyed to prevent injury or loss of life or to protect the remaining property in a community.[139] In 2004, in *Thousand Trails, Inc. v. California Reclamation District Number 17,*[140] a California appellate court held that it was a valid exercise of the police power for the public authority to cut a levee to prevent potentially massive flooding without a preexisting flood prevention plan even though the act resulted in the flooding of the property owner's campground.

D.4. Regulatory Action That Is Compensable

There are other regulations, statutes, and ordinances, however, that have been held to rise to the level of a compensable taking. As one treatise states,

> "[n]ot only is an actual physical appropriation, under an attempted exercise of the police power, in practical effect an exercise of the power of eminent domain, but if regulative regulation is so unreasonable or arbitrary as virtually to deprive a person of his property, it comes within the purview of eminent domain."[141]

The resolution of the issue of where the police power ends and eminent domain begins depends on the facts of each case. As Justice Holmes wrote in *Pennsylvania Coal Co. v. Mahon,*

> [g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. *When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.*[142]

For example, in the *Mahon* case, the defendants in error sought to prevent the coal company from mining under their property in such a way as to remove the support for their house that would cause the house and surface area to subside. The coal company relied on a deed that conveyed the surface of the property but reserved to the company the right to remove the coal. The issue was whether the 1921 Kohler Act in Pennsylvania that forbade the mining of anthracite coal in such a way as to cause the subsidence among other things of structures used for human habitation could be used to prevent the removal of the coal. The state supreme court had agreed that the statute was a legitimate exercise of the police power, a ruling the U.S. Supreme Court reversed and remanded.

> [T]he extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding the plaintiffs. If we were called upon to deal with the plaintiffs' position alone, we should think it clear that the statute does not disclose a public interest sufficient to warrant so exten-

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[132] 482 U.S. at 306–07, 107 S. Ct. at 2397, 96 L. Ed. 2d at 278.

[133] *Id.* at 310, 107 S. Ct. at 2383, 96 L. Ed. 2d at 260-61.

[134] *Id.* at 312, 107 S. Ct. at 2384, 96 L. Ed. 2d at 262.

[135] *Id.* at 322, 107 S. Ct. at 2389, 96 L. Ed. 2d at 268. After the flood along Mill Creek that destroyed the Petitioner's camp, Los Angeles County enacted an ordinance precluding construction on either side of the creek, thus preventing rebuilding of the camp.

[136] *Id.,* 482 U.S. at 304, 107 S. Ct. at 2388, 96 L. Ed. 2d at 266.

[137] 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

[138] *Id.* at 542, 125 S. Ct. at 2083–84, 161 L. Ed. 2d at 890–91 (reversing and remanding a summary judgment for Chevron "because Chevron argued only a 'substantially advances' theory in support of its takings claim." *Id.,* 544 U.S. at 548, 125 S. Ct. at 2087, 161 L. Ed. 2d at 892.)

[139] On the destruction of private property by necessity, *see* 1 NICHOLS ON EMINENT DOMAIN § 1.43[2], at 1-842. *See, e.g.,* Rose v. State of California, 19 Cal. 2d 713, 730, 123 P.2d 505, 515 (1942).

[140] 124 Cal. App. 4th 450, 21 Cal. Rptr. 3d 196 (2004).

[141] 1 NICHOLS ON EMINENT DOMAIN § 1.42[1], at 1-157.

[142] 260 U.S. at 413 (emphasis supplied).

> sive a destruction of the defendant's constitutionally protected rights….[143]
>
> It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved.[144]

More recently, in *Lucas v. South Carolina Coastal Council,*[145] a developer had purchased two lots on a barrier island in 1986, lots that at the time did not fall within a "critical area" as defined by a South Carolina statute enacted in 1977. The law required owners of certain coastal-zone property to obtain a permit before changing the use of the land. In 1988, the state enacted the Beachfront Management Act, which established a new baseline and in effect prohibited any construction on the lots by the developer. Although the Supreme Court remanded the case,[146] the Court held that the Takings Clause of the U.S. Constitution is violated when land-use regulation does not substantially advance legitimate state interests or denies an owner economically-viable use of his or her land.[147] It may be recalled that the Court had held in *Agins* that when a zoning ordinance or regulation is enacted to advance legitimate governmental goals and does not prevent the highest and best use of the land, the law may be a legitimate exercise of the police power.[148] We should note the prior discussion of the *Lingle* case, decided in 2005, which rejected the "substantially advances legitimate state interests" test.

D.5 Highway Regulations as Exercises of the Police Power

Regulations that cause conflict between the exercise of the police power and eminent domain include such matters as control of traffic, access to highways and the highway environment, and relocation of utility facilities on highways. "Damage caused by the limitation of access resulting from a combination of the power of eminent domain and the police power retains the characteristic of *damnum absque injuria* which is peculiar to an exercise of the police power."[149] As explained more fully, *infra*, in Sections 2, 3, and 4, in a variety of situations the courts have held that highway or traffic regulations did not constitute a compensable taking. For example, the government's redirection of traffic flow has been held to be a noncompensable exercise of its police power;[150] it is a proper exercise of the police power for a city to regulate traffic flow and alter the route patrons use for access to a property owner's business;[151] and it is a proper exercise of the police power to reduce traffic when closing a road that provided access to a property owner's store, even though the result is an additional 1.25 mi of circuitous travel.[152]

As also discussed in Section 2, *infra*, with respect to access to an abutting owner's property, as long as ingress and egress are not denied to the owner's property, depending on the circumstances, a state may regulate a property owner's easement of access without having to pay compensation.[153] However, if a government entity were to deny access to an adjacent public road where there is no other access to the property, such conduct would constitute a taking and require the payment of just compensation to the owner.[154] A "substantial or unreasonable interference" with an abutting owner's access to a public road constitutes a compensable taking.[155] Of course, if a government activity "totally landlocks a parcel," it is a taking.[156]

Absent a physical taking of property, construction-related interference with a property owner's right of access or an increase in traffic, noise, dust, and/or fumes usually is not compensable.[157] (*See* Section 3, *in-*

[143] 260 U.S. at 414, 43 S. Ct. at 159, 67 L. Ed. at 325.

[144] *Id.*

[145] 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

[146] The Court stated that "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027, 112 S. Ct. at 2899, 120 L. Ed. 2d at 820.

[147] *Id*. at 1016, 112 S. Ct. at 2894, 120 L. Ed. 2d at 814.

[148] Agins v. City of Tiburon, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 115 (1980) (open-space zoning plans are legitimate exercises of a city's police power to protect its citizens from the ill effects of urbanization), *overruled on other grounds,* First English Evangelical Lutheran Church v. L.A. County, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987).

[149] 1 NICHOLS ON EMINENT DOMAIN § 1.42[7], at 1-573.

[150] *See* Sienkiewicz v. Commw., Dep't of Transp., 883 A.2d 494 (Pa. 2005) (*citing* Sienkiewicz v. Commonwealth Dep't of Transp., 842 A.2d 973 (Pa. Commw. Ct. 2004)).

[151] *See* Kau Kau Take Home No. 1 v. City of Wichita, 281 Kan. 1185, 135 P.3d 1221 (2006).

[152] Salvation Army v. Ohio DOT, 2005 Ohio 2640, 2005 Ohio App. LEXIS 2460 (Ohio App. 10th Dist. 2005).

[153] State *ex rel*. Habash v. City of Middletown, 2005 Ohio 6688, at *P15, 2005 Ohio App. LEXIS 6018, at *6 (Ohio App. 12th Dist. 2005) (*citing* Windsor v. Lane Dev. Co., 109 Ohio App. 131, 136, 158 N.E.2d 391 (1958)).

[154] State of Ohio *ex rel*. Hilltop Basic Res., Inc., v. City of Cincinnati, 167 Ohio App. 3d 798, 801–02, 857 N.E.2d 612, 614–15 (Ohio App. 1st Dist. 2006).

[155] 167 Ohio App. 3d at 804, 857 N.E.2d at 617 (2006) (involving an Ohio statute granting a right of access to public streets or highways that private property abuts). *See also* Hall v. State*,* 2006 SD 24, 712 N.W.2d 22 (2006) (involving the closure of a highway exit and the opening of another a mile away and a finding that there was an inadequate record below for determining whether there had been a compensable taking).

[156] LeBlanc v. State of Louisiana, Through the Dep't of Transp. and Dev.*,* 626 So. 2d 1151, 1157, n.6 (La. 1993) (stating that "a survey of American law indicates that any government activity that totally landlocks a parcel is a taking").

[157] The Metro. Water Dist. of S. Cal. v. Campus Crusade for Christ, Inc., 2005 Cal. App. LEXIS 11613, at *63 (2005) (Unpub.) (*citing* People *ex rel*. Dep't of Pub. Works v. Ayon, 54 Cal. 2d 217, 228, 5 Cal. Rptr. 151, 352 P.2d 519 (1960); People *ex rel*. Dep't of Pub. Works v. Symons, 54 Cal. 2d 855, 858–59, 9 Cal. Rptr. 363, 357 P.2d 451 (1960)).

fra.) Although the construction of jails, hospitals, firehouses, and school playgrounds in the vicinity of a complainant's land is a nonphysical interference that may cause a loss of value of an owner's property, such activities also are not compensable takings or damaging of property rights.[158] In 2004, an Ohio court held that the construction of a firehouse adjacent to the owner's property did not give rise to a compensable taking.[159]

E. THE DOCTRINE OF DAMNUM ABSQUE INJURIA

E.1. Damage Without Legal Injury

As discussed in the previous Subsection D, depending on the circumstances government action that is said to be a reasonable exercise of the police power and/or that is regulatory in nature may be held not to constitute a taking. The landowner may incur a loss that is not compensable. Courts may refer to such noncompensable loss or damage as *damnum absque injuria,* i.e., "damage without legal injury" or "loss or harm for which there is no legal remedy."[160] In applying the aforesaid expression or doctrine the courts are once again addressing the issue of which property interests or losses traditionally are considered compensable and which property interests or losses traditionally are considered noncompensable when private property is affected by a government project, action, or regulation. Arguably, the treatment of the expression or doctrine *damnum absque injuria* is repetitious of Subsection D, *supra*. However, the courts use the phrase as though it were a legal doctrine rather than merely as a term, expression, or phrase that describes a result of government action to which a property owner objects but for which the owner is not entitled to compensation. Because some courts seem to consider the term *damnum absque injuria* as a legal doctrine, the concept is discussed separately herein. In addition, the doctrine has been used to explain that there is an absence of causation between the taking and an individual owner's property interest alleged to have been taken.

In any event, few axioms of American law are more readily accepted than the one that when private property is taken for public use there is a duty to compensate the owner. For example, a compensable taking occurs where private property is "actually invaded by super-induced additions of water, earth, sand, or other material, or by having any artificial structure placed on it."[161] However, although the power of eminent domain is inherent in the sovereignty of the government and is both recognized and limited by the Fifth Amendment to the U.S. Constitution, there are many forms of injury to property resulting from the exercise of eminent domain that are not compensable, except to the extent that a generous legislature may choose to alleviate the landowner's loss. Such noncompensable injuries may involve changes in the physical condition of land or added economic costs of land use. The injuries occur in varying degrees depending on the nature of the public taking or action but may not require the payment of compensation to the landowner. Thus, some courts appear to treat such cases as a separate category of injuries, referring to them as *damnum absque injuria.*

From the viewpoint of the landowner whose property is condemned, the owner is vulnerable to a wide range of possible injuries that the owner unwittingly or unwillingly ultimately may have to bear regardless of the impact on the affected property.[162] A landowner may have to underwrite the expense of fencing or draining his or her property,[163] or a landowner may lose his or her privacy[164] or the ability to be seen from the road.[165] As for nonrecoverable economic costs, the owner of residential or business property who must relocate after condemnation faces a formidable list of possible expenses, including the costs of dismantling, moving, reassembling, and reinstalling equipment or structures used in business property; losses on the forced sale of personal property not usable after displacement; expenses of obtaining substitute real property, such as the costs for an appraisal, survey, and title examination and for financing and closing costs; expenses incurred to find and move to replacement housing or business property; loss of existing, favorable financing, including penalties for prepayment of mortgages; increased rent

[158] Schuler v. Wilson, 322 Ill. 503, 153 N.E. 737 (1926) (school); Gulledgle v. Tex. Gas Transmission Corp., 256 S.W.2d 349 (Ky. 1953) (gas line); Ohio Pub. Serv. Co. v. Dehring, 34 Ohio App. 532, 172 N.E. 448 (1929) (hospital).

[159] State *ex rel*. Reich v. City of Beachwood, 158 Ohio App. 3d 588, 820 N.E.2d 936 (2004).

[160] Sienkiewicz v. Commw. DOT, 584 Pa. at 280, 883 A.2d at 501 (describing *damnum absque injuria* as "damage without legal injury"). *See also* Mich. Dep't of Transp. v. Tomkins, 270 Mich. App. 153, 715 N.W.2d 363, 370 (2006) (explaining that *damnum absque injuria* is "damage without injury"); Hansen v. United States, 65 Fed. Cl. 76, 92 (2005) (defining *damnum absque injuria* as "'loss or harm for which there is no legal remedy'") (*quoting Black's Law Dictionary* 398 (7th ed. 1999)).

[161] Allegreti & Co. v. County of Imperial, 138 Cal. App. 4th 1261, 1272, 42 Cal. Rptr. 3d 122 (Cal. App. 4th Dist. 2006), *review denied*, 2006 Cal. LEXIS 9142, *cert. denied*, 127 S. Ct. 960, 166 L. Ed. 2d 706 (2007).

[162] *See, e.g.*, Allegreti & Co., 138 Cal. App. 4th at 1277, 42 Cal. Rptr. 3d at 138 (county's limit on amount of groundwater available for the property owner's use did not present a compensable taking).

[163] Beck v. City of Evansville, 842 N.E.2d 856, 864 (Ind. App. 4th Dist. 2006). In *Beck*, the homeowners argued that the city's sewer system was inadequate at times because of heavy rainfall in support of a claim for inverse condemnation but the court held that under these circumstances "[a]ny inconvenience or incidental damage which arises from the reasonable continued use of the combined sewer system is regarded as within the rule of damnum absque injuria." *Id*.

[164] *See State, ex. rel. Reich*, 158 Ohio App. 3d at 594, 820 N.E.2d at 940 (two-story fire station constructed next to owner's one-story property with the station's sleeping quarters overlooking owner's backyard held *damnum absque injuria*.)

[165] *See* § 2, *infra*.

for replacement housing or business property; loss of rental or other income between the time of announcement of a public acquisition and the time of an actual taking; loss of income due to business interruption and ultimately a loss of going concern value, good will, and income where a business cannot relocate without substantial loss of its patronage; loss of opportunity to continue in business by a small operator with inadequate capital or credit to finance relocation or by an elderly operator with inadequate training or good health required to cope with increased risks and competition caused by relocation; or loss of employees because of the discontinuance or relocation of a displaced business.

As a practical matter, these expenses may be significant in a given case and in the aggregate may have the effect of shifting to the private sector a substantial share of the overall cost of public improvements.[166] The courts' findings in specific cases that such injuries are not compensable arguably are consistent with the Fifth Amendment's requirement of just compensation for the taking of private property, because the courts have construed the Fifth Amendment to require compensation for the value of property that a condemnor acquires rather than for losses sustained by a condemnee.

E.2. Absence of Causation

The doctrine of *damnum absque injuria* has been construed to mean that there is an absence of causation between the taking and the individual owner's property. As the U.S. Court of Federal Claims explained in 2005 in *Hansen v. United States,*[167]

> [e]arly takings cases provide examples of how tort causation rules were imported into takings jurisprudence. The earliest cases focused on the distinction between direct and indirect harm caused by the government. While the courts seemed comfortable to place cases in the "takings" pew when the government had effected some real invasion of land or destruction of property, they were less likely to do so when the harm did not involve direct harm….
>
> *Pumpelly v. Green Bay Co.* [80 U.S. 166, 20 L. Ed. 557 (1871)] contains one of the Supreme Court's first important discussions of causation in the takings context….
>
> In applying causation principles, including the broad causation-in-fact logic employed by the *Pumpelly* Court, subsequent courts struggled with the problem of where to draw the line between government actions that resulted in compensable takings and those that did not. Once again using tort law as an exemplar, the Supreme Court applied the concept of proximate causation as a means to [rein] in liability for harm that, while in fact caused by government action, was not proximately related to that action. Specifically, the Court applied the maxim *damnum absque injuria.*[168]

Lack of causation and *damnum absque injuria* were specifically at issue in *City of Carlsbad v. Rudvalis,*[169] involving an eminent domain action to take portions of two commercial properties used as nurseries for highway improvements. One of the issues was whether the condemnees could claim consequential damages for the improvements' causing of accelerated residential development in the area with a resulting shortening of the economic life of the properties as nurseries.[170] Thus,

> [a]t the compensation trial, in addition to physical damages to inventory, defendants sought economic damages on the theory that their nursery assets and improvements suffered a shortened economic life due to "massive development pressures" to more rapidly convert the property to residential use—all caused by the road extension.[171]

Although there were other valuation issues in the case, the city argued that "any economic losses were not otherwise compensable because they were caused by an exercise of the City's police power or urbanization and not the roadway project."[172] The court agreed, holding that severance damages must be caused by the construction and use of the project.

> Our focus is on the causation element in eminent domain actions. "It is the damages [to the remainder] *caused by the taking* which is the subject of a condemnation action. That is what the governing statute says. It provides that the condemnee may recover any 'damage…*caused to* the remainder *by*…(a) [t]he severance [or *by*]…(b) [t]he construction and use of the project for which the property is *taken* in the manner proposed by the plaintiff….'"[173]

The defendants argued that

> severance damages may be based on *any factor* causing a diminution in fair market value of the property and thus the jury can properly award damages for obsolescence of the improvements caused by the accelerated transition of the surrounding lands to residential use.[174]

However, the court held that the "defendants' damage claims rest on developmental influences arising well before construction of the road extensions."[175] Moreover, the court stated that

> [w]ere we to adopt the position taken by defendants on causation, we would in any event reject the damage awards on the ground the negative effect of accelerated surrounding development on the subject properties caused by the extended roadway is an injury that is *damnum absque injuria*, that is, damage without injury….

[166] *See* Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs, House Select Subcommittee on Real Property Acquisition, Comm. Print 31, 88th Cong., 2d Sess. (1964).

[167] 65 Fed. Cl. 76, 2005 U.S. Claims LEXIS 93 (2005).

[168] *Id*. at 102–03, 104; 2005 U.S. Claims LEXIS at *87–88, 91–92.

[169] 109 Cal. App. 4th 667, 135 Cal. Rptr. 2d 194 (Cal. App. 4th Dist. 2003).

[170] *Id.* at 674, 675, 135 Cal. Rptr. 2d at 199.

[171] *Id.* at 672, 135 Cal. Rptr. 2d at 199.

[172] *Id.* at 676, 135 Cal. Rptr. 2d at 200.

[173] *Id.* at 681, 135 Cal. Rptr. 2d at 204.

[174] *Id.* at 682, 135 Cal. Rptr. 2d at 205.

[175] *Id.* at 683, 135 Cal. Rptr. 2d at 206.

> Under that doctrine, "a person may suffer damages and be without remedy because no legal right or right established by law and possessed by him has been invaded, or the person causing the damage owes no duty known to the law to refrain from doing the act causing the damage…." Just as diversion of traffic from a business is not a compensable injury inasmuch as a landowner has no property right in the continuation or maintenance of the flow of traffic past his property…, these defendants have no legal right or vested interest in keeping the surrounding land free of incoming development or increased population.[176]

E.3. Highway Improvements and *Damnum Absque Injuria*

With respect to highways, in addition to the foregoing cases focusing on causation, a variety of claims have been denied based on the doctrine.

A loss of business or profits is one of the complaints that a landowner may have, as many claims involve diminished access to highways that may in turn result in a loss of business patronage. However, "there is no cognizable legal interest in preserving a particular traffic flow"[177] that may be important for patronage and business. If governmental action results in circuity of access to property, then compensation may not be recoverable, because the claim is one that is considered to be *damnum absque injuria*.[178] In *Old Romney Development Co. v. Tippecanoe County, Indiana,*[179] in which the property owner brought an inverse condemnation action because of the closing of an intersection, although the distance would be greater and the route more circuitous, the court ruled that there had not been a taking because Old Romney still had access to the main highway.[180] Citing the doctrine of *damnum absque injuria*, the court explained that

> [o]ne whose property abuts upon a roadway, a part of which is closed or vacated has no special damage if his lands do not abut upon the closed or vacated portion so that his right of ingress and egress is not affected. If he has the same access to the general highway system as before, his injury is the same in kind as that suffered by the general public and is not compensable. It is damnum absque injuria.[181]

Loss of privacy caused by public development of facilities may be noncompensable. As one court noted, "[t]he courts have held that many intangible interferences with property do not constitute a taking."[182] In *State ex. rel. Reich v. City of Beachwood,*[183] the property owner Reich complained that the city's construction of a fire station on city property that abutted her backyard resulted in a loss of privacy and a taking. However, the court held that there was no taking of the plaintiff's interest in her property: "the owner cannot claim compensation for any diminution in value in [her] land resulting from a change in abutting land for a public use."[184] Reich, moreover, according to the court, did not show that she suffered any loss that was any different from other landowners in the vicinity.

> "Consequential damages are generally noncompensable…." The Ohio Supreme Court has explained why: "Whatever injury is suffered thereby is an injury suffered in common by the entire community; and even though one property owner may suffer in a greater degree than another, nevertheless the injury is not different in kind, and is therefore *damnum absque injuria.*"[185]

Condemnees also may suffer damages where an eminent domain proceeding is commenced but later abandoned by the condemning authority. However,

> [c]ondemnees have no constitutional right to interest or damages on abandonment when there never was a taking of the property and the owner never lost possession. In the absence of a statute, losses sustained by a landowner when a condemnation is so abandoned are *damnum absque injuria*, for which no damages may be awarded.[186]

F. COMPENSABLE PROPERTY INTERESTS AND LOSSES IF EMINENT DOMAIN IS EXERCISED

F.1. All Interests in Property

A physical taking of property without compensation is forbidden under the U.S. and state constitutions.[187]

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[176] *Id.* at 686, 135 Cal. Rptr. 2d at 208 (citations omitted).

[177] Sienkiewicz v. Commw. DOT, 584 Pa. at 276, 883 A.2d at 498.

[178] Comm'r of Transp. v. Candlewood Valley Country Club, Inc., 2005 Conn. Super. LEXIS 3308, at *16 (2005) (*quoting* W.R. Assocs. of Norwalk v. Comm'r of Transp., 46 Conn. Supp. 355, 751 A.2d 859 (1999)).

[179] 817 N.E.2d 1282 (Ind. App. 4th Dist. 2004).

[180] *Id.* at 1288.

[181] *Id.* at 1287. *See also Candlewood Valley Country Club, Inc*., 2005 Conn. Super. LEXIS 3308, at *16 ("It is well known that damages resulting merely from circuity of access have been considered damnum absque injuria.") (*quoting* W.R. Assocs. of Norwalk v. Comm'r of Transp., 46 Conn. Supp. 355, 751 A.2d 859 (1999) (internal quotation marks omitted)).

[182] State *ex. rel*. Reich v. City of Beachwood*,* 158 Ohio App. 3d at 593, 820 N.E.2d at 939.

[183] 158 Ohio App. 3d 588, 820 N.E.2d 936 (Ohio App. 8th Dist. 2004).

[184] *Id.* at 591, 820 N.E.2d at 938.

[185] *Id.* at 594 n.4, 820 N.E.2d at 941 n.4 (citations omitted).

[186] 66, Inc. v. Crestwood Commons Redevelopment Corp*.*, 130 S.W.3d 573, 585 (Mo. App. E. Dist. 2003) (citations omitted). The court noted, *inter alia*, that the third sentence of Mo. Rev. Stat. § 523.045 recognizes the possibility that a valuable property right may have been invaded or appropriated by the pending condemnation and gives the trial court the authority to look at the nature of that invasion on a case by case basis, and, in its discretion, award interest if the landowner has been practically deprived of proprietary rights. *Id*. at 586.

[187] First English Evangelical Lutheran Church v. County of L.A., 482 U.S. 304, 318, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987); Kaiser Aetna v. United States, 444 U.S. 164, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979); Comm'r v. Gillette Motor Transport, Inc., 364 U.S. 130, 135, 80 S. Ct. 1497, 4 L. Ed. 2d 1617

Property ownership consists of an aggregate bundle of rights, powers, and privileges that can be enjoyed and exercised with respect to a given parcel of land. Private property generally is understood to be land and anything erected or growing upon or affixed to the land. Personal property may be condemned as well.[188] As the U.S. Supreme Court stated in *United States v. General Motors Corporation*[189], "[t]he Constitutional provision (Fifth Amendment) is addressed to every sort of interest the citizen may possess." However, at the time of the taking or alleged taking "a party must have a property interest…. Not any property interest will do; that interest must have risen to the level of a vested right."[190]

F.2. Permanent Versus Temporary Invasions of Property

"Generally a taking does not occur unless the invasion of the property is permanent."[191] Where there is an absence of such continuance or permanency of the taking, the landowner's only recourse may be an action in tort.[192] Thus, there is a taking of an easement when a highway project has been designed and built in such a way as to divert water and cause intermittent but serious flooding of the landowner's property, thereby creating "'a *permanent* condition of continued overflow' or a *permanent* 'liability to intermittent but inevitably recurring overflows….'"[193] In such a case, the "compensation for the taking of an easement is the difference in market value of the property before and after imposition of the easement."[194] The taking occurs when the plaintiff's interest in the property is permanently lost.[195] *See* discussion in Section 4, *infra*.

There is authority that an inspection or survey of property or the issuance of an order for entry on land for such an inspection is not a taking.[196] Even in the absence of a statutory basis for temporary entry onto property there is authority that a precondemnation entry to conduct an inspection or survey of the property is not a taking unless the government damages the property.[197] Thus, some limited inspecting, surveying, and the taking of measurements of an owner's property may proceed prior to condemnation, that is, without the government having to take property before doing so as long as the inspecting and testing are "minimally intrusive."[198] Such authority has been held to arise under the police power[199] or, depending on the circumstances, the government's right to abate a public nuisance.[200] The right to enter property to conduct a survey is incidental to the right of condemnation[201] or implied in eminent domain.[202]

Some courts have required that there be an express statutory grant of authority.[203] As discussed in a 1995 paper, a number of states have "right of entry" statutes (Arizona, California, Colorado, Hawaii, Minnesota, Nebraska, Tennessee, Vermont, and Wisconsin).[204] However, "courts have found pre-condemnation inspections to be authorized and appropriate as incident to condemnation and the power of eminent domain. Other courts, however, have turned this against transportation agencies by citing the general rule that eminent domain statutes are to be narrowly construed and strictly applied."[205]

(1960); and United States v. General Motors Corp., 323 U.S. 373, 382, 65 S. Ct. 357, 89 L. Ed. 311 (1945)).

[188] *See* State *ex rel*. Dep't of Transp. v. Little, 2004 Okla. 74, at *P22, 100 P.3d 707, 718 (2004). *But see* City of Hollywood v. Mulligan, 2006 Fla. LEXIS 1476, at *23 n.7, 934 So. 2d 1238, 1248 (2006) and State Highway Comm'n of Mo. v. Park, 322 Mo. 293, 15 S.W.2d 785 (Mo. 1929).

[189] 323 U.S. 373, 378, 65 S. Ct. 357, 359, 89 L. Ed. 311, 319 (1945).

[190] Tex. S. Univ. v. State St. Bank and Trust Co., 2006 Tex. App. LEXIS 4950, *23 (Tex. App. 1st Dist. 2006).

[191] K & W Elec. Inc. v. State of Iowa, 712 N.W.2d 107, 115 (Iowa 2006).

[192] *Id.*

[193] *Id.* at 116 (*citing, e.g.*, 4 NICHOLS ON EMINENT DOMAIN § 13.16[5], at 13-149 (internal quotation marks omitted) (emphasis in the original)).

[194] *Id.* at 116 (court noting that the plaintiff's "condemnation claim is consistent with these principles" as the plaintiff had "alleged [that] the DOT 'permanently raised the flood levels of the diversion channel near [the] plaintiff's property making it more susceptible to overflow into the plaintiff's plant….'" *Id*. at 116).

[195] *Id.* at 118 (holding that the action was time-barred as the "landowner must file its action for inverse condemnation within five years of the date upon which it discovers the injury to its land and the cause of the injury." *Id*. at 121).

[196] Hendler v. United States, 952 F.2d 1364, 1374–75 (Fed. Cir. 1991).

[197] 2A NICHOLS ON EMINENT DOMAIN § 6.01 [16a], at 6-85–6-87, § 6.05[3], at 6-73–6-75 (1995); 26 AM. JUR. 2D, *Eminent Domain* § 168; Annotation, *Eminent Domain: Right to Enter Land for Preliminary Survey or Examination*, 29 A.L.R. 3D 1104, 1107.

[198] Town of Clinton v. Schrempp, 2005 Conn. Super. LEXIS 92, at *31 (large or deep test-borings not to be conducted without further order of the court).

[199] *See* Kessler v. Tarrats, 194 N.J. Super. 136, 476 A.2d 326, 331 (N.J. 1984).

[200] *See* discussion in Ciampetti v. United States, 18 Cl. Ct. 548, 556–57 (1989).

[201] Thomas v. Horse Cave, 249 Ky. 713, 721, 61 S.W.2d 601, 604 (1933).

[202] Oglethorpe Power Corp. v. Goss, 253 Ga. 644, 322 S.E.2d 887, 889–91 (1984).

[203] Iowa State Highway Comm'n v. Hipp, 259 Iowa 1082, 1089, 147 N.W.2d 195, 199 (1966).

[204] James S. Thiel, Problems of Access to Contaminated Properties for Valuation, 74th Annual Meeting, Transportation Research Board (Washington, D.C., Jan. 26, 1995), hereinafter cited as "Thiel," at 16. *See also* Uniform Eminent Domain Code, *supra* note 38, § 301.

[205] Thiel, *supra* note 204, at 20.

F.3. Nature of the Title Taken

When property is acquired by eminent domain, both the rights and the damages are affected by the nature of the title acquired by the condemnor. Usually in eminent domain a condemnor acquires only the estate necessary to accomplish the public purpose,[206] a rule of reasonable necessity. Under this rule, condemning authorities usually take only an easement.[207] If the law permits only the taking of an easement, then no greater estate may be acquired.[208] If the acquisition is for the construction of a public building, then a taking of the property in fee is generally presumed.[209] Legislative grants of authority to take are likely to be construed to permit only takings necessary for the specific public purpose.[210] Thus, where construction on a highway project resulted in damage to an adjacent landowner's water table and the water was not necessary to complete the project, an inverse condemnation action succeeded, because the taking was not reasonably necessary for the intended public purpose.[211]

There are three factors to be considered in any condemnation to determine the nature of the title acquired: the constitutional or statutory provisions; the document or documents instigating the condemnation that inform a landowner how much of his or her estate the condemning authority wants to take;[212] and the use to which the condemned land is to be put.[213] Because of the many statutory and factual variations, it is not possible to lay down precise rules. However, when a statute is vague on the type of title acquired, or where there is controversy over the public need for a taking in fee simple, litigation may ensue.

F.4. Taking of Public Property

There is no question that property already devoted to public use may be condemned by another public entity for yet another public use under the proper circumstances.[214] If a condemning authority seeks to condemn land already devoted to public use, the general rule is that if the proposed use will destroy the existing use or interfere with it in such a way as effectively to destroy the existing use, the power of eminent domain may be denied.[215] Where a condemnor seeks to condemn public use property for another public use, the more necessary public use will prevail in a dispute.[216] Although it is possible for property already devoted to a public use to be condemned, when a taking occurs there may be an issue of the property owner's remedy. When the federal government or a state government condemns property of a state or of a municipality, even though the property is public in nature, the property is subject to all the characteristics of private property and therefore to the constraints of the Fifth Amendment.[217] In arriving at a remedy for the taking of property already in public use, the conventional method of ascertaining fair market value may not suffice.

F.5. Whether Business Losses or Lost Profits Are a Property Right

There appears to be some confusion in the use of the terms "business losses," "loss of business profits," and "lost profits." For example, in a case in which the condemnee "failed to submit evidence on the value of the business on the condemned land as a whole" but "offered evidence only of lost profits," the evidence was not sufficient to prove a business loss.[218] Another court has noted that it is incorrect to "commingle" the concepts of lost profits and business losses as they are "distinct concepts."[219]

> "[L]ost profits are not the only element to be considered in determining the damages resulting from the total or partial destruction of a business." In a condemnation case, business losses are not limited to lost profits, so if the jury had to choose between awarding damages for lost profits or for business losses, such an election was plainly wrong.[220]

Nevertheless, the majority rule appears to be that loss of business or lost profits is not recoverable in a condemnation proceeding.[221] Moreover, the federal rule also prohibits recovery of lost business profits in a con-

206 Bear Creek Dev. Corp. v. Genesee Found., 919 P.2d 948 at 954–55 (Colo. App. 4th Div. 1996).

207 *3* NICHOLS ON EMINENT DOMAIN § 9.02[1], at 9–12.

208 *See* Forest Preserve Dist. v. Chicago, 159 Ill. App. 3d 859, 513 N.E.2d 22 (1987).

209 *See* Bd. of Educ. of United Sch. Dist., 512 v. Vic Regnier Builders, 231 Kan. 731, 648 P.2d 1143 (1982).

210 *See* Dep't of Transp. v. Stapleton, 97 P.3d 938 (Colo. 2004).

211 *See* Deisher v. Kan. Dep't of Transp., 264 Kan. 762, 958 P.2d 656 (1998).

212 The documentation may include such items as offer letters, complaints, or petitions.

213 *See In Re: Condemnation of Tax Parcel 38-3-25*, 898 A.2d 1186, 1190 (Pa. Commw. Ct. 2006) (owner's objection was not premature when the city had disclosed the intended purpose of the taking).

214 8A NICHOLS ON EMINENT DOMAIN, § 22.01.

215 Wash. Metro. Transit Auth. v. One Parcel of Land, 169 U.S. App. D.C. 109, 514 F.2d 1350 (1975).

216 *See* SFPP, LP v. Burlington No. & Santa Fe Ry. Co., 121 Cal. App. 4th 452, 467, 17 Cal. Rptr. 3d 96, 107 (2004) (stating that "[o]nly where the two uses are not compatible and cannot be made compatible should a condemnor be permitted to take for its exclusive use property already appropriated to public use….[and] only for a more necessary public use than the use to which the property is already appropriated").

217 *See* Georgia v. City of Chattanooga, 264 U.S. 472, 44 S. Ct. 369, 68 L. Ed. 796 (1924).

218 Pinewood Manor, Inc. v. Vt. Agency of Transp., 164 Vt. 312, 319, 668 A.2d 653, 658 (1995).

219 Action Sound, Inc. v. Dep't of Transp., 265 Ga. App. 616, 621, 594 S.E.2d 773, 778 (Ga. App. 2004).

220 *Id.* at 621, 594 S.E.2d at 778 (footnote omitted).

221 Dep't of Transp. v. M.M. Fowler, Inc., 361 N.C. 1, 7, 637 S.E.2d 885, 891 (2006) (the "longstanding rule" in North Carolina) (*citing* Pemberton v. City of Greensboro, 208 N.C. 466, 470-72, 181 S.E. 258, 260–61 (1935)).

demnation.[222] (As one example, when there is a claim based on a change in an abutting property owner's access to a highway, there is no "'protectable property interest in the mere hope of future sales from passing traffic….'"[223]) Consequently, as a general matter, "[e]vidence of lost business profits is impermissible because recovery of the same is not allowed."[224] Damages are limited "to the diminished pecuniary value *of the property* incident to the wrong."[225] The reason is that just compensation does "not require expenditure of taxpayer funds for losses remote from governmental action or too speculative to calculate with certainty."[226]

> Just compensation "'is not the value to the owner for his particular purposes….'" Awarding damages for lost profits would provide excess compensation for a successful business owner while a less prosperous one or an individual landowner without a business would receive less money for the same taking. Indeed, if business revenues were considered in determining land values, an owner whose business is losing money could receive less than the land is worth. Limiting damages to the fair market value of the land prevents unequal treatment based upon the use of the real estate at the time of condemnation. Further, paying business owners for lost business profits in a partial taking results in inequitable treatment of the business owner whose entire property is taken, in which case lost profits clearly are not considered.[227]

However, business income may be relevant to the valuation of a business when "revenue [is] derived directly from the condemned property itself, such as rental income, [and] is distinct from profits of a business located on the property."[228] In such a situation, "'care must be taken to distinguish between income from the property and income from the business conducted on the property."[229]

In a 2004 case from Washington, an appellate court similarly held that "[c]onsequential damages are not included as part of 'just compensation' in condemnation actions under Washington State Constitution article I, section 16."[230] The court held that the property owner was "not entitled to recover lost profits or other consequential damages,"[231] such as relocation expenses, reconstruction expenses, and the increased cost of operating at a new location.[232] Thus, an owner "may not recover lost profits from a business conducted on condemned land as just compensation in an eminent domain proceeding."[233]

However, in other jurisdictions a loss of business profits may be recoverable as part of just compensation.[234] *See* discussion in Section 7.I., *infra*. "A condemnee may recover business losses as a separate item if it operated [an established] business on the property, if the loss is not remote or speculative, and if the property is 'unique.'"[235] The loss of the business under these circumstances is a "separate item."[236] When a water authority announced that it would be constructing a reservoir on a landowner's property, causing a loss of customers and the closing of the plant before the condemnation, "the absence of a business in operation on the property on the date of the taking [did] not automatically end all inquiry into the relevance of business loss evidence."[237]

Depending on the jurisdiction a landowner may be able to

> recover for (1) the value of the most reasonable use of the property or right in the property, (2) the value of the business on the property, and (3) the direct and proximate decrease in the value of the remaining property or right in the property and the business on the property…. The value of the most reasonable use of the property is the market value of the land's highest and best use as of the date of the condemnation.[238]

Even if a condemnee is entitled to business loss as a compensable item, one court noted, the property owner "still has to demonstrate that the land award did not already compensate it for business losses."[239] One

[222] *Id.* at 10, 637 S.E.2d at 892 (*citing* United States v. Petty Motor Co., 327 U.S. 372, 377–78, 66 S. Ct. 596, 90 L. Ed. 729 (1946); Mitchell v. United States, 267 U.S. 341, 344–45, 45 S. Ct. 293, 69 L. Ed. 644 (1925); Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 675, 43 S. Ct. 684, 67 L. Ed. 1167 (1923)).

[223] Utah Dep't of Transp. v. Ivers, 2005 UT App. 519, *P23 n.7, 28 P.3d 74, 80 n.7 (2005) (citation omitted), *affirmed by, in part, remanded by Ivers v. Utah DOT*, 2007 UT 19, 2007 Utah LEXIS 24 (2007).

[224] *M.M. Fowler, Inc*., 361 N.C. at 9–10, 637 S.E.2d at 892 ("It is…well settled that evidence of the profits of a business conducted upon land taken for the public use is not admissible in proceedings for the determination of the compensation which the owner of the land shall receive.") (*citing* 4 NICHOLS ON EMINENT DOMAIN § 12B.09[1], at 12B-59).

[225] *Id.* at 8, 637 S.E.2d at 891 (emphasis in original) (internal quotation marks omitted).

[226] *Id.* at 9, 637 S.E.2d at 892.

[227] *Id.* at 9, 637 S.E.2d at 892 (citations omitted).

[228] *Id.* at 7, 637 S.E.2d at 890.

[229] *Id.* at 7, 637 S.E.2d at 890 (*quoting* 4 NICHOLS ON EMINENT DOMAIN § 12B.09, at 12B-56-59).

[230] Cent. Puget Sound Reg'l Transit Auth. v. Coco's Rest., Inc., 2004 Wash. App. LEXIS 1140, at *1.

[231] *Id.,* 2004 Wash. App. LEXIS 1140, at *5.

[232] *Id.,* 2004 Wash. App. LEXIS 1140, at *3, n.3.

[233] *Id*., 2004 Wash. App. LEXIS 1140, at *7 (*citing* State v. McDonald, 98 Wash. 2d 521, 531, 656 P.2d 1043 (1983)).

[234] Pinewood Manor v. Vt. Agency of Transp., 164 Vt. 312, at 319, 668 A.2d 653, at 657–58.

[235] Carroll County Water Auth. v. L.J.S. Grease & Tallow, Inc., 274 Ga. App. 353, 354, 617 S.E.2d 612, 615 (Ga. App. 2005) (citation omitted).

[236] *Id.*

[237] *Id.* Furthermore, "[t]he general rule, that lost profits are too speculative to authorize a direct recovery, is not necessarily a bar to the admission of evidence of lost profits to aid in establishing the value of a business." 274 Ga. App. at 356, 617 S.E.2d at 616.

[238] Pinewood Manor, Inc. v. Vt. Agency of Transp., 164 Vt. at 315, 668 A.2d at 656 (*citing* 19 V.S.A. § 501(2)).

[239] *Id.,*164 Vt. at 317, 668 A.2d at 657.

method of computing a business loss, if allowed, is to take

> the value of the business on the condemned land as a whole, and from that number, subtract[] the value of the land's highest and best use. The remainder, if any, represents the property owner's business loss which has not "necessarily been compensated" in the valuation of the land…. A property owner may not recover for business loss beyond the extent of that remainder….[240]

In *Action Sound, Inc. v. DOT,*[241] *supra,* the lessee Action Sound, Inc., which owned "the only fuel stop at [the] interchange capable of fueling large trucks," was entitled to a new trial because of erroneous jury instructions. The court held that Action Sound was entitled to recover business damages.

> Here, it is undisputed that Action Sound's leasehold interest and its established business were completely destroyed as a result of the taking. *When a business is totally destroyed, business damages may be recovered regardless of whether the business interest has merged with the land ownership or whether the business interest belongs to a separate lessee claimant.* Because of the constitutional requirement that a condemnee receive just and adequate compensation for his loss, a lessee is entitled to recover business damages. To recover business losses, it is not necessary that the operator of that business demonstrate that his business was being operated at a profit at that location prior to the condemnation, provided that the loss being claimed is not remote or speculative. "[E]vidence of *any* business losses which result in a diminution of the value of a condemnee's business is admissible." [Emphasis in original]
>
> "The correct measure of damages that a lessee condemnee can recover for damage to his business is the difference in market value of the business prior to and after the taking. Various elements, such as loss of profits, loss of customers, or possibly what might be termed a decrease in the earning capacity of the business, may all be considered in determining the decrease in value of the business, although these factors do not themselves represent separate elements of damage."[242]

At the time of a partial taking, where business losses are concerned, a state statute may authorize the recovery of both severance damages and business damages; business damages may include loss of goodwill.[243] However, "several jurisdictions allow compensation for the loss of the going concern value or goodwill in certain instances, but do not provide for lost profits."[244] Some jurisdictions "that do recognize lost profits as a compensable element of business loss damage limit such awards to particular circumstances,"[245] such as for temporary loss of profits during relocation[246] or lost profits for duration of the lease.[247] Some jurisdictions require a condemnee to prove that the property has some unique or peculiar relationship to the business and require that the owner mitigate his or her damages before loss of profits may be considered.[248] However, the land considered for mitigation purposes must be the land that was taken, not the new site where some of the damage may be mitigated.[249]

Goodwill may not be necessarily a compensable property interest.

> "Goodwill" is defined as "the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage."…"Goodwill value is a transferable property right which is generally defined as the amount a willing buyer would pay for a going concern above the book value of the assets."[250]

"Compensation for goodwill is not constitutionally required," and, for example, was not an element of damages under California's eminent domain law until 1975.[251]

F.6. Leasehold Interests

A lessee may recover the value of a leasehold taken as a result of highway construction unless the lessee has abandoned the leasehold prior to the taking.[252] Moreover, a lessee "may be entitled to recover for other property taken, such as fixtures and equipment, and

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[240] *Id.*

[241] 265 Ga. App. 616, 594 S.E.2d 773 (Ga. App. 2004).

[242] Action Sound, Inc. v. DOT, 265 Ga. App. at 619, 594 S.E.2d at 777 (footnotes omitted) (emphasis supplied except as noted).

[243] *See* State of Fla., Dep't of Transp. v. Tire Centers LLC, 895 So. 2d 1110, 1111–12 (Fla. App. 4th Dist. 2005), (*citing* Fla. Stat. § 73.071(3)(b)(2003)), *rehearing denied*, 2005 Fla. App. LEXIS 5369 (Fla. App. 4th Dist. Apr. 4, 2005), *review denied*, 915 So. 2d 1196 (Fla. 2005).

[244] Pinewood Manor, Inc. v. Vt. Agency of Transp., 164 Vt. at 319, 668 A.2d at 658, (*citing* CAL. CIV. PROC. CODE § 1263.510 (West 1982) (adopting § 1016 of Uniform Eminent Domain Code); WYO. STAT. § 1-26-713 (1988) (adopting § 1016 of Uniform Eminent Domain Code); City of Detroit v. Michael's Prescriptions, 143 Mich. App. 808, 373 N.W.2d 219, 224–25 (Mich. Ct. App. 1985); City of Minneapolis v. Schutt, 256 N.W.2d 260, 261–62 (Minn. 1977)).

[245] *Id*., 164 Vt. at 319, 668 A.2d at 658.

[246] State v. Hammer, 550 P.2d 820, 823 (Alaska 1976).

[247] Dep't of Transp. & Dev. v. Exxon Corp., 430 So. 2d 1191, 1195 (La. Ct. App. 1983).

[248] Metro. Atlanta Rapid Transit Auth. v. Ply-Marts, Inc., 144 Ga. App. 482, 241 S.E.2d 599, 601–02 (Ga. App. 1978).

[249] DOT v. Tire Centers LLC, 895 So. 2d 1110, at 1113 (Fla. App. 4th Dist. 2005)

> Eminent domain law focuses only on the land taken, notwithstanding that in a case such as this a substantial portion of lost goodwill may possibly be recaptured by way of a nearby relocation. As such, the taking of the specific property at issue is the sole focus of business damages under section 73.071(3)(b).

Id.

[250] Redevelopment Agency of San Diego v. Attisha, 128 Cal. App. 4th at 367, 27 Cal. Rptr. 3d at 133, 134 (citations omitted).

[251] *Id.* at 367 n.4, 27 Cal. Rptr. 3d at 134 n.4.

[252] USA Independence Mobile Home Sales v. City of Lake City, 908 So. 2d 1151, 1155, 1156 (Fla. App. 1st Dist. 2005) (upholding trial court's decision that suitable access remained after construction. *Id*. at 1156).

goodwill."[253] Although one would ordinarily look to the terms of a lease to determine whether there would have been a renewal of the lease relevant to the taking, a prior history of lease renewals coupled with a good relationship between the landlord and the lessee may give rise to a jury question of "whether there was a reasonable probability of a lease renewal" under the circumstances.[254]

A written lease may not be necessary to recover for loss of business damages. In *City of McCall v. Seubert,*[255] the issue was whether two businesses operating on the affected property at the location of a partial taking could claim business damages when they neither owned the property nor had a written lease or agreement with the Seuberts, the property owners. The court ruled that the city's argument that the businesses that had intervened in the case did not have an interest in the land was an "attempt[] to import a requirement" into Idaho Code Section 7-711 regarding elements needed to claim business damages in an eminent domain proceeding.[256] Not only had the intervenors been on the property for the 5-year statutory period, but also one of the Seuberts was the majority shareholder of one of the intervening companies and was "in effect the owner of the corporation."[257]

F.7. Fixtures and Personal Property

Land acquisition in commercial or industrial areas often involves questions regarding the compensability of equipment and machinery that are costly to remove and difficult to use at other sites.

> Where…a building and industrial machinery housed therein constitute a functional unit, and the difference between the value of the building with such articles and without them, is substantial, compensation for the taking should reflect that enhanced value. This, rather than the physical mode of annexation to the freehold is the critical test in eminent domain cases.[258]

Compensation moreover may be required for business inventory in some limited circumstances where "the loss results from the condemnatory act itself (e.g., the inventory cannot be relocated)…."[259] If the items cannot be classified as trade fixtures, or are not so closely associated with land and buildings that they may be considered part of the realty, the items are treated as personal property. As such they are by definition removable, and it is presumed that the condemnee will relocate and reuse them following condemnation.[260] In regard to condemnation and valuation of billboards, *see* discussion in Section 5.G., *infra*.

G. REQUIREMENT OF A TAKING FOR A PUBLIC USE

G.1. Elasticity of the Meaning of Public Use

The requirement under the Fifth Amendment that a taking be for a public use has proved to be an elastic one. As the U.S. Supreme Court noted in 2005 in *Kelo v. City of New London, Connecticut*, the mid-19th century endorsement of a narrow definition and application of public use has been eroded in lieu of a broader definition and application of public use.[261] Thus, the concept has been interpreted broadly or narrowly, flexibility that has influenced the scope of the power of eminent domain and of the police power.

The earlier exercises of the power of eminent domain were reserved for limited projects such as construction of a town hall or a paved road, projects that presented no serious issue concerning the purpose of the taking as being one for a public use. As one authority states, "[t]he primary object for the establishment of eminent domain in any community is the establishment of roads."[262] As to such uses, the legislative authority was clear and the public's occupancy and use of the facilities for which the land was acquired were direct and exclusive. "From the very beginning of the exercise of the power the concept of the 'public use' has been so inextricably related to a proper exercise of the power that such element must be construed as essential in any statement of its meaning."[263] The term "public use" has been described variously as being synonymous with the "'general welfare,' the 'welfare of the public,' the 'public good,' the 'public benefit,' or 'public utility or necessity.'"[264]

The concept of public use expanded as state laws authorized privately-owned turnpikes, canal companies, and later railroads and utilities to exercise the power of eminent domain to acquire private property. Another period of doctrinal expansion commenced in the mid-20th century as public agencies extended their activities in the construction of public works, the renewal and reconstruction of urban areas, and the conservation or development of outdoor recreation resources. As these programs led to increased public acquisition of land, the

[253] *Attisha,* 128 Cal. App. 4th at 367, 27 Cal. Rptr. 3d at 133.

[254] *Id.,* 128 Cal. App. 4th at 373, 27 Cal. Rptr. 3d at 139.

[255] 142 Idaho 580, 130 P.3d 1118 (Idaho 2006).

[256] *Id.* at 584, 130 P.3d at 1122.

[257] *Id.*

[258] State by State Highway Comm. v. Gallant, 42 N.J. 583, at 590, 202 A. 2d. 401, at 405 (looms bolted to mill floor).

[259] Redevelopment Agency of San Diego v. Attisha, 128 Cal. App. 4th at 378, 27 Cal. Rptr. 3d at 142–43.

[260] *See, e.g.*, *In re Civic Center in City of Detroit*, 335 Mich. 528, 56 N.W.2d 375 (1953); In re Slum Clearance, City of Detroit v. United Platers, 332 Mich. 485, 52 N.W.2d 195 (1952) (electrolytic chemical tanks).

[261] 545 U.S. 469, at 522, 125 S. Ct. 2655, at 2687, 162 L. Ed. 2d 439, 2d at 479.

[262] 1 NICHOLS ON EMINENT DOMAIN § 1.22[1], at 1-78.

[263] 1 NICHOLS ON EMINENT DOMAIN § 1.11, at 1-9 (citations omitted).

[264] 1 NICHOLS ON EMINENT DOMAIN § 1.11, at 1-9 (citations omitted).

courts were introduced to new types of injury to private property and resulting claims for compensation.

What constitutes a public use has expanded both with respect to the kinds of land uses that were appropriate for public management and with the timing of public acquisition. The expanded interpretation of what constitutes a public use is explained by the increasing complexity of the urban environment that dominates modern American life and by the demand for governmental agencies to assume responsibility for promoting certain community goals through indirect influence on market forces regarding the development of private land.[265]

The definitions of public use and public purpose have become synonymous, but as discussed below there has been some divergence between the U.S. Supreme Court and state supreme courts on this issue. The term "public use" is defined broadly as "encompassing virtually any project that may further the public benefit, utility, or advantage."[266] Public use does not include taking private property and transferring it to a private third party for that owner's benefit.[267] However, if the basis for the transfer to the third party is for the use of the public, then the taking most likely would be valid—for example, the condemnation of land for light rail usage having the duties of a common carrier.[268] What constitutes a public use also includes economic development,[269] urban renewal,[270] and the creation of jobs and infrastructure and stimulation of the local economy.[271] However, as explained below, "[a]n eminent domain case brought under a state constitutional provision may require a different analysis and lead to different results…."[272]

The old concept of public use, meaning an actual physical use, has given way to allow eminent domain to be wielded for less invasive takings such as scenic easements,[273] that is, easements that allow a condemning authority to restrict the use of land to ensure a property's aesthetic maintenance for the benefit of the traveling public.[274] Other examples of condemning authorities having the ability to use eminent domain for purposes other than the physical occupation of land are highway beautification projects. These projects usually involve billboards and junkyards. As discussed in Section 5.G., *infra*, although billboards and junkyards are not located on the highway right-of-way, they may be regulated under federal and state law.

G.2. Public Use as Meaning Public Purpose or Benefit

The law of eminent domain thus has evolved from one of eminent domain being for public use to one of eminent domain being for a public purpose. The evolution is evident in *Berman v. Parker,*[275] in which the power of eminent domain was used for "promotional purposes," that is, the redevelopment of property in the District of Columbia that had been designated as being injurious to public health. In *Berman*, the condemnation of commercial property to become part of an urban redevelopment project was challenged as being beyond the scope of the redevelopment law. "To take for the purpose of ridding the area of slums is one thing," the landowners argued, but "it is quite another…to take a man's property merely to develop a better-balanced, more attractive community."[276] Nevertheless, the U.S. Supreme Court upheld the redevelopment authority's action, stating that

> [t]he concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[277]

Elaborating on its reasoning, the Court declared that once an object is within the authority of Congress, the means to be used in attaining that object are to be determined by that body.

In improving the community, the public's interest may be served as well or better through private agencies than through governmental agencies; thus, public programs may be implemented properly by permitting former owners or new owners to repurchase the condemned land subject to conditions imposed on the property's future development in private hands. The *Berman* decision openly sustained the use of eminent domain on the basis of the development's *benefit* to the public and did not insist that the condemned land be devoted exclusively to use by the public. Most state courts thereafter expanded the meaning of public use either by adopting the public benefit test or by holding that slum demolition was the principle use of the land and that subsequent private redevelopment was inci-

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[265] DANIEL MANDELKER, MANAGING OUR URBAN ENVIRONMENT 574 (1966).

[266] Vitucci v. N.Y. City Sch. Constr. Auth., 289 A.D. 2d 479, 480, 735 N.Y.S.2d 560, 562 (N.Y. App. 1st Dept. 2001).

[267] Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 199 Ill. 2d 225, 768 N.E.2d 1 (2002), *cert. denied*, 537 U.S. 880, 123 S. Ct. 88, 154 L. Ed. 2d 135 (2002).

[268] *See* Kelo v. City of New London, 545 U.S. at 477, 125 S. Ct. at 2661, 162 L. Ed. 2d at 449.

[269] *Id.* 545 U.S. at 476, 125 S. Ct. at 2660, 162 L. Ed. 2d at 449.

[270] *Vitucci,* 289 A.D. 2d at 481, 735 N.Y.S.2d at 562 (2001).

[271] Sunrise Props. v. Jamestown Urban Renewal Agency, 206 A.D. 2d 913, 614 N.Y.S.2d 841, 842 (N.Y. App. 4th Dept. 1994).

[272] 1 NICHOLS ON EMINENT DOMAIN § 1.3, at 1-95.

[273] *See* Wis. Builders Ass'n v. Wis. Dep't of Transp., 285 Wis. 2d 472, 503, 702 N.W.2d 433, 447 (2005).

[274] Kamrowski v. Wisconsin, 31 Wis. 2d 256, 265, 142 N.W.2d 793, 797 (1966).

[275] 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1953).

[276] *Id.* at 31, 75 S. Ct. at 102, 99 L. Ed. 2d at 37.

[277] *Id.* at 33, 75 S. Ct. at 102-03, 99 L. Ed. 2d at 38 (citation omitted).

dental.[278] As explained in the *Norwood* case, *infra*, "[i]n some jurisdictions, a belief [took] hold that general economic development is a public use."[279] However, as discussed below, some state supreme courts recently have held that certain attempted takings were not for a public use and thus were unconstitutional.

G.3. Participation of Private Parties

A private party participates in eminent domain when an acquisition is made for the benefit of the condemning agency and a private developer. The condemning authority could acquire right-of-way that extinguished an easement, for example, a private road, of another private party. If necessary, a condemning authority could condemn land not needed for an improvement to permit it to replace the private road and convey it to a private owner.[280] A city may transfer property from one private party to another if the future use is for the public, such as acquiring parcels of land and transferring parts to a developer for the public purpose of economic development.[281]

Requiring one private owner to dedicate a property interest for the use and benefit of another party such as a utility, however, may give rise to a taking. For example, the government may require that an owner comply with a requirement that the owner provide an easement as a condition to obtaining approval of the owner's plan for the development of property. In *Uniwell, L.P. v. City of Los Angeles,*[282] the property owner Uniwell applied to the city for approval of Uniwell's plan to develop a shopping center on its property. After tentative approval and after construction was well underway, the city and the public utility Southern California Edison Company (Edison) informed Uniwell that the City "would not certify…that Uniwell had complied with the conditions of the Tentative Tract Map unless and until Uniwell conveyed to Edison an easement for a fiber-optic communications cable…."[283] The threat (with which the owner complied under protest) was held to state a claim for a taking because "plaintiff has indeed been denied all economic use of the property subject to Edison's easement…."[284] Thus, if a city and a privately-owned utility company jointly participate in a taking without compensation, an inverse condemnation action may lie to hold both parties liable.[285] (Moreover, in *Uniwell,* the court also held that a claim was stated against the utility for economic duress.[286])

G.4. U.S. Supreme Court Precedent: *Kelo v. City of New London* (2005)

There is recently a divergence of opinion between the U.S. Supreme Court and some state supreme courts on what constitutes a public use under the federal and state constitutions. The U.S. Supreme Court in *Kelo v. City of New London*[287] took an expansive view, while some state supreme courts have tended toward holding the line against allowing private property to be condemned for the benefit of private development although having some public purpose or benefit.

In *Kelo,* in 2000, the city of New London approved a development plan for the purpose of generating jobs and tax revenue and urban revitalization, including its downtown and waterfront areas.[288] The city's unemployment rate and local economic conditions had prompted the city to reactivate the New London Development Corporation (NLDC), a private nonprofit entity, to assist the city in planning economic development. The city's development agent obtained some of the intended property through purchase and acquired the remaining needed property by eminent domain. As the Court framed it, "[t]he question presented [was] whether the city's proposed disposition of this property qualifies as a 'public use' within the meaning of the Takings Clause of the Fifth Amendment to the Constitution."[289] After discussing the economic reasons for developing the Fort Trumbull area, the Court observed that "the plan was also designed to make the City more attractive and to create leisure and recreational opportunities on the waterfront and in the park."[290] The state courts had held that "all of the City's proposed takings were valid."[291]

In affirming, the U.S. Supreme Court, relying on cases such as *Hawaii Housing Authority* v. *Midkiff*[292] and *Berman* v. *Parker*,[293] held that the economic development in *Kelo* qualified as a valid public use under both the federal and state constitutions. The Court, in a 5–4 decision with the majority opinion delivered by Justice Stevens, stated that there were two "polar positions" on the meaning of public use.

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[278] *See* Daneil Mandelker, *Public Purpose in Urban Redevelopment*, 28 TUL. L. REV. 96 (1953).

[279] City of Norwood v. Horney, 110 Ohio St. 3d at 371, 2006 Ohio 3799, at *P60, 853 N.E.2d at 1135 (2006) (*citing, e.g.*, Jamestown v. Leevers Supermarkets, Inc., 552 N.W.2d 365, 369 (N.D. 1996); Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981), [*overruled,* County of Wayne v. Hathcock, 471 Mich. 445, 684 N.W.2d 765 (2004)]; Duluth v. State, 390 N.W.2d 757, 763–64 (Minn. 1986); Prince George's County v. Collington Crossroads, Inc., 275 Md. 171, 191, 339 A.2d 278 (1975)).

[280] *See* Pitznogle v. W. Md. Ry. Co., 87 A. 917 (1913).

[281] *See* discussion, *infra*, of *Kelo*, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005).

[282] 124 Cal. App. 4th 537, 21 Cal Rptr. 3d 464 (Cal. App. 2d Dist. 2005), *review denied*, 2005 Cal. LEXIS 1766 (2005).

[283] 124 Cal. App. 4th at 540, 21 Cal Rptr. 3d at 466.

[284] 124 Cal. App. 4th at 544, 21 Cal Rptr. 3d at 469.

[285] *Id.*

[286] 124 Cal. App. 4th at 545, 21 Cal Rptr. 3d at 469–70.

[287] 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005).

[288] *Id.* at 474, 125 S. Ct. at 2658-9, 162 L. Ed. 2d at 448.

[289] *Id.* at 472, 125 S. Ct. at 2658, 162 L. Ed. 2d at 447.

[290] *Id.* at 474–75, 125 S. Ct. at 2659, 162 L. Ed. 2d at 448.

[291] *Id.* at 476, 125 S. Ct. at 2660, 162 L. Ed. 2d at 449.

[292] 467 U.S. 229, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984).

[293] 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954).

> On the one hand, it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example. Neither of these propositions, however, determines the disposition of this case.[294]

As for the first proposition, the Court stated that

> the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party…. Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit. The takings before us, however, would be executed pursuant to a "carefully considered" development plan…. The trial judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case. Therefore, as was true of the statute challenged in *Midkiff*,… the City's development plan was not adopted "to benefit a particular class of identifiable individuals."[295]

However, as for the second proposition, the Court stated that although the condemned land would not be open entirely for public use, the definition of public use had "steadily eroded over time,"[296] that the definition "embraced the broader and more natural interpretation of public use as 'public purpose,'"[297] and that the disposition of the case turned on "whether the City's development plan serves a 'public purpose.'"[298]

In upholding the proposed taking of private property by the city, the Court held that it must look at the entire plan, and on that basis "the takings challenged here satisfy the public use requirement of the Fifth Amendment."[299] "Promoting economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized."[300]

Furthermore, the Court stated that the

> Petitioners contend that using eminent domain for economic development impermissibly blurs the boundary between public and private takings. Again, our cases foreclose this objection. Quite simply, the government's pursuit of a public purpose will often benefit individual private parties…. "We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects."[301]

The Court rejected the Petitioners' argument that

> for takings of this kind we should require a "reasonable certainty" that the expected public benefits will actually accrue. Such a rule, however, would represent an even greater departure from our precedent." When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts."[302]

The *Kelo* Court recognized that state constitutional law and state statutes could define a public use more narrowly but held that the Supreme Court's "authority, however, extends only to determining whether the City's proposed condemnations are for a 'public use' within the meaning of the Fifth Amendment to the Federal Constitution."[303] As discussed below, in 2006, the Supreme Court of Ohio would cite *Kelo* when stating that the courts in Ohio were not bound by the U.S. Supreme Court's ruling in *Kelo* on the meaning of public use when construing the meaning of public use under the Ohio Constitution.[304]

G.5. State Constitutional and Legislative Changes Post-*Kelo*

As discussed in the GAO Report,[305] after the Supreme Court's decision in *Kelo,* the states of Florida, Georgia, Louisiana, Michigan, Nevada, New Hampshire, North Dakota, and South Carolina approved constitutional amendments restricting eminent domain.[306]

With respect to legislative changes, as found by the GAO, from June 23, 2005, through July 31, 2006, 29 states revised their eminent domain laws.[307] Although three of the states doing so "specifically made reference to the *Kelo* decision in connection with their legislation, other states stated that the legislation was enacted to protect property rights and limit eminent domain use."[308] Twenty-three states "placed restrictions on the use of eminent domain, such as prohibiting its use to increase property tax revenues, transfer condemned

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[294] *Kelo*, 545 U.S. at 477, 125 S. Ct. at 2661, 162 L. Ed. 2d at 450.

[295] *Id.* at 477–78, 125 S. Ct. at 2661–62, 162 L. Ed. 2d at 450–51 (citations omitted).

[296] *Id.* at 479, 125 S. Ct. at 2662, 162 L. Ed. 2d at 451.

[297] *Id.* (citations omitted).

[298] *Id.* at 480, 125 S. Ct. at 2663, 162 L. Ed. 2d at 452. At this point, the Court discussed Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954) (upholding a redevelopment plan targeting a blighted area of Washington, D.C., over a challenge by the owner of a department store located in the area) and Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984) (upholding a Hawaii statute whereby title in fee to property was taken from the lessor and transferred to the lessees for just compensation to reduce the concentration of land ownership).

[299] *Id.* at 484, 125 S. Ct. at 2665, 162 L. Ed. 2d at 454.

[300] *Id.*

[301] *Id.* at 485–86, 125 S. Ct. at 2666, 162 L. Ed. 2d at 455 (citations omitted).

[302] *Id.* at 487–88, 125 S. Ct. at 2667, 162 L. Ed. 2d at 456–57 (citation omitted).

[303] *Id.* at 489–90, 125 S. Ct. at 2668, 162 L. Ed. 2d at 458.

[304] City of Norwood v. Horney, 110 Ohio St. 3d at 372, 2006 Ohio 3799, at **P65, 853 N.E.2d at 1136.

[305] GAO Report, *supra* note 3.

[306] GAO Report, *supra* note 3, at 42.

[307] GAO Report, *supra* note 3, at 5, 38.

[308] *Id.* at 38.

property to a private entity, or assemble land for projects that are solely for economic development."[309] Twenty-four states have "established additional procedural requirements, such as providing further public notice prior to condemnation."[310] Twenty-one states "enacted changes that defined or redefined blight or blighted property, public use, or economic development.[311]

Among the changes that the GAO found since the *Kelo* decision were that

> some states redefined public use to include the possession, occupation, or use of the public or government entity, public utilities, roads, and the addressing of blight conditions. For instance, Iowa defined public use to include acquisition by a public or private utility, common carrier, or airport or airport system necessary to its function. Indiana included highways, bridges, airports, ports, certified technology parks, and public utilities as public uses.[312]

Finally, some states' laws provided "that economic development and the public benefits resulting from it, including increased tax revenue and increased employment, do not constitute a public use."[313] The foregoing and other legislative changes since the *Kelo* decision are described more fully in the GAO Report.[314]

G.6. State Court Decisions and Public Use

There are state cases adhering to a more restrictive view of what constitutes a public use.[315] In *The Southwestern Illinois Development Authority v. National City Environmental, LLC,*[316] the Southwestern Illinois Development Authority (SWIDA) was established by the Illinois state legislature to "promote development within the geographic confines of Madison and St. Clair counties;" to "assist in the development, construction, and acquisition of industrial, commercial, housing or residential projects within these counties;" and in furtherance thereof to issue bonds and acquire property by eminent domain.[317] One project for which SWIDA issued bonds was for the development of a "multipurpose automotive sports and training facility in the region (the racetrack)."[318] Later, the owner of the racetrack, Gateway International Motorsports Corporation (Gateway), "called upon SWIDA to use its quick-take eminent domain powers to acquire land to the west of the racetrack for the purposes of expanded parking facilities."[319] National City Environmental, LLC (NCE), a recycling center, owned real property sought by Gateway and SWIDA for which NCE also had plans.

After the circuit court entered a taking order vesting SWIDA with title to the property in fee simple and granting it the right to immediate possession, the Supreme Court of Illinois affirmed the appellate court's reversal of the trial court's ruling. The Illinois Supreme Court stated that

> [c]learly, private persons may ultimately acquire ownership of property arising out of a taking and the subsequent transfer to private ownership does not by itself defeat the public purpose.... However, that principle alone cannot adequately resolve the issues presented in this case. "Before the right of eminent domain may be exercised, the law, beyond a doubt, requires that the use for which the land is taken shall be public as distinguished from a private use...."[320]

Nevertheless, for the Illinois Supreme Court

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[309] *Id.* at 5.

[310] *Id.*

[311] *Id.*

[312] *Id.* at 41.

[313] *Id.* at 5–6.

[314] *Id.* at 37–44.

[315] Cases so holding are noted in City of Norwood v. Horney, 110 Ohio St. 3d at 375, 2006 Ohio 3799, at **P.70, 853 N.E.2d at 1139: Merrill v. Manchester*,* 127 N.H. at 237–39, 499 A.2d 216, 217-218 (1985) (holding that in light of the declared legislative policy of preserving open lands, the plaintiffs' open lands could not be taken for the construction of an industrial park, because an industrial park does not provide a direct public benefit); *In re Petition of Seattle*, 96 Wash. 2d 616, 627–29, 638 P.2d 549, 557 (1981) (Without giving deference to the legislature's determination, the court concluded that the primary purpose of the planned redevelopment was to promote retail and therefore the contemplated use was "a predominantly private, rather than public, use," the court noting that "[a] beneficial use is not necessarily a public use."); Owensboro v. McCormick, 581 S.W.2d 3, 7–8 (Ky. 1979) (invalidating a statute to the extent that it granted the city or other governmental unit an "unconditional right to condemn private property which [was] to be conveyed by the local industrial development authority for private development for industrial or commercial purposes"); Karesh v. Charleston City Council, 271 S.C. 339, 343, 247 S.E.2d 342, 344 (1978) (holding that a city could not condemn land and lease it to a developer for a parking garage and a convention center, because there was no assurance that the new use would provide more than a "negligible advantage to the general public"); Baycol, Inc. v. Fort Lauderdale Downtown Dev. Auth., 315 So. 2d 451, 456–58 (Fla. 1975) (holding that the economic benefit that would come from an appropriation of land for a parking garage and a shopping mall did not satisfy the public-use requirement despite potential economic benefits and holding that any public benefit from the construction of the garage was "incidental" and insufficient to justify the use of eminent domain); *Opinion of the Justices*, 152 Me. 440, 447, 131 A.2d 904 (1957) (advisory opinion concluding that a proposed statute that would authorize the city to use eminent domain for the development of an industrial park was unconstitutional). *See also* City of Little Rock v. Raines, 241 Ark. 1071, 1086, 411 S.W.2d 486, 495 (1967) (holding that a proposed taking for an industrial park did not satisfy the public-use clause). The *Raines* decision is based on the Arkansas Constitution, art. 2, § 22, and is the leading case in Arkansas prohibiting the taking of public property for a private purpose.

[316] 199 Ill. 2d 225, 768 N.E.2d 1 (2002), *cert denied*, 537 U.S. 880, 123 S. Ct. 88, 154 L. Ed. 2d 135 (2002).

[317] *Id.* at 228, 768 N.E.2d at 3 (internal quotation marks omitted).

[318] *Id*.

[319] *Id.* at 229, 768 N.E.2d at 4.

[320] *Id.* at 235–36, 768 N.E.2d at 7 (citations omitted).

[t]he essence of this case relates not to the ultimate transfer of property to a private party. Rather, the controlling issue is whether SWIDA exceeded the boundaries of constitutional principles and its authority by transferring the property to a private party for a profit when the property is not put to a public use.[321]

The court stated that although the line between the terms "public purpose" and "public use" "has blurred somewhat in recent years, a distinction still exists and is essential to this case."[322] For the court, although additional parking would benefit members of the public who chose to go to the racetrack, the project was really a private one—the public would have to pay a fee to use the lot. The project was really

a private venture designed to result not in a public use, but in private profits. If this taking were permitted, lines to enter parking lots might be shortened and pedestrians might be able to cross from parking areas to event areas in a safer manner. However, we are unpersuaded that these facts alone are sufficient to satisfy the public use requirement, especially in light of evidence that Gateway could have built a parking garage structure on its existing property.[323]

The court held that "this taking bestows a purely private benefit and lacks a showing of a supporting legislative purpose."[324]

SWIDA's true intentions were not clothed in an independent, legitimate governmental decision to further a planned public use. SWIDA did not conduct or commission a thorough study of the parking situation at Gateway. Nor did it formulate any economic plan requiring additional parking at the racetrack…. SWIDA entered into a contract with Gateway to condemn whatever land "may be desired…by Gateway."[325]

The court in particular noted not only that there were other options available to Gateway, such as building a parking garage on its existing property, but also that "Gateway chose the easier and less expensive avenue" by seeking to have NCE's property condemned for Gateway's use.[326] "Using the power of the government for purely private purposes to allow Gateway to avoid the open real estate market and expand its facilities in a more cost-efficient manner, and thus maximizing corporate profits, is a misuse of the power entrusted by the public."[327] The court held that "[t]he initial, legitimate development of a public project does not justify condemnation for any and all related business expansions."[328]

A 2006 case also construing the meaning of public use more narrowly is *City of Norwood v. Horney*.[329] Although a neighborhood in the City of Norwood had become less residential and more commercial with increased noise and traffic, the area was not a blighted area.[330] In the belief that that redevelopment would raise more tax revenue for the city, the city made plans for redeveloping the area.[331] The appellants refused to sell their property, thereby forcing the prospective developer Rookwood Partners, Ltd. (Rookwood), which would own most of the property after the planned improvements, to ask Norwood to take the appellants' properties and transfer them to Rockwood.[332] Although the trial court found that there were problems with the evidence of the affected area's state of "deterioration" (as defined in the Norwood Code, 163.02(b)(c)), the trial court ultimately upheld the takings, a ruling that the Supreme Court of Ohio stated "seems to have been driven by the deferential standard that the trial court believed it was required to use in evaluating Norwood's conclusion" that the neighborhood was deteriorating.[333]

Notwithstanding a statute prohibiting injunctions in eminent domain cases pending appeal (see discussion below), the Supreme Court of Ohio ordered the appellees not to destroy or alter the properties at issue pending the court's review of the takings.[334] The court, before ruling that the takings did not constitute a public use and thus violated the Ohio Constitution, reviewed the history of the right of private property in Ohio and found the right to be a fundamental right.[335] "There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces."[336] Reviewing the history of eminent domain law and the meaning of public use, the court stated that

[321] *Id.* at 236, 768 N.E.2d at 8.

[322] *Id.* at 237, 768 N.E.2d at 8.

[323] *Id.* at 238–39, 768 N.E.2d at 9.

[324] *Id.* at 240, 768 N.E.2d at 10.

[325] *Id.*

[326] *Id.* at 241, 768 N.E.2d at 10.

[327] *Id.* at 241, 768 N.E.2d at 11.

[328] 199 Ill. 2d at 242, 768 N.E.2d at 11. Continuing, the court stated:

In its wisdom, the legislature has given SWIDA the authority to use eminent domain power to encourage private enterprise and become involved in commercial projects that may benefit a specific region of this state. While we do not question the legislature's discretion in allowing for the exercise of eminent domain power, "the government does not have unlimited power to redefine property rights." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 439, 73 L. Ed. 2d 868, 885, 102 S. Ct. 3164, 3178 (1982) The power of eminent domain is to be exercised with restraint, not abandon.

Id.

[329] 110 Ohio St. 3d 353, 2006 Ohio 3799, 853 N.E.2d 1115 (Ohio 2006).

[330] 110 Ohio St. 3d at 359, 2006 Ohio 3799 at **P24, 853 N.E.2d at 1126.

[331] 110 Ohio St. 3d at 357, 2006 Ohio 3799 at **P17, 853 N.E.2d at 1124.

[332] 110 Ohio St. 3d at 358, 2006 Ohio 3799 at **P21, 853 N.E.2d at 1125.

[333] 110 Ohio St. 3d at 371, 853 N.E.2d at 1136.

[334] 110 Ohio St. 3d at 361, 2006 Ohio 3799, at **P31, 853 N.E.2d at 1127.

[335] 110 Ohio St. 3d at 363, 2006 Ohio 3799, at **P38, 853 N.E.2d at 1129.

[336] *Id.*

> [t]he broader concept of public use set forth in these cases eventually dominated and became entrenched in early 20th century eminent-domain jurisprudence. In this view, the fact that an "incidental benefit" flowed to a private actor was not a critical aspect of the analysis (even if that benefit was significant) provided that there was a clear public benefit in the taking.[337]

The court agreed that "modern urban-renewal and redevelopment efforts fostered the convergence of the public-health police power and eminent domain" with the alteration of the meaning of public use.[338]

> In this paradigm, the concept of public use was altered. Rather than furthering a public benefit by appropriating property to *create* something needed in a place where it did not exist before, the appropriations power was used to *destroy* a threat to the public's general welfare and well-being: slums and blighted or deteriorated property.[339]

The court, although recognizing that it had upheld takings "that seized slums and blighted or deteriorated private property for redevelopment, even when the property was then transferred to a private entity,"[340] proceeded to distinguish those prior precedents from the situation presented by this case. "The use of 'deteriorating area' as a standard for a taking has never been adopted by this court…."[341]

Although not fully developed in the *City of Norwood v. Horney* case, the court suggested that a higher standard of review was required in reviewing such a taking even though there is an expectation that courts will defer to the legislative judgment on whether a particular taking is for a public use. The court suggested that the doctrine of judicial deference to the legislative judgment on what is a taking for a public use was akin to the lowest level of review such as the rational basis standard.[342] However, even such a deferential review is not satisfied by "superficial scrutiny" and a "heightened" standard of review is required.[343] When the court addressed later the issue of whether a provision in the Norwood Code was unconstitutionally vague, the court was more specific regarding the standard of review but again did not affix a label such as intermediate review or strict scrutiny.

> We hold that when a court reviews an eminent-domain statute or regulation under the void-for-vagueness doctrine, the court shall utilize the heightened standard of review employed for a statute or regulation that implicates a First Amendment or other fundamental constitutional right.[344]

Arguably, the standard of review the Ohio Supreme Court was applying to the government's decision that a taking is for a public use is to be judged by the same standard the court applied to the provision of the Norwood Code, because the court ruled that ownership of private property in Ohio is a fundamental right.[345] On the other hand, possibly the court's approach is simply to subject the question of whether a taking is for a public use to *de nova* review ("this court has always made an independent determination of what constitutes 'public use'"[346]; "both common sense and the law command independent judicial review of the taking"[347]). Nevertheless, although the court implies that a heightened level of review is required when the issue is whether a taking is for a public use, the court does not state specifically what the heightened standard is[348] but does state that "[w]e agree that the public-use requirement cannot be reduced to mere 'hortatory fluff.'"[349]

The court is clear that private property may not be taken from one private owner and simply deeded to another.

> There can be no doubt that our role—though limited—is a critical one that requires vigilance in reviewing state actions for the necessary restraint, including review to ensure that the state takes no more than that necessary to promote the public use,…and that the state proceeds fairly and effectuates takings without bad faith, pretext, discrimination, or improper purpose.[350]

The court emphasizes that one reason that it may not simply defer to the legislature's decision is that "the state's decision to take may be influenced by the financial gains that would flow to it or the private entity because of the taking…."[351]

> To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional

[337] 110 Ohio St. 3d at 367–68, 2006 Ohio 3799, at **P51, 853 N.E.2d at 1133 (citations omitted).

[338] 110 Ohio St. 3d at 369, 2006 Ohio 3799, at **P56, 853 N.E.2d at 1134.

[339] *Id.* (emphasis in original).

[340] 110 Ohio St. 3d at 370, 2006 Ohio 3799, at **P59, 853 N.E.2d at 1135.

[341] 110 Ohio St. 3d at 372, 2006 Ohio 3799, at **P64, 853 N.E.2d at 1136.

[342] 110 Ohio St. 3d at 372, 2006 Ohio 3799, at **P66, 853 N.E.2d at 1136–37.

[343] *Id.* (*quoting* Justice Kennedy's concurring opinion in *Kelo* that heightened scrutiny in some cases may be warranted).

[344] 110 Ohio St. 3d at 380, 2006 Ohio 3799, at **P88, 853 N.E.2d at 1143 (*citing* Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc*.,* 455 U.S. at 489, 498–99, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982)).

[345] *See, e.g.,* City of Norwood v. Horney, 110 Ohio St. 3d at 363, 2006 Ohio 3799, at **P38, 853 N.E.2d at 1129.

[346] 110 Ohio St. 3d at 374–75, 2006 Ohio 3799, at **P70, 853 N.E.2d at 1138–39.

[347] 110 Ohio St. 3d at 376, 2006 Ohio 3799, at **P73, 853 N.E.2d at 1140.

[348] *See* 110 Ohio St. 3d at 371–74, 2006 Ohio 3799, at **P63, 64, and 66, 853 N.E.2d at 1136–38.

[349] 110 Ohio St. 3d at 372–73, 2006 Ohio 3799, at **P66, 853 N.E.2d at 1136–37 (*quoting Kelo*, 125 S. Ct. at 2673 (O'Connor, J., dissenting)).

[350] 110 Ohio St. 3d at 373–74, 2006 Ohio 3799, at **P69, 853 N.E.2d at 1138 (citations omitted).

[351] 110 Ohio St. 3d at 376, 2006 Ohio 3799, at **P73, 853 N.E.2d at 1140.

limitations on the government's power of eminent domain.[352]

For the court, "economic development by itself is not a sufficient public use to satisfy a taking."[353] Furthermore, the power of eminent domain "'is not simply a vehicle for cash-strapped municipalities to finance community improvement.'"[354]

In sum, the court held "that an economic or financial benefit alone is insufficient to satisfy the public-use requirement of Section 19, Article 1" of the state's constitution.[355] "In light of that holding, any taking based solely on financial gain is void as a matter of law and the courts owe no deference to a legislative finding that the proposed taking will provide financial benefit to a community."[356] Arguably, the court's decision was not a significant departure from its prior rulings on what constituted a public use; the court did not repudiate earlier rulings upholding, for example, takings "that seized slums and blighted or [already] deteriorated private property."[357] The court was emphatic, however, that it had "never found economic benefits alone to be a sufficient public use for a valid taking."[358] The court stated that it was refusing to affirm a "taking of property upon a finding that the property is in an area that is *deteriorating*."[359]

As stated, the court also held that the provision of the Norwood Code authorizing a taking of a "deteriorating area" was unconstitutionally vague, a "standard-less standard."[360] "Such a speculative standard is inappropriate in the context of eminent domain, even under the modern, broad interpretation of 'public use.'"[361] The court held "that government does not have the authority to appropriate private property based on mere belief, supposition or speculation that the property may pose such a threat in the future."[362]

Finally, the court also held that an Ohio Statute (R.C. 163.19), providing that where a condemning agency pays or deposits the amount of the award for a taking and otherwise gives adequate security then "the right to take and use the property appropriated shall not be affected by such review by the appellate courts," was an unconstitutional violation of the doctrine of separation of powers.[363]

Another state case construing the term "public use" narrowly within the meaning of a state statute is *McCabe Petroleum Corporation v. Easement and Right-of-Way Across Township 12 North,* decided in 2004.[364] McCabe, the holder of U.S. oil and gas leases, argued that an access road to explore and develop landlocked oil and gas leases is a public use and that under Montana Code Section 70-30-102(33), potential oil wells are "mines," thus permitting property to be taken for that purpose. The Supreme Court of Montana held that the statute had to be strictly construed and that an oil well was not a mine, and thus a taking for such purpose would not be one for a public use.[365]

In Oklahoma, the state's supreme court has held that a city may not use a general power of eminent domain for the purpose of economic development and blight removal when it acted jointly with a public trust, when the legislature had provided specific procedures for economic redevelopment and blight removal by the joint conduct of municipalities and public trusts.[366]

As for public use and highway construction, the authority of the transportation department to condemn land for "state highway purposes" has been held to "include[] the authority to condemn lands adjacent to a state highway for the construction of a parking and transit facility that is an integral part of a broader state highway improvement project."[367] However, in *State Department of Highways v. Denver,*[368] the court held that the department did not have the statutory authority to condemn a private way of necessity over railroad tracks on behalf of a landlocked operator of a ranch.

In contrast to the foregoing cases, in Pennsylvania it has been held that the taking of private property to construct a facility operated on a proprietary basis was for a public, not a proprietary, use.[369]

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[352] 110 Ohio St. 3d at 377–78, 2006 Ohio 3799, at **P77, 853 N.E.2d at 1141.

[353] 110 Ohio St. 3d at 378, 2006 Ohio 3799, at **P78, 853 N.E.2d at 1141 (*citing* County of Wayne v. Hathcock, 471 Mich. 445, 684 N.W.2d 765 (2004) which overruled Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981)). *Poletown* had "found a generalized economic benefit in the transfer of private property to a private entity sufficient to satisfy the public-use requirement." 110 Ohio St. 3d at 377, 2006 Ohio 3799, at **P76, 853 N.E.2d at 1141.

[354] 110 Ohio St. 3d at 378, 2006 Ohio 3799, at **P79, 853 N.E.2d at 1141 (*quoting* Beach-Courchesne v. Diamond Bar, 80 Cal. App. 4th 388, 407, 95 Cal. Rptr. 2d 265 (2000)).

[355] 110 Ohio St. 3d at 378, 2006 Ohio 3799, at **P80, 853 N.E.2d at 1142.

[356] *Id.*

[357] 110 Ohio St. 3d at 370, 2006 Ohio 3799, at *P59, 853 N.E.2d at 1135.

[358] 110 Ohio St. 3d at 377, 2006 Ohio 3799, at *P75, 853 N.E.2d at 1140–41.

[359] 110 Ohio St. 3d at 380–81, 2006 Ohio 3799, at *P90, 853 N.E.2d at 1143–44 (emphasis supplied).

[360] 110 Ohio St. 3d at 382, 2006 Ohio 3799, at *P98, 853 N.E.2d at 1145.

[361] 110 Ohio St. 3d at 382, 2006 Ohio 3799, at *P99, 853 N.E.2d at 1145.

[362] 110 Ohio St. 3d at 383, 2006 Ohio 3799, at *P103, 853 N.E.2d at 1145.

[363] 110 Ohio St. 3d at 388, 2006 Ohio 3799, at **PP124, 125, 128, 853 N.E.2d at 1150.

[364] 320 Mont. 384, 87 P.3d 479 (2004).

[365] *Id*. at 391, 87 P.3d at 483.

[366] City of Midwest City v. House of Realty, Inc., 2004 Okla. 56, at **P1, 100 P.3d 678, 680, 690 (2004).

[367] Dep't of Transp., State of Col. v. Stapleton, 97 P.3d 938, 941, 943 (Colo. 2004).

[368] 789 P.2d 1088, 1092 (Colo. 1990).

[369] *In Re: Condemnation by the City of Coatesville*, 898 A.2d 1186, 1190 (Pa. Commw. Ct. 2006).

In sum, some state courts have construed the term public use more narrowly than the U.S. Supreme Court did in *Kelo* and have ruled that the taking for the project in question was not for a public use, even though some members of the public at least would derive some benefit from the project.

H. INVERSE CONDEMNATION

Inverse condemnation occurs when a governmental entity takes private property from a private property owner with an interest in the property without the initiation of formal condemnation proceedings by the governmental entity.[370] A property owner "must show a substantial or unreasonable interference with a property right" that may involve the actual physical taking of real property or impairment of an intangible interest.[371] As one court defines the term

> [a]n action for inverse condemnation is one for damages asserted against a governmental entity with the power of eminent domain that has taken private property for public use without initiating condemnation proceedings, that is, without paying just compensation…. It is a direct action to enforce the self-executing provisions of [the state constitution] or the Fifth Amendment to the United States Constitution, both of which prohibit takings of private property for public use without the payment of just compensation…. "Just compensation" has been construed by the courts to mean the full value of the property taken. In that sense, an action for inverse condemnation is not a tort; it is an action to enforce the state or federal constitution…. [A]ctions for inverse condemnation "are not tort actions…. " On the other hand, it also could be argued that an inverse condemnation action is an action for "damage to or destruction of property," in the sense that it seeks monetary relief for a taking—that is, for destruction—of some property right. Neither construction is wholly implausible.[372]

Even if state code does not provide a procedure for instituting an inverse condemnation action, "a cause of action must arise out of the self-executing nature of the constitutional command to pay just compensation."[373] Federal courts similarly recognize the right to compensation within the meaning of the Fifth Amendment to the U.S. Constitution. Federal courts have recognized a cause of action for physical takings[374] and for some non-physical, regulatory takings as well.[375] An inverse condemnation action may be brought over an objection that the state has sovereign immunity, although it may be necessary to bring the action against state officials in their representative capacity.[376] "The inverse condemnation action is independent of any right to sue under traditional tort theories."[377]

There is an exception to inverse condemnation actions for the proper exercise of a public entity's police power in responding to an emergency. "This 'emergency' exception arises when damage to private property is inflicted by government under the pressure of public necessity and to avert impending peril."[378] Thus, the action of a reclamation district in cutting a levee to prevent potentially-massive flooding was held to be a legitimate, noncompensable exercise of the police power.[379]

In *Sienkiewicz v. Commonwealth of Pennsylvania, Department of Transportation,*[380] customers of the landowner, the owner of a commercial property located in close proximity to Interstate 81, had access to the property via a diamond-shaped set of ramps known as the Davis Street Interchange. The landowner claimed a de facto taking had occurred because of the transportation department's decision to reconfigure the interchange. "The net effect of the alterations was to require Route 81 traffic to proceed approximately 100 yards past [the] Landowner's property, by and around his closest competitor, and a similar distance in the opposite direction, in order to gain access."[381] Because some of the planned work was never completed, the department relied on a "line of decisions establishing that a cause of action for consequential damages in the eminent domain context does not arise until the public improvement causing the harm is actually constructed."[382] Moreover, the department relied on cases holding that because "the interest of the abutting property must be subordinated to the interest of the public at large…the harm in such causes [is] *damnum absque injuria*…."[383] The court agreed that because of the absence of any evidence that curbing was ever installed, there had not been a compensable interference with direct access.[384]

It has been held that damage resulting from a city's rezoning of property was not a compensable taking

[370] Kau Kau Take Home No. 1, v. City of Wichita*,* 281 Kan. at 1189, 135 P.3d at 1226 (*citing* Deisher v. Kan. Dep't of Transp.*,* 264 Kan. 762, 722, 958 P.2d 656 (1998)).

[371] State *ex rel.* Hilltop Basic Res., Inc., v. City of Cincinnati, 167 Ohio App. 3d 798 at 804, 2006 Ohio 3348, at **P24, 857 N.E.2d 612, at 617.

[372] Vokoun v. City of Lake Oswego, 189 Ore. App. 499, 510–11, 76 P.3d 677, 684 (2003) (some citations omitted); *see* City of Keizer v. Lake Labish Water Control Dist*.*, 185 Or. App. 425, 429–31, 60 P.3d 557, 559–61 (2002) (describing the nature and theory of inverse condemnation claims).

[373] LeBlanc v. State of Louisiana, Through the Dep't of Transp. and Dev.*,* 626 So. 2d 1151, 1156 (La. 1993).

[374] *See* Kaiser Aetna v. United States, 444 U.S. 164, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979).

[375] *See* Penn Central v. City of N.Y., 438 U.S. 109, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

[376] Drummond Co. v. Ala. Dep't of Transp*.*, 937 So. 2d. 56, 2006 Ala. LEXIS 43 (Ala. 2006).

[377] Thousand Trails, Inc. v. Cal. Reclamation Dist. No. 17, 124 Cal. App. 4th 450, 461, 21 Cal. Rptr. 3d 196, 204 (Cal. App., 3d Dist. 2004).

[378] 124 Cal. App. 4th at 462, 21 Cal. Rptr. 3d at 204.

[379] 124 Cal. App. 4th at 464, 21 Cal. Rptr. 3d at 206.

[380] 584 Pa. 270, 883 A.2d 494 (2005).

[381] *Id.*, 584 Pa. at 274, 883 A.2d at 497.

[382] 584 Pa. at 279–80, 883 A.2d at 500.

[383] 584 Pa. at 280, 883 A.2d at 501 (citations omitted) (internal quotation marks omitted).

[384] 584 Pa. at 282, 883 A.2d at 502.

when the damage was caused by a private lessor's activities on the property made possible by the rezoning.[385] In *Osceola County v. Best Diversified, Inc.*,[386] the trial court held that the county's denial of an owner's application for approval of a conditional use had denied the owner all reasonable economic use of his land and that the owner was entitled to damages under a theory of inverse condemnation. However, an appeals court reversed, in part because the county had determined that the landfill was a public nuisance; accordingly, the owner was not entitled to compensation. *See* further discussion of inverse condemnation in subsequent sections, *infra*.

I. SEVERANCE AND CONSEQUENTIAL DAMAGES

There is an interest too in any loss of value in the remaining, uncondemned portion of property, including any loss of value for diminished access or loss of view and visibility.[387] However, there is some confusion in the use of the terms "severance damages" and "consequential damages."

"'Severance damages are those caused by the taking of a portion of the parcel of property where the taking or the construction of the improvement on that part causes injury to the portion of the parcel not taken.'"[388] There must be a "causal link between the damages [the owner] claims for loss of access, and 'the taking itself and…the condemnor's use of the land taken.'"[389] As discussed below, if no part of the landowner's property is taken, then compensation is due only "if the consequential injury is peculiar to the owner's land and not of a kind suffered by the public as a whole."[390]

Some cases refer to consequential damages as damages suffered by a property owner resulting from highway construction or improvement or traffic regulation without there having been a physical taking of property. In those situations, however, the question is really one of whether the construction, improvement, or regulation is sufficiently burdensome and permanent to amount to a taking requiring just compensation, not whether there are consequential damages. The "'test simply requires proof that the government is the cause-in-fact of the harm for a taking to occur.'"[391] In contrast, in pure terms "[t]he consequential damages rule provides that 'in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision.'"[392]

As one treatise explains,

> [t]he coming of a major new project to a neighborhood often has widespread positive or negative impacts on surrounding real estate values. But Eminent Domain law stops well short of compensating every property owner in a general area who experiences a change in real estate values during or after completion of a public project.[393]

For there to be severance or consequential damages, there must be a taking. The term "consequential damage" is used sometimes in describing whether government action alleged to have damaged property in fact is a taking. "The challenge is to determine the appropriate compensation when the property owner not only experiences a loss of a portion of his or her property, but also suffers damage to the portion not taken."[394] Furthermore, as one authority explains, "[t]he general rule…is that when the whole or part of a particular tract of land is taken for public use, the owner of such land is not entitled to compensation for injury to other separate and independent parcels belonging to him, which results from the taking."[395]

A state constitution may go further than the U.S. Constitution and allow a plaintiff to claim damages against the state for consequential damages to the plaintiff's property as a result of a taking of abutting property, including damages for disturbing easements of light, air, or any other intangible rights that a property owner enjoys in connection with and incidental to

[385] *See* Harms v. City of Sibley*,* 702 N.W.2d 91 (Iowa 2005).

[386] 2006 Fla. App. LEXIS 13412 (Fla. App. 5th Dist. 2006).

[387] Utah Dep't of Transp. v. Ivers, 2005 Utah App. 519, 128 P.3d 74 (2005), *aff'd in part, rev'd and remanded on other grounds,* 2007 Utah 19, at *P1, 154 P.3d 802, 804 (2007) (remanding for a factual determination regarding whether "the use of the condemned land was essential to the construction of the raised highway" that gave rise to Arby's claim for severance damages for loss of view and visibility, the trial court having granted the Department's motion in limine precluding presentation to the jury of evidence of severance damages).

[388] *Id.* at *P11, 128 P.3d at 77 (*quoting* Utah Dep't of Transp. v. D'Ambrosio, 743 P.2d 1220, 1222 (Utah 1987)). In *Ivers* there was no damage to the remainder for loss of access as no portion of the land was taken that related to the loss of access and view; the DOT could have chosen to close the intersection and elevate the highway independently of the taking. *Id*., 2005 Utah App. at 519, at *P16, 128 P.3d at 78.

[389] 2005 Utah 519, at *P16, 128 P.3d at 78 (some internal quotation marks omitted).

[390] Krier v. Dell Rapids Twp.*,* 2006 S.D. 10, at *P23, 709 N.W.2d 841 at 847–48 (court holding that there was no claim for consequential damages where the township used gravel rather than resurface the road. *Id*., 2006 S.D. 10, at *PP27–28, 709 N.W.2d at 848.).

[391] *Harms,* 702 N.W.2d at 100 (*quoting* Hansen v. United States, 65 Fed. Cl. 76, 102–06 (2005)).

[392] *Id.* (citations omitted) (holding that a rezoning of property did not result in a taking of an easement that enabled the construction of a private ready mix plant that was the cause of a nuisance in close proximity to the property).

[393] 4A NICHOLS ON EMINENT DOMAIN § 14.01[2], at 14-3.

[394] *Id*.

[395] 4A NICHOLS ON EMINENT DOMAIN § 14B.02[1], at 14B-7 (citation omitted). For rules applicable to a taking and damage to separate parcels, *see id*. § 14B.02[2]; for criteria applicable to the establishment of unity of use, *see id.* § 14B.03[1]–[6], at 14B-11–14B-60.

his or her ownership of the land.[396] In partial takings of property for highway construction, the issue of consequential damages often arises. However, the general rule in a condemnation case is that

> "damage that will naturally and proximately arise to the remainder of the owner's property from the taking of the part which is taken and the devoting of it to the purposes for which it is condemned, including its proper maintenance and operation, and the measure of these consequential damages is the diminution in the market value of the remainder of the property proximately arising from these causes."[397]

However, inconvenience shared by the public in general and that is not special to the landowner, part of whose property has been taken, is not compensable.[398]

When there is government action but no taking of a landowner's property, it is particularly difficult to claim damages for an impairment of the property's value. For example, in a case in which the evidence showed, *inter alia,* that there was no physical damage to the property and that the business did not have to close even for a day during a 7 month period of construction, there was no taking.[399]

If there has not been a physical taking of property then it must be determined whether the property owner has sustained a "special damage peculiar to [his or her property] and not general damage sustained by other property similarly located."[400] Furthermore, if the property taken can be treated as a separate tract, not a part of the condemnee's entire tract, then it is a separate, complete taking and not a partial taking. In that case, damages to the remaining land of the condemnee are not damages to a "remainder" and are not compensable, as they are damages to other property not taken.[401]

Although the concept of private property has been expanded in various ways to accommodate the interests of landowners, there are still many situations in which compensation continues to be denied because the law does not acknowledge that any taking of property has occurred. Some of these noncompensable cases involve hardships, inconvenience, and costs that roadside landowners are expected to bear along with the general public, such as circuity of travel,[402] regulation of traffic flow,[403] or diversion of traffic.[404]

If there is a taking and if there are consequential damages to the remaining property that the law recognizes, then severance damages to the remainder are recoverable.[405] However, an area "that falls within the 'consequential and not recoverable' ambit is when the damage is the same as that suffered by the populace generally."[406] If there is a taking of a part of a condemnee's land, consequential but not recoverable damages typically mean damages sought for noise, dust, or the rerouting of traffic.[407] Consequential damages cannot be compensated unless they are proximate and special to the land of the condemnee.[408] One rationale is that injuries alleged by the landowner are said to be too speculative to permit accurate valuation, particularly when they have to be determined at the time property for a project is acquired and prior to any experience with the completed construction. In such cases some courts have reasoned that damages may be the result of factors other than the public improvement. It should be noted that "[w]here the term 'consequential damage' is used in reference to injuries to property not taken, the legal axiom that consequential damages do not produce recoverable damage, is apt."[409]

As seen, strictly speaking, for there to be consequential damages to property, there must have been a taking of a portion of the owner's property. For there to be a taking, there must have been a permanent interference with the property. For example, in *Kingsway Cathedral v. Iowa Department of Transportation,*[410] the Supreme Court of Iowa ruled that Kingsway did not have an inverse condemnation claim because of work on two construction projects. The projects produced vibrations to such an extent that Kingsway Cathedral, valued prior to the construction projects at $580,000, needed at least $3.9 million to restore the property. Al-

[396] Krier v. Dell Rapids Twp*.,* 2006 S.D. 10, at 23–28, 709 N.W.2d at 846–48.

[397] Dep't of Transp. v. Taylor*,* 264 Ga. 18, 19, 440 S.E.2d 652, 654 (1994) (*quoting* Dep't of Transp. v. Simon, 151 Ga. App. 807, 810, 261 S.E.2d 710, 712 (1979)).

[398] *Id.* at 654 (citing authorities).

[399] Constance v. State *ex rel* Dep't of Transp. & Dev., 626 So. 2d 1151 at 1157 (La. 1993).

[400] *Id.* at 1156.

[401] *See, generally*, *4A* NICHOLS ON EMINENT DOMAIN § 14.02[2][a] and § 14A.01[1].

[402] *See, however,* Blount County v. McPherson, 268 Ala. 133, 105 So. 2d 117 (1958).

[403] Kau Kau Take Home No. 1 v. City of Wichita, 281 Kan. at 1191–92, 135 P.3d at 1227.

[404] Sienkiewicz v. DOT, 584 Pa. at 277, 883 A.2d at 499. *See also* Board of Comm'rs of Santa Fe County v. Slaughter, 49 N.M. 141, 158 P.2d 859 (1945).

[405] *See, e.g.,* Dep't of Transp. v. Taylor, 264 Ga. 18, 19; 440 S.E.2d 652, 654 (1994), stating that

> [i]n a land condemnation case, consequential damage is "damage that will naturally and proximately arise to the remainder of the owner's property from the taking of the part which is taken and the devoting of it to the purposes for which it is condemned, including its proper maintenance and operation, and the measure of these consequential damages is the diminution in the market value of the remainder of the property proximately arising from these causes."

(citation omitted).

See discussion of partial takings and consequential damages and the severance damages rule in 4A NICHOLS ON EMINENT DOMAIN § 14.02.

[406] 4 NICHOLS ON EMINENT DOMAIN § 14.01[2], at 14-8.

[407] *Id*.

[408] Bishop, *Noncompensable Damages in Eminent Domain Proceedings*, AMERICAN ASSOCIATION OF STATE HIGHWAY OFFICIALS, ACQUISITION FOR RIGHT OF WAY 41–53 (1962).

[409] 4 NICHOLS ON EMINENT DOMAIN § 14.01[3], at 14-9.

[410] 711 N.W.2d 6 (Iowa 2006).

though Kingsway lost "permanently…the substantial use and enjoyment of the building,"[411] the court agreed with the defendants "that construction damages like Kingsway has suffered do not rise to the level of constitutional takings."[412]

The court stated that where there is some physical invasion of property, then there is a taking, because "'there is no *de minimis* rule,'" a category of takings referred to earlier as *per se* takings.[413] Compensation thus must be paid when there is a "permanent physical invasion of the property."[414] However, "[w]hether a taking has occurred is determined by the character of the invasion and not by the amount of damages."[415] Because there was no physical contact with the construction, even though the vibrations caused a total loss of the church, the vibrations were of a temporary nature and did not result in a taking.[416] Consequently, Kingsway Cathedral's recovery had to be based on tort and not on a constitutional taking.[417]

J. RELOCATION BENEFITS

By the 1960s it had become clear that noncompensable, socioeconomic damages resulting from condemnation were far greater and a more subtle form of *damnum absque injuria* than the courts previously had recognized. For example, as one congressional report found, federally-aided programs for highways and housing were responsible for most of the instances of displacement of residents and businesses.[418] Most people displaced from residential sites occupied buildings of low value in urban areas.[419] When they relocated, often it was necessary for them to pay higher prices or higher rents for replacement housing.[420] In the early 1960s, less than half of the states had exercised their legislative power to require condemnors to pay moving costs,[421] costs that fell most heavily on businesses displaced by condemnation. Approximately one-third of businesses displaced by highway and urban renewal acquisitions had to discontinue their operations permanently, and the process of returning to former levels of earnings following relocation was slow for all.[422] Farm units forced to relocate because of highway right-of-way acquisitions experienced equally serious problems.[423]

As noted in *Nichols on Eminent Domain,* in recent decades the concept of eminent domain has "undergone fundamental change in the direction of refinement of the condemnee's substantive and procedural rights."[424] In 1970, Congress enacted the Uniform Relocation Assistance and Real Property Acquisition Act of 1970,[425] Section 4622 of which authorizes payment of specific types of compensation to condemnees where federally-funded highway projects require relocation of persons and property—moving and related expenses, replacement housing for the homeowner, and relocation assistance advisory services together with a federal sharing of the costs of the program.[426] "State agencies must comply with the [federal relocation act's] payment and assistance provisions as a condition for receiving federal funding of programs and projects that cause displacement."[427] State laws also authorize the payment of relocation expenses; for example, a Connecticut statute provides that a business owner may be compensated for business relocation expenses and losses when the state acquires the owner's property and the owner is forced to remove personal property.[428] In California, in a case involving a taking by a school district, the school district paid the costs of removing and relocating manufactured homes.[429]

The features of federal and state relocation assistance acts are discussed in the recent case of *State of*

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[411] *Id.* at 8.

[412] *Id.*

[413] *Id.* at 10 (*quoting* Fitzgarrald v. City of Iowa City, 492 N.W.2d 659, 664 (Iowa 1992). *See also* Lucas v. S.C. Coastal Council, 505 U.S. at 1015, 112 S. Ct. at 2893, 120 L. Ed. 2d at 812 ("No matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation [for physical invasion].").

[414] *Id.* at 10 (*citing* Loretto v. Teleprompter Manhattan CATV Corp*.,* 458 U.S. 419, 432 n.9, 102 S. Ct. 3164, 3174 n.9, 73 L. Ed. 2d 868, 880 n.9 (1982) (described in *Kingsway Cathedral, supra*, as a "regulatory taking" because the involved law required that a landlord allow a cable television company to install its cable facilities on the landlord's property) and United States v. Causby, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946) (described in *Kingsway Cathedral* as an "enterprise taking").

[415] *Id.*

[416] *Id.* at 11.

[417] *Id.* (*citing*, *e.g*., Ohio ex rel. Fejes v. City of Akron, 5 Ohio St. 2d 47, 213 N.E.2d 353, 354 (Ohio 1966); Sullivan v. Massachusetts, 335 Mass. 619, 142 N.E.2d 347, 352–53 (Mass. 1957); and Arvo Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 HASTINGS L.J. 431, 478 (1969) ("In jurisdictions that recognize inverse liability only for a 'taking,' structural damage as the result of vibrations from heavy equipment (*e.g.*, a pile driver) or from shock waves caused by blasting, ordinarily is held to be noncompensable." (footnotes omitted.)).

[418] House Select Subcommittee on Real Property Acquisition Report, *supra* note 166, at 20.

[419] *Id*. at 20–21.

[420] *Id*. at 21.

[421] *Id.* at 25.

[422] *Id.* at 30.

[423] *See* Vlasin, Pendleton & Hedrick, *The Effects on Farm Operating Units of Land Acquisition for Controlled-Access Highways*, USDA Econ. Res. Ser. Bull. No. 69 (June 1962).

[424] 1 NICHOLS ON EMINENT DOMAIN § 1.14[5], at 1-33.

[425] 42 U.S.C.S. § 4601, *et seq.*

[426] *See* 1 NICHOLS ON EMINENT DOMAIN § 1-14[5], at 1-35.

[427] State of Oklahoma v. Little, 2004 Okla. 74, at *12, 100 P.3d 707, 712 (2004). The state of Oklahoma enacted legislation corresponding to the federal act in 1971. *Id*. at 714 (*citing* 63 OKLA. STAT. 2001 § 1092.1, *et seq.*).

[428] *See* Commw. of Transp. v. Rocky Mt., LLC, 277 Conn. 696, 894 A.2d 259 (2005).

[429] Escondido Union Sch. Dist. v. Casa Suenos De Oro, Inc*.,* 129 Cal. App. 4th 944, 957, 29 Cal. Rptr. 3d 89, 96 (2005).

Oklahoma v. Little.[430] In the *Little* case, the court was confronted with the question of whether receipt by a landowner of administratively determined relocation assistance precluded the landowner from seeking reimbursement for relocation expenses in the condemnation proceeding. In the *Little* case, it appears that the relocation payment may have been made to the landowners without any request on their part.[431] (For whatever reason, the transportation department did not show that the landowners ever invoked the administrative process.[432]) The Supreme Court of Oklahoma noted that the case raised a question of "first impression" of how the federal and state relocation assistance acts interrelated with condemnation proceedings.[433] Although it appears that the *Little* case is an aberration, that is, a departure from the majority view that relocation benefits are not part of constitutionally-required just compensation, nevertheless, the *Little* court held that the landowners were not barred from claiming relocation expenses in the condemnation proceeding.[434]

> [T]he relocation assistance acts are not the exclusive remedy for reimbursement of moving and related expenses in those jurisdictions where such expenses are recoverable in a condemnation proceeding….
>
> Long before the enactment of the [federal relocation assistance act], moving and related expenses were recoverable in this jurisdiction in a condemnation proceeding as an element of just compensation.[435]

In a California case where damages for loss of goodwill were at issue, the court stated that the property owner must prove that "the loss cannot reasonably be prevented by relocating the business or otherwise mitigating damages, and compensation for the loss will not be included in relocation benefits allowed under [California] Government Code section 7262 or otherwise duplicated in the condemnation award."[436] Relocation benefits are discussed in more detail in Subsection 5.E and 5.F, *infra*.

K. EXERCISE OF EMINENT DOMAIN BY RAILROADS AND PUBLIC UTILITIES

Railroads and utilities do not have an inherent power of eminent domain. This power is inherent only in the state. Thus, a railroad or utility derives its authority to exercise eminent domain by delegation of the state's power to it.[437] For example, in *Wisconsin Public Service Corporation v. Shannon,*[438] the Wisconsin Public Service Commission filed eight condemnation petitions for an electrical transmission utility easement. As provided by state statute, the Wisconsin Public Service Corporation (WPSC) had to obtain a certificate of public convenience and necessity from the Wisconsin Public Commission after which the WPSC would be able to file condemnation petitions to obtain possession of the easements.[439]

There are other recent examples of the exercise of eminent domain by utilities and railroads. In *Garriga v. Sanitation Dist. No. 1,*[440] a utility condemned 144 acres to construct a sewage treatment plant. *In re: HUC Pipeline Condemnation Litigation,*[441] a city condemned land through six counties to create an easement for a natural gas pipeline. In *Hubenak v. San Jacinto Gas Transmission Co.,*[442] two separate and unrelated gas utility companies sought to condemn property to construct natural gas pipelines as authorized by Texas law. As the U.S. Supreme Court stated in *Kelo, supra,* a "State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking; the condemnation for land for a railroad with common-carrier duties is a familiar example."[443]

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[430] State of Oklahoma v. Little*,* 2004 OK 74, 100 P.3d 707 (2004).

[431] 2004 OK 74, at *24, 100 P.3d at 720.

[432] *Id.*

[433] *Id.* 2004 OK 74, at *17, 100 P.3d at 716.

[434] *Id.*, 2004 OK 74 at *18, 100 P.3d at 717.

[435] *Id.*

[436] Redevelopment Agency of San Diego v. Attisha, 128 Cal. App. 4th 357 at 367, 27 Cal. Rptr. 3d 126, at 134.

[437] *See* Dakota, Minn. & R.R. Corp. v. South Dakota, 362 F.3d 512, 515 (8th Cir. 2004) (stating that under South Dakota's previous eminent domain statute a railroad may exercise the right of eminent domain in acquiring right-of-way as provided by statute).

[438] 2005 U.S. Dist. LEXIS 6711, at *1 (also recognizing that the utilities' condemnation petitions were authorized by state statute).

[439] *Id.*

[440] 2003 Ky. App. LEXIS 305, at *2 (Ky. Ct. App. 2003).

[441] 2004 Minn. App. LEXIS 463, at *2 (Minn. Ct. App. 2004).

[442] 141 S.W.3d 172, 175 (Tex. 2004).

[443] 545 U.S. at 477, 125 S. Ct. at 2661, 162 L. Ed. 2d at 450.

SECTION 2

IMPAIRMENT OF ACCESS AND JUST COMPENSATION

To be compensated for impairment of access, a landowner must prove he suffered a substantial and material impairment of access to his land…. To show material and substantial impairment, the property owner must establish 1) a total temporary restriction of access, 2) a partial permanent restriction of access, or 3) a partial temporary restriction of access due to illegal or negligent activity. The "material and substantial test" acknowledges situations in which the access for which the property was specifically intended is rendered unreasonably deficient even though normal access remains reasonably available.

It is a question of law whether there is a "material and substantial impairment" to the remainder as a direct result of a taking…. Before trial, the court must determine whether access rights have been materially and substantially impaired and control the admission of trial evidence accordingly.

A landowner is entitled to compensation when a public improvement destroys *all reasonable access*, thereby damaging the property.[1]

[1] Magnolia Assocs., Ltd. v. Texas, 2001 Tex. App. LEXIS 392 (Unpub.) (Tex. App. 5th Dist. 2001) (citations omitted) (emphasis supplied).

A. HISTORICAL ORIGINS OF ACCESS AS A PROPERTY RIGHT

A.1. Development of the Law during the 19th Century

As abutting landowners began to experience hardship caused by highway construction, the courts were asked to award compensation for loss of access to the adjacent street. In 1821, the U.S. Supreme Court denied compensation to an abutting landowner for damage caused by street grading.[2] In 1833, the Massachusetts Supreme Court likewise denied compensation where a landowner had to construct new access to the street after a grade alteration.[3]

As densely developed urban areas appeared in the United States and the value of land depended greatly on its accessibility, the legal concepts began to change. A Kentucky court in 1839 recognized that streets were designed to serve both the public and the persons who owned property to adjacent streets: "The title to such lots carries with it, as essential incidents, certain servitudes and easements, not only valuable and almost indispensable, but as inviolable as property in the lots themselves."[4]

"Between 1850 and 1880 the concept that property was 'taken' in the constitutional sense only if it was physically appropriated or destroyed was extended to include instances of interference with the landowner's use of his land."[5] Thus, in an 1857 Ohio case, *Crawford v. Village of Delaware*,[6] the court held that injury to an abutting landowner's access could constitute a taking within the meaning of the state constitution. In that case the landowner had lost all access to the street because of a 6-ft change in grade. The court held that access to and from the abutting street was a distinct property right just as was ownership of the lot itself.

A.2. Evolution of the Rights of Abutting Landowners

The earliest American cases involving *damnum absque injuria* or damage without legal injury[7] arose as these improvements were superimposed on existing patterns of land use. Change of street grade and impairment of lateral support provided situations that tested the extent to which abutting owners could claim compensation for consequential damages caused by public improvements. In 1821, in *Goszler v. The Corporation of Georgetown,*[8] the U.S. Supreme Court affirmed the dismissal of a landowner's action to enjoin the defendant municipal corporation from altering the grade and level of the street near the owner's house. Although "the power of graduating and leveling the streets ought not to be capriciously exercised,"[9] the work on the street did not amount to a condemnation of private property for public use.[10] Two years later, the Massachusetts Supreme Court in *Callendar v. Marsh* denied the claim of a landowner who had been put to the expense of building retaining walls and a new point of access to the public street following a change of the grade of the street.[11]

For the next 50 years the *Callendar v. Marsh* precedent remained the authoritative definition of the rights of landowners suffering consequential damages.[12] Some scholars argued that there was no reason the public should not pay for injury to property in any degree the same as in the case of a physical taking of property for public use.[13] Gradually, Lord Kenyon's statement in the *British Cast Plate Manufacturers Case*—that compensation of roadside landowners for consequential damages would expose every bridge and turnpike project to "an infinity of claims"—began to lose support as the law gradually evolved.[14]

In the 1880s, the *New York Elevated Railroad cases*[15] expanded the basis for compensation by approving the proposition that the use to which one put his land was itself a form of property entitled to protection under the law and by recognizing that a functional relationship exists between roads and adjacent land. In *Story v. New York Elevated R.R. Co.,*[16] a landowner whose property abutted a street that was restricted to use as a public street brought an action to restrain a railroad company from constructing an aboveground structure that the

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[2] Goszler v. Georgetown, 19 U.S. 593, 5 L. Ed. 339, 1821 U.S. LEXIS 381 (1821).

[3] Callendar v. Marsh, 18 Mass. (1 Pick.) 417 (1823).

[4] Lexington & Ohio R.R. Co. v. Applegate, 9 Dana (Ky.) 289, 294 (1839).

[5] R. Netherton, *A Summary and Reappraisal of Access Control*, in LIMITED ACCESS CONTROLS AND THEIR ADMINISTRATION, at 5 Highway Research Board Bulletin No. 345 (1962).

[6] 7 Ohio St. 459 (1857).

[7] *See, e.g.,* Sienkiewicz v. Commonwealth, Dep't of Transp., 584 Pa. 270, 280, 883 A.2d 494, 501 (2005) (describing *damnum absque injuria* as "damage without legal injury"), (*citing* Mo. *ex rel*. State Highway Comm'n v. Meier, Mo., 388 S.W.2d 855, 857 (Mo. 1965)).

[8] 19 U.S. 593, 5 L. Ed. 339, 1821 U.S. LEXIS 381 (1821).

[9] 1821 U.S. LEXIS 381, at *4.

[10] 1821 U.S. LEXIS 381, at *5.

[11] Callender v. Marsh, 18 Mass (1 Pick.) 418 (1823).

[12] In the change of grade cases, Kentucky and Ohio were the first states to show signs of recognizing a rule that would compensate consequential damages. *See* City of Louisville v. Louisville Rolling Mill Co., 3 Bush (66 Ky.) 416, 96 Am. Dec. 243 (1867); Lexington & Ohio R.R. Co. v. Applegate, 8 Dana (38 Ky.) 289, 33 Am. Dec. 496 (1839); and Crawford v. Village of Delaware, 7 Ohio St. 460 (1857).

[13] THEODORE SEDGWICK, STATUTORY AND CONSTITUTIONAL LAW 524 (1857).

[14] 4 Term Rep. 794 (1772).

[15] Kane v. Metro. Elevated R.R. Co., 125 N.Y. 164, 26 N.E. 278 (1891); Abendroth v. N.Y. Elevated R.R. Co., 122 N.Y. 1, 25 N.E. 496 (1890); Lohr v. Metro. R.R. Co., 104 N.H. 268, 10 N.E. 528 (1887); Story v. N.Y. Elevated R.R. Co., 90 N.Y. 122, 43 Am. Rep. 146 (1882).

[16] 90 N.Y. 122, 171, 43 Am. Rep. 146 (1882).

landowner argued impaired the owner's right to air, light, and access provided by the street. The New York Court of Appeals, *inter alia*, held that the landowner had an easement that entitled him to keep the street open as a public street and that the structure would amount to a taking of the landowner's property.

> The defendant's railroad, as authorized by the legislature, directly encroaches upon the plaintiff's easement and appropriates his property to the uses and purposes of the corporation. This constitutes a taking of property for public use. It follows that such a taking cannot be authorized except upon condition that the defendant makes compensation to the plaintiff for the property thus taken.[17]

In the New York Elevated Railway cases, the U.S. Supreme Court gave further impetus to the view that an abutting landowner's access was a property right. The Court held that the abutting property owner could recover for interference with light, air, and existing access when elevated railroads were constructed on public streets. The right of access in relation to the abutting physical property was "an incorporeal hereditament," was "appurtenant" to the lot, and constituted a "perpetual encumbrance."[18] The *Story v. New York Elevated R.R. Co.* case and others that followed held that the right of abutters arose by virtue of the proximity of their land to the street and the necessity for access to the street. No longer could it be argued that a right of the abutting owner was not taken simply because his land was not physically disturbed.[19]

A.3. Modern View on Impairment of Access and Compensation

The modern view of an abutter's rights of access is stated in *Canon v. City of Chicopee,*[20] in which the Supreme Judicial Court of Massachusetts noted that the limiting of an adjacent owner's access without an actual physical taking may be compensable.

> It is well settled that a taking of private property for which compensation must be paid is not necessarily restricted to an actual physical taking of the property. See Nichols, Eminent Domain (Rev. 3d ed.) § 6.1. This rule has long been recognized in this Commonwealth. In *Old Colony & Fall River R.R.* v. *County of Plymouth*, 14 Gray, 155, 161, we stated that private property can be "appropriated" to public use "by taking it from the owner, or depriving him of the possession or some beneficial enjoyment of it." Likewise, the Supreme Court of the United States has stated that "[g]overnmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking…." In line with the above rule, we have stated that the taking of an interest in adjacent property thereby limiting access to the owner's property constitutes a compensable taking, …and that the setting of a building line constitutes an encumbrance on the land in the nature of an equitable easement for the benefit of the public and that, as such, it is a taking of private property for public use.[21]

In sum, there may be a compensable taking of access, a property right, without a taking of the land itself. The issue of course is whether there is an impairment of access requiring the payment of compensation.

A.4. Access as a Compensable Property Right

It is clear that the term property now includes an abutter's right of access to the street or highway;[22] "an owner of property abutting a public road has both the right to use the road in common with other members of the public and a private right for the purpose of access."[23] Thus, "[w]hen property is contiguous to a public road, the right of access or easement of access to such public road is a property right arising from the ownership of such land."[24] As stated in *Nichols on Eminent Domain*, "[i]n the severance damage context, it is occasionally noted that any diminution in value to the remainder parcel is compensable if it is directly attributable to the taking, regardless of the existence or nonexistence of similar damage to neighboring properties."[25] In addition to judicial evolution of the right of access, the right of access may be created by legislative grant or by express agreement; thus, a breach of an agreement by the highway authority may give rise to a claim for damages.[26]

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[17] Story v. N.Y. Elevated R.R. Co*,* 90 N.Y. at 171.

[18] *Id.,* 90 N.Y. at 145–6.

[19] *Id.*

[20] 360 Mass. 606, 277 N.E.2d 116 (1971).

[21] *Id.,* 609, 277 N.E.2d at 118 (citations omitted); *see also* Skrocki v. City of Pittsburgh, Mass., 1980 U.S. Dist. LEXIS 11194, at *6-7 (D. Mass. 1980) (*quoting Canon*); Paul's Lobster v. Commw., 53 Mass. App. Ct. 227, 758 N.E.2d 145, 149 (2001) (*quoting Canon* but holding that the redesign of roads affecting the landowner's access to its loading dock was not a constructive taking).

[22] WILLIAM B. STOEBUCK, *The Property Right of Access Versus the Power of Eminent Domain*, 47 TEX. L. REV. 733, 734 (1969).

[23] Okemo Mountain, Inc. v. Town of Ludlow, 171 Vt. 201, 207, 762 A.2d 1219, 1225 (2000).

[24] Dep't of Transp. v. Taylor, 264 Ga. 18, 19, 21, 440 S.E.2d 652, 654, 655 (1994) (holding that evidence was excluded properly by the trial court because the evidence related not to inconvenience or difficulty of access caused by any physical alteration or obstruction of the owner's former access but to inconvenience caused by traffic flow and traffic volume); *see also* Dep't of Transp. v. Durpo, 220 Ga. App. 458, 460, 469 S.E.2d 404, 406 (Ga. App. 1996) (*citing Taylor* and reversing the trial court's decision that the erection of a barricade and the resultant interference with access to the shopping center constituted a compensable taking.)

[25] 2A NICHOLS, EMINENT DOMAIN (3d ed.), § 6.02[4][a], at 6-111.

[26] People *ex rel*. Dep't of Pub. Works v. Di Tomaso*,* 248 Cal. App. 2d 741, 755, 57 Cal. Rptr. 293, 302–3 (Cal. App. 1st Dist. 1967) (holding that the state had agreed to construct a "road approach" and that the agreement could not be abrogated because of new traffic demands without the payment of compensation. 248 Cal. App. 2d at 758–60, 57 Cal. Rptr. at 303–04.). *See also* Kenco Petroleum Marketers, Inc. v. State Highway Comm'n, 269 N.C. 411, 152 S.E.2d 508 (1967) (holding that

If the public authority is unable to acquire property by purchase, then it must acquire the property by condemnation. If the government condemns the right of access of an abutting landowner, then the government must pay just compensation.[27] The reason is that "[I]f the Commission acquires the rights of access of an abutting property owner on an existing highway, the Commission has absolute control and may prohibit, at will, any further entrances to the portion of the land along which access rights have been acquired."[28]

Even if a road has not been built, damages must be awarded for the taking of access. A county board of commissioners' decision to vacate two of four platted and dedicated but not maintained county roads abutting a ranch was held to impair the landowners' right of access even if another means of access existed.[29] Condemning a right-of-way without a road still entitles the abutting owner to compensation.[30] However, "notations on a plat incorporated into a deed cannot vary or expand the right of access given in a deed."[31]

The landowner must show a substantial or unreasonable interference with a property right, either an actual physical taking of property or an impairment of an intangible interest.[32] For instance, it has been held that if the government denies vehicular access to property, leaving it landlocked with the only access being by boat, then the government must pay compensation.[33] It does not matter that the property that is being denied access is not "developed property."[34] "Whether a property has access to another road is a principal consideration for the state when it considers whether a property has reasonable access." However, the fact that a property owner has a "license" that is revocable or terminable at will for access through another owner's adjacent property does not obviate the requirement of reasonable access to the public street.[35]

A.5. Regulating Access as an Alternative to a Taking of Access

Although the outright acquisition of access rights is one method to inhibit functional obsolescence of highways, it is undoubtedly an expensive one. In a condemnation proceeding for the taking of physical property, it is important not to condemn access rights unless that is the intent. Moreover, it should be borne in mind that the same result—control of access—may be accomplished by a reasonable restriction of existing access without the necessity of purchase or condemnation. It is possible for the highway authority to condemn a parcel of land for highway improvements and simultaneously impair access without paying compensation for the latter.[36]

For example, in *Department of Transportation v. Taylor*,[37] involving a partial taking of the owner's land, the court agreed with the trial court that Taylor had not been denied convenient access. It was error for the court of appeals to hold that for purposes of compensating the property owner evidence could be introduced relating to "any change in traffic flow or pattern, the location of the exit ramp and the replacement of a stop sign with a yield sign, the configuration of the lanes [on the avenue being widened], and the expected traffic activity resulting from the use of the strip or property taken."[38]

Various kinds of access control are discussed in succeeding subsections herein whereby the highway authority has been able to restrict an owner's access in a reasonable manner without having to pay compensation.

A.6. Denial of Access as Court or Jury Question

There appears to be a split of authority on whether impairment of access is a question of law for the court to decide or a question of fact for a jury's determination. It may be argued that the decision in some instances appears to be an arbitrary one; that is, the courts simply announce that the question is one of law[39] or one of

prohibiting construction of a driveway at a point designated in a right-of-way agreement entitled the owner to compensation).

[27] Smith v. State Highway Comm'n, 185 Kan. 445, 346 P.2d 259 (1959) (*cited in Okemo Mountain, Inc.*, 171 Vt. 201, 762 A.2d 1219 (2000)).

[28] *Id.* at 459, 346 P.2d at 271.

[29] Davenport Pasture, LP v. Morris County Bd. of County Comm'rs, 31 Kan. App. 2d 217, 62 P.3d 699 (Kan. App. 2003).

[30] 31 Kan. App. 2d at 224–25, 62 P.3d at 705.

[31] Dep't of Transp. v. Meadow Trace, Inc., 280 Ga. 720, 722, 631 S.E.2d 359, 362 (Ga. 2006) (*citing* Johnson v. Willingham, 212 Ga. 310, 311, 92 S.E.2d 1 (1956) and Wooten v. Solomon, 139 Ga. 433, 435, 77 S.E. 375 (1913)).

[32] State *ex rel*. Hilltop Basic Res., Inc. v. City of Cincinnati, 167 Ohio App. 3d 798, 804, 2006 Ohio 3348, at *P24, 857 N.E.2d 612, 617 (Ohio App. 1st Dist. 2006), *aff'd*, 2008 Ohio 1966, 2008 Ohio LEXIS 1167 (Ohio, Apr. 30, 2008).

[33] 167 Ohio App. 3d at 809, 2006 Ohio 3348, at *P44, 857 N.E.2d at 620.

[34] 167 Ohio App. 3d at 805, 2006 Ohio 3348, at *P29, 857 N.E.2d at 618.

[35] 167 Ohio App. 3d at 807–08, 2006 Ohio 3348, at *P38, 40857 N.E.2d at 619.

[36] Wolf v. Commw., Dep't of Highways, 422 Pa. 34, 37–40, 220 A.2d 868, 870, 873 (1966). In *Wolf*, the state had condemned a portion of the property and constructed curbs that permitted access at two points and erected median dividers on the highway. The trial court had allowed the jury to consider the impact of the construction of the barriers and curbs in arriving at the after-value of the property; however, the Pennsylvania Supreme Court reversed, holding that the partial taking of the physical property bore no relation to the construction and that Wolf retained reasonable although circuitous access. *See* Commw., Dep't of Transp. v. Kastner, 13 Pa. Commw. 525, 532, 320 A.2d 146, 149 (1974) (noting that the *Wolf* court rejected the argument that there is a distinction between business properties and residences such that business establishments should have a compensable interest in the traffic pattern existing before a street has been vacated).

[37] 264 Ga. 18, 440 S.E.2d 652 (1994).

[38] *Id.* at 19, 440 S.E.2d at 653.

[39] Ada County Highway Dist. v. Sharp, 135 Idaho 888, 891, 892, 26 P.3d 1225, 1228, 1229 (2002); Schwartz v. State *ex rel.*

fact[40] without any discussion of the reasons that support or compel a court's conclusion. However, in *Palm Beach County v. Tessler,*[41] the Supreme Court of Florida stated the rule as follows:

> [I]n an inverse condemnation proceeding of this nature, the trial judge makes both findings of fact and findings of law. As a fact finder, the judge resolves all conflicts in the evidence. Based upon the facts as so determined, the judge then decides as a matter of law whether the landowner has incurred a substantial loss of access by reason of the governmental activity. Should it be determined that a taking has occurred, the question of compensation is then decided as in any other condemnation proceeding.[42]

B. ABUTTING AND NONABUTTING LANDOWNER'S RIGHT OF ACCESS

B.1. Abutting Owner's Entitlement to Reasonable Access

As seen, property that abuts a highway has been held to have certain incorporeal or intangible rights or easements appurtenant to the property. Furthermore, as discussed in section 3, *infra*, the abutting landowner has easements of access, as well as of light, air, and view that constitute property, the taking or damaging of which may give rise to a requirement of compensation.[43] It should be noted that a state's constitution requiring the payment of just compensation for a damaging of property "provides a remedy additional to that provided by the federal constitution."[44]

One court recently explained the rules applicable to an abutting owner's right of access in this manner:

> "An owner of property abutting on a public highway possesses, as a matter of law, not only the right to the use of the highway in common with other members of the public, but also a private right or easement for the purpose of ingress and egress to and from his property, which latter right may not be taken away or destroyed or substantially impaired without compensation therefor…." *A property owner's easement of access to the abutting highway is located at any or all points located within his frontage on the highway until such easement is extinguished by proper legal process….*
>
> However, the state may, in the lawful exercise of police power, regulate a property owner's easement of access without compensation so long as there is no denial of ingress and egress…. The critical issue in cases involving the easement right of access is whether the action taken by the state amounts to a mere regulation to promote the public safety, comfort, health, and welfare or whether such action amounts to a substantial material, or unreasonable interference with the physical access to or from the property.[45]

The issue is whether "'the right of access is destroyed or materially impaired'," in which case "the damages are compensable if the injury sustained is peculiar to the owners' land and not of a kind suffered by the public generally.'"[46] In *Hall*, *supra*, the case was remanded because the trial court had not considered whether there was a loss of reasonable and convenient access nor had considered the state's purpose, both issues being relevant to whether "the State's exercise of police power was unreasonable and arbitrary."[47]

B.2. No Entitlement to "Direct Access" to Property

The majority and long-standing rule appears to be that an abutting owner is not entitled to direct access to

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DOT, 111 Nev. 998, 1001, 900 P.2d 939, 941 (1995) ("The determination of whether such substantial impairment has been established must be reached as a matter of law. The extent of such impairment must be fixed as a matter of fact."); *see also* Rueth v. State, 100 Idaho 203, 596 P.2d 75, 92, 93 (1979); State *ex rel*. Dep't of Highways v. Linnecke, 468 P.2d 8 (Nev. 1970); Ray v. State Highway Comm'n, 196 Kan. 13, 410 P.2d 278 (1966); Stefan Auto Body v. State Highway Comm'n, 21 Wis. 2d 363, 124 N.W.2d 319 (1963); People v. Ricciardi, 23 Cal. 2d 390, 405, 144 P.2d 799, 807 (1943) ("[T]he question whether there has been a substantial impairment of her property right is a question of law, or of fact, or a mixed question of law and fact, for the trial court to determine. In no case is it a 'question of fact for the jury' to determine.").

[40] Maloley v. Lexington, 3 Neb. Ct. App. 976, 983, 536 N.W.2d 916, 921–22 (Neb. Ct. App. 1995) (*citing* Balog v. State Dep't of Roads, 177 Neb. 826, 131 N.W.2d 402 (1964)). *See also* Hendrickson v. State, 267 Minn. 436, 445–46, 127 N.W.2d 165, 172–73 (1964) ("What is reasonable ingress and egress is a fact question. If the jury decides that the location of the proposed interchange substantially impairs plaintiffs' right to reasonably convenient and suitable access to the main thoroughfare, plaintiffs are entitled to damages." *Hendrickson,* 267 Minn. 436, 445–46, 127 N.W.2d at 172–73.); State *ex rel*. Herman v. Schaffer, 105 Ariz. 478, 467 P.2d 66 (1970).

[41] 538 So. 2d 846 (Fla. 1989).

[42] *Id*. at 850 (*followed by* USA Independence Mobile Home Sales, Inc. v. City of Lake City, 908 So. 2d 1151 (Fla. App. 1st Dist. 2005)).

[43] 2 NICHOLS ON EMINENT DOMAIN § 5.07[2][c], at 5-359.

[44] Hall v. State, 2006 S.D. 24, at *P13, 712 N.W.2d 22, 27 (2006).

[45] Ohio *ex rel*. Habash vs. City of Middleton, Ohio, 2005 Ohio 6688, at *P14-15, 2005 Ohio App. LEXIS 6018, at **5-7 (2005) (emphasis supplied), (*quoting* State *ex rel*. Merritt v. Linzell, 163 Ohio St. 97, 126 N.E.2d 53 (1955)). *See also* Hillerege v. City of Scottsbluff, 164 N.D. 560, 573, 83 N.W.2d 76, 84 (1947)

> (The right of an owner of property abutting on a street to ingress and egress to and from his premises by way of such street is a property right in the nature of an easement in the street which the owner of abutting property has, not in common with the public generally, and of which he cannot be deprived without due process of law and compensation for his loss.).

[46] Hall v. State, 2006 SD 24, at *P17, 712 N.W.2d at 29, (*quoting* Hurley v. State, 82 S.D. 156, 143 N.W.2d 722, 726 (1966) (compensable taking where the State erected a steel barrier along the entire eastern edge and for a short distance on the southern edge of the property, substantially impairing the landowner's right of access)).

[47] 2006 SD 24 at *P21, 712 N.W.2d at 30.

the road or highway.[48] As one state's supreme court has stated,

> "'[i]n cases of…destruction of a fundamental attribute of ownership like the right of access, the landowner need not establish the deprivation of *all* economically viable uses of the land….'" Instead, the landowner must demonstrate "a substantial or unreasonable interference with a property right…."
>
> Consistent with these holdings, "[a] property owner's right of access to his property from a street or highway upon which it abuts cannot be lawfully destroyed or unreasonably affected…."[49]

The court in the foregoing case rejected the argument that "a substantial or unreasonable interference with access to abutting roads necessarily occurs when that access no longer is direct from the frontage of the parcel itself."[50]

In an earlier case in which a condemnee claimed severance damages for impairment of access to a shopping center, the appellate court held that the trial judge improperly instructed the jury when he charged that the condemnee was entitled to damages for loss of direct access:

> [T]he right to such compensation doesn't depend upon whether the right of access taken was a *direct* route of access; rather, it appears the question is whether, where as here some right of access is still available, there has been a *substantial diminution in access* as a result of the taking. It is rudimentary, of course, that it is for the jury to determine whether such diminution in access is nominal or substantial.[51]

Hence, the rule appears to be well settled that an abutting landowner is not entitled to direct access to his or her property.

B.3. No Entitlement to Access along the Entire Frontage of the Property

Although one case has stated that "[i]t is fundamental that the owner of land possesses an easement of access to the abutting highway at any or all points included within his frontage on such highway until such easement is extinguished by proper legal process,"[52] the majority view appears to be that the landowner is not entitled to access all along the frontage of his or her property.

> It seems fairly well settled that, while access may not be entirely cut off, an owner is not entitled, as against the public, to access to his land at all points between it and the highway. If he has free and convenient access to his property and the improvements on it and his means of ingress and egress are not substantially interfered with by the public he has no cause for complaint….[53]

Most authorities, moreover, seem to be in agreement that an abutter's right is subordinate to the public's right of passage and may be limited reasonably without the payment of compensation. "[A] landowner is not entitled to unlimited access to abutting property at all points along a highway, nor does a taking occur where ingress and egress is made more circuitous and difficult."[54] The reason is that the public has a valid interest in the safety and convenience of travel, both of which may be impaired where unrestricted access exists along arterials.[55] Finally, a landowner may have frontage

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[48] State v. Thelberg, 87 Ariz. 318, 350 P.2d 988 (1960); State Dep't of Transp. v. ABS Inc., 336 So. 2d 1278 (Fla. App. 1976). *Compare Ricciardi*, 23 Cal. 2d at 399, 144 P.2d at 803–04 (the court stating "that the defendants have no property right in any particular flow of traffic over the highway adjacent to their property, but they do possess the right of direct access to the through traffic highway and an easement of reasonable view of their property from such highway").

[49] State *ex rel*. Preschool Dev. Ltd. v. City of Springboro, 99 Ohio St. 3d 347, 349, 2003 Ohio 3999, at **P13-14, 792 N.E.2d 721, 724 (2003) (citations omitted). *See also* State *ex rel*. OTR v. Columbus, 76 Ohio St. 3d 203, 667 N.E.2d 8 (1996); State *ex rel.* McKay v. Kauer, 156 Ohio St. 347, 102 N.E.2d 703 (1951).

[50] *Id.* at 350, 2003 Ohio 3999, at *P17, 792 N.E.2d at 725.

[51] Fla. Dep't of Transp. v. ABS, Inc., 336 So. 2d 1278, 1280 (Fla. App. 2d Dist. 1976) (emphasis in original).

[52] *In re Appropriation of Easement for Highway Purposes*, 93 Ohio App. 179, 187, 112 N.E.2d 411, 415 (Ohio. App. 6th Dist. 1952) (reversing and remanding for new trial, *inter alia*, with respect to whether the appropriation affected the ease and facility of access to the residue of the property, as the jury's finding that the residue of the property on the west side of the highway was not damaged was contrary to the evidence).

[53] Iowa State Highway Comm'n v. Smith, 248 Iowa 869, 875, 82 N.W.2d 755, 759 (1957) (citations omitted).

[54] Town Council of New Harmony, Indiana v. Parker, 726 N.E.2d 1217, 1222 (Ind. 2000) (placing of a chain across the street held not to constitute a taking of property in that the action did not deprive plaintiff of access to her property or inconvenience her more greatly than the general public); Iowa State Highway Comm'n v. Smith, 248 Iowa 869, 875, 82 N.W.2d 755, 759 (1957) (*citing* State *ex rel*. Gebelin v. Dep't of Highways, 200 La. 409, 8 So. 2d 71 (1942); Sweet v. Irrigation Canal Co., 198 Or. 166, 254 P.2d 700, 717 (1953); Genazzi v. Marin County, 88 Cal. App. 545, 263 P. 825, 826 (1928); State Highway Bd. v. Baxter, 167 Ga. 124, 144 S.E. 796 (1928); and Wegner v. Kelley, 182 Iowa 259, 265, 165 N.W. 449 (1917)).

[55] Dale Props., LLC v. State, 638 N.W.2d 763, 766 (Minn. 2002); State v. Ensley, 240 Ind. 472, 490, 164 N.E.2d 342, 350–51 (1960)

> (This court takes judicial notice of the ever-increasing problems of traffic control with which a thriving metropolitan area is confronted. The creation of such facilities as limited access highways, one-way streets, express thoroughfares and other methods of construction such as that involved in the present case, is to be encouraged in the interest of traffic control and regulation to the end that the general welfare and safety of the public may best be served.);

Mueller v. N.J. Highway Auth., 59 N.J. Super. 583, 158 A.2d 343, 349 (1960); Johnson v. Burke County, 101 Ga. App. 747, 115 S.E.2d 484 (1960); State Highway Dep't v. Strickland, 213 Ga. 785, 102 S.E.2d 3 (1958); Wilson v. Iowa State Highway Comm'n, 249 Iowa 994, 90 N.W.2d 161 (1958); Iowa State Highway Comm'n v. Smith, 248 Iowa 869, 876, 82 N.W.2d 755, 759 (1957) (The state

> has the undoubted right, in the interest of public safety, to regulate the means of access to abutting property provided its regulations are reasonable and strike a balance between the public and private interest. And an abutting owner may make

along a new, limited-access highway where no road previously existed. In such instance there is no compensable damage due to lack of access because the landowner had no prior rights of access.[56]

B.4. Owner's Entitlement to Reasonable Access

The abutter of course may not be deprived of all access to an existing street or highway.[57] Indeed, the owner is entitled to reasonable access, a concept that depends on whether he or she has suitable access under the circumstances to the adjacent street and from there to the general system of highways. As discussed below, a finding of whether access is suitable may depend, for example, on the difficulties in gaining access to the premises or on whether the remaining access continues to satisfy the property's needs in regard to the highest and best use of the property. It should be noted that "the imposition of even substantial inconvenience has not been considered tantamount to a denial of the right of reasonable access."[58]

As one court has explained, when "direct access to a highway has been eliminated or substantially interfered with, causing diminution in value of an abutting property, the landowner is entitled to damages…."[59] "[W]hen all direct access has been eliminated, there has been *pro tanto* a taking; the availability and reasonableness of any other access goes to the question of damages and not to the question of liability for the denial of access."[60] There may be a compensable taking of direct access if no frontage or service road has been provided that is directly visible and accessible from the highway.[61] Compensation may be required if access is "only available through a series of *local roads* which are part of the city street system, not '*local traffic lanes*' which are part of the new highway."[62]

> only such use of his right of access as reasonable regulations permit.)

(citations omitted).

[56] Lehman v. Iowa State Highway Comm'n, 251 Iowa 77, 82, 83, 99 N.W.2d 404, 406, 407 (1959).

[57] Annotation, *Power to Directly Regulate or Prohibit Abutter's Access to Street or Highway*, 73 A.L.R. 2D 652, 659 (1960). *See also* Annotation, *Power to Restrict or Interfere with Access of Abutter by Traffic Regulations*, 73 A.L.R. 2D 689 (1960).

[58] Johnson v. City of Plymouth, 263 N.W.2d 603, 607 (Minn. 1978), (*citing* Delta Rent-A-Car Systems, Inc. v. City of Beverly Hills, 1 Cal. App. 3d 781, 82 Cal. Rptr. 318 (1969); Or. Inv. Co. v. Schrunk, 242 Or. 63, 408 P.2d 89 (1965); City of San Antonio v. Pigeonhole Parking of Texas, 158 Tex. 318, 311 S.W.2d 218 (1958); and Wood v. City of Richmond, 148 Va. 400, 138 S.E. 560 (1927)).

[59] Dep't of Transp. v. Harkey, 308 N.C. 148, 154, 301 S.E.2d 64, 68 (1983) (compensation required for the elimination of direct access to the highway with access to a new highway via various streets in a residential neighborhood) (citation omitted).

[60] *Id.* at 155, 301 S.E.2d at 69.

[61] *Id.* at 158, 301 S.E.2d at 70. *See also* Palm Beach County v. Tessler, 538 So. 2d 846 (Fla. 1989).

[62] 308 N.C. at 158, 301 S.E.2d at 70 (emphasis in original).

B.5. Reasonable Restrictions on Access

Pursuant to its police power the highway authority may regulate highway traffic reasonably in a manner that has a significant impact on an abutter's access.[63] Thus, it may not be necessary for the public authority to condemn a right of access when taking a part of the abutting property. Although these forms of regulation may affect the abutter's ease or convenience of access, absent some unusual circumstances, they come within the category of noncompensable restrictions on access pursuant to the public authority's police power and constitute *damnum absque injuria*. The abutting property owner has no absolute right, as against the public, to insist that the adjacent highway always remain available for his or her use in the same manner and to the same extent as when the highway was constructed.[64] Because the property owner has no property right in the flow of traffic,[65] the law of access "does not include any right to develop property with reference to the type of access granted or to have access at any particular point on the boundary line of the property."[66]

The abutter's access is subject to reasonable control and regulation of the public authority without a requirement of compensation for changes made by the highway department. One who acquires property abutting a public road acquires it subject and subordinate to the right to have the road improved to meet the public need.[67] For example, the highway authority may establish one-way streets and traffic lanes, regulate speed, parking, and U-turns and prohibit left turns;[68] create

[63] State Highway Comm'n v. Hazapis, 3 Or. App. 282, 287, 472 P.2d 831, 833 (1970) (ordering new trial as it was improper for the trial court to rule as a matter of law that the property owners were entitled to compensation for "unreasonable access" and to submit question of damages to the jury because the property was placed on a cul-de-sac) (*citing* By and Through State Highway Comm'n v. Burk, 200 Or. 211, 265 P.2d 783 (1954)).

[64] By and Through State Highway Comm'n v. Burk, 200 Or. 211, 265 P.2d 783 (1954).

[65] Voss v. Middleton, 162 Wis. 2d 737, 767, 470 N.W.2d 625, 637 (1991); Palm Beach County v. Tessler, 538 So. 2d 846, 849 (Fla. 1989); Narciso v. State, 114 R.I. 53, 62, 328 A.2d 107, 112 (1974) (court remanding the case for determination whether the installation of curbing amounted to a substantial denial of access) (*citing* State Highway Comm'r v. Howard, 213 Va. 731, 195 S.E.2d 880 (1973); Surety Savings & Loan Ass'n v. State, 54 Wis. 2d 438, 195 N.W.2d 464 (1972); Acme Theatres, Inc. v. State, 26 N.Y.2d 385, 258 N.E.2d 912, 310 N.Y.S.2d 496 (1970); Commw. v. Hession, 430 Pa. 273, 242 A.2d 432 (1968); and STOEBUCK, *supra* note 22, at 764)).

[66] Surety Savings and Loan Ass'n v. State Dep't of Transp., 54 Wis. 2d 438, 444, 195 N.W.2d 464, 467 (1972).

[67] Palm Beach County v. Tessler, 538 So. 2d 846, 847 (Fla. 1989); Weir v. Palm Beach County, 85 So. 2d 865, 868 (1956).

[68] Jones Beach Blvd. Estate, Inc. v. Moses, 268 N.Y. 362, 367, 197 N.E. 313, 315 (1935) (*cited in* Cities Serv. Oil Co. v. New York, 5 N.Y.2d 110, 115, 154 N.E.2d 814, 816 (1958) (holding that maintenance of bus stops does not constitute an unreasonable interference with plaintiffs' right of ingress and egress and did not result in a taking).

one-way streets;[69] regulate vehicle weights;[70] grant permits for driveway openings;[71] and reduce the number of parking spaces on an abutting street[72] or restrict parking or the making of deliveries.[73] Other forms of regulation are not compensable such as the installation of "no parking" signs, curbs, stop lights, or yellow lines that separate the direction of traffic.[74] Neither is causing an increase or decrease in the flow of traffic past the property compensable,[75] nor is causing the landowner to have to back out into the street from the property necessarily compensable.[76]

There is recent authority confirming that a city's designation of a street as a one-way street is not a compensable taking of an owner's right to access to his or her property.[77] Similarly, another court recently explained that "[p]roperty owners do not have a right to be free from one-way streets, restricted 'U' and left turns, or other suitable traffic control devices deemed necessary."[78] As the North Carolina Court of Appeals wrote in a 2005 opinion,

> [t]he scope of the police power generally includes the protection of the public health, safety, morals and general welfare. The means used to accomplish a goal within the scope of the police power are unreasonable when they deprive an owner of all practical use of the property or they cause the property to lose all reasonable value….
>
> Our Supreme Court specifically has stated, "[a] median strip, completely separating traffic moving in opposite directions on [the roadway], and preventing left turns except at intersections, is an obvious safety device clearly calculated to reduce traffic hazards."[79]

In sum, the rule everywhere uniformly seems to be that reasonable exercises of the police power to regulate access do not require the payment of compensation for an impairment of access.

B.6. Nonabutting Property and Compensation for Special Injury

A landowner near a street whose access has been impaired may not obtain a recovery without demonstrating that the owner "'has suffered special damages which are not common to the general public.'"[80] Even if an owner's property does not abut a highway but the owner's access is impaired, the owner may be entitled to compensation if he or she is able to show a special injury, that is, an injury that is different in kind from the injury suffered by the general public.[81] As another court has reiterated, a "taking [is not] limited to physical confiscation—it can also be by impairing the property's value by, as here, cutting off access."[82] As the Supreme Court of Minnesota held in an earlier case, "[t]o be constitutionally compensable, the taking or damage need not occur in a strictly physical sense and can arise out of any interference by the state with the ownership, possession, enjoyment, or value of private property."[83] In a 2006 case in which the owners' property did not abut a road closed by the city, the court held that the owners had to prove special damages; however, the owners still had adequate access via a new access road.[84]

In *Hardin v. South Carolina Department of Transportation,*[85] the Supreme Court of South Carolina reversed the South Carolina Court of Appeals in two separate but consolidated cases that involved claims for compensation based on a diminution in access and loss of property value in which the appellate court had ruled that the property owners were entitled to compensation.[86] In the *Hardin* case, the property owners had

[69] Brumer v. L.A. County Metro. Transp. Auth., 36 Cal. App. 4th 1738, 1748, 43 Cal. Rptr. 2d 314, 320 (Cal. App. 2d Dist. 1955); Chissel v. City of Baltimore, 193 Md. 535, 69 A.2d 53 (1949); Commw. v. Nolan, 189 Ky. 34, 224 S.W. 506 (1920).

[70] Wilbur v. City of Newton, 310 Mass. 97, 16 N.E.2d 86 (1938); Ferguson Coal Co. v. Thompson, 343 Ill. 20, 174 N.E. 896 (1931).

[71] Pure Oil Co. v. City of Northlake, 10 Ill. 2d 241, 140 N.E.2d 289 (1956); Bfeinig v. County of Allegheny, 332 Pa. 474, 2 A.2d 842 (1938); Lydy, Inc. v. City of Chicago, 356 Ill. 230, 190 N.E. 273 (1934).

[72] *Brumer*, 36 Cal. App. 4th at 1749, 43 Cal. Rptr. 2d at 320.

[73] Village of Wonewoc v. Taubert, 203 Wis. 73, 233 N.W. 755 (1930).

[74] City of Phoenix v. Wade, 5 Ariz. App. 505, 428 P.2d 450 (1967).

[75] *Id.* at 508, 428 P.2d at 453.

[76] *Id.* at 509, 428 P.2d at 454.

[77] Hanson v. City of Roswell, 262 Ga. App. 671, 672, 586 S.E.2d 341, 342 (2003).

[78] Bauder v. State of Wash. Dep't of Transp., 2006 Wash. App. LEXIS 541, at *4-5 (Wash. App. 3d Div. 2006).

[79] City of Concord v. Stafford, 173 N.C. App. 201, 205–06, 618 S.E.2d 276, 279 (2005), *review denied*, 360 N.C. 174, 625 S.E.2d 784 (N.C. 2005) (*quoting* Gene's, Inc. v. Charlotte, 259 N.C. 118, 121, 129 S.E.2d 889, 892 (1963)).

[80] Palm Beach County v. Tessler, 538 So. 2d at 849 (*quoting* Pinellas County v. Austin, 323 So. 2d 6, 8–9 (Fla. App. 2d Dist. 1975)).

[81] Bowden v. Louisiana, 556 So. 2d 1343 (La. App. 3d Cir. 1990), *cert. denied*, 563 So. 2d 879 (La. 1990) (holding that special damages were shown where plaintiffs' access to a public road was completely obstructed by I-49); *but see* Hibert v. Louisiana, 238 So. 2d 372 (La. App. 3d Cir. 1970), *cert. denied,* 240 So. 2d 373 (La. 1970) (holding that special damage was not shown, resulting in reversal and entry of judgment for the state).

[82] State *ex rel* Hilltop Basic Res., Inc. v. City of Cincinnati*,* 167 Ohio App. 3d at 799, 2006 Ohio 3348, at *P1, 857 N.E.2d at 613.

[83] Johnson v. Plymouth, 263 N.W.2d 603, at 605 (Minn. 1978).

[84] Mill Creek Props., Inc. v. City of Columbia, 944 So. 2d 67, 69 (Miss. Ct. App. 2006).

[85] 371 S.C. 598, 641 S.E.2d 437 (S.C. 2007).

[86] Hardin v. S.C. Dep't of Transp*.,* 359 S.C. 244, 597 S.E.2d 814, 816 (S.C. Ct. App. 2004) and Tallent v. S.C. Dep't of Transp., 363 S.C. 160, 609 S.E.2d 544 (S.C. Ct. App. 2005), both *reversed* in Hardin v. S.C. Dep't of Transp*.,* 371 S.C. 598, 641 S.E.2d 437 (S.C. 2007). Even prior to the reversal of the *Tallent* and *Hardin* cases the North Carolina Court of Appeals

property on Dave Lyle Boulevard situated on either side of the highway's intersection with Garrison Road near Interstate Highway 77.[87] The intersection had an opening that "allowed vehicles at the intersection to access both Garrison Road and the highway in either direction."[88] The construction of a new intersection required the closure of the Garrison/Dave Lyle intersection that "prevented vehicle traffic from making any left turns at the Garrison/Dave Lyle intersection."[89] The plaintiffs' inverse condemnation action alleged that the closure "depriv[ed] the traffic leaving their properties the ability to cross Dave Lyle Boulevard…."[90]

In the *Tallent* case, the transportation department in constructing a controlled-access diamond interchange, altered the character of Old Eastley Bridge Road, which had provided access to Highway 123 from the owner's property.[91] The "changes altered the character of Old Eastley Road from a through-connecting surface street to a road ending in a cul-de-sac."[92]

In reversing the two cases, the South Carolina Supreme Court sought to clarify takings law in the context of change in a property owner's access without a physical taking of property or a regulation that "denies all economically beneficial or productive use of land."[93]

First, "as long as a property owner has access to the public road system, his easement is intact. For this reason, any road re-configuration that does not cut off an owner's access to the public road system effects no taking upon him."[94]

Second,

> When only a portion of a public road abutting a landowner's property is closed, leaving the property in a cul-de-sac, no taking has occurred. As long as the owner has access to and from the remainder of the road that continues to abut his property, his easement with respect to that road remains intact. Further, as long as a landowner still has access to the public road system, this easement is unaffected. This reasoning is in line with the notion that a landowner has no right to access abutting roads in more than one direction.[95]

The court stated that to the extent its prior decisions implied that a property owner possesses "a property interest in the existence of a particular road," its prior decisions were not correct.[96] The court interpreted the owner's right of access to more one of an easement and stated that the owner does not possess more than an easement:

> [T]he focus of our inquiry must be on a landowner's actual property interests; that is, his easements. We therefore overrule the "special injury" analysis contained in our jurisprudence in this area and specify that our focus in these cases is on how any road re-configuration affects a property owner's easements. An easement is either taken or it is not. That is the "injury different in kind and not merely in degree" with which we are concerned.[97]

All that is required is that after a road's realignment or closure is that the property owner "still has access to the public road system…."[98] The court held that in neither the *Hardin* case nor the *Tallent* case had there been a taking.[99]

Although the court in *Hardin* "overrule[d] the 'special injury' analysis…in this area and specif[ied] that [the] focus in these cases is on how any road reconfiguration affects a property owner's easements,"[100] the majority rule appears to be that where an affected owner's property does not abut the highway but the owner alleges an impairment of access in the constitutional sense, the owner must prove that he or she has suffered special damage, damage that is different in kind from that suffered by other property owners whose access has been affected.

C. DETERMINING WHAT CONSTITUTES A COMPENSABLE IMPAIRMENT OF ACCESS

C.1. Difficulty of Access to Affected Property as the Critical Factor

For there to be a taking or damaging in the constitutional sense, it is not necessary that access rights be acquired directly. The public authority's action in making highway improvements or alterations or in implementing traffic regulations may hamper, restrict, impede, or limit an abutting landowner's present access. With respect to an impairment of access, although there

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in City of Concord v. Stafford, 173 N.C. App. 201, 618 S.E.2d 276, 278 (2005), *review denied*, 625 S.E.2d 785 (N.C. 2005), declined to allow for the "recovery of diminution of value resulting from the construction of medians included in larger road projects" as held in *Hardin, supra.*

[87] 371 S.C. at 602, 641 S.E.2d at 440.

[88] *Id.*

[89] *Id.* at 603, 641 S.E.2d at 440.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] Hardin v. S.C. DOT, 371 S.C. at 605, 641 S.E.2d at 441 (*citing* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)).

[94] *Id*. The court did state that

> [i]n South Carolina…a property owner has more rights. As we have held, a property owner in South Carolina has an easement for access to and from any public road that abuts his property, regardless of whether he has access to and from an additional public road. South Carolina State Hwy. Dep't v. Allison, 246 S.C. 389, 393, 143 S.E.2d 800, 802 (1965). Thus, for example, in South Carolina, *an owner of a corner lot has an easement for access to and from both roads that abut his property*. Of course, an owner in South Carolina also has an easement for access to and from the public road system. This principle provides that an owner whose property does not abut any public road will not be denied access to the public road system.

Id. (emphasis supplied).

[95] *Id.* at 607, 641 S.E.2d at 442 (footnote omitted) (citation omitted).

[96] *Id.* at 609, 641 S.E.2d at 443.

[97] *Id.* (emphasis supplied).

[98] *Id.* at 607, 641 S.E.2d at 442.

[99] *Id.* at 610, 641 S.E.2d at 441.

[100] *Id.* at 609, 641 S.E.2d at 443.

is no distinction between condemnation and inverse condemnation in this instance,[101] every action of the government that impairs access does not require the payment of compensation.

Only if the government unreasonably impairs or substantially impairs existing access will the government be held liable; loss of access is not compensable when the property owner retains a reasonable means of ingress and egress to the highway. "It follows that the owner must be entitled to show what he will have left in the way of access before it can be determined whether it is reasonable."[102] Moreover, "whether or not a material impairment of access exists must be determined in each case upon the basis of the factual situation present, and each case must be considered on its own right. Material impairment of access cannot be fixed by abstract definition."[103]

There is considerable difficulty in articulating a standard by which to determine whether an impairment of access is a compensable one. The extent of impairment that is compensable has been addressed in a number of ways by the courts and commentators. As the Minnesota Supreme Court has observed, the dilemma is that

> [c]ourts have long struggled with the notion of reasonable access and the compensable "taking" thereof…. The result has been the creation of an unfortunate rhetorical device: Reasonable assertions of the police power are not compensable but the "taking" of a reasonable right of access is compensable. There is an obvious difficulty, however, with any attempted application of this statement as a rule of law. The statement itself provides no principled means for distinguishing a due process "taking" from a noncompensable exercise of police powers.[104]

The difficulty in gaining access to property is clearly a factor in determining whether remaining access is unreasonable.[105] However, merely because access is rendered more difficult, or even nearly impossible, by a highway improvement does not mean that the courts will find a compensable loss of access. It must be shown that the governmental action has interfered with the method of ingress and egress to an unreasonable extent. The abutter may find it difficult to make a sufficient showing of loss of access if, for example, his access has been unsuitable all along. As discussed below, if the abutter has been injured by a diversion of traffic, rather than an unreasonable impairment of access, then compensation may not be required.

C.2. Diversion of Traffic as Noncompensable

The abutting owner has the right to enter and leave the street from the abutting property in a reasonable manner and to have access to the general system of public roads. The abutter's right of access includes having his property reasonably accessible to others.[106] Although a claimant may contend that many items should be included as elements of damage, the element the property owner frequently attempts to include is for diversion of traffic that may result or has resulted in a loss of business. Ordinarily, the abutting property owner may not recover damages for any loss of business or diminution in value of the property due to the impairment of his or her access.[107] In *Department of Transportation v. Taylor,*[108] the owner's access was the same, and the landowner's evidence did "not relate to inconvenience or difficulty of access caused by any physical alteration or obstruction to Taylor's former (pre-take) access; rather [the evidence] relates to inconvenience caused by traffic flow and traffic volume, an inconvenience shared by the public in general."[109]

Thus, the abutter is not entitled to insist that the current volume of traffic that passes by his or her business establishment be maintained, nor is the abutting property owner entitled to have his or her economic status quo maintained as an element of the owner's

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[101] State v. Schmidt, 867 S.W.2d 769, 775, 777 (Tex. 1993) (stating that "we have refused to allow recovery for loss of value due to diversion of traffic and circuity of travel in both condemnation cases and inverse condemnation cases").

[102] G. Roettger & Dickson, *Access Control: Improper Hybridization of Police Power*, 6 URBAN LAWYER 603, 615 (1974).

[103] *Id.* at 616.

[104] Johnson v. Plymouth, 263 N.W.2d at 603, 606 (citation omitted).

[105] State v. Dunard, 485 S.W.2d 657, 658 (Mo. 1972). In *Dunard* it appeared that the access to the remaining property following the condemnation of a portion of farmland would be impaired to the extent that it would be difficult or impossible to move agricultural equipment unless a bridge was built over creeks and low-lying areas. At trial, the state sought to amend its petition to show the proposed construction of new access, evidence to which the landowners objected on the basis that the same might not be constructed. Although the court allowed the amendment, the court indicated that absent the additional access the owners should be compensated for their loss of access. *See also* State *ex rel*. Mo. Highway & Transp. Comm'n v. Cowger*,* 838 S.W.2d 144, 147 (Mo. App. W. Dist. 1992) (holding that "a condemnor has the right to offer evidence as to its plans for the condemned land, even where the petition does not set out the manner of its use") (*citing* St. Louis K. & N.W. Ry. Co. v. Clark*,* 25 S.W. 906, 907 (Mo. 1894)).

[106] *See* Palm Beach County v. Tessler, 538 So. 2d 846, 850 (Fla. 1989) (*citing Tessler*, 518 So. 2d 970, 972 (Fla. App. 4th Dist. 1988)).

[107] Mont. Dep't of Transp. v. Simonson*,* 320 Mont. 249, 256, 87 P.3d 416, 421 (2004) (*quoting* State v. Peterson, 134 Mont. 52, 328 P.2d 617 (1958); and *see also* Miczek v. Commw., 32 Mass. App. Ct. 105, 586 N.E.2d 1004, 1006 (1992); Malone v. Commw., 378 Mass. 74, 389 N.E.2d 975 (1979); Commw., Dep't of Highways v. Wooton, 507 S.W.2d 451 (Ky. 1974); Narcisco v. State, 114 R.I. 53, 328 A.2d 107 (R.I. 1974)).

[108] 264 Ga. 18, 440 S.E.2d 652 (1994).

[109] 264 Ga. 21, 440 S.E.2d at 655 (*cited in* Dep't of Transp. v. Bridges, 268 Ga. 258, 259, 486 S.E.2d 593, 594 (1997) (reversing an appeals court decision that held that the landowner had suffered a violation of a special right entitling him to compensation because the transportation department's road closure had an impact on the commercial nature of the property).

property right.[110] As the Supreme Court of Pennsylvania has stated,

> "all traffic on public highways is controlled by the police power of the State, and what the police power may give an abutting property owner in the way of traffic on the highway it may take away, and by any such diversion of traffic the State and any of its agencies are not liable for any decrease of property values by reason of such diversion of traffic, because such damages are 'damnum absque injuria', or damage without legal injury."[111]

Many if not all methods of controlling access to existing, uncontrolled-access highways cause the abutter or his or her patrons to travel some additional distance before being able to enter or leave the premises. However, as the Supreme Court of Texas stated in *State v. Schmidt,*[112] the "decisions have uniformly refused to allow severance damages based upon diversion of traffic and circuity of travel."[113] A landowner "cannot demand that the adjacent street be left in its original condition for all time to insure his ability to continue to enter and leave his property in the same manner as that to which he has become accustomed."[114]

According to the court in *Narcisco v. State*,[115] the majority of courts have refused to grant compensation for diversion of traffic.[116] However, the *Narcisco* court did refer to some cases "in which loss of access due to rerouting of traffic has been held to be a relevant factor in determining the loss in fair market value suffered by the property."[117]

In *Tessler*, *supra*, the Supreme Court of Florida held that there had been a compensable taking of access. The property owners' business had frontage and access to a road, both of which the county planned to block with a wall. The remaining access to the property was "an indirect winding route of some 600 yards through a primarily residential neighborhood."[118] The court rejected the county's argument that "unless the property owner has been deprived of all access, the law of eminent domain does not recognize that a taking has occurred."[119] The court held that although "the rights of abutting landowners [are] subordinate to the needs of government to improve the roads,"[120] more recent cases had held that "'an unreasonable interference [with access] may constitute a taking or damaging within constitution provisions requiring compensation…."[121] The *Tessler* court agreed with the lower court that in this case there was a "substantial loss of access," quoting the appellate court's conclusion that "'the retaining wall will require their customers to take a tedious and circuitous route to reach their business premises which is patently unsuitable and sharply reduces the quality of access to their property'" and would "'block visibility of the commercial storefront from Palmetto Park Road.'"[122] Nevertheless, the *Tessler* court also recognized that there could be no compensable taking of property merely because of a reduction in the flow of traffic in front of the property.[123]

Consequently, the courts usually are of the opinion that whatever the police power may provide an abutting

[110] Palm Beach County v. Tessler, 538 So. 2d at 849 (*citing* Div. of Admin. v. Capital Plaza, Inc., 397 So. 2d 682 (Fla. 1981); Jahoda v. State Road Dep't, 106 So. 2d 870 (Fla. App. 2d Dist. 1958)).

[111] Wolf v. Commw., Dep't of Highways, 422 Pa. 34, 47, 220 A.2d 868, 875 (1966) (*quoting* Missouri v. Meier, 388 S.W.2d 855, 857 (1965)). The *Wolf* decision is cited in Sienkiewicz v. Commw., Dep't of Transp., 584 Pa. 270, 276, 883 A.2d 494, 498 (2005). *See also* Tubular Serv. Corp. v. Comm'r State Highway Dep't, 77 N.J. Super. 556, 187 A.2d 201 (1963).

[112] 37 Tex. Sup. Ct. J. 47, 867 S.W.2d 769 (Tex. 1993).

[113] *Id.* at 777 (suggesting that the same rule applied even to claims based on "visibility of property or disruption of use due to construction activities….") (*Id*.). *See also* County of Bexar v. Santikos, 144 S.W.3d 455, 463 (Tex. 2004).

[114] Bumer v. L.A. County Metro. Transp. Auth., 36 Cal. App. 4th 1738, 1747, 43 Cal. Rptr. 2d 314, 319 (Cal. App. 2d Dist. 1995).

[115] 114 R.I. 53, 328 A.2d 107 (1974).

[116] *Narcisco*, 328 A.2d at 111 (*citing* State Comm'n of Transp. v. Monmouth Hills, Inc., 110 N.J. Super. 449, 266 A.2d 133 (1970); Jacobson v. State Highway Comm'n, 244 A.2d 419 (Me. 1968); Painter v. State Dep't of Roads, 177 Neb. 905, 131 N.W.2d 587 (1964); People *ex rel*. v. Ayon, 54 Cal. 2d 217, 5 Cal. Rptr. 151, 352 P.2d 519 (1960); State v. Ensley, 240 Ind. 472, 164 N.E.2d 342 (1960); State v. Fox, 53 Wash. 2d 216, 332 P.2d 943 (1958)). With respect to the majority rule, *see also* Bruzzese v. Wood, 674 A.2d 390, 394 (R.I. 1996) and St. Sahag & Mesrob Armenian Church v. Dir. of Pub. Works, 116 R.I. 735, 360 A.2d 534 (1976) (both *citing Narcisco*). *See also* Wolf v. Commw., Dep't of Highways, 422 Pa. 34, 38, 220 A.2d 868, 870 (Pa. 1966) (Where after a partial taking it was necessary to proceed 1,500 to 1,700 ft east of the property and then make turns to reach the premises, the court held that the diversion of traffic, even though it resulted in a diminution of the value of the property, was not an element properly to be considered in determining the after-value of the property.).

[117] *Id.* (*citing* State Dep't of Highways v. Bagwell, 255 So. 2d 852 (La. App. 1971); S.C. State Highway Dep't v. Wilson, 254 S.C. 360, 175 S.E.2d 391 (1970); State *ex rel*. Morrison v. Thelberg, 87 Ariz. 318, 350 P.2d 988 (1960); Riddle v. State Highway Comm'n, 184 Kan. 603, 339 P.2d 301 (1959); McRea v. Marion County, 222 Ala. 511, 133 So. 278 (1931)).

[118] Palm Beach County v. Tessler, 538 So. 2d at 847.

[119] *Id.*

[120] *Id.* (*citing* Weir v. Palm Beach County, 85 So. 2d 865 (Fla. 1956); Bowden v. City of Jacksonville, 52 Fla. 216, 42 So. 394 (1906); Selden v. City of Jacksonville, 28 Fla. 558, 10 So. 457 (1891)).

[121] *Id.* at 848 (*quoting* Benerofe v. State Road Dep't, 217 So. 2d 838, 839 (Fla. 1969)).

[122] *Id.* at 850 (*quoting Tessler*, 518 So. 2d 970, 972 (Fla. App. 4th Dist. 1988)). S*ee also* USA Independence Mobile Home Sales, Inc. v. City of Lake City, 908 So. 2d 1151, 1156–57 (Fla. App. 1st Dist. 2005) (*quoting Tessler*) (affirming that part of a trial court's decision that held that no taking had occurred on the basis of a loss of access).

[123] *Id.* at 849 (*citing* Div. of Admin. v. Capital Plaza, Inc., 397 So. 2d 682 (Fla. 1981); Jahoda v. State Rd. Dep't, 106 So. 2d 870 (Fla. App. 2d Dist. 1958)).

landowner, it may take away.[124] The state has no duty to maintain the traffic on a certain highway for the business establishments that may abut the highway.[125] As seen in *La Briola v. State,*[126] one must be careful to distinguish loss of access that may be compensable from diversion of traffic caused by a relocation of traffic that is not compensable. Each case depends on its particular circumstances, a point illustrated aptly in the Supreme Court of Vermont's decision in *Ehrhart v. Agency of Transportation.*[127]

In *Ehrhart* the property owners conceded that they "base[d] their business losses on the change in the flow of traffic from the construction of the median strip" in front of their businesses.[128] In Vermont a recovery may be had for business losses but the claim must be "directly and proximately caused by the physical loss of the property."[129] That is, compensation is not recoverable "when traffic is only routed away from a business…."[130] In the *Ehrhart* case the emphasis appears to have been more on the loss of business from reduced flow rather than on the difficulty of access to the owners' properties, although the court did discuss how the median restricted access to the businesses to certain openings. In ruling that the claims were not compensable, the court did observe that there were "several out-of-state cases" that permitted compensation for all incidental effects of a highway project on the value of the remaining land.[131]

The *Ehrhart* court stated, however, that the rule in Vermont and most jurisdictions was that "when the loss of a piece of property results directly in further losses to a business, the owner is entitled to compensation, but when the business loss arises from the rerouting of traffic, and not from the loss of the land itself, no compensation is due."[132] The court rejected the landowners' argument that

> the losses resulting from the median strip fit within the 'direct and proximate decrease' language of [Vermont Stat. Ann. tit. 19] § 501(2) because the State could not have built the median strip without widening the road and taking landowners' property. According to this logic, the physical taking of their land caused the placement of the median strip and the resulting business losses.[133]

However, the court held that

> [a]ttaching legal significance to the incidental link between the physical takings and the losses from the median strip would also introduce an arbitrary distinction between those adjacent landowners whose property is taken and those whose property is left intact. If the State were to take all the land it needed to widen a road from the landowners on one side of the road, and none from the other, it would be required to compensate half of the landowners affected by the concurrent placement of a median strip, while the other half, who would presumably be affected in equal measure by the median strip, would receive no compensation. Instead of reducing the burden of the highway project on those who may be harmed by it, this approach would place a larger burden than the current system on a smaller group of property owners, while disproportionately benefiting a similarly situated group.[134]

[124] Wolf v. Commonwealth, 422 Pa. 34 at 47, 220 A.2d 868, at 875.

[125] *Id*.

[126] 36 N.Y.2d 328, 328 N.E.2d 781 (1975).

[127] 180 Vt. 125, 904 A.2d 1200 (2006).

[128] *Id.* at 129, 904 A.2d at 1204.

[129] *Id.* at 128, 904 A.2d at 1203. *See also* LA. CODE 48:217.

[130] *Id*.

[131] *Id.* at 129, 904 A.2d at 1204 (*citing* S.C. State Highway Dep't v. Wilson, 254 S.C. 360, 367–68, 175 S.E.2d 391, 396 (S.C. 1970) (holding that a landowner could recover for placement of a median strip that could not have occurred but for the taking of the landowner's property because "the inquiry is, how much has the particular public improvement decreased the fair market value of the property, taking into consideration the use for which the land was taken and all the reasonably probable effects of its devotion to that use") (internal quotation marks omitted)). *See also* State *ex rel.* Mo. Highway and Transp. Comm'n v. Jim Lynch Toyota, Inc., 830 S.W.2d 481, 485 (Mo. App. E. Dist. 1992) (holding that the "loss of access resulting from a median strip constructed as part of a highway widening project was a proper consideration because '[a]ny factor that has a present, quantifiable effect on the market value of the property is proper as an element of damages.'") (citation omitted).

[132] *Id.* at 129, 904 A.2d at 1203 (*citing* Div. of Admin., State Dep't of Transp. v. Capital Plaza, Inc., 397 So. 2d 682, 683 (Fla. 1981) (holding that a landowner who lost a strip of property to a highway widening project could not recover losses caused by concurrent placement of a median strip because "[w]hen less than the entire property is taken, compensation for damage to the remainder can be awarded only if such damage is caused by the taking" and that "[c]onstruction of the median, not the taking, caused the alleged damage");
Jacobson v. State *ex rel*. State Highway Comm'n, 244 A.2d 419, 421-22 (Me. 1968); Painter v. Dep't of Roads, 177 Neb. 905, 909-10, 131 N.W.2d 587, 590-91 (Neb. 1964) (holding that a landowner whose property was taken in a highway widening project could recover only for the lost land and not for losses caused by traffic islands constructed as part of the same project); State v. Ensley, 240 Ind. 472, 164 N.E.2d 342, 349 (Ind. 1960)).

[133] *Id.* at 131, 904 A.2d at 1205. The court observed that the "[l]andowners' approach would result in compensation not only for lost traffic flow, but also for the even more remote effects of the highway project, such as heavier competition from nearby businesses that might be more accessible after the completion of the project." *Id.*

[134] *Id.* at 131–32, 904 A.2d at 1205 (Emphasis added) For decisions that have been read to permit or that have held that a diversion of traffic may be compensable, *see* People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943) (distinguished in People *ex rel*. Dep't of Public Works v. Ayon, 54 Cal. 2d 217, 5 Cal. Rptr. 151, 352 P.2d 519 (1960) (affirming trial court's decision in a condemnation action that compensation was not due for an alleged impairment to the lessees' right of access to an abutting street)); State *ex rel*. Herman v. Wilson, 103 Ariz. 194, 197, 438 P.2d 760, 163 (1968) (permitting testimony concerning diversion of traffic and loss of business in determining the after-value of the property); and State *ex rel*. Herman v. Jacobs*,* 7 Ariz. App. 396, 440 P.2d 32 (1968).

In *Brumer v. Los Angeles County Metropolitan Transportation Authority,*[135] although the court held that there had been no substantial impairment of access caused by the construction of a transit project, the court stated that

> [t]he compensable right of an abutting property owner is to direct access to the adjacent street *and to the through traffic which passes along that street* (*People v. Riccardi, supra*.) If this basic right is not adversely affected, a public agency may enact and enforce reasonable and proper traffic regulations without the payment of compensation although such regulations may impede the convenience with which ingress and egress may thereafter be accomplished, and may necessitate circuitry of travel to reach a given destination....[136]

C.3. Circuity or Increased Distance of Travel

Although the courts hold that there is no compensable damage for mere circuity of travel, this phrase appears to be another way of saying that distance in and of itself does not make the remaining or existing access unreasonable.[137] If access is changed and entails a more circuitous route, the abutter shares the same inconvenience as the general public, although perhaps to a greater extent. The question as always is whether the abutting property owner "has suffered special damages which are not common to the general public."[138]

Although the abutter may have a greater distance to travel following highway improvements or alterations, his or her right of access is one of being able to enter and leave the highway with a reasonable connection to the system of public roads. According to an Indiana court the general rule is that

> [o]ne whose property abuts upon a roadway, a part of which is closed or vacated has no special damage if his lands do not abut upon the closed or vacated portion so that his right of ingress and egress is not affected. If he has the same access to the general highway system as before, his injury is the same in kind as that suffered by the general public and is not compensable. It is damnum absque injuria.[139]

Increased distance is probably insufficient in most cases to establish a compensable loss of access. If the owner still has a reasonable means of access to the highway, there is not a compensable taking of access.[140] However, as each case depends on its particular facts, a precise rule simply may not be stated. Nevertheless, the cases illustrate that some additional distance or circuity of travel is insufficient to constitute a compensable impairment of access, such as increased distance of 400 ft,[141] or to one-third of a mi beyond the property to reach and return via a frontage road,[142] to 1,400 or 1,500 ft beyond the property,[143] to 1,500 ft in one direction and 200 ft in the other direction,[144] to 1.2 and 1.3 mi in either direction,[145] or to as much as 2[146] or even 3[147] mi from the property as held in more recent cases. However, an additional distance of 7.45 mi from the property was held in one case to be unreasonable.[148] Also, it has been held that loss of frontage and access to one street with remaining access being a winding, circuitous route of 600 yds through a residential section was a compensable impairment of access.[149]

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[135] 36 Cal. App. 4th 1738, 43 Cal. Rptr. 2d 314 (1995).

[136] *Id.* at 1748, 843 Cal. Rptr. 2d at 320 (internal quotation marks omitted) (emphasis supplied). The property had a one-story commercial building consisting of eight stores. Before the construction of a transit line,vehicular traffic on the property owners' abutting street was two-way; after the construction, traffic was one-way. The court held that "designating an entire street as one way is a non-compensable police regulation." *Id.*

[137] 4A NICHOLS ON EMINENT DOMAIN § 14.A.01[6][a], [b].

[138] Palm Beach County v. Tessler, 538 So. 2d at 849. *See* State v. City of Terre Haute, 250 Ind. 613, 618, 238 N.E.2d 459, 462 (1968), in which the court stated that

> "either some physical part of the real estate must be taken from the owner or lessor, or some substantial right attached to the use of the real estate [must be] taken before any basis for compensable damage may be obtained by an owner of real estate in an eminent domain proceeding. It must be special and peculiar to the real estate and not some general inconvenience suffered alike by the public."

(citation omitted). *See also* State v. Hastings, 246 Ind. 475, 481–83, 206 N.E.2d 874, 877 (1965) (jury instruction permitting the consideration of loss of profits held to be error).

[139] Old Romney Dev. Co. v. Tippecanoe County, Ind.*,* 817 N.E.2d 1282, 1287 (Ind. App. 4th Dist. 2004).

[140] *Id.* at 1288.

[141] New v. State Highway Comm'n, 297 So. 2d 821, 823 (Miss. 1974).

[142] State *ex rel*. State Highway Comm'n v. Mauney, 76 N.M. 36, 43, 411 P.2d 1009, 1013 (1966).

[143] *See* State *ex rel*. Morrison v. Thelberg, 86 Ariz. 263, 265, 344 P.2d 1015, 1016, 1017 (1959), but the opinion was replaced by State *ex rel*. Morrison v. Thelberg, 87 Ariz. 318, 324, 350 P.2d 988, 991 in which the court

> overruled the principle laid down in In re Forsstrom, [44 Ariz. 472, 38 P.2d 878] and Grande v. Casson, [50 Ariz. 397, 72 P.2d 676], ...which declared the non-compensability of an abutting property owner for the destruction or substantial impairment of his right of access to such highway. We also reject the reasoning upon which the rule rests i.e., that there is a presumption of payment. The rule to the contrary, supported by the weight of authority, is based upon the fact that an abutting property owner to a highway has an easement of ingress and egress to and from his property which constitutes a property right.

[144] State, Comm'r of Transp. v. Charles Investment Corp., 143 N.J. Super. 541, 543, 546, 363 A.2d 944, 945, 946 (1976).

[145] In Re: De Facto Condemnation by the Commw. of Pa., 164 Pa. Commw. 81, 82, 88, 644 A.2d 1274, 1274, 1277 (1994).

[146] Kau Kau Take Home No. 1 v. City of Wichita, 281 Kan. 1185, 1188, 135 P.3d 1221, 1225 (2006).

[147] City of Wichita v. McDonald's Corp., 266 Kan. 708, 711, 971 P.2d 1189, 1193 (1999).

[148] Dep't of Transp. v. Guyette, 103 Pa. Commw. Ct. 402, 404, 520 A.2d 548, 549 (1987), *appeal denied*, 516 Pa. 644, 533 A.2d 714 (1987).

[149] Palm Beach County v. Tessler, 538 So. 2d at 847.

D. COMPENSATION FOR REDUCTION IN HIGHEST AND BEST USE OF PROPERTY

An important factor to be considered in determining whether the remaining access is unreasonable is any reduction in the highest and best use of the property attributable to the impairment of access.[150] "What constitutes reasonable access must…depend to some extent on the nature of the property under consideration."[151] If the highway project or "government's use…constitute[s] a fundamental change in the character of use from its original use, the government's conduct amounts to a taking requiring compensation."[152]

Chemung Canal Trust Co. v. State of New York[153] involved the state's appropriation of part of a street bordering the bank's land, resulting in a loss of access. The court held that the "fact that the taking and closing of State Street did not involve any direct taking of plaintiff's land does not preclude recovery in damages, if through that taking, claimant's property was in fact deprived of suitable access."[154] "Unsuitability of access is not to be determined in the abstract, but in relation to the need for access inherent in the highest and best use of the property…. What constitutes the highest, best use and access suitable for such use is generally a question of fact…."[155]

In *Priestly v. State,*[156] the court held that the evidence established that the highest and best use of the property had been reduced from commercial to residential and that the sole remaining access to the property was quite circuitous. More recently, in *Split Rock Partnership v. State*,[157] an appellate court stated that *Priestly* had been interpreted

> to include cases in which the remaining access would not support the degree of development potential that existed before the taking. Thus, consequential damages have been properly awarded when the highest and best use of the property was the same both before and after the taking, but the remaining access reduced the potential development of the property….[158]

Nevertheless, the court in *Split Rock Partnership* determined that there was no evidence "that the size of the office building would have to be reduced because of the lack of access thereto or that a new access road would not support the same amount of traffic as the old one…. Under these circumstances, the award of consequential damages was improper."[159]

In 2005, in *Lake George Associates v. New York*,[160] a case involving a partial taking and a change in access to the property, an appellate court agreed with the court of claims that the property owner was not entitled to consequential damages based upon "allegations that suitable access to and from the property was diminished, its traffic flow was adversely implicated, the property lost its corner identity, and the property ended up with reduced parking benefits."[161] Although citing *Priestly*, the court stated that

> consequential damages will not be recovered when the appropriation results in making travel to and from the parcel more inconvenient or circuitous…. Instead, it must be demonstrated that access "is not only circuitous or inconvenient but *unsuitable*, i.e., 'inadequate to access needs inherent in the highest and best use of the property involved….'" Here, claimant was given substitute access by means of an easement over a driveway south of its parcel on Route 9 and by means of an easement over a driveway east of its parcel on Route 149. This type of access is considered sufficient….[162]
>
> Claimant also failed to establish that ingress or egress to and from Routes 9 and 149 through the newly established curb cuts restricted or impeded access.[163]

The foregoing cases illustrate that a reduction in the highest and best use of the remaining property is a factor to consider but that it must be shown that it is the loss of access that has caused the change in the use of

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[150] See, e.g., State *ex rel*. Dep't of Highways v. Beatty, 288 So. 2d 900, 909 (La. App. 1st Cir. 1973), *cert. denied*, 293 So. 2d 169 (La. 1974) (holding that "the inconvenience and diversion of traffic which will result from this expropriation diminished the value of defendant's remaining property by changing its highest and best use from highway commercial to residential" and that "[t]he inconvenience and diversion of traffic [were] proper elements of severance damages"); Priestly v. State*,* 23 N.Y.2d 152, 157, 242 N.E.2d 827, 830 (1968) (holding that the evidence established that the highest and best use of the property was reduced from commercial to residential and that the sole remaining access to the property was quite circuitous); Rose v. State, 19 Cal. 2d 713, 123 P.2d 505, 515, 519 (1942) (holding that because traffic lanes were not capable of supplying the necessary ingress and egress for the industrially zoned property, the property could not be put to the same uses after the construction as it had been prior to the construction). *See, however,* La Briola v. State*,* 36 N.Y.2d 328, 334, 328 N.E.2d 781, 785 (1975) (holding that there had not been a reduction in highest and best use because of loss of access or mere diversion of traffic).

[151] *Johnson*, 263 N.W.2d at 607 (holding "that the reduction in highest use of claimant's property was caused not by loss of suitable access but by the loss of abutment on a highway and its profitable traffic").

[152] Killinger v. Twin Falls Highway Dist., 135 Idaho 322, 327, 17 P.3d 266, 271 (2000) (holding in a case involving a highway widening project that altered the property's use by making access more difficult for semi and tow trucks, that, inter alia, "the creation of the buffer zone constitutes a change in character of the type of use and, thus, a taking").

[153] 90 A.D. 2d 889, 456 N.Y.S.2d 518 (App. Div. 3d Dep't 1982).

[154] *Id.* at 890, 456 N.Y.S.2d at 519.

[155] *Id.* (citation omitted).

[156] 23 N.Y.2d 152, 155–56, 242 N.E.2d 827, 829–30 (1968).

[157] 275 A.D. 2d 450, 713 N.Y.S.2d 64 (App. Div. 1st Dep't 2000).

[158] *Id.* at 451, 713 N.Y.S.2d at 65 (citation omitted).

[159] *Id.*

[160] 23 A.D. 3d 737, 803 N.Y.S.2d 724 (App. Div. 3d Dep't 2005).

[161] *Id.* at 738, 803 N.Y.S.2d at 725.

[162] *Id.*

[163] *Id.* at 739, 803 N.Y.S.2d at 726.

property. The cases demonstrate the difficulty the courts encounter in determining whether a substantial or unreasonable impairment of access exists; the question is largely one of fact.[164]

E. DENIAL OR LOSS OF DIRECT ACCESS

E.1. Denial of Access to a New Highway

Although not discussed in detail here, the highway authority may construct a new highway pursuant to a statute that authorizes such highways but that denies access to newly created abutting landowners.[165] An abutter to a new highway is not entitled to compensation for something that he or she never had in the first place, and, therefore, could not lose: "There is no inherent right of access to a newly relocated highway…. The condemnee never having had access to the new highway there is no easement of access taken in this proceeding."[166]

E.2. Substitute Access via a Service or Frontage Road

In situations where access must be partially or fully controlled, the highway department may find it necessary to convert an uncontrolled-access highway into a limited-access highway and limit ingress and egress to the main road at specified interchanges via service roads. Thus, the highway authority may eliminate direct access and provide the abutter with substitute access by a service or frontage road. The abutting landowner who by virtue of the conversion is relegated to access via a service road to a main highway may find that his other access is more circuitous. Customers may have to travel to a point beyond the property, exit at an interchange, and travel in the opposite direction to reach the premises. Moreover, a significant amount of traffic (i.e., business) may be diverted entirely because of the circuitous access.

One approach is for a highway authority to locate and build a new highway near an existing road that is converted into a service road for a new highway. Another approach is to construct a limited-access road over an old road with a new service road to provide ingress and egress. The issue is whether the abutting landowner may recover compensation for a loss of direct access and for the substitute access with which he or she has been provided. One court has held that compensation is required when a service road is converted into a limited-access facility "'regardless of the specific requirements of a statute.'"[167]

The majority view appears to be that it is immaterial whether the service road was constructed from the old highway or is entirely new[168] and that the substitution of an alternative means of access is noncompensable if the substitute access is reasonable to meet the needs of the affected property.[169]

E.3. Service or Frontage Road—Not Merely a Substitute for Direct Access

It is not enough merely for the public authority to substitute a frontage road for what had been direct access;[170] a destruction or substantial impairment of ac-

[164] La Briola v. State*,* 36 N.Y.2d at 337, 328 N.E.2d at 787.

[165] *See* Lehman v. Iowa State Highway Comm'n, 251 Iowa 77, 81–83, 99 N.W.2d 404, 406 (1959).

[166] State *ex rel*. Rich v. Fonburg, 80 Idaho 269, 277, 328 P.2d 60, 64 (Idaho 1958), (*quoted in* James v. State, 88 Idaho 172, 178, 397 P.2d 766, 770 (1964)). *See also* South Meadow Realty Corp. v. State, 144 Conn. 289, 130 A.2d 290 (1957); State v. Clevenger, 365 Mo. 970, 291 S.W.2d 57 (1956); State v. Burk, 200 Or. 211, 265 P.2d 783 (1954); Smick v. Commonwealth, 268 S.W.2d 424 (Ky. 1954); City of L.A. v. Geiger, 94 Cal. App. 2d 180, 210 P.2d 717 (Cal. App. 2d Dist. 1949).

[167] Palm Beach County v. Tessler, 538 So. 2d at 848 (*quoting* Anhoco Corp. v. Dade County, 144 So. 2d 793, 797 (Fla. 1962)).

[168] State v. Mauney, 76 N.M. 36, 42, 411 P.2d 1009, 1012–13 (1966). The court stated that it could not "understand why a person's rights as to compensation should differ if the state should decide to use the old road for a frontage road or use it for the through lanes of a limited-access highway…. [S]uch a difference should make no change in the right to compensation for deprivation of access." *Id*. *See, however*, State *ex rel*. Morrison v. Thelberg, 87 Ariz. 318, 350 P.2d 988 (1960), in which the court suggests that if the highway authority converts the paved surface of the existing conventional road into a frontage road for the use of the abutting property owner, then under these circumstances the abutting owner has not suffered an impairment of access because he or she has the same access as existed before the conversion.

> It seems to be the law…that where land is condemned or purchased for the construction of a controlled-access highway…that an abutting owner of land on the old highway, which is retained as a service road, cannot recover damages for destruction or impairment or loss of access for the reason that his access to the old highway has not been disturbed in the slightest degree.

87 Ariz. at 324–25, 350 P.2d at 992.

[169] *See, e.g.,* Triangle, Inc. v. State*,* 632 P.2d 965, 968 (Alaska 1981) (*quoting* State Highway Comm'n v. Danfelser, 72 N.M. 361, 384 P.2d 241 (1963), *cert. denied,* 375 U.S. 969, 84 S. Ct. 487, 11 L. Ed. 2d 416 (1964)). *See also* State by State Highway Comm'n v. Cent. Paving Co., 240 Or. 71, 74, 399 P.2d 1019, 1021–22 (1965) (adopting the rule denying recovery to a landowner caused by "circuity of route resulting from the construction of a limited access highway" and holding that the "[d]efendants are not entitled to recover compensation for a loss unless they can show that the type of loss is peculiar to those owning land as distinct from the loss suffered by the general public") (*citing* Stefan Auto Body v. State Highway Comm'n, 21 Wis. 2d 363, 124 N.W.2d 319 (1963); Selig v. New York, 10 N.Y.2d 34, 217 N.Y.S.2d 33, 176 N.E.2d 59 (1961); Ark. State Highway Comm'n v. Bingham, 231 Ark. 934, 333 S.W.2d 728 (1960)).

[170] In Dep't of Pub. Works & Bldgs. v. Wilson and Co., Inc., 62 Ill. 2d 131, 340 N.E.2d 12 (1975), the court affirmed a trial court's judgment awarding damages to the property owner based on damages to the land taken and to the remainder based on loss of highway access. The court stated that

> [w]e do not agree with the Department's suggestion that the frontage road in this case was a traffic control device of the same character [as the median divider cases]. Here, the effect of the partial taking was not merely a limitation of the existing direct access to Roosevelt Road nor simply a change in the flow of

cess may be compensable when a service road is provided in lieu of direct access.[171]

> The measure of damages for the destruction or impairment of access to the highway upon which the property of an owner abuts is the difference between the market value of the abutting property immediately before and immediately after the destruction or impairment thereof. *The damages awarded the abutting landowner for destruction or impairment of access therefore is based, not upon the value of the right of access to the highway, but rather upon the difference in the value of the remaining property before and after the access thereto has been destroyed or impaired.* This in turn is based upon the highest and best use to which the land involved is best suited before and after the right of access is molested.[172]

In *State ex rel. Herman v. Wilson*,[173] involving condemnation of land and conversion of a state route into an interstate highway, the court noted that a number of states had

> adopted the principle that the right of direct access to a public highway may be limited to frontage roads and possibly to other circumstances in which access is not unreasonably circuitous.
>
> ….
>
> But we do not have such a situation here for there is no frontage road and the substitute access road is, in our opinion, unreasonably circuitous. Accordingly we hold, consistent with our former decisions, that the complete destruction of direct access to a public highway constitutes a damaging of property within the meaning of the Constitution of Arizona.[174]

Extended to its logical conclusion, the idea that a service or frontage road may be substituted without regard to the suitability of the access would seem to deny recovery even if no connection were ever made to the new highway. Such a wholly untenable possibility was recognized in *Teachers Insurance and Annuity Association of America v. City of Wichita*.[175] Prior to the proposed conversion of Kellogg Street to a fully-controlled-access highway, the owners' parcels had direct access to Kellogg Street. No part of the owners' properties was taken for the project. Although the city argued that the owners had the same street access as before the project, the court held that no physical taking of property was required for compensation.[176] The court further held that the street (Kellogg Drive), which would front the plaintiffs' properties for a distance of five blocks after the completion of the highway project, was not a frontage road.[177] Because the new "Kellogg Drive will not furnish any access whatever to the newly improved Kellogg Street and highways,"[178] the property owners were entitled to compensation for impairment of their preconstruction access.[179]

> Here long distances must be traveled on roads, other than Kellogg Drive, which are no part of a frontage road, in order to gain access to the controlled highway at interchanges on the highway. The circuity of travel in the instant case is such that reasonable men could not differ in finding it unreasonable.
>
> While Kellogg Drive in the instant case is adjacent to the plaintiffs' properties and parallel to the new limited access highway, at no point does it permit entry onto the express lanes of the highway. Kellogg Drive which extends for a distance of five blocks parallel to the new highway terminates at its extremities without permitting any access to the new controlled highway facility.[180]

In 2006, in *Department of Transportation v. Lowderman, LLC,*[181] an interesting question was posed by the property owner that was rejected by the appellate court regarding whether the landowner was entitled to compensation for damages to the remainder for impairment of access when an Illinois statute guaranteed access to state highways. The state condemned a portion of Lowderman's property located adjacent to a state highway.[182] The complaint stated that it was necessary for the Illinois Department of Transportation to acquire all access rights to the highway of the remaining property, but that access to the remainder would be provided by a frontage road.[183]

Lowderman's argument was that access via a frontage road was a mere license revocable at will by the state, that the state had "extinguished all of the Lowderman remainder's access rights to U.S. Route 136, including those by way of the frontage road."[184] Consequently, Lowderman wanted the jury to be allowed to

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> traffic on the street, but rather a complete elimination of all direct access with the substitution of a frontage road….

62 Ill. 2d at 144, 340 N.E.2d at 18.

[171] State *ex rel.* Morrison v. Thelberg, 87 Ariz. 318, 350 P.2d 988 (1960) (affirming the trial court's judgment awarding severance damages to the landowners where part of land was taken to convert a conventional highway into a controlled-access highway, so that access to and from remaining property was controlled by a frontage road.)

[172] *Id.*, 87 Ariz. at 325, 350 P.2d 992 (citations omitted) (emphasis supplied).

[173] 103 Ariz. 194, 438 P.2d 760 (1968) (affirming the trial court's decision for the condemnees and reasoning that access was a substantial right that allowed the condemnees' family, friends, and guests to pass to and from the property).

[174] *Id.,* 103. Ariz. at 197, 438 P.2d at 763 (citations omitted).

[175] 221 Kan. 325, 559 P.2d 347 (1977).

[176] *Id.,* 221 Kan. at 330, 559 P.2d at 353 (stating that "[o]ur cases…clearly indicate there is no requirement that the land of an abutting property owner be taken by eminent domain or otherwise as a condition precedent to the maintenance of an action for damages to compensate for the loss of access taken from the abutting property owner" and that "[o]ur controlled access statute, K. S. A. 1975 Supp. 68-1901, et seq., expressly contemplates compensation for the taking of an abutting landowner's right of access").

[177] *Id.,* 221 Kan. at 334, 559 P.2d at 355, 356.

[178] *Id.*

[179] *Id.* at 333–34, 559 P.2d at 355, 356.

[180] *Id.* at 334, 559 P.2d at 356.

[181] 367 Ill. App. 3d 502 (Ill. App. 3d Dist. 2006).

[182] *Id.* at 503.

[183] *Id.*

[184] *Id.* at 506.

determine damages based on the extinguishment of such rights.[185] Lowderman argued that it "only had one opportunity to obtain compensation for the loss of access rights…and that the jury [should have been] allowed to determine damages resulting from the extinguishment of such rights."[186]

The statute on which Lowderman relied provided:

> Except where the right of access has been limited by or pursuant to law every owner or occupant of property abutting upon any State highway shall have reasonable means of ingress from and egress to the State highway consistent with the use being made of such property and not inconsistent with public safety or with the proper construction and maintenance of the State highway for purposes of travel, drainage and other appropriate public use.[187]

The appellate court held that it would be improper, under 605 Illinois Compiled Statutes 5/8-102,[188] " to read into section 4-210 a prohibition on a governmental entity's power to landlock property abutting a freeway.[189] Thus, the appeals court held that section 4-210 could not restrict Lowderman's property from being landlocked as a matter of law."[190] Although a dissenting opinion argued that "the usage of the frontage road [was] merely a license and not a right,"[191] the majority held "that Lowderman still retains a reasonable right of indirect access to U.S. Route 136" and that there was a "right of access that is protected under section 4-210 until it is further limited pursuant to some law such as section 8-102."[192] The court held that the claim that the owner was entitled to more compensation "because its remainder has effectively become landlocked is premature and thus not before this court."[193]

Relying on *Department of Public Works and Buildings v. Wilson and Co., Inc.,*[194] the *Lowderman* court agreed that "the 'frontage road bears not on the question of compensability but is relevant in mitigation of damages resulting from the elimination of the existing *direct* access.'"[195]

> Here, the trial court followed the procedure announced by the court in Wilson. The court correctly determined that Lowderman's access rights were materially impaired as a result of the State's taking of his direct access to the highway. The court then found that the jury can determine just compensation based on the value of the land itself and any reduction in value of the remainder resulting from the taking of direct access and the substitution of the frontage road. Because Lowderman retains an indirect right of access through the use of the frontage road, the trial court also ruled correctly in denying Lowderman's claim that the jury can determine damages resulting from IDOT's extinguishment of all access rights of the Lowderman remainder to U.S. Route 136.[196]

E.4. Whether Substitute Access Is Compensable

As discussed below, the courts generally have applied one of several rules concerning the substitution of the service or frontage road on the question of compensation:

- Any loss of access that results from being placed on a service road should not be compensated if the substitute access is suitable, or
- Any loss of access should be compensated and the existence of the frontage road should be considered in mitigation of the loss, or
- Any loss should be compensated only when accompanied by a taking of a parcel of the land by eminent domain.

E.4.a. No Compensation If Access Is Suitable

As seen, if all direct access to the adjacent road is eliminated on the conversion of a road into a limited-access facility, the owner must be provided with substitute access that provides reasonable ingress to and egress from his or her property. Numerous cases hold that if the highway authority provides "reasonable access to a service road when it terminated direct access to the highway…[,] the [property owners] are not entitled to compensation for the termination of their direct access."[197] In following a reasonableness test, a New Jersey court stated that

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[185] *Id.* at 505.

[186] *Id.* at 507.

[187] 605 ILL. COMP. STAT. 5/4-210 (West 2004).

[188] 605 ILL. COMP. STAT. 5/8-102 (West 2004) provides:

> The Department, the county board, or the corporate authorities of any municipality, as the case may be, shall also have authority to extinguish by purchase or condemnation any existing rights or easements of access, crossing, light, air or view to, from or over the freeway vested in abutting land, in the same manner as the Department, county board, or corporate authorities of any municipality now is or hereafter may be authorized by law to acquire private property and property rights in connection with highways under their respective jurisdiction and control.

[189] DOT v. Lowderman, LLC, 367 Ill. App. 3d at 503.

[190] *Id.* at 505.

[191] *Id.* at 508.

[192] *Id.* at 507.

[193] *Id.*

[194] 62 Ill. 2d 131, 340 N.E.2d 12 (1975).

[195] 367 Ill. App. 3d at 508 (emphasis in original).

[196] *Id.* at 509.

[197] 26 AM. JUR. 2D, *Eminent Domain* § 195, at 592 (2004 ed.) ("[T]he impairment or loss of access resulting from the conversion of a conventional road into a limited-access or controlled-access highway is noncompensable if after the conversion the owner of abutting land retains a reasonable means of ingress and egress to and from his or her property."). *See State*, Comm'r of Transp. v. Charles Investment Corp., 143 N.J. Super. 541, 546, 363 A.2d 944, 946 (1976) (adopting a reasonableness of access test and holding that because reasonable access existed there could be no recovery of damages for loss of direct access in a case in which because of highway reconstruction the closest access points to a service road were 1500 ft in one direction and approximately 200 ft in the other direction); Surety Savings and Loan Ass'n v. State Dep't of Transp., 54 Wis. 2d 438, 443, 195 N.W.2d 464, 467 (1972) (holding that "there is no compensable taking when direct access to a controlled access highway is de-

> fairness dictates noncompensability. Fairness with respect to this particular case because the owner is not charged for the benefits, if any, resulting from the fact the abutting road is now a feeder from the New Jersey Turnpike any more than the State is charged for the detriment, if any, which may result from the fact the abutting road is now a service road.[198]

In *South Carolina State Highway Department v. Allison*,[199] the court observed that "[a] number of jurisdictions have held that the state…may deprive an abutting landowner of access to an existing highway, in the course of the construction of a controlled-access facility, without compensation, where the landowner is provided with a frontage road along the abutting property;" however, the court stated that "the decisions are…far from unanimous on the point."[200]

In *Utah Department of Transportation v. Ivers,*[201] the department took private property to construct a frontage road. Although access to the highway from one road to another road known as Shepard Lane was modified, the affected place of business (an Arby's restaurant) still had access to Shepard Lane, as well as via a frontage road that connected to the highway one-half mi in either direction from the business. The court agreed with the trial court that "Arby's had failed to establish the essential link between the damages it claims for loss of access, and 'the taking itself and…the condemnor's use of the land taken.'"[202]

> Thus, while Arby's "taking may be somewhat related" to the construction project, the taking did not "cause the damages [Arby's] claims as a result" of the project….[203]

> "The right does not extend so far as to guarantee a property owner that his property will be accessed through specific intersections or that the roads accessing his property will be easily accessed from other thoroughfares…." In other words, the right of access is the right of reasonable access. In the present case, the frontage roads provide access, via Shepard Lane, to and from Arby's property to Highway 89, albeit circuitously, both one-half mile to the north and one-half mile to the south of Arby's property. Additionally, Arby's Shepard Lane access remains unchanged. This is reasonable access.[204]

National Auto Truckstops, Inc. v. State of Wisconsin[205] involved a partial taking for a reconstruction project of a highway abutting the truckstop's property. "The project involved widening a highway and building a frontage road on the condemned property."[206] After the project, vehicles could enter the property only via a frontage road north of the property. The improved highway was not declared to be a controlled-access highway. The court held that the change in access via the frontage road was not a change in access based on an exercise of the state's police power.[207] The court noted that Wisconsin law requires that compensation be paid for a "partial taking of premises, such as access rights under the power of eminent domain."[208] The court, stating that the court of appeals had erred in assuming that "[a] frontage road [always] provides reasonable access to and from a landowner's property,"[209] held that "[t]he essential inquiry is whether a change in access is 'reasonable,'"[210] thus remanding the case for a determination on that issue.

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nied…where other access is given or otherwise exists" in a case in which the department condemned a strip of land across the owner's land that caused a severance of the northeast and southwest portions of the land, resulting in loss of access to the owner's other parcels except by a frontage road). *See also* Bock v. United States, 375 F.2d 479 (9th Cir. 1967); Houghs v. Mackie, I Mich. App. 554, 137 N.W.2d 289 (1965); State Highway Comm'n v. Cent. Paving Co., 240 Or. 71, 399 P.2d 1019 (1965); Ark. State Highway Comm'n v. Bingham, 237 Ark. 934, 333 S.W.2d 728 (1960); Gagne v. Morton, 102 N.H. 114, 151 A.2d 588 (1959); State *ex rel.* State Highway Comm'n v. Brockfeld, 388 S.W.2d 862 (Mo. 1965).

[198] State by Comm'r of Transp. v. Charles Inv. Corp., 143 N.J. Super. 541 at 546–47, 363 A.2d at 947 (footnote omitted). *See also* Brock v. State Highway Comm'n, 195 Kan. 361, 370, 404 P.2d 934, 943 (1965) (holding that there was not a denial of access when abutting owners were placed on a frontage road after the road adjacent their property was changed into a limited-access highway and that the owners "have access to the frontage road at all points at which it abuts their property"). *See* Eberth v. Carlson, 266 Kan. 726, 734, 971 P.2d 1182, 1188 (1999) (*citing Brock*). *But see* State *ex rel*. Herman v. Wilson, 103 Ariz. 194, 197, 438 P.2d 760, 763 (1968) (reaching a different result and holding the state liable for compensation for impairment of access because the substitute access after the conversion of an abutting conventional road into a limited-access highway caused unreasonable circuity of travel).

[199] 246 S.C. 389, 143 S.E.2d 800 (1965).

[200] *Id.* at 395, 143 S.E.2d at 803.

[201] 2005 UT App. 519, 128 P.3d 74 (Utah Ct. App. 2005), *aff'd in part, rev'd in part, remanded*, 2007 UT 19, 154 P.3d 802 (2007) (affirming the appellate court, which held that Arby's was precluded from presenting evidence of severance damages for loss of visibility of the property ("essentially a claim for lost business profits"), (2007 UT 19, at *P14, 154 P.3d at 806), but remanding for a determination of whether Arby's was entitled severance damages for loss of view from the property: "If the use of Arby's condemned land was not 'essential' to the project, they are not entitled to severance damages for loss of view from the property under article I, section 22 of the Utah Constitution or Utah Code section 78-34-10. If it was, appropriate damages may be awarded." 2007 UT 19, at *P24, 154 P.3d at 807.

[202] 2005 UT App. 519, at *P16, 128 P.3d at 78 (citation omitted) (internal quotation marks omitted).

[203] 2005 UT App. 519, at *P17, 128 P.3d at 78 (citation omitted).

[204] 2005 UT App. 128, at *P18, 128 P.3d at 79 (citation omitted).

[205] 263 Wis. 2d 649, 665 N.W.2d 198 (2003).

[206] *Id.* at 654, 665 N.W.2d at 201.

[207] *Id.* at 655–56, 661, 665 N.W.2d at 202–03, 204.

[208] *Id.* at 660, 665 N.W.2d at 203 (citations omitted).

[209] *Id.*

[210] *Id.* at 665, 665 N.W.2d at 206.

E.4.b. Substitute Access as Mitigation of Compensation

If the highway authority eliminates direct access and provides other access by a service road, it is not relieved of its obligation to compensate the abutting landowner for the impairment of direct access; however, the new method of access may mitigate the damages that otherwise may be required.[211] For example, in *South Carolina State Highway Department v. Allison,*[212] a right-of-way was acquired for a controlled-access facility, one lane of which was to be constructed on top of the existing highway leaving the abutter with identical access after the taking via the frontage road being constructed. The court held that the loss of access was compensable to the extent that the loss adversely affected the fair market value of the remainder of the property; however, the frontage road is a benefit that may mitigate damages or may be offset against compensation.[213]

In *Muse v. Mississippi State Highway Comm'n*,[214] involving a partial taking and access to a frontage road, the court held that the introduction of evidence of the existence of the frontage road was proper and that the exclusion of such evidence would require the jury "to award damages based upon a false assumption that the taking of the strip of land sought to be condemned would leave the appellant without any right of access to the highway."[215]

Other cases have held that "[t]he fact that other means of access to the property are available affects merely the amount of damages, and not the right of recovery."[216] As one court earlier had stated,

> [w]here a part of the owner's contiguous land is taken in a condemnation proceeding, all inconveniences resulting to the owner's remaining land, including an easement or access to a road or right of way formerly enjoyed, which decrease the value of the land retained by the owner, are elements of severance damage for which compensation should be paid. [217]

The difference in approach by the courts is important. Under the first approach, if the court rules as a matter of law that the substitute access is reasonable the jury would be precluded from considering loss of access as an element of damage. However, in jurisdictions following the second approach, the jury would be entitled to consider loss of access as an element of damage, although it would be further advised to consider the effect of the service road in mitigation of damages.

E.4.c. Compensation Only When There Is a Partial Taking

There is apparently some support for a third approach in the situation of substitute access, *i.e.*, that there should be compensation for a loss of access only if the loss is accompanied by a partial taking of the property in eminent domain. In *Nick v. State Highway Commission,*[218] the court stated that

> [a]n impairment of the use of property by the exercise of police power, where the property itself is not taken by the state, does not entitle the owner of such property to a right to compensation....
>
> In *Carazalla v. State*, 1955, 269 Wis. 593, 608b, 70 N.W.2d 208, 71 N.W.2d 276,—a controlled-access highway case,—we approved the conclusion of textwriters that if no land is taken for the converted highway but the abutting landowner's access to the highway is merely made more circuitous, no compensation should be paid, and our decision embodied that principle.[219]

The opinion seems to be based on the belief that a recovery for impairment of access may be had only as part of severance damages and that if there is not a partial taking of land (and hence no severance damage), a recovery for impairment of access cannot be allowed. Such reasoning, the subject of strong criticism, has been either ignored by a majority of the courts or repudiated.[220]

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[211] DOT v. Lowderman, LLC, 367 Ill. App. 3d at 508 (holding that the frontage road bears not on the question of compensability but is relevant in mitigation of damages resulting from the elimination of the existing *direct* access) (*citing* Dep't of Pub. Works and Bldgs. v. Wilson and Co., Inc., 62 Ill. 2d 131, 340 N.E.2d 12 (1975)).

[212] 246 S.C. 389, 143 S.E.2d 800 (1965).

[213] *Id.* at 393–94, 143 S.E.2d at 802 *See also* Haymore v. N.C. State Highway Comm'n, 14 N.C. App. 691, 189 S.E.2d 611 (N.C. Ct. App. 1972); State v. Mauney, 76 N.M. 36, 411 P.2d 1009 (1966); Ray v. State Highway Comm'n, 196 Kan. 13, 410 P.2d 278 (1966).

[214] 233 Miss. 694, 103 So. 2d 839 (Miss. 1958).

[215] *Id.* at 716, 103 So. 2d at 848–49.

[216] S.C. State Highway Dep't v. Allison, 246 S.C. 393, 143 S.E.2d at 802 (citations omitted).

[217] State *ex rel.* Rich v. Fonburg, 80 Idaho 269, at 278, 328 P.2d 60, at 64 (holding that it was error for the trial court not to instruct the jury "that the easement and right of access, ingress and egress to highway No. 95 as formerly enjoyed, and curtailed in this proceeding, was an element of damage to be considered by the jury") (*Id.,* 80 Idaho at 279, 328 P.2d at 65). *See also* State *ex rel*. Rich v. Dunclick, Inc., 77 Idaho 45, 286 P.2d 1112 (1955); State v. Styner, 58 Idaho 233, 72 P.2d 699 (1937).

[218] 13 Wis. 2d 511, 109 N.W.2d 71 (1961).

[219] *Id.* at 514, 109 N.W.2d at 72 (citation omitted).

[220] State Dep't of Highways v. Davis, 626 P.2d 661 (Colo. 1981). One commentator observes that

> [s]ome courts…profess to award compensation for loss of access only when part of the…land is physically taken. This betrays a fundamental lack of knowledge of the nature of access rights. We allow compensation for loss of access at all only because the right of access is a species of property within the panoply of a constitutional eminent domain clause. Why then should we refuse to compensate for its loss unless other forms of property no doubt compensable separately in their own right, are taken along with it? To refuse compensation is to deny legitimacy in the long historical process by which various forms of intangible rights in land, including access rights, were recognized as "property." It is an anachronism and a source of confusion.

Stoebuck, *supra* note 22, at 753.

It appears that the weight of authority is that there need not be a partial taking of an abutting owner's property to allow the owner to recover compensation for damages where substitute access is provided by the highway agency that is not suitable for the affected property.

F. SPECIFIC ACCESS CONTROL MEASURES

F.1. Change of Grade

F.1.a. Evolution of Abutting Owners' Rights

The public authority may undertake road and street improvements that result in a change or alteration of the grade of an abutting property owner. Such construction may have a substantial effect on an abutter's means of access to the highway. There are disparate views among the courts on the question of compensability for a change of grade of the abutting street or highway.

When discussing change-of-grade cases, one may begin with the 1823 decision of the Massachusetts court in *Callendar v. Marsh*.[221] It may be recalled that the court in that case ruled that the abutting property owner could not recover compensation for loss of access to the public street resulting from a change of grade. Although the modern law of abutters' rights of access differs sharply from the rule of noncompensability announced in *Callendar v. Marsh*, it appears that there are still some jurisdictions in which the decision has viability when compensation is sought for a change of grade. Some courts hold that unless compensation is required or authorized by statute, the state may change the grade of the highway without having to pay the owner for impairment of access. As noted, some state constitutions provide that just compensation must be paid by the state for a taking of private property for public use, while others provide that payment must be made for a taking or damaging of private property. Some authorities, particularly *Nichols on Eminent Domain*, attribute the variance among the states on the issue of compensation for change of grade to differences in constitutional language.[222]

F.1.b. Whether a Taking is the Sine Qua Non *for Compensation for a Change of Grade*

The following rules relating to compensation for change of grade are set forth first for states with a taking provision and then for those states with a taking or damaging provision in the state's constitution.

First, in those states with a taking provision, some courts have held that the owner of abutting land has no constitutional right to compensation for injury to his premises because of the public agency's raising or lowering of the grade of the road if no part of the land is taken.[223] As stated in *Dumala v. State*,[224] New York having a taking provision,[225] the anomaly is that the common law rule was and still is that "the State is not liable for change of grade damages not part of a direct taking…."[226] In denying compensation for a change in grade in an inverse condemnation case, an Oregon appeals court held in *Deupree v. State*, Oregon also having a taking provision,[227] that "[w]here access to private property is retained through another public road, even though that access may be less satisfactory, the loss of direct highway access is not compensable."[228]

The second view is that in a state with a taking provision, there is a taking of property within the meaning of the constitution if a change of grade unreasonably or substantially impairs access even though no part of the real estate itself is taken.[229] In *Thom v. State,*[230] Michigan having a taking provision,[231] the court found that the courts in several instances had held that a change of the grade of a highway may result in a taking of the abutter's property.[232] Moreover, the court found that in those cases in which compensation for impairment of access because of a change of grade had been denied, suitable access to the abutting property still remained.[233] The court, expressly overruling *City of Pontiac v. Carter,*[234] held that a substantial impairment of access caused by a change of grade may constitute a taking.

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[221] Callender v. Marsh, 18 Mass. (1 Pick.) 418 (1823).

[222] 5 NICHOLS ON EMINENT DOMAIN (3d ed.) §§ 16.05[1], [2].

[223] 5 NICHOLS ON EMINENT DOMAIN (3d ed.) § 16.05[1].

[224] 72 Misc. 2d 687, 340 N.Y.S.2d 515 (Ct. Cl. 1973).

[225] N.Y. CONST. art. I, § 7.

[226] Dumala v. State, 72 Misc. 2d at 693, 340 N.Y.S.2d at 523 (citation omitted). *See also* Deupree v. State, 173 Or. App. 623, 22 P.3d 773 (Or. Ct. App. 2001), *review denied*, 334 Or. 397, 52 P.3d 435 (2002) (holding in an inverse condemnation case that there was no compensation for a change in grade); Look v. State, 267 A.2d 907 (Me. 1970); Smith v. State Highway Comm'n, 257 N.C. 410, 414, 126 S.E.2d 87, 90 (1962)

> (holding that there had not been a taking of access and stating that [w]hen a public highway is established, whether by dedication, by prescription, or by the exercise of eminent domain, the public easement thus acquired by a governmental agency includes the right to establish a grade in the first place, and to alter it at any future time, as the public necessity and convenience may require) .

[227] OR. CONST. art I, § 18.

[228] Deupree v. State, 173 Or. App. at 629, 22 P.3d at 777 (citation omitted).

[229] *See* Thom v. State, 376 Mich. 608, 627, 138 N.W.2d 322, 330 (1965) (holding in a case involving a change of grade causing the claimant great difficulty in moving his farm machinery to and from his property, that the state had taken the plaintiff's property when it caused the access to the land to become very difficult, resulting in a "substantial diminution" in the value of the property).

[230] 376 Mich. 608, 138 N.W.2d 322 (1965).

[231] MICH. CONST. art. 10, § 2.

[232] *Id.* at 616–17, 138 N.W.2d at 325.

[233] *Id.* at 623–24, 138 N.W.2d at 329.

[234] 32 Mich. 164 (1875).

> We conclude then, that when a governmental unit changes the grade of a highway in such a way as either to destroy or to interfere seriously with an abutting owner's right of access to that highway, and such interference results in a significant diminution in value of the property, then there has been a taking of the property to that extent….[235]

Similarly, in an Indiana case,[236] also a state with a taking provision,[237] it was contended that a change of grade constituted a taking. The court referred to its duty to determine whether there was a taking of a "substantial" right in the property. The court appears to treat the phrases "substantial right,"[238] "special and peculiar" injury,[239] and "materially and substantially impaired"[240] as synonymous. The decision, noting that there was available access to the property at intersecting streets, appears to hold that there has not been a taking unless access is substantially impaired, which is not the case if the owner has suitable, remaining access. According to the court, "unless the lowering of the grade of the highway cuts off access to the abutting property, there can be no compensable damages to the property owner."[241]

In *State ex rel. Schiederer v. Preston,*[242] a case from Ohio that has a taking provision,[243] the court stated that if

> an owner of land abutting on a highway has made improvements thereon with reference to an established grade for that highway, a substantial interference with his right of access to those improvements from that highway by a subsequent change of grade of the highway is a taking of property for which compensation must be provided.[244]

A more recent Ohio case held that in a condemnation action, damages were recoverable only when there was an unreasonable change of grade.[245]

A third and apparently uniform view among the courts is that in a taking state, compensation must be paid for an impairment of access if a change of grade accompanies a partial taking of abutting land.[246] In a partial-taking case from the State of Tennessee, whose constitutional provision refers to property "taken[] or applied,"[247] an appellate court held that it was proper for the trial court to admit testimony relating to impairment of access caused by the construction of an embankment that raised the grade level of the highway.[248]

A fourth rule applies in those states that have a constitutional provision against a "taking or damaging" of private property for public use without payment of just compensation; compensation is required for an unreasonable impairment of access caused by a change of grade regardless of whether there is a partial taking of property.[249] However, a slight lowering of grade that does not impair the abutter's access directly, substantially, or peculiarly as compared to the injury suffered by the public does not entitle the owner to compensation in a taking or damaging state.[250] In *Thomsen v. State*, a case from Minnesota having a provision requiring compensation for property "taken, destroyed, or damaged,"[251] the highest court held that although

> it is clear that deprivation of lateral support can amount to damage in the constitutional sense,…there is no evidence, beyond plaintiff's mere contention, that the slight lowering of the grade of the highway below the level of his property deprived his house of lateral support. Not every change in the grade of a highway entitles abutting property owners to compensation. In order to be compensable, the change, unlike the one involved in this case, must be material and must give rise to direct and substantial consequential damages…. It is clear…that not every conceivable kind of injury to the value of adjoining property resulting from highway construction is "damage" in the constitutional sense….[252]

Similarly, in *Cheek v. Floyd County, Georgia*,[253] Georgia's constitutional provision referring to property

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[235] 376 Mich. at 628, 138 N.W.2d at 331. *See* Barker v. City of Flint, 2001 Mich. App. LEXIS 1952, at *10 (Mich. Ct. App. 2001) (denying compensation "because plaintiff offer[ed] no evidence in this case that defendant changed the grade of the street 'in such a way as either to destroy or to interfere seriously with [plaintiff's] right of access to that highway'") (*quoting* Thom, 376 Mich. at 628, 138 N.W.2d at 331.)

[236] Young v. State, 252 Ind. 131, 246 N.E.2d 377 (1969).

[237] IND. CONST. art 1, § 21.

[238] 252 Ind. at 134, 246 N.E.2d at 378, 379.

[239] *Id.* (citation omitted).

[240] *Id* .at 135, 246 N.E.2d at 380.

[241] *Id.* at 136, 246 N.E.2d at 380 (citations omitted).

[242] 170 Ohio St. 542, 166 N.E.2d 748 (1960).

[243] OHIO CONST. art. 1, § 19.

[244] 170 Ohio St. at 545, 166 N.E.2d at 751 (citations omitted).

[245] Smith v. Sembach, 1988 Ohio App. LEXIS 1641, at *5 (Ohio App. 11th Dist. 1988) (citations omitted).

[246] Commw., Dep't of Highways v. Roberts, 496 S.W.2d 343 (Ky. 1973). Kentucky's constitutional provision refers to property "taken or applied." KY. CONST., part 1, § 13.

[247] TENN. CONST. art. I, § 21.

[248] Pack v. Boyer, 59 Tenn. App. 141, 145, 438 S.W.2d 754, 756 (1969) (affirming the trial court's decision allowing landowners to introduce evidence of incidental damages from a high fill or embankment that was constructed to raise the grade level of a state highway, which landowners argued was unsightly and obstructed the view of the landscape and the house, thereby materially decreasing the market value of their remaining land).

[249] *See* 5 NICHOLS ON EMINENT DOMAIN (3d ed.) § 16.05[2].

[250] Thomsen v. State, 170 N.W.2d 575 (Minn. 1969); Trolano v. Colo. Dep't of Highways, 463 P.2d 448 (Colo. 1969) (Colorado having a provision regarding property "taken or damaged," COLO. CONST. art. II, § 15).

[251] MINN. CONST. art I, § 13.

[252] Thomsen v. State*,* 170 N.W.2d at 579 (citations omitted).

[253] 308 F. Supp. 777 (N.D. Ga. 1970). *See also* Dep't of Transp. v. Kendricks*,* 150 Ga. App. 9, 256 S.E.2d 610, 612 (1979) (holding that in condemnation action "testimony relating to interference with access from the lowering of the grade was properly admitted"), *rev'd on other grounds*, 244 Ga. 613, 261 S.E.2d 391 (1979).

"taken or damaged,"[254] a federal district court held that a change in grade will give rise to a claim for damages for deprivation of access if there is a "substantial change" in access.[255]

In *County of Bexar v. Santikos,*[256] the Texas Constitution having a "taken, damaged, or destroyed" provision,[257] a jury awarded severance damages in a condemnation action because the project had raised the roadway above the natural grade. The Supreme Court of Texas reversed and remanded, holding that it was "hard to find any effects on access here, as the tract has no businesses, homes, driveways, or other improvements of any kind" and holding that "[e]asy access to the frontage road remains along 90 percent of the [owner's] tract."[258] However, in *Cozby v. City of Waco,*[259] the court held that factual issues precluded summary judgment for the city. The property owners alleged that a 9 in. rise in the elevation of an alley caused by paving prevented the owners from using their rear garage or from parking on their property adjacent the alley, allegations that if proved could establish an unreasonable interference with access.[260]

F.1.c. Compensation for a Change of Grade Pursuant to a State Statute

Some states have adopted legislation requiring or authorizing compensation if the grade of a highway is changed or altered by highway improvements. Moreover, it has been held that such legislation authorizes the payment of damages even if suitable access remains after the reconstruction or grading.[261] Claimants, however, may be barred from seeking compensation under such statutes if they do not adhere to required procedural steps such as filing a claim within the prescribed period.[262]

States have addressed the issue of the right to compensation for a change of grade of the highway, one such state being Pennsylvania in Section 612 of the Pennsylvania Eminent Domain Code, providing that "[a]ll condemnors, including the Commonwealth, shall be liable for damages to a property abutting the area of an improvement resulting from change of grade of a road or highway, permanent interference with access thereto, or injury to surface support, whether or not any property is taken."[263]

In *Daw v. Commonwealth of Pennsylvania, Department of Transportation,*[264] the owner of property along a two-lane state route alleged that PennDOT's resurfacing of the street and addition of 1 in. in height to its surface changed the grade, creating drainage problems and causing damage to her property.[265] The appellate court noted that "no Pennsylvania cases have squarely addressed the issue of what constitutes a change in grade to allow an action for a *de facto* taking."[266] The court, however, disagreed with the trial court and found that the resurfacing was maintenance only and that such "repair does not constitute a change of grade under Section 612 of the Code."[267] Relying on a New York case,[268] the court agreed that "the 'mere removal of irregularities or improvement of the street is not to be regarded as a change of grade for which compensation may be had.'"[269] (The court, however, was also of the opinion that the evidence failed to show that the resurfacing caused any damage to the property.)[270]

Access was not an issue in the *Daw* case, *supra*; however, in another Pennsylvania case, as well as an Ohio case, *infra*, access was one of the issues with respect to a claim for compensation concerning a change of grade. In the Pennsylvania case, *Harrington v. Commonwealth of Pennsylvania, Department of Transportation*,[271] resurfacing raised the height of a road by 2.5 in. The court affirmed the trial court's judgment in favor of the property owner. In addition to damage caused by rain and water runoff, the court agreed with the owner that

> the totality of DOT's actions, including the paving of the berm whereby traffic was brought within five feet of Harrington's front door, has resulted in permanent interference with her access to the property. *Consequently, a change of grade and a permanent interference with access to her property have caused Harrington to experience a deprivation in the use and enjoyment of her property*.[272]

In an Oregon case, property owners sought damages resulting from a change in access to the road but failed to show that a change of grade caused "legal damage" to the property.[273] Although including a claim also in inverse condemnation, the plaintiffs brought a statutory claim for a change of the grade of the highway under

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[254] GA. CONST. art I, § III.

[255] Cheek v. Floyd County, 308 F. Supp. at 781.

[256] 144 S.W.3d 455 (Tex. 2004).

[257] TEX. CONST. art 1, § 17.

[258] 144 S.W.3d at 460.

[259] 110 S.W.3d 32 (Tex. App. 10th Dist. 2002).

[260] *Id.* at 39.

[261] *See* 240 Scott, Inc. v. State, 18 N.Y.2d 299, 304–05, 274 N.Y.S.2d 673, 676–77 (1966).

[262] Jantz v. State Dep't of Transp., 63 Wis. 2d 404, 217 N.W.2d 266 (1974); Look v. State, 267 A.2d 907 (Me. 1970). *See* Annotation, 156 A.L.R. 416 for further discussion of statutes authorizing compensation for change of grade.

[263] PA. STAT. ANN. tit. 26, § 1-612.

[264] 768 A.2d 1207 (Pa. Commw. Ct. 2001).

[265] *Id.* at 1208.

[266] *Id.* at 1211.

[267] *Id.*

[268] Williams v. New York, 34 A.D. 2d 101, 309 N.Y.S.2d 795 (N.Y. App. 3d Dep't 1970).

[269] Daw v. Commonwealth, 768 A.2d at 1211 (citation omitted).

[270] *Id.*

[271] 792 A.2d 669 (Pa. Commw. Ct. 2002).

[272] *Id.* at 675–76 (emphasis supplied).

[273] Deupree v. State, 173 Or. App. 623, 626–27, 22 P.3d 773, 776 (Or. Ct. App. 2001) (*quoting* OR. REV. STAT. 105.755).

Oregon Revised Statues 105.755.[274] The statute provides:

> (2) Whenever the Department of Transportation changes the grade of any public road from a previously established or maintained grade, the state shall be liable for and shall pay just and reasonable compensation for any legal damage or injury to real property abutting upon the public road affected by the grade change; except that the state shall not be liable for any damage or injury for any such change whenever the county has requested the Department of Transportation to make such change.[275]

The court noted that the plaintiffs' argument was a straightforward one: "ODOT changed the highway grade, resulting in a loss of direct access to plantiff's property at four locations."[276] The court saw the matter differently, separating, as did the trial court, the issues of a change of grade and of impairment of access. The court held that the plaintiffs had to show that "the change of grade has caused legal damage or injury to their property."[277] According to the court, such legal damage would include a claim for faulty drainage or the loss of lateral support, not, however, for interference with access *as long as* the abutting owner had access to the property.[278]

> ORS 105.755 refers only to the effects of a change of grade; it does not refer expressly to damage or injury resulting from loss of highway access. Assuming, nevertheless, that such damage or injury falls within the ambit of the statute, nothing in its language suggests that the legislature intended to create a remedy for a harm for which a person is not entitled to just compensation under Article I, section 18. Because the statute is framed in terms familiar to the law of eminent domain, it suggests precisely the opposite inference. We therefore conclude that, because plaintiffs have not suffered a loss of all highway access to their property, they have not suffered legal damage or injury giving rise to a right under ORS 105.755.[279]

The plaintiffs had not shown "that the change of grade deprived them of all highway access to their property."[280]

In *County of Bexar v. Santikos,*[281] *supra,* property was taken in a condemnation proceeding for an embankment to support the elevation of a frontage road. The question was whether there was a claim for compensation for damages to the remainder because the grade of the property was below the frontage road. The court held that because the property was undeveloped it was difficult to find "any effects on access here, as the tract has no businesses, homes, driveways, or other improvements of any kind…. [T]he only claim is that someday a developer may want to build a driveway at the single most difficult and expensive location on the entire property."[282] It was important in the *Santikos* case that the owner had in the court's view "[e]asy access to the frontage road...along 90% of the property."[283]

Although the lack of any development of access affected the court's ruling in the *Santikos* case, in *State ex rel. OTR v. City of Columbus,*[284] the court did not allow the lack of present development of access to the property to preclude the award of compensation for impairment of future access to the properties in question. The court held that the owners of two parcels were entitled to compensation where the properties were developed after the establishment of the grade of the abutting boulevard.[285] However, an appellate court in reversing the trial court had noted that the owners had not established any driveways along the properties' frontage on the boulevard. The Supreme Court of Ohio disagreed with the appellate court's belief, which was that for there to be a taking, the overpass structure (causing a change of grade) "would have had to interfere with an existing driveway or a 'developed' access route."[286] The Supreme Court of Ohio, ruling that the overpass construction denied forever the owners' access along the properties' frontage, quoted prior authorities to the effect that

> "[t]he owner of a lot abutting on a street has an easement in the street appendant to his lots whereby he is entitled to an unobstructed access to and from the street, and this appendant easement is as much property as the lot itself. This right of property vested in the owner of abutting land is subject, however, to the right of the public to grade and improve the street. But grades once established are presumptively permanent and cannot, it is obvious, be changed without causing injury and confusion…." Public authorities of cities and towns have control over the use, grade and regrade of streets. "But if, after establishing the grade, they block up or cut down the street before one man's house for the benefit of others, doing a substantial injury, the rights of property have been invaded, and plainest principles of justice require compensation."[287]

In brief, in cases involving a change of grade, a state statute may authorize compensation for a change of grade. The statute may refer to compensation, as well for impairment of access caused by a change of grade. Compensation for a change of grade may be recoverable in an inverse condemnation action; the majority rule appears to be, except in those states in which a taking of property must accompany a change of grade for there to be compensation, that an abutting owner has no claim for impairment of a right of access because of a change of grade—unless it is shown that access to the

[274] *Id.*

[275] OR. REV. STAT 105.755.

[276] Deupree v. State, 173 Or. App. at 627, 22 P.3d at 776.

[277] *Id.* at 628, 22 P.3d at 776.

[278] *Id.* at 629, 22 P.3d at 777 (citation omitted).

[279] *Id.* at 629–30, 22 P.3d at 777–78.

[280] *Id.* at 630, 22 P.3d at 778.

[281] 144 S.W.3d 455 (Tex. 2004).

[282] *Id.* at 460.

[283] *Id.* at 461.

[284] 76 Ohio St. 3d 203, 667 N.E.2d 8 (Ohio 1996).

[285] *Id.* at 208, 667 N.E.2d at 13.

[286] *Id.* at 209, 667 N.E.2d at 13.

[287] *Id.* at 211, 667 N.E.2d at 15 (citations omitted).

property actually has been impaired substantially and that the impairment was caused by the change of grade.

F.2. Closing of an Intersection, Street, or Interchange

The majority view appears to be that the highway authority may close an intersection as long as a property owner has reasonable, although more circuitous, access.[288] As the court stated in a Kansas case, "[r]ight of access is traditionally defined as an abutting landowner's common-law right of access from the landowner's property to abutting public roads. Such a right is the right to reasonable, but not unlimited, access to existing and adjacent public roads…."

On the other hand, "[w]hen the government actually blocks or takes away existing access to and from property, the landowner is generally entitled to compensation."[289]

In *Kau Kau Take Home No. 1 v. City of Wichita,*[290] an inverse-condemnation case, a road project involved the closing of an intersection. The property was located near but did not abut the roads that formed the intersection. Although the project "significantly altered the route for patrons" of the restaurant on the property, the project did not change the property owners' two points of access to their property.[291] The court observed that "[t]he additional 2 miles of travel to access [the owners'] property is less than the additional 3 miles of travel that the *McDonald's* court found to be reasonable."[292] As discussed previously, "[a]n abutting property owner has no right to the continuation of a flow of traffic from nearby highways to the owner's property."[293]

On the other hand, another case concerned the construction of an extension of a public transit system that interfered with access to the owners' driveway to their business and resulted in the closing of the street on which the business was located. The court held that the "level of deprivation of use" compromising the ability of the business to operate "constitute[d] more than a 'temporary inconvenience'…."[294]

In *Hall v. State of South Dakota*,[295] the court addressed the issue of whether the state had to pay just compensation "for depriving Owners of their right of access to a public highway by closing the highway interchange abutting their property…."[296] The issue was whether "'the right of access is destroyed or materially impaired,'" in which case "the damages are compensable if the injury sustained is peculiar to the owners' land and not of a kind suffered by the public generally.'"[297] In *Hall,* the case was remanded because the trial court had not considered whether there was a loss of reasonable and convenient access or considered the state's purpose which was relevant to whether "the State's exercise of police power was unreasonable and arbitrary."[298]

F.3. Curbs, Curb Openings, and Driveways

Public control over curbs, curb openings, and driveways is another method to control highway access. The majority view appears to be that a physical taking is not required and that a highway agency's substantial limitation of the access to property may be compensable.[299]

With respect to curb openings and driveways, the abutting landowner either may attempt to secure additional openings or simply retain the ones that he or she already has. If the owner is denied additional access or is deprived of existing openings, the owner may seek damages for a denial or loss of access. However, it must be the property owner's access that is restricted or taken. In one case, in which a property owner had a point of access via the driveway of a bus depot, such access was not a vested right, because the driveway was not on the claimants' land and the claimants did not abut the highway in question.[300] The claimants were "not by law entitled to ingress and egress by that particular roadway, [because they had] full access by way of the highway frontage road."[301] In another case, the court held that the city had not completely eliminated the property owner's access to the highway "as the new curb and small aprons still allow ingress and egress[] and are merely designed to regulate the flow of traffic…."[302]

In *State by Commissioner of Transportation v. Van Nortwick,*[303] an appellate court reversed a trial court for

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[288] *See, e.g.,* Thomas A. McElwee & Son, Inc. v. Se. Pa. Transp. Auth., 896 A.2d 13 (Pa. Commw. Ct. 2006), *appeal granted*, 2006 Pa. LEXIS 2466 (Pa., Dec. 20, 2006).

[289] Kau Kau Take Home No. 1 v. City of Wichita, 281 Kan. at 1191, 135 P.3d at 1227 (citation omitted).

[290] 281 Kan. 1185, 135 P.3d 1221 (2006).

[291] *Id.* at 1188, 135 P.3d at 1225.

[292] *Id.* at 1194, 135 P.3d at 1228.

[293] *Id.* at 1192, 135 P.3d at 1227 (*citing* City of Wichita v. McDonald's Corp., 266 Kan. 708, 714, 971 P.2d 1189 (1999)).

[294] *Thomas A. McElwee & Son, Inc.,* 896 A.2d at 21.

[295] 2006 S.D. 24, 712 N.W.2d 22 (2005).

[296] 2006 S.D. 24, at *P7, 712 N.W.2d at 25 (question of whether the owners had no right of access to the Interstate and the intersection closed by the state because I-90 was a controlled-access highway was not raised below, and thus was not before the court).

[297] 2006 S.D. 24, at *P17, 712 N.W.2d at 29 (*quoting* Hurley v. State, 82 S.D. 156, 163, 143 N.W.2d 722, 726 (1966) (compensable taking where the state erected a steel barrier along the entire eastern edge and for a short distance on the southern edge of the property, substantially impairing the landowner's right of access)).

[298] 2006 S.D. 24, at *P21, 712 N.W.2d at 30.

[299] *Hilltop Basic Res., Inc.*, 167 Ohio App. 3d at 805, 2006 Ohio 3348, at *P26, 857 N.E.2d at 617 (city's denial of a request for a curb side permit, such that the only access to river front property along River Road in Cincinnati was by boat).

[300] Carson v. Texas, 117 S.W.3d 63, 65, 66, 67 (Tex. App. 3d Dist. 2003).

[301] *Id.* at 69.

[302] Ohio *ex rel*. Habash v. City of Middleton, Ohio, 2005 Ohio 6688, at *P18 (12th Dist. 2005).

[303] 260 N.J. Super. 555, 617 A.2d 284 (N.J. App. 1992).

having allowed evidence relating to diminution in value to the remainder where the owner continued to have reasonable access to the highway.[304] However, the Supreme Court of Rhode Island, in *Bruzzese v. Wood*,[305] affirmed a trial court's judgment that a property owner was entitled to compensation for elimination of several railroad crossings that precluded some vehicular traffic.[306]

In a more recent case, an appellate court affirmed the trial court's judgment that the city's denial of an application for a curbcut to an abutting street did not constitute a taking because the owner had alternate access via a back alley.[307] The court held that "'taking' jurisprudence does not divide a single parcel into discrete segments…. The focus is upon both the character of the action and on the nature and extent of the interference with rights in the parcel as a whole."[308] Moreover, "the fact that property is rendered less desirable as a result of the governmental activity does not in and of itself constitute a taking so as to entitle the owner thereof to compensation."[309] Moreover, reasonable access need not be directly from the property to the street if the owner has access to and from one lot through another lot. It is proper for the city to consider the fact that an unsafe traffic situation already exists without another driveway.[310]

Furthermore, it has been held that it is a reasonable exercise of governmental discretion to order the closure of certain curb cuts if it has been some years since they were used.[311] In *Orchard Grove of Dutchess, Inc. v. New York,*[312] the court held that an earlier taking of the subject property did not leave any residual rights of access to the future owner's property bisected by the appropriation. "Acquiescence by the State to the use of the driveway by claimant's predecessors-in-interest afforded permissive and practical access but not a permanent legal right of access."[313]

As for driveways, "[t]he absolute prohibition of driveways to an abutting owner's land which fronts on a single thoroughfare, and which cannot be reached by any other means, is unlawful and will not be sustained."[314] There is no compensable claim for loss of driveway access unless the owner is able to demonstrate that the remaining access is no longer suited to the highest and best use of the property.[315] On the other hand, it has been held that a city may not deny a service station access to one street without first paying compensation even though there was a driveway to the

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[304] *See also* Johnson v. City of Plymouth, 263 N.W.2d 603, 607 (Minn. 1978) (affirming a trial court's ruling that curb-cuts that had been constructed by the city were generous and were plainly designed with the commercial use of the appellants' property in mind and holding that therefore there had been no taking for which the owner could claim compensation from the city). *See also* State by State Highway Comm'r v. Kendall*,* 107 N.J. Super. 248, 251–52, 258 A.2d 33, 35 (1969) (holding that where the state erected curbing and a guardrail along the entire frontage yet granted five curb opening permits leaving approximately 242 ft of the frontage of the property without access, the abutting property owner was not denied reasonable access); W.E.W. Truck Lines, Inc. v. State Dep't of Roads, 178 Neb. 218, 222, 132 N.W.2d 782, 786 (1965) (holding that the trial court properly excluded a condemnee's evidence with respect to any loss of access from his premises to the highway); Painter v. State, Dep't of Roads, 177 Neb. 905, 909, 131 N.W.2d 587, 590 (1964) (holding that three 30-ft curb cuts constituted reasonable access to the premises); State Highway Dep't v. Strickland, 213 Ga. 785, 102 S.E.2d 3 (1958); Wilson v. Iowa State Highway Comm'n*,* 249 Iowa 994, 1003, 90 N.W.2d 161, 167 (Iowa 1958) (holding that three curb openings, each 34 ft wide, afforded reasonable access from the highway to a restaurant and service station serving cross-country trucks and that the plaintiffs were not entitled to damages because traffic islands prevented left turns into the property); Elder v. Mayor of New Port, 73 R.I. 482, 484–85, 57 A.2d 653, 655 (1948) (holding that a curb opening or driveway need only be reasonably suited for the permitted use of the land).

[305] 674 A.2d 390, 394 (R.I. 1996).

[306] *See also* Narciso v. State*,* 328 A.2d 107, 112 (R.I. 1974) (remanding on the issue of whether installation of the curbing amounted to a substantial denial of access).

[307] State *ex rel.* Morris v. City of Chillicothe, 1991 Ohio App. LEXIS 4807 (Ohio App. 4th Dist. 1991).

[308] 1991 Ohio App. LEXIS 4807 at *16 (c*iting* Penn Central Transp. Co. v. N.Y. City, 438 U.S. 104, 123, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)).

[309] 1991 Ohio App. LEXIS 4807, at *10. The court pointed out that

> [i]n determining whether there has been a substantial interference with the abutting property owner's easement right of access to a public street, Ohio courts have considered the issue not in the abstract nor in relation to what might be developed in the future on the land, but in relation to the improvements currently existing on the property.

Id. at *12–13 (citation omitted).

[310] Delta Rent-A-Car Systems, Inc. v. City of Beverly Hills, I Cal. App. 3d 781, 82 Cal. Rptr. 318 (Cal. App. 2d Dist. 1970).

[311] Johnston v. Boise City, 87 Idaho 44, 50-52, 390 P.2d 291, 294–95 (1964).

[312] 1 Misc. 3d 810, 772 N.Y.S.2d 201 (N.Y. Ct. Cl. 2003).

[313] *Id.* at 816, 772 N.Y.S.2d at 206.

[314] Breinig v. County of Allegheny, 332 Pa. 474, 482, 2 A.2d at 847–48. *See* Brownlow v. O'Donoghue Bros., Inc., 276 F. 636, 637 (D.C. Cir. 1921) ("No doubt the Commissioners have the right to make reasonable regulations for the use of driveways across sidewalks…and…their decision in that regard will not be disturbed if it has any reasonable basis in the facts relating to the matter…. But regulation is one thing, and prohibition is another.") (citations omitted)).

[315] *See, e.g.,* Raj v. State of New York, 124 A.D. 2d 426, 427–28, 507 N.Y.S.2d 770, 771, 772 (N.Y. App. 3d Dep't 1986) (holding that the reconstruction of a highway causing the elimination of the property owner's status as an abutting landowner and necessitating extension of her driveway to meet the relocated highway was not compensable);
Penningroth v. State, 35 A.D. 2d 1024, 316 N.Y.S.2d 123, 124 (N.Y. App. 3d Dep't 1970) (holding that the fact that claimant's trucks must do substantial maneuvering after the impairment of access in order to use a semicircular driveway on the property may be inconvenient but not necessarily unsuitable access).

property from another street.[316] One court has held that if a planned curb cut is not installed there is no basis for a *de facto* condemnation action for loss of direct access.[317]

The cases illustrate the majority rule that if the right of access to land abutting a highway is impaired or diminished, unless the impairment is so substantial that the property is left without reasonable, suitable access, there is not a taking or damaging requiring compensation. Thus, public authorities may deny applications for driveway permits and curb openings or close existing ones in some instances without the payment of compensation if reasonable access exists. One authority, however, has observed that the courts tend to review more strictly the cutting off of existing access than the refusal to permit new access.[318]

F.4. Fences, Barricades, and Medians

The public authority may erect fences along the boundary of the right-of-way to control access without paying compensation as long as the abutting landowner retains reasonable access.[319] In *Aposporos v. Urban Redevelopment Comm'n of the City of Stamford,*[320] the Urban Redevelopment Commission first condemned a portion of the plaintiff partners' property on which they operated Curly's Diner and then erected a chain-link fence along the sides of the diner, one foot from the building, and constructed a fence along the rear of the building, restricting access only to the sidewalk in front of the building.[321] Nevertheless, the court dismissed the action, in part, because access still existed to the diner.[322]

In regard to barricades, in a case in which the city erected a barricade along the entire frontage of an abutting apartment house and convenience store preventing through traffic, leaving the apartment house on two cul-de-sacs and the convenience store on one cul-de-sac, the court held that the respective owners' "easement rights were materially and substantially impaired as a matter of law."[323] Moreover, the court held that the owners' "easement rights are being subjected to a 'perpetual servitude' for the benefit of the residents in the neighborhood."[324]

As for medians, there exist numerous cases involving alleged deprivation or unreasonable impairment of access caused by the installation of medians in the street or highway. The objections to control of access are readily apparent. Businesses, formerly having direct access to traffic in both directions, may be accessible from one direction only. Motorists may have to travel beyond the premises to the next median opening to turn or may be forced to make several turns before reaching the premises. Commercial establishments may believe that the results of such access control are a loss of business and a lower value of the abutting property.

The courts, however, have held that the abutting property owner is not entitled to damages for loss of business or for consequential damages for the diminution in value of the adjacent land where abutters and patrons are relegated to more circuitous access.[325] In *In Re: De Facto Condemnation by the Dept. of Transp.,*[326] the court held that the transportation department's use of a medial barrier that eliminated left turns and resulted in additional travel of 1.2 and 1.3 mi was not a compensable taking. The court relied on a number of authorities in reaching its conclusion that there was not an unreasonable interference with access.[327] However,

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[316] State *ex rel.* Moore v. Bastian, 97 Idaho 444, 449, 546 P.2d 399, 404 (1976).

[317] Sienkiewicz v. Commw. of Pa., Dep't of Transp., 584 Pa. 270, 282, 883 A.2d 494, 502 (2005).

[318] Annotation, 73 A.L.R. 2d at 674.

[319] Lodestro Co. v. City of Shreveport, 768 So. 2d 724, 728 (La. App., 2d Cir. 2002) (holding that no compensation was allowable in an inverse condemnation case for construction activities that included barricades and a ditch that eliminated direct access to a store because parking for patrons was still available two blocks from the store); Town Council of New Harmony, Ind. v. Parker, 726 N.E.2d 1217, 1222 (Ind. 2000) (placing of a chain across the street held not to constitute a taking of property in that the action did not deprive plaintiff of access to her property or inconvenience her more greatly than the general public); Tucci v. State, 28 A.D. 2d 774, 280 N.Y.S.2d 789, 791 (N.Y. App. 3d Dep't 1967); Houghs v. Mackie, 1 Mich. App. 554, 137 N.W.2d 289 (Mich. Ct. App. 1965). *See, however,* Ark. State Highway Comm'n v. Kesner, 239 Ark. 270, 275, 388 S.W.2d 905, 909–10 (Ark. 1965) (abutting owners suffered special damages because of the erection of barricades on one abutting street that rendered the owners' ingress and egress much more difficult and unsafe).

[320] 2005 Conn. Super. LEXIS 3468 (Stamford Dist. 2005).

[321] *Id.* at *5.

[322] *Id.* at *10–11.

[323] Lethu Inc. v. City of Houston, 23 S.W.3d 482 (Tex. App. 1st Dist. 2000), *petition for review denied* (Apr. 5, 2001).

[324] *Id.* at 488.

[325] New v. State Highway Comm'n, 297 So. 2d 821 (Miss. 1974) (holding that additional travel of 400 ft to reach a crossover after a median strip was built in the highway was not compensable); Langley Shopping Center v. State Roads Comm'n, 213 Md. 230, 131 A.2d 690 (1957) (holding that although left turns could no longer be made directly into the property after highway construction, reasonable access to the highway still existed).

[326] 164 Pa. Commw. 81, 644 A.2d 1274 (1994).

[327] Cases holding that there was not a compensable taking notwithstanding the use of barriers or other controls include: Commerce Land Corp. v. Dep't of Transp., 34 Pa. Commw. Ct. 356, 358, 383 A.2d 1289, 1290 (1978) (medial strip requiring circuitous travel of 2.35 mi and 2.8 mi, respectively); Brill v. Dep't of Transp., 22 Pa. Commw. Ct. 202, 205, 348 A.2d 451, 452 (1975) (change of grade requiring additional travel of about 1.5 mi); Dep't of Transp. v. Nod's Inc., 14 Pa. Commw. Ct. 192, 193, 321 A.2d 373, 374 (1974) (medial barrier restricting access, for example, such that northbound traffic was required to travel an additional 2 mi to an opening in the barrier and then 2 mi back to get to the property); Dep't of Transp. v. Kastner, 13 Pa. Commw. 525, 527, 320 A.2d 146 (1974), *cert. denied*, 419 U.S. 1109, 95 S. Ct. 783, 42 L. Ed. 2d 806 (1975) (bypass and road relocation caused distance to the property to increase

the court observed that in one case the erection of a medial barrier forcing a detour of 7.45 mi for 18-wheel trucks was "so circuitous as to constitute an unreasonable interference with access."[328]

In *Kick's Liquor Store, Inc. v. City of Minneapolis,*[329] the liquor store had access to its property from McNair Avenue, which the city closed with a barrier, turning the street into a cul-de-sac and eliminating direct access to the store's parking lot for patrons traveling on the street from the south. Although there was still access to McNair at Broadway and Penn Avenues, the city erected a pylon that among other things confused drivers who entered the parking lot by mistake, thus forcing them to have to turn around in the parking lot. The court noted that the state's highest court had held, in *Dale Props., LLC v. State,*[330] "that, as a matter of law, the installation or closure of a median does not constitute a compensable taking when the property owner maintains direct access in one direction."[331] There was a compensable taking of access in this case, however, because the city "erected a barrier across McNair that completely closed access in one direction. And, it also erected a concrete pylon in the middle of McNair that modified access in the remaining direction."[332]

Construction of medians may accompany a taking of a parcel of the adjoining property. Again the rule is the same: the abutting landowner is entitled to damages for impairment of access as an element of severance damage only where he shows that there has been an unreasonable impairment of his access to his remaining property.[333] Nevertheless, in *State ex rel. Missouri Highway and Transportation Commission v. Jim Lynch Toyota, Inc.,*[334] the court held that the loss of access resulting from a median strip constructed as part of a highway-widening project was a proper consideration because "[a]ny factor that has a present, quantifiable effect on the market value of the property is proper as an element of damages."[335]

F.5. Restriction of Access to Pedestrian Traffic

Access is usually thought of in terms of vehicular access, but the question has arisen in some instances whether the public authority may regulate streets by denying access to all vehicular traffic, thereby permitting access only by pedestrians. The general rule is that a street may be closed to vehicular traffic if other reasonable means of access are available;[336] if such alternate access is not available, then the abutting landowner may be entitled to compensation.[337] Thus, it has been held that the public authority may close a street to vehicular traffic if there is a serious traffic hazard presented without paying compensation when the abutting property owner has other, suitable access.[338]

An illustration of a situation in which compensation was required for a denial of vehicular access is *Metropolitan Atlanta Rapid Transit Authority v. Datrey*.[339] In the *Datrey* case, the abutting property owners challenged the Metropolitan Atlanta Rapid Transit Authority (MARTA) when it closed the 100 block of Sycamore Street to vehicular traffic and constructed a transit station at that location. The court held that the agency could not properly exclude all vehicular traffic in the 100 block of Sycamore Street unless the owners were paid just compensation.

The court stated that

> the question is limited to plaintiffs' right to vehicular access to their property. The prohibition of vehicular traffic

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slightly but a possible decrease in the travel time to the property).

[328] *In Re: De Facto Condemnation by the Dep't of Transp.,* 644 A.2d at 1277 (*citing* Dep't of Transp. v. Guyette, 103 Pa. Commw. 402, 404–05, 520 A.2d 548, 549 (1987), *appeal denied*, 516 Pa. 644, 533 A.2d 714 (1987) (involving the use of a medial barrier)).

[329] 2002 Minn. App. LEXIS 754 (2002), *review denied*, 2002 Minn. LEXIS 722 (2002).

[330] 638 N.W.2d 763 (Minn. 2002) (holding that the closure of a median crossover opposite the point of access to the owner's property was not compensable even though the owner alleged a reduction in the highest and best use of the property).

[331] 2002 Minn. App. LEXIS 754, at *10.

[332] *Id.* at *10–11. The court held also that there was an independent basis to find that a taking had occurred that was unrelated to the Dale Props' principles inasmuch as the trial court had found that the city failed "to provide an adequate turn around at the cul-de-sac, forcing drivers to use respondent's parking lot…." *Id.* at *11–12. *See also* Hall v. State, 2006 S.D. 24, at *P16, 712 N.W.2d at 28 (compensable taking where the State erected a steel barrier along the entire eastern edge and for a short distance on the southern edge of the property, substantially impairing the landowner's right of access).

[333] Div. of Admin., State Dep't of Transp. v. Capital Plaza, Inc., 397 So. 2d 682, 683 (Fla. 1981) (holding that a landowner who lost a strip of property to a highway widening project could not recover losses caused by concurrent placement of a median strip because "[w]hen less than the entire property is taken, compensation for damage to the remainder can be awarded only if such damage is caused by the taking," and that "[c]onstruction of the median, not the taking, caused the alleged damage"). *See also* State *ex rel*. Moore v. Bastin, 97 Idaho 444, 546 P.2d 399 (1976) (State's requested instruction that the jury be advised not to award damages for any injury that they might find to have been caused by the medians should have been granted); Richley v. Jones, 38 Ohio St. 2d 64, 310 N.E.2d 236 (1974) (holding that the fact that a median strip was constructed on land taken from the abutting owner did not alter the result); Jacobson v. State *ex rel*. State Highway Comm'n, 244 A.2d 419, 421–22 (Me. 1968); Painter v. Dep't of Roads, 177 Neb. 905, 131 N.W.2d 587, 590–91 (Neb. 1964) (holding that a landowner whose property was taken in a highway widening project could recover only for the lost land, and not for losses caused by traffic islands constructed as part of the same project); State v. Ensley, 240 Ind. 472, 164 N.E.2d 342 (1960).

[334] 830 S.W.2d 481 (Mo. App. E. Dist. 1992).

[335] *Id.* at 485 (citation omitted).

[336] *See* Annotation, 73 A.L.R. 2d at 660.

[337] Breinig v. Allegheny County, 332 Pa. 474, 482–84, 2 A.2d at 847–49 (1938).

[338] Segal v. Village of Scarsdale, 17 Misc. 2d 27, 184 N.Y.S.2d 547 (N.Y. Sup. Ct. Westchester Co. 1958).

[339] 235 Ga. 568, 220 S.E.2d 905 (1975).

> in the 100 block of Sycamore Street will clearly deprive plaintiffs of the possibility of vehicular access to their property from Sycamore Street.
>
> "Interfering with access to premises by impeding or rendering difficult ingress or egress is such [a] taking and damaging as entitles the party injured to compensation under a provision for compensation where property is damaged."[340]

More recent cases have allowed restrictions on pedestrian access. In *Banning v. King County,*[341] the property owners had built steps, ladders, and platforms on the county's right-of-way for access to adjacent tidelands. The court held that the county's reconstruction of the road and seawall eliminating the property owners' structures was not a taking. In *Jordan v. Landry's Seafood Restaurant, Inc.,*[342] the city's restriction of traffic on a street abutting a restaurant to pedestrian traffic and emergency vehicles was held not to constitute a taking. The court observed that "[a] decrease in market value alone will not support the conclusion that a taking has occurred" and that "[a] property owner must demonstrate that the interference with the property's use and enjoyment is substantial."[343]

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[340] *Id.* at 577, 220 S.E.2d at 911 (citation omitted).

[341] 2000 Wash. App. LEXIS 216 (Wash. App. 1st Div. 2000), 30 ELR 20363.

[342] 89 S.W.3d 737 (Tex. App. 1st Dist. 2002).

[343] *Id.* at 743 (citations omitted).

SECTION 3

COMPENSATION FOR NOISE, FLOODING, POLLUTION, EROSION, OR LOSS OF VISIBILITY OR VIEW

Beginning in the 1800s, American courts began to recognize a number of “abutter’s rights” enjoyed by property owners along public roads…. These rights, described as being in the nature of easements and “deduced by way of consequence from the purposes of a public street”…, include the right of access to and from the road, and the right to receive light and air from the adjoining street…. Judicial recognition of these rights derives from the perceived expectations of those who own or purchase property alongside a public street, to the effect that the land enjoys certain benefits associated with its location next to the road…. It is well established, however, that abutter’s rights are qualified, rather than absolute….”[1]

[1] Regency Outdoor Adver., Inc. v. City of L.A., 39 Cal. 4th 507, 517, 139 P.3d 119, 124, 46 Cal. Rptr. 3d 742, 748 (2006) (citations omitted).

A. COMPENSATION FOR NOISE DAMAGE

The genesis of claims for noise damage may be traced to cases brought against railroads in which it was widely held that, regardless of whether the constitutional provision applied to a taking or a taking or damaging of property, such claims were *damnum absque injuria*.[2] As for highways, it was held that noise that affected all property owners the same in the neighborhood constituted general damages only and was not compensable.[3]

Nevertheless, the question of whether a property owner may recover damages for noise regardless of whether there has been a partial taking resulted in a number of judicial positions on the subject. There are cases denying compensation under any circumstances;[4] however, there also are cases permitting compensation for damages caused by the entire public improvement[5] or only for damages caused by the portion of the improvement that is located on condemned land.[6] There are cases permitting the recovery of damages when the remaining land is put to a special use, such as a school or a church,[7] when the effect of noise is special or peculiar to the land taken,[8] or when the entire beneficial use of the property is destroyed.[9] Finally, "[a] few courts recognize noise impact as a factor [that contributes] to the decrease in market value of the remaining area, rather than as a separate item of severance damages."[10]

As discussed below, cases involving claims for noise damages appear to fall into two major categories—those involving a partial taking of the landowner's property and those in which there is increased noise resulting from a highway but no part of the owner's property was taken for the project. If there is no physical taking of the owner's property, there is ordinarily no claim for damage due to noise unless there is a showing of special damage to the abutting land.[11]

A.1. Partial Taking of Property and Compensation for Noise

A.1.a. Compensation for Noise Damages Along With Other Severance Damages

As held in *State by Commissioner of Transp. v. Carroll*, *supra*, although the record in that case was insufficient to permit compensation for increased noise, in a proper case noise damages may be compensable as one factor affecting the market value of the land.

> We have stated that "*all* material facts and circumstances" that could influence potential buyers of the remaining parcel should be considered in valuing that property for purposes of determining severance damages. *Commissioner of Transp. v. Silver*, 92 N.J. 507, 515, 457 A.2d 463 (1983). We have also noted that a compensation award should indemnify a landowner as fully as possible and that just compensation should be regarded "'from the point of view of the owner and not the condemnor.'" *Commissioner of Transp. v. William G. Rohrer, Inc.*, 80 N.J. 462, 467, 404 A.2d 29 (1979) (quoting 4 *Nichols, Eminent Domain* § 12.21 at 12-86.1 (3rd ed. 1978)).[12]

Thus, the court held that

> [i]n an appropriate case with an adequate record, damage from increased traffic noise may be a factor that at the time of the taking demonstrably affects the market value of land. *See South Carolina State Highway Dep't v. Bolt*, 242 S.C. 411, 419, 131 S.E.2d 264, 268 (1963) (in a partial taking, market value of remainder can be affected by impact on use of remaining buildings).[13]

In an earlier case, *Dennison v. State,*[14] the court permitted noise to be considered as an element of damage to the remainder when taken into consideration

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[2] Richards v. Wash. Terminal Co., 233 U.S. 546, 34 S. Ct. 654, 58 L. Ed. 1088 (1914); Harrison v. Denver City Tramway Co., 54 Colo. 593, 131 P. 409 (1913).

[3] People *ex rel*. Dep't of Pub. Works v. L.J. Presley, 239 Cal. App. 2d 309, 311, 48 Cal. Rptr. 672, 673 (Cal. App., 3d Dist. 1966) (holding that increased noise, fumes, and annoyance that would result from the more heavily trafficked freeway are not a property interest and, therefore, are not compensable). *See also* State Highway Dep't v. Hollywood Baptist Church, 112 Ga. App. 857, 146 S.E.2d 570 (1965).

[4] New Jersey v. Carroll, 123 N.J. 308, 587 A.2d 260 (1991); State by Road Comm'n v. Williams, 22 Utah 2d 331, 452 P.2d 881 (1969).

[5] City of Amarillo v. Attebury, 303 S.W.2d 804 (Tex. Civ. App. 1957); Brannon v. State Roads Comm'n, 305 Md. 793, 506 A.2d 634 (1986).

[6] Commw., Dep't of Highways v. Williams, 487 S.W.2d 290 (Ky. 1972); Bd. of Transp. v. Brown, 34 N.C. App. 266, 237 S.E.2d 854 (1977), *aff'd*, 296 N.C. 250, 249 S.E.2d 803 (1978).

[7] State, Dep't of Highways v. United Pentecostal Church, 313 So. 2d 886 (La. App., 2d Cir. 1975), *cert. denied*, 318 So. 2d 60 (La. 1975), *cert. denied*, 423 U.S. 1018, 96 S. Ct. 453, 46 L. Ed. 2d 389 (1975); Highway Comm'r v. Bd. of Educ., 116 N.J. Super. 305, 282 A.2d 71 (1971).

[8] City of Lakewood v. DeRoos, 631 P.2d 1140 (Colo. App. Div. 2 1981); People *ex rel*. Dep't of Pub. Works v. Presley, 239 Cal. App. 2d 309, 48 Cal. Rptr. 672 (Cal. App. 3d Dist. 1966); Miss. State Highway Comm'n v. Colonial Inn, Inc., 246 Miss. 422, 149 So. 2d 851 (1963).

[9] Div. of Admin., Dep't of Transp. v. West Palm Beach Garden Club, 352 So. 2d 1177 (Fla. App. 4th Dist. 1977).

[10] State v. Carroll, 123 N.J. at 326, 587 A.2d at 269 (*citing* San Diego Gas & Elec. Co. v. Daley, 205 Cal. App. 3d 1334, 253 Cal. Rptr. 144 (1988); Miss. State Highway Comm'n v. Colonial Inn, 246 Miss. 422, at 430, 149 So. 2d 851, 855 (1963); Dennison v. State, 22 N.Y.2d 409, 239 N.E.2d 708, 293 N.Y.S.2d 68 (1968)).

[11] *See* 4 NICHOLS ON EMINENT DOMAIN § 13.23[4], at 13-204–13-205 (discussing other categories of cases in which the courts have allowed compensation for noise damage).

[12] State by Comm'r of Transp. v. Carroll, 123 N.J. 308, 327, 587 A.2d 260, 269 (1991).

[13] *Id.*

[14] 22 N.Y.2d 409, 239 N.E.2d 708, 293 N.Y.S.2d 68 (1968).

with other damages. As a concurring opinion stated, however, the court was "not, contrary to intimations in the dissenting opinion, "[accepting] future traffic noise as an element of consequential damage" …in 'quite unrestricted form….'"[15] Rather, the reason that compensation for noise was appropriate in that particular case had to do with the property's "quietude, the tranquility and the privacy…, qualities which the claimant prized and desired and which undoubtedly are items that would be taken into account by an owner and a prospective purchaser in fixing the property's market value."[16]

In *Williams v. State,* [17] the State took 3 acres of a parcel of land for construction of a four-lane Interstate highway that had been covered by hardwood trees 70- to 90-ft in height. The "claimant offered proof only as to consequential loss, basing his claim primarily on the negative impact of removal of the wooded area and replacement by the highway, with the attendant loss of privacy, increase in noise and change in the character of the view."[18] The court held that "[l]oss of enhancement due to the location and esthetic qualities of a claimant's property is readily cognizable as consequential damage….It is clear that the presence of an interstate arterial in place of a preserved woodlot had a consequential effect on the market value of the premises remaining…."[19] However, in a later New York case,[20] involving a taking of the owners' property, the court held that the "[r]espondents have sustained no loss of privacy distinct from the noise factor and it would be inappropriate to award damages for increased traffic noise on the facts of this case."[21]

More recently, in *Tilcon Minerals, Inc. v. Commissioner of Transportation,*[22] the plaintiff claimed for the cost of replacement a tree-buffer removed by the transportation department. Tilcon's business was such that the noise, dust, and other pollutants would mean that without the buffer the "property is not suited for its prior use unless the tree buffer is replaced."[23] Because Tilcon had the obligation to remain in compliance with the permit issued for its business, the court held that the department's assessment of damages was insufficient to compensate the company for the effect of the taking on the remainder.[24]

A.1.b. Whether the General Versus Special Damage Rule Applies

There is an absence of judicial unanimity concerning whether there must be proof of special damage when there is a taking and a claim for damages to the remainder.

A case that appears to apply the general versus special damage rule in a taking case is *AGS Embarcadero Associates v. Department of Transportation,*[25] in which the department had condemned a portion of the owner's property for a ramp. The owner's eight-unit apartment building was located within 15 ft of the ramp that the department constructed on the property taken from the owner. The property owner alleged that traffic noise had rendered its building uninhabitable. The court agreed that the condemnee sustained damages that "were *different in kind* from those sustained by the general public."[26] Thus, it was error to exclude evidence of the effect of the noise on the remainder of the property after the taking.[27]

In a New Jersey case involving a partial taking of the owner's property, the State's supreme court held that noise damage is compensable as severance damages. In *New Jersey v. Carroll,*[28] the State sought to acquire private property to widen a highway. Although the court held that the State had engaged in good faith negotiations and properly used its "one-price offer procedure," another issue was whether the state's appraisal was deficient for failing to include damages for increased traffic noise. Although the trial court and appellate court had agreed with the owners "that noise damages may be compensable in a condemnation action, and are not restricted to those whose property is put to special uses,"[29] the Supreme Court of New Jersey reversed. The court found that in New Jersey there was "very little authority to support compensability even for 'special use' properties."[30] Indeed, the court held that "[t]here is simply no established rule that noise damages are compensable in takings of 'special use' properties" and that "other states 'are divided on the issue….'"[31]

[15] 22 N.Y.2d at 413, 239 N.E.2d at 711, 293 N.Y.S.2d at 72 (Fuld, J., concurring). *See also* State *ex rel*. Mo. Highway and Transp. Dep't v. Mosley, 697 S.W.2d 247, 248 (Mo. App., E. Dist. 1985), in which the court held: "[S]uch matters as noise, traffic, unsightliness, possible risk of explosion, inconvenience, and in this case, loss of security and privacy, while not individual, separable elements of compensation in and of themselves, may be considered as factors which contribute to a diminution in value."

[16] 22 N.Y.2d at 414, 239 N.E.2d at 711, 293 N.Y.S.2d at 72.

[17] 90 A.D. 2d 882, 456 N.Y.S.2d 528 (N.Y. App. 3d Dep't 1982).

[18] *Id*. at 883, 456 N.Y.S.2d at 529.

[19] *Id.*

[20] George v. New York, 134 A.D. 2d 847, 521 N.Y.S.2d 593 (N.Y. App. 4th Dep't 1987).

[21] 134 A.D. 2d at 847, 521 N.Y.S.2d at 594.

[22] 2000 Conn. Super. LEXIS 1823 (New Haven Dist. 2000) (Unrept.).

[23] *Id.* at *7.

[24] *Id.* at *9.

[25] 185 Ga. App. 574, 365 S.E.2d 125 (1988).

[26] 185 Ga. App. at 576, 365 S.E.2d at 127 (emphasis supplied).

[27] *Id.*

[28] 123 N.J. 308, 587 A.2d 260 (1991).

[29] 123 N.J. at 324, 587 A.2d at 268 (internal quotation marks omitted). The owners' property was used as a horse farm and was improved with a residence and out-buildings and fence-enclosed training areas. *Id*.

[30] 123 N.J. at 325, 587 A.2d at 268.

[31] *Id.* (citation omitted).

In 2006 in *Michigan Department of Transportation v. Tomkins,*[32] this very issue was addressed — whether in a case involving a partial taking there must be proof of special damage to the remainder before there may be a recovery for noise damage to the remainder. According to the Michigan Court of Appeals, proof of special damage to the remainder is not required in a case involving a physical taking of property. As will be discussed, however, in 2008 the Supreme Court of Michigan reversed the Michigan Court of Appeals' decision. In *Tomkins*, in which the transportation department condemned a strip of the owners' land abutting a road in connection with a new highway, the owners sought additional damages for "the highway effects," including "dust, dirt, noise, vibration, and smell."[33] In deciding the case, the Michigan Court of Appeals and later the Michigan Supreme Court had to determine the constitutionality of Section 20(2) of the Uniform Condemnation Procedures Act (UCPA),[34] Michigan Compiled Laws (MCL) 213.70(2), which excluded the general effects of a public project in calculating just compensation. Thus, as the Michigan Court of Appeals stated, the court was "faced with determining whether Section 20(2) is impermissibly in conflict with constitutional just compensation principles."[35] The transportation department relied on *Spiek v. Michigan Department of Transportation.*[36] In *Spiek*, the Supreme Court of Michigan had

> held that the property owners had no constitutional right to compensation for loss in their property values caused by the noise, dust, vibration, and fumes from the new freeway, because to receive just compensation for project effects, the owner must show that the damages are unique, special, peculiar, or in some way different in kind or character from the effects incurred by all property owners who reside next to busy highways and roads.[37]

The Michigan Court of Appeals in *Tomkins*, however, distinguished the *Spiek* case on the basis that it was an inverse condemnation case and that the court in *Spiek* had "carefully limited application of this rule to inverse condemnation cases where there had been no direct or physical invasion of the landowner's property."[38] The court held "the *Spiek* ruling is not binding on condemnation cases involving partial takings."[39] Thus, "the Spiek ruling does not require that a landowner who suffers severance damages from a partial taking demonstrate damages to the remaining land that are special or 'different in kind' from those suffered by other nearby landowners."[40] The court held that UCPA Section 20(2) "as applied to partial taking cases, impermissibly conflicts with the established constitutional meaning of 'just compensation'…."[41]

As stated, the Supreme Court of Michigan reversed.[42] The court concluded "that the presumption of the constitutionality of MCL 213.70(2) had not been overcome" and that "the circuit court properly relied on the state statute to exclude evidence of 'general effects' damages…."[43] First with respect to the appellate court's interpretation of *Spiek*, the Michigan Supreme Court disagreed with the Court of Appeals' conclusion that the rule in *Spiek* did not apply to partial takings.[44] Second, the court held that prior to 1963, the year the Michigan Constitution was adopted with the terms "just compensation" in Article 10, Section 2, the "case law does not suggest that 'general effects' damages were treated differently in an actual, partial taking and an inverse condemnation case."[45] Thus, general effects damages do not come within the meaning of just compensation. The Michigan Supreme Court reiterated "that those sophisticated in the law before 1963 understood that those

[32] 270 Mich. App. 153, 715 N.W.2d 363 (2006), *rev'd and remanded*, 2008 Mich. LEXIS 1162 (Mich., June 11, 2008).

[33] 270 Mich. App. at 155, 715 N.W.2d at 367.

[34] MCL 213.51 *et seq*.

[35] 270 Mich. App. at 161, 715 N.W.2d at 370.

[36] 456 Mich. 331, 572 N.W.2d 201 (1988).

[37] DOT v. Tomkins, 270 Mich. App. at 162, 715 N.W.2d at 370.

[38] *Id.* at 162, 715 N.W.2d at 370–71.

[39] *Id.*

[40] *Id.*

[41] 270 Mich. App. at 165, 715 N.W.2d at 372 (*citing* Ark. Hwy. Comm'n v Kesner, 239 Ark. 270, 277, 388 S.W.2d 905 (Ark. 1965); La Plata Elec. Ass'n, Inc. v. Cummins, 728 P.2d 696, 700 (Colo. 1986) (stating that "the general damage/special damage distinction has no validity…when reduction in property value results from a taking of a portion of the land held by the property owner"); Commnw. of Ky., Dep't of Hwys. v. Curtis, 385 S.W.2d 48, 51 (Ky. App. 1964) ("[A] reduction in the value of residential property as a consequence of a highway's being brought in close proximity to it may be considered as an element of condemnation damages."); Mo. P. R. Co. v Nicholson, 460 So. 2d 615, 627 (La. App. 1984) ("Aesthetic considerations, unsightliness of the particular project, excessive noise, an inherent fear of living in close proximity to the particular project, in conjunction with other proven factors, …can support an award for severance damages, if these factors serve to reduce the value of the remainder of the property."); City of Crookston v. Erickson, 244 Minn. 321, 325, 69 N.W.2d 909 (Minn. 1955) (stating that where there is a partial taking, "[i]t is sufficient that the damage is shown to have been caused by the taking of part of [the] property even though it is damage of a type suffered by the public as a whole"); New Jersey v. Bd. of Educ. of the City of Elizabeth, 116 N.J. Super. 305, 314, 282 A.2d 71 (N.J. Super. Ct. Law Div. 1971) (stating that where there are damages to the remainder when part of a tract is physically appropriated, "it matters not that the injury is suffered in common with the general public"); State Highway Comm'n v. Bloom, 77 S.D. 452, 461, 93 N.W.2d 572 (S.D. 1958) ("Where a part of an owner's parcel or tract of land is taken for a public improvement such as a public highway, the owner is entitled to be compensated for the part taken and for consequential damage to the part not taken, even though the consequential damage is of a kind suffered by the public in common."); and Yakima v. Dahlin, 5 Wash. App. 129, 131–32, 485 P.2d 628 (1971).

[42] Mich. Dep't of Transp. v. Tomkins, 2008 Mich. LEXIS 1162, at *1 (June 11, 2008).

[43] *Id.* at *3.

[44] *Id.* at *31.

[45] *Id.* at *30.

'general effects' of a taking felt by the public are not compensable in a partial taking."[46]

In general, whether there is proof of noise damage requiring compensation depends on the property and the circumstances. Even increased noise near a park may not be compensable. For example, in *Florida, Department of Transportation v. West Palm Beach Garden Club*,[47] a judgment of $1.7 million for the municipal owner was reversed.[48] Not until the municipality amended its answer did the city assert for the first time that the department's taking would require the construction of a barrier to reduce sound, vibration, and light from the highway.[49] The court, finding that it was unlikely that the property would ever be used for anything other than a park, held that there was no evidence that the park "is no longer beneficially useful as a park because of the noise increase"[50] and that the traffic on I-95 did not affect the park anymore than it affected "tens of thousands of Florida residences…."[51] The court distinguished the decision in *Dennison v. State,*[52] *supra,* in which the court emphasized a park's seclusion and its "sylvan beauty" from the park in question that was located in close proximity to "a screaming jet path for a major airport…."[53]

Although the court did not refer to the general versus special damage rule, the court's opinion suggests that the court was applying a similar type of analysis, because the action did involve a partial taking and alleged damage to the remainder caused by noise, but the court found that the park was affected no more than other properties along I-95. Also implicit in the case is that the increased noise did not reduce the highest and best use of the property, *i.e.*, its use as a park. On the other hand, as discussed next, if the owner shows that increased noise will reduce the highest and best use of the property then noise damages may be recoverable.

A.2. Compensation for Noise Damage Absent a Partial Taking

A.2.a. Whether the General Versus Special Damage Rule Applies

As seen, a physical taking is not required for a landowner to have a claim for damages for highway traffic noise.[54] However, where there is no physical taking of property, the owner may have to show that the noise of which he or she complains is different in kind from that suffered by the general public.

In a case from the State of Washington, the court applied the special damage rule and found that there was special damage to the subject property. No land, however, was taken from the owner in connection with the city's proposed construction of an overpass with a solid concrete wall 20 ft in height approximately 15 ft from the plaintiff's warehouse and office.[55] The inverse condemnation action alleged that the sound of traffic moving within 1 and 1/2 ft of the building would cause a build up of noise reverberating against the concrete wall that would be "intolerable" and render the office area unusable.[56] The appellate court agreed with the trial court's ruling that allowed the jury to consider noise damages. The appellate court stated:

> The instant case does not involve a physical taking of respondent's property. This fact does not prevent an award for damages…. *Generally, compensation is not allowed in such circumstances where the injury or damage is one suffered in common with the general public.* On the other hand, where the injury or damage is special or peculiar to the particular property involved and not such as is common to all the property in the neighborhood, compensation may be allowed….[57]
>
> We believe the ramp to be constructed in this case may create an echo chamber for one-way traffic immediately adjacent to the south end of respondent's warehouse and may thereby materially affect the fair market value of respondent's property. *This is a special damage differing in kind from the damage sustained by other properties due to the improvement in question.* In this situation the jury may consider noise as a factor.[58]

In *Felts v. Harris County, Texas,*[59] the court rejected the county's argument that there could be no constitutional damages to property unless "the government makes a physical appropriation, denies access to the property, or denies a permit for development."[60] When selling their house, the owners, who alleged in an inverse condemnation case that noise from the highway had damaged their property,[61] disclosed the proposed four-lane "major thoroughfare" highway project that would be adjacent their property line. The owners eventually sold the house for about $40,000 less than the original asking price.[62] Although a jury verdict was returned for the owners, the court of appeals reversed and the Supreme Court of Texas affirmed a judgment for the county.[63] In addressing the owners' claim, the court stated that injuries to property sustained in common

[46] *Id.* at *37.

[47] 352 So. 2d 1177 (Fla. App. 4th Dist. 1977).

[48] *Id.* at 1178.

[49] *Id.* at 1179.

[50] *Id.* at 1180–81.

[51] *Id.* at 1181.

[52] 48 Misc. 2d 778, 265 N.Y.S.2d 671 (Ct. Cl. 1965), *aff'd* 22 N.Y.2d 409, 265 N.Y.S.2d 68, 239 N.E.2d 708 (N.Y. 1968).

[53] Fla. DOT v. West Palm Beach Garden Club, 352 So. 2d at 1181.

[54] Felts v. Harris County, Texas, 915 S.W.2d 482, 484 (Tex. 1996).

[55] City of Yakima v. Dahlin, 5 Wash. App. 129, 485 P.2d 628 (Wash. Ct. App. 1971).

[56] 5 Wash. App. at 131, 485 P.2d at 630.

[57] *Id.* (citation omitted, emphases supplied).

[58] 5 Wash. App. at 133, 485 P.2d at 630 (emphasis supplied).

[59] 915 S.W.2d 482 (Tex. 1996).

[60] *Id.* at 484.

[61] *Id.* at 483.

[62] *Id.*

[63] *Id.* at 484.

with the "community in which the property is situated…[that] are not connected with the landowner's use and enjoyment of property" are not compensable.[64] The court held that the owners' property would not experience noise any different from that experienced by their neighbors.[65] Moreover, "[t]he fact that some damages may be greater if the property is in closer proximity to the roadway does not suffice to render such damages constitutionally compensable…."[66]

A.2.b. Whether a Total or Substantial Deprivation of Use of the Property Is Required

With respect to a claim for noise damages, depending on the jurisdiction, it may be held in a case that does not involve a partial taking of the owner's property that the owner must demonstrate a deprivation of all, or substantially all, of his or her beneficial use of the property instead of special damage caused by noise to the property. For example, in 2005 a claim for damages for noise and vibrations caused by changes to a railroad track near the plaintiff's business was rejected in *Suchon v. Wisconsin Central Ltd*.[67] The court held that

> Wisconsin law does not recognize "mere consequential damage to property resulting from governmental action…." An actionable taking requires either an actual physical occupation by the condemning authority or a restriction on the use of the property that "deprives the owner of all, or substantially all of the beneficial use of his property."
>
> Plaintiff does not deny that it is his burden to show that he has been deprived of all or substantially all of the beneficial use of his property. He argues that this is exactly what he has suffered because, he alleges, customers and suppliers are frequently cut off from access to his building when trains block the railroad crossings, visitors to his business feel as if they are experiencing an earthquake when a train goes by and his shop is exposed to dust, fumes and debris thrown up by passing trains. Although the dust, inconvenience and noise are unpleasant impediments to the shop's operation, they fall far short of a taking…. Plaintiff can continue his operations by taking precautions such as painting vehicles inside and mixing paint when trains are not passing by.[68]

It is not clear that other jurisdictions require such a showing of a complete or substantial deprivation of use of the subject property. In *Knight v. City of Billings,*[69] after the city widened a street conditions changed dramatically, including an increase in "noise from passing traffic [that was] so loud that front doors must be closed for conversation to be heard inside."[70] Although the city argued that it did not "create the business growth" that caused the noise but merely adapted the street to it,[71] the Supreme Court of Montana disagreed. The court observed that a similar argument could be used with respect to larger airports and noise from aircraft, "[y]et the cases recognize that inverse condemnation has occurred…."[72] One of the issues for the court arose from the fact that property owners on the other side of the street "were compensated either in eminent domain proceedings, or by agreement with the city."[73] The court held that "under the unique facts of this case" there had been a taking but "caution[ed] that this holding is limited to the situation here, where a physical taking across the street occurred."[74]

In another Montana case, after the completion of a bridge there was an "immediate" increase in traffic noise.[75] The Supreme Court of Montana stated that it

> [s]ympathize[d] with the plight of the Landowners. However, the wheels of progress shall not be slowed. There is no doubt that increased traffic volume, traffic fumes, noise, dust and difficulty of ingress and egress caused inconvenience or discomfort to the property owners when the Reserve Street Bridge was opened. Nonetheless, we find these detriments to be noncompensable.[76]

In *Butler v. Gwinnett County,*[77] after a condemnation of the owners' property the owners filed suit 2 years later in inverse condemnation alleging that a taking caused by "negligent construction of the access lane damaged their remaining property by causing noise, pollution, erosion and other problems."[78] The court recognized that "[d]amages caused by negligent or improper construction on condemned property…are recov-

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[64] *Id.* at 485 (*citing* TEX. PROP. CODE § 21.042(d); State v. Schmidt, 867 S.W.2d 769, 779–81 (Tex. 1993); State v. Carpenter, 126 Tex. 604, 89 S.W.2d 194, 201 (1936); Gainesville, H. & W. R.R. v. Hall, 78 Tex. 169, 14 S.W. 259 (1890); Texarkana & N.W. R.R. v. Goldberg, 68 Tex. 685, 5 S.W. 824, 826 (1887)).

[65] *Id.*

[66] *Id.* (*citing Schmidt*, 867 S.W.2d at 781; NICHOLS ON EMINENT DOMAIN § 6.08[2], at 6-130–6-132 (3d ed. rev. 1994) ("If the damage suffered is of a type similar to that suffered by the public in general or by other neighboring landowners, even if different in degree, …no compensation is required regardless of the severity of the injury sustained.")).

[67] 2005 U.S. Dist. LEXIS 4343 (W.D. Wis. 2005).

[68] *Id.* at *6–7 (emphasis supplied) (*quoting* Howell Plaza, Inc. v. State Highway Comm'n, 66 Wis. 2d 720, 725, 226 N.W.2d 185, 188 (1975) (observing that a taking requires more than impairment of value of farm from noxious odors from municipal sewerage disposal plant, or partial obstruction of ingress to and egress from plaintiff's property or obstruction of view from property)).

[69] 197 Mont. 165, 642 P.2d 141 (1982).

[70] 197 Mont. at 169, 642 P.2d at 143.

[71] 197 Mont. at 171, 642 P.2d at 144.

[72] *Id.* (citation omitted).

[73] 197 Mont. at 173, 642 P.2d at 145.

[74] 197 Mont. at 174, 642 P.2d at 146.

[75] Adams v. Dep't of Highways of Montana*,* 230 Mont. 393, 753 P.2d 846 (1988).

[76] 230 Mont. at 401, 753 P.2d at 851. The court stated that "while a reduction in property values may result from the noise, light, vibration, or fumes produced by the proximity of increased vehicular traffic on a newly constructed highway, such consequential damage is not usually treated as 'damage' in the constitutional sense." 230 Mont. at 403, 753 P.2d at 852.

[77] 223 Ga. App. 703, 479 S.E.2d 11 (1996), *cert. denied*, 1997 Ga. LEXIS 335.

[78] 223 Ga. App. at 704, 479 S.E.2d at 12–13.

erable in a suit separate from the condemnation proceeding."[79] In this case the owners' own expert conceded that the damages were the result of "the overall manner in which the County chose to design and use the improvement."[80] The court ruled that there was no taking caused by negligent construction and that "[f]rom a policy perspective, allowing this claim to proceed will permit unending inverse condemnation and damage claims from property owners who decide, after construction, that the improvement's design impacts them in a way they did not anticipate."[81]

A.2.c. Compensation for Temporary Increase in Noise

Temporary inconveniences caused by "noise, dust, increased traffic, and other inconveniences incident to the building of a highway" are not compensable."[82] However, there may be evidence of special damage to property caused by noise that is peculiar to the owner's property.

In *Hillman v. Department of Transportation,*[83] a case involving easements that were taken for construction for a 13-month period for road work, the court rejected the transportation department's claim that any compensation for noise damages was barred by the "temporary inconvenience rule" as stated in two earlier Georgia cases, *State Highway Department v. Hollywood Baptist Church of Rome*[84] and *Department of Transportation v. Dent.*[85] In *Hillman* the Supreme Court of Georgia determined that

> the only proper distinction to be made in cases of temporary takings is the same requirement in force for permanent takings. That is that the consequential damages must be special to the condemnee and not be those suffered by the public in general.[86]

> *[T]he fact that the property taken is an easement and is held by the public only temporarily does not authorize the condemning body to impose special damages which diminish the value of the land not taken.* If the taking of a temporary easement can be shown by competent evidence to have diminished the fair market value of the land not taken, the owner is entitled to just and adequate compensation.[87]

Thus, the *Hillman* court held that the owner was entitled to show that the "construction easement caused some special damage to his remaining property, other than the general inconvenience, noise, dust and obstruction of the construction process…."[88]

B. COMPENSATION FOR NOISE DAMAGE FROM AIRCRAFT

B.1. United States v. Causby and Its Progeny

As one authority states,

> [o]wners of property near a government-owned airport may have a cause of action for an unconstitutional *de facto* taking because of noise and vibration caused by overflights of jet aircraft landing and taking off, and this [fact] is true even though their property was purchased after the beginning of these conditions.[89]

There are numerous cases involving airport noise in which some property owners recovered compensation for a taking of their property caused by aircraft noise. Although there is some authority holding that for ground or flight operations to constitute a taking or damaging of property, there must be a physical invasion of the property,[90] the U.S. Supreme Court and other courts do not require a direct, physical invasion of the property.[91]

The seminal case in this area is *United States v. Causby.*[92] In *Causby*, the respondents owned 28 acres near an airport outside Greensboro, North Carolina; the owners used the property principally for raising chickens.[93] The United States had leased the nearby airport for the use of military aircraft, including bombers, transports, and fighters.[94] The glide-path for one runway as approved at the time by the Civil Aeronautics Authority resulted in planes passing over the property's

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[79] *Id.* (citation omitted).

[80] *Id.*

[81] 223 Ga. App. at 705, 479 S.E.2d at 13.

[82] Felix v. Harris County, 915 S.W.2d at 485 (*citing* Texas v. Biggar, 873 S.W.2d 11, 14 (Tex. 1994); Texas v. Schmidt, 37 Tex. Sup. J. 47, 867 S.W.2d 769, 775 (1993); City of Austin v. Avenue Corp., 704 S.W.2d 11, 12 (Tex. 1986); L-M-S Inc. v. Blackwell, 149 Tex. 348, 233 S.W.2d 286, 289 (Tex. 1950)).

[83] 257 Ga. 338, 359 S.E.2d 637 (1987).

[84] 112 Ga. App. 857, 146 S.E.2d 570 (1965).

[85] 142 Ga. App. 94, 235 S.E.2d 610 (1977).

[86] 257 Ga. at 339, 359 S.E.2d at 639.

[87] 257 Ga. at 340, 359 S.E.2d at 640 (emphasis supplied).

[88] *Id.* (citation omitted).

[89] 51 N.Y. JUR. 2d *Eminent Domain* § 103 (*citing* Cunliffe v. Monroe County, 63 Misc. 2d 62, 312 N.Y.S.2d 879 (N.Y. Sup. 1970) (holding that flights had not rendered the property substantially uninhabitable). *See also* 3775 Genesee St. Inc. v. State, 99 Misc. 2d 59, 415 N.Y.S.2d 575 (Ct. Cl. 1979) (claim dismissed). *See also* Annotation, *Airport Operations or Flight of Aircraft as Constituting Taking or Damaging of Property*, 22 A.L.R. 4th 863 (2008 Supp.); Young v. Palm Beach County, 443 So. 2d 450 (Fla. App. 4th Dist. 1984) (cause of action stated in inverse condemnation)).

[90] 22 A.L.R. 4th 863, § 3 (*citing, e.g.,* Breneman v. United States, 57 Fed. Cl. 571 (2003) [*aff'd*, 2004 U.S. App. LEXIS 9987 (Fed. Cir. 2004)]; City of Austin v. Travis County Landfill Co., LLC, 73 S.W.3d 234 (Tex. 2002) *reh'g overruled* (May 30, 2002)).

[91] *Id.* § 4 (*citing, e.g.,* Garamella v. City of Bridgeport, 63 F. Supp. 2d 198 (D. Conn. 1999); Walsh v. Avalon Aviation, Inc., 118 F. Supp. 2d 675 (D. Md. 2000); *but see Hero Lands Co. v. United States*, 1 Cl. Ct. 102, 554 F. Supp. 1263 (1983), *aff'd*, 727 F.2d 1118 (Fed. Cir. 1983)).

[92] 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946) (*superseded by statute as stated in, distinguished by, cited in dissenting opinion,* McCarran Int'l Airport v. Sisolak, 137 P.3d 1110 (Nev. 2006)).

[93] 328 U.S. at 260, 66 S. Ct. at 1064, 90 L. Ed. at 1208.

[94] 328 U.S. at 259, 66 S. Ct. at 1064, 90 L. Ed. at 1209.

house and barn at distances of 67 ft above the house and 63 ft above the barn.[95] Because the frequent, low-flying military operations were conducted within the "navigable air space of the United States," over which the United States had complete sovereignty, and were "within the minimum safe altitudes of flight which had been prescribed, they were an exercise of the declared right of travel through the airspace."[96] Nevertheless, there was a taking of the landowners' property.

Although there had been no physical invasion or taking of the property,[97] the United States conceded at oral argument that "if the flights over respondents' property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment."[98] However, in *Causby* the government defended against the landowners' claim on the basis of federal law[99] that provided that "the United States has 'complete and exclusive national sovereignty in the air space' over this country."[100] Thus, according to the government, there was no taking because

> these flights were within the minimum safe altitudes of flight which had been prescribed, [and] they were an exercise of the declared right of travel through the airspace. The United States concludes … that at most there was merely incidental damage occurring as a consequence of authorized air navigation. It also argues that the landowner does not own superadjacent airspace which he has not subjected to possession by the erection of structures or other occupancy.[101]

The Court reasoned, however, that

> [i]f, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.[102]

> [T]he line of flight is over the land. And the land is appropriated as directly and completely as if it were used for the runways themselves.[103]

Moreover, the fact that the glide-path was approved by a federal agency did not matter. "The path of glide governs the method of operating—of landing or taking off. The altitude required for that operation is not the minimum safe altitude of flight which is the downward reach of the navigable airspace."[104]

The Supreme Court observed that "[i]t is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*Cujus est solum ejus est usque ad coelum*."[105] However, "that doctrine has no place in the modern world."[106]

> The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.[107]

Nevertheless, the Court held that "if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere…. The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land."[108] Furthermore, "[t]he fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material…. [T]he flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it."[109]

The Court referred to an earlier case in which the Court had held that the continual firing of artillery over the owner's land warranted a finding that a servitude had been imposed in favor of the United States, giving rise to the petitioner's right to compensation.[110] The Court held that

> [t]he path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value.[111]

The Court ruled that the frequent overflights at such low altitude constituted a taking of the property, the same as if the "United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly…."[112] However, the Court held that "[f]lights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of

[95] 328 U.S. at 258, 66 S. Ct. at 1064, 90 L. Ed. at 1208.

[96] 328 U.S. at 260, 66 S. Ct. at 1065, 90 L. Ed. at 1209–10.

[97] 328 U.S. at 260, 66 S. Ct. at 1065, 90 L. Ed. at 1210.

[98] 328 U.S. at 261, 66 S. Ct. at 1065, 90 L. Ed. at 1210.

[99] Air Commerce Act of 1926, 44 Stat. 568, 49 U S.C. § 171, as amended by the Civil Aeronautics Act of 1938, 52 Stat. 973 [*Superseded*]. *See* 49 U.S.C. § 40102(a)(30) (2006) ("'[N]avigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft."); *see* 49 U.S.C. § 40103(a) (2006) (declaring sovereignty and public right of transit).

[100] 328 U.S. at 260, 66 S. Ct. at 1065, 90 L. Ed. at 1209 (*citing* 49 U.S.C. § 176(a)).

[101] 328 U.S. at 260, 66 S. Ct. at 1065, 90 L. Ed. at 1210.

[102] 328 U.S. at 261, 66 S. Ct. at 1066, 90 L. Ed. at 1210 (footnote omitted).

[103] 328 U.S. at 262, 66 S. Ct. at 1066, 90 L. Ed. at 1211.

[104] 328 U.S. at 263, 66 S. Ct. at 1067, 90 L. Ed. at 1211.

[105] 328 U.S. at 260–61, 66 S. Ct. at 1065, 90 L. Ed. at 1210.

[106] *Id.*

[107] *Id.*

[108] 328 U.S. at 264, 66 S. Ct. at 1067, 90 L. Ed. at 1212.

[109] *Id.*

[110] Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 43 S. Ct. 135, 67 L. Ed. 287 (1922).

[111] United States v. Causby, 328 U.S. at 262, 66 S. Ct. at 1066, 90 L. Ed. at 1211.

[112] 328 U.S. at 264–65, 66 S. Ct. at 1067, 90 L. Ed. at 1212.

the land."[113] Because it was not clear on the record whether the taking was a temporary or permanent one, the Court remanded the case to the Court of Claims.[114]

Fourteen years after *Causby*, the Supreme Court of the State of Washington in *Ackerman v. Port of Seattle*[115] had occasion to apply the *Causby* rule to takeoffs and landings over open and unoccupied land. The question presented was whether such takeoffs and landings at the newly opened Seattle-Tacoma International Airport constituted a taking in violation of the State Constitution, and, if so, who must pay the compensation, the governmental entity operating the airport, or others.

A key issue in *Ackerman* was the interpretation of what is navigable airspace under the Civil Aeronautics Act.[116] The Port argued that "Congress has made the 'airspace' a public highway, and, therefore, appellants have never owned any rights in the airspace which could be subject to a governmental taking."[117] The court, however, disagreed and followed *Causby*. The court held that

> [i]n landing and taking off, a plane necessarily flies a few feet, even a few inches, above the ground for some instants. Whether this occurs over airport property or over private property depends upon the size and type of the plane, as well as the size of the airport and the length of the particular runway. We do not believe that the Civil Aeronautics Act is to be interpreted as allowing the civil aeronautics board to place such flights over private property within the public domain. Such an interpretation would be a strained and unnatural construction of the language of the act. Congress has defined *navigable airspace* (*public domain*) only in terms of minimum safe altitudes of flight; this definition has not been changed since the *Causby* case, *supra*. "Thus, it is apparent that the path of glide" used by planes in landing and taking off from airports "is not the minimum safe altitude of flight within the meaning of the statute."[118]

The court held that the overflights constituted a taking of an air easement over the owners' land.[119] Equally important, the *Ackerman* decision established that the Port was liable for the taking.[120] The court held that

> [h]aving the power to acquire an approach way by condemnation, the Port, allegedly, failed to exercise that power, with the result that the appellants' private airspace is allegedly being used as an approach way, without just compensation first having been paid to them. Clearly, an adequate approach way is as necessary a part of an airport as is the ground on which the airstrip, itself, is constructed, if the private airspace of adjacent landowners is not to be invaded by airplanes using the airport. The taking of an approach way is thus reasonably necessary to the maintenance and operation of the airstrip. "The taking or damaging of land to the extent reasonably necessary to the *maintenance and operation of other property devoted to a public use*, is a taking or damaging for a public use and subject to the provisions of Art. I, § 16 (amendment 9) of the state constitution."[121]

In 1999 in *Melillo v. City of New Haven,*[122] the Supreme Court of Connecticut followed the holding in *Causby*. In *Melillo* the homeowners' property was located several hundred ft from the Tweed-New Haven Airport and less than 1500 ft from the end of the runway.[123] Between 1975 and 1984 there was no commercial jet service but Air Wisconsin began such service in 1985.[124] A substantial number of jets flew over the owners' home, frequently at less than 100 ft above the ground.[125] Although the trial court held that earlier commercial jet traffic from 1967 to 1975 had resulted in a taking for constitutional purposes, the owners had not acquired the property until 1979.[126] Although the "earlier, permanent taking did not automatically bar the plaintiffs from establishing a second compensable taking by virtue of the Air Wisconsin flights,"[127] the plaintiffs failed to prove that there was another taking "to an even greater extent by the substantially more severe [Air Wisconsin] overflights from 1984 to 1986," at least according to the trial court.[128] On this issue the Supreme Court of Connecticut held that the plaintiffs' evidence below was sufficient to show that there was a substantial interference with the owners' enjoyment of the property. Nevertheless, the court agreed that because the owners' expert was not credible there was no proof of a "*compensable* taking."[129]

In finding for the defendant the court stated that

> "[t]he answer to the question of when a takings claim has accrued requires the court to consider each element as it relates to the unique facts of a particular case.... Avigation easement claims cannot be tried on a 'one size fits all' formula. Each element must be established for each parcel, and evidence of a taking over one parcel in a case does not, without more, support a finding of a taking over other parcels...."[130]

Thus, there is a right on the part of landowners to have peaceable enjoyment of the property from airports, but, as discussed below, whether a landowner has a right to compensation depends on the facts of each case.

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[113] 328 U.S. at 266, 66 S. Ct. at 1068, 90 L. Ed. at 1213.

[114] 328 U.S. at 268, 66 S. Ct. at 1069, 90 L. Ed. at 1214.

[115] 55 Wash. 2d 400, 348 P.2d 664 (1960).

[116] 49 U.S.C.A. § 401 *et seq.* [*superseded*; *see* note 98, *supra*.]

[117] 55 Wash. 2d at 409, 348 P.2d at 669.

[118] 55 Wash. 2d at 412, 348 P.2d at 671 (citation omitted).

[119] *Id.*

[120] 55 Wash. 2d at 413, 348 P.2d at 671.

[121] 55 Wash. 2d at 413, 348 P.2d at 671–72 (emphasis in original).

[122] 249 Conn. 138, 732 A.2d 133 (1999).

[123] *Id.* at 140, 732 A.2d at 135.

[124] 249 Conn. at 141, 732 A.2d at 136.

[125] *Id.*

[126] 249 Conn. at 145, 732 A.2d at 138.

[127] 249 Conn. at 146, 732 A.2d at 138.

[128] 249 Conn. at 146, 732 A.2d at 139 (internal quotation marks omitted).

[129] 249 Conn. at 150, 732 A.2d at 141 (emphasis in original).

[130] 249 Conn. at 149, 732 A.2d at 140 (*quoting* Persyn v. United States, 34 Fed. Cl. 187, 196 (1995)).

B.2. Compensation Regardless of Whether Flights Are Above or Below Minimum Safe Altitudes

In several cases the courts have considered whether a property owner had established that a taking of property had occurred because of noise caused by overflights of aircraft. Although navigable airspace, that is, airspace that is regulated by the Federal Aviation Administration (FAA), has been defined as that airspace that is 500 ft above ground level in noncongested areas and 1,000 ft above ground level in congested areas, such a rule does not preclude a landowner from having a claim for noise damages above or below those altitudes.[131] As held in *Branning v. United States*,[132] "it is clear that the Government's liability for a taking is not precluded merely because the flights of Government aircraft are in what Congress has declared to be navigable airspace and subject to its regulation." As held later in *Argent v. United States,*[133] the government may be required to pay compensation for a taking caused by noise damages at altitudes above 500 or 1,000 ft, notwithstanding the law on what constitutes navigable airspace that is in the public domain. When airplanes are at altitudes at less than 500 ft for takeoffs and landings at government airports, the landowner may have a claim for compensation because the landowner has a property right to useable airspace below 500 ft.[134]

In *Argent v. United States, supra,* the owners of 46 parcels of land surrounding the Naval Air Station at Whidbey Island, Washington, sued in inverse condemnation because of aircraft noise at an airstrip used by the Navy to simulate landings on aircraft carriers at sea. The court noted that since *Causby* "federal courts have repeatedly confirmed that the United States may convert private property to public use by its operation of aircraft."[135] The court observed that there are cases holding "that the United States might be liable for flights below 500 feet in noncongested areas (or 1000 feet in congested areas), but that flights at higher altitudes did not interfere with the landowner's use of the surface."[136]

The court held, however, that there is no such *per se* or mechanical rule: "while the facts, reasoning, and rules of *Causby* have always guided this corner of takings law, they do not imprison it."[137] If the plaintiffs "allege a peculiar burden," then the plaintiffs have stated a claim.[138] Thus, the court held that "where, as here, plaintiffs complain of a peculiarly burdensome pattern of activity, including both intrusive and non-intrusive flights, that significantly impairs their use and enjoyment of their land, those plaintiffs may state a cause of action."[139] Although certain claims prior to 1986 were barred because the case was filed in 1992, and a claim must be filed against the United States for a taking within 6 years of the date the claim arose,[140] the court held:

> "The taking of an avigation easement by the Government occurs when the Government begins to operate aircraft regularly and frequently over a parcel of land at low altitudes, with the intention of continuing such flights indefinitely…." The United States may effect a second taking by, inter alia, increasing the number of flights…or introducing noisier aircraft….[141]

The court found that "the plaintiffs may be able to show that the Navy sufficiently increased the scope of its easement in the years after 1986" so as to entitle them to a recovery.[142]

These issues were visited recently with different outcomes by the Indiana Court of Appeals and the Supreme Court of Indiana. The question was whether a compensable taking occurred when a neighborhood was affected by noise from overflights of aircraft. In *Biddle v. BAA Indianapolis, LLC,*[143] the Indiana Court of Appeals considered a homeowners' appeal of the trial court's grant of a summary judgment in favor of the defendant.[144] The airport in question had constructed a new runway on a location nearly identical to the one proposed in an earlier master plan for the airport.[145] Arriving aircraft passed over the owners' property at distances of approximately 1,300 to 1,500 ft above the ground; departing aircraft from the runway passed over the neighborhood at distances of 2,000 to 4,800 ft, apparently 24 hours a day.[146] The defendants argued that

[131] *See* 14 C.F.R. § 91.119 (2005).

[132] 228 Ct. Cl. 240, 257, 654 F.2d 88, 99 (1981).

[133] 124 F.3d 1277 (Fed. Cir. 1997).

[134] McCarran Int'l Airport v. Sisolak*,* 137 P.3d 1110, 1119 (Nev. 2006).

[135] 124 F.3d at 1281.

[136] *Id.* (*citing* Lacey v. United States, 219 Ct. Cl. 551, 595 F.2d 614, 616 (1979) (treating 500 ft as line of demarcation between compensable and noncompensable over-flights); Aaron v. United States, 160 Ct. Cl. 295, 311 F.2d 798, 801 (1963) (allowing claims based on flights below 500 ft, while denying those based on flights over 500 ft); Matson v. United States, 145 Ct. Cl. 225, 171 F. Supp. 283, 286 (1959) (allowing recovery for flights under 500 ft)).

[137] 124 F.3d at 1282.

[138] *Id.* at 1283.

[139] *Id.* at 1284 (*citing* Griggs v. Allegheny County*,* 369 U.S. 84, 87, 82 S. Ct. 531, 7 L. Ed. 2d 585 (1962) (affirming that a taking occurred even though some of the activities of which the plaintiff complained were near, but not over, the plaintiff's property); Branning v. United States, 228 Ct. Cl. 240, 242, 654 F.2d 88, 90 (1981) (finding that the United States took private land without violating the landowner's airspace because its over-flights were "peculiarly burdensome" to the landowner)).

[140] *Id.* at 1285 (*citing* 28 U.S.C. § 2501).

[141] *Id.* (citations omitted).

[142] *Id.* at 1286.

[143] 830 N.E.2d 76 (Ind. App. 5th Dist. 2005), *aff'd in part, superseded in part*, 860 N.E.2d 570 (2007).

[144] *Id.* at 79. Although the appeals court affirmed in part the grant of summary judgment to appellees on the inverse condemnation claim, the summary judgment was reversed in part and remanded regarding whether the flights constituted a taking.

[145] *Id.*

[146] *Id.*

because the flights were above an altitude of 1,000 ft mandated for flights in congested areas, there was not a compensable taking of the owners' property.[147]

The Indiana Court of Appeals, however, relied on cases holding that even if aircraft are operating in navigable airspace above the minimum prescribed for safe flight, there still may be a taking.[148] The court reversed a summary judgment below, dismissing the owners' inverse condemnation claim:

> There can be no imaginary line above which flights cannot result in a taking and below which they may without some rational basis for the imposition of that boundary. It is conceivable that constant or even intermittent flights in the navigable airspace may interfere more in the use and enjoyment of property than the occasional flight below the navigable airspace. Landowners who feel that they are subject to a taking because of flights in the navigable airspace should have the opportunity to present their claims to a trier of fact and not have them dismissed because of an arbitrary rule which apparently was written with safety as its concern, not the legitimate and enjoyable use of property.[149]

Thus, the court held that a taking may occur based on overflights even though those flights above an owner's property occur in navigable airspace above 1,000 ft in congested areas.[150]

In *Biddle* the defendants argued that the plaintiffs could not show that they had suffered an injury special and peculiar to the owners' property in contrast to inconvenience suffered by the public generally.[151] However, the court defined "public" to mean "the entire public in general," i.e., all residents of Indianapolis.[152] "[B]y IAA's own admission, the overflights affect thousands of homeowners, a tiny fraction of the hundreds of thousands that live in the greater Indianapolis area."[153] The court held "that the injury suffered by the Homeowners is not suffered by the public generally but is special and peculiar to the Homeowners, who have chosen to file a claim against IAA, and others similarly situated who have not sought legal recourse."[154]

The Supreme Court of Indiana reversed.[155] First, the court held that "[w]hether a taking occurred can be subject to summary judgment" and that "appellate review of whether a taking occurred is proper."[156] Second, the court stated that it would follow the "great weight of Federal authority," holding that a taking occurs only when aircraft are present in the 'superjacent airspace' (meaning the air the owner reasonably occupies for his own use)."[157] Third, the court recognized the rule in Causby, *supra*, that noise from aircraft overflying a landowner's property may result in a taking of a permanent or temporary nature, "[e]ven though planes flew within navigable airspace" regulated by the FAA.[158] However, the Indiana Supreme Court relied on *Aaron v. United States,*[159] in which the U.S. Court of Claims "articulated a presumption based on navigable airspace boundaries. When an aircraft flies within the navigable airspace directly above private property, the court presumes there is no taking unless the effect on private property is 'so severe as to amount to a practical destruction or a substantial impairment of it.'"[160]

The court agreed that some of its "inverse condemnation cases have labeled the required degree of harm for takings a 'special' or 'peculiar' injury," but the court stated that the test did not "add much to the tasks of identifying takings." [161] The court adopted a rule combining the U.S. Supreme Court's "*Lingle* analysis"[162]

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[147] *Id.* at 83. The court cited 14 C.F.R. § 91.119 (2005), which states:

> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
>
> (a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.
>
> (b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.
>
> (c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

[148] *Id*. (*citing* Aaron v. United States, 160 Ct. Cl. 295, 311 F.2d 798 (1963) (concluding that unavoidable damage could be so severe as to amount to a practical destruction or substantial impairment of the property even for flights exceeding 500 ft, the minimum altitude for flight in noncongested areas); Stephens v. United States, 11 Cl. Ct. 352, 362 (1986) (concluding as a general proposition that because the flights occurred at more than 1000 ft over congested areas, there was no taking but recognizing an exception in that "a presumption of non-taking…can be overcome by proof of destruction of, or substantial impairment to the property"); Thornburg v. Port of Portland, 233 Or. 178, 198, 376 P.2d 100, 109 (1962) (a "noise-nuisance" could amount to a taking because it was possible that the person could be ousted from the legitimate use of the property by aircraft flying above 500 ft)).

[149] *Id.* at 84.

[150] *Id.*

[151] *Id.* at 84–85.

[152] *Id.* at 85.

[153] *Id.*

[154] *Id.* (footnote omitted). One landowner's claim was precluded on the basis that the prior owner of the property had been compensated and the new owners had "accepted the home with the noise and all other effects of the airspace." *Id.* at 86. The defendant airport was a third-party beneficiary of the agreement between the current and prior owners of the property. *Id.*

[155] Biddle v. BAA Indianapolis, LLC, 860 N.E.2d 570 (2007).

[156] *Id.* at 575.

[157] *Id.* at 578 (*quoting* Branning v. United States, 228 Ct. Cl. 240, 654 F.2d 88, 99 (1981) (some internal quotation marks omitted).

[158] *Id.* at 579.

[159] 160 Ct. Cl. 295, 311 F.2d 798 (1963).

[160] Biddle v. BAA Indianapolis LLC, 860 N.E.2d at 579.

[161] *Id*. at 580.

[162] In describing Lingle v. Chevron USA, Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005), the Supreme Court

with the "Aaron presumption," which the court deemed to be "a more precise standard" for determining whether noise from overflights of aircraft results in a taking.[163] In reversing the Court of Appeals and agreeing with the trial court, the Indiana Supreme Court held that the

> [h]omeowners did not demonstrate injury sufficient to support an exception to the Aaron presumption. For one thing, the flight altitudes alleged are several times higher than the minimum navigable airspace. While the noise from aircraft flying between 1,300 and 4,800 feet above ground is no doubt considerable, the trial court was warranted in concluding that it does not amount to a "practical destruction" or "substantial impairment" of Homeowners' use of their properties. Homeowners still make many valuable uses of their properties in spite of the noise.[164]

In sum, the court agreed with the trial court that the aircraft noise had not resulted in a taking and that a summary judgment for the defendant was indeed proper.[165]

B.3. Liability for Noise Damages Based on Resumption of Flights or Increased Noise

The noise cases in recent years and claims of a taking without a physical taking of property have dealt with a variety of issues. As seen in the *Biddle* and *Argent* cases, *supra*, one issue that has arisen is whether the landowner has a claim for compensation for a later taking allegedly caused by an increase in noise because of additional overflights or an increase in noise as a result of the resumption of operations and resulting overflights of jet aircraft.

In *City of Austin v. Travis County Landfill Co. LLC,*[166] the court held that an increase in noise must be such that the property may no longer be used for its intended purpose. The Supreme Court of Texas reversed an appellate court's decision affirming a trial court's judgment for an amount exceeding $2.9 million for a taking caused by flight operations at Austin-Bergstrom International Airport (ABIA). The airport had opened in 1997 on the site of the former Bergstrom Air Force Base which had closed in 1991. A landfill owned a 133-acre tract of land about 1/2 mi from the airport's main runway.[167] The former owner of the property had granted an avigation easement allowing over 60,900 military aircraft flights over the property each year.[168] The new owner sued the city on the basis that the city's civilian flights constituted a taking of the landfill's property not authorized by the easement for military flights.[169]

The court held that the owner had to show that "the flights over private land [are]…'so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.'"[170] Moreover, the court, relying on a number of federal and state cases, held that the standard for a taking was that "the overflight-related effects must directly, immediately, and substantially impact the property's surface so that it is no longer useable for its intended purpose."[171]

The court reversed the judgment below because the jury was allowed to find on an alternate basis "that the overflights caused a decrease in the property's market

of Indiana stated that "regulation effects a taking if it deprives an owner of all or substantially all economic or productive use of his or her property." 860 N.E.2d at 577.

[163] 860 N.E.2d at 580.

[164] *Id.*

[165] *Id.*

[166] 73 S.W.3d 234 (Tex. 2002).

[167] *Id.* at 237.

[168] *Id.*

[169] *Id.*

[170] *Id.* at 239 (*quoting Causby*, 328 U.S. at 266, 66 S. Ct. at 1068, 90 L. Ed. at 1213).

[171] *Id.* at 240 (*citing Causby*, 328 U.S. at 262, 66 S. Ct. at 1066–67, 90 L. Ed. at 1211 and Griggs v. Allegheny County, 369 U.S. 84, 87, 82 S. Ct. 531, 532, 7 L. Ed. 2d 585, 587 (1962) (holding that a taking occurred when civilian airplane overflights caused noise comparable to that of "a riveting machine or steam hammer," caused vibrations that separated plaster from the walls and ceilings, and caused residents to become nervous and distraught, making residential use impossible, and thus forcing claimants to move from their home); City of Houston v. McFadden, 420 S.W.2d 811, 814 (Tex. Civ. App. 14th Dist. 1967), *writ ref'd n.r.e.* (holding that there was a taking claim where evidence showed that aircraft over-flights caused blinding glare, intense noise that made communication impossible, jet sprays, and vibrations that broke windows and cracked walls); Melillo v. City of New Haven, 249 Conn. 138, 732 A.2d 133, 141 (Conn. 1999) (observing that the trial court's finding that noise and turbulence interfered with enjoyment of the property was enough to establish a taking under *Causby* and therefore under the Connecticut Constitution, but concluding that the plaintiffs were not entitled to compensation because they failed to show economic harm); Johnson v. City of Greeneville, 222 Tenn. 260, 435 S.W.2d 476, 478–80 (1968) (concluding that allegations that noise and vibrations from airplane over-flights caused physical distress and fear and interfered with the property's use stated a takings claim under the Tennessee Constitution); State v. City of Columbus, 3 Ohio St. 2d 154, 158, 209 N.E.2d 405, 408–09 (Ohio 1965) (holding that there was a taking under the Ohio Constitution when the evidence demonstrated that over-flights caused disruption of sleep and physical damage to walls and personal property); Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540, 540–42 (Wash. 1964) (holding that noise from airplanes' takeoff and landing can establish a taking under the Washington Constitution); Johnson v. Airport Auth. of Omaha, 173 Neb. 801, 115 N.W.2d 426, 434–35 (Neb. 1962) (affirming trial court's judgment in the property owner's favor in a condemnation case under the Nebraska and Federal Constitutions when the evidence showed that intense vibrations interfered with the property's use and enjoyment and caused fear); Hillsborough County Aviation Auth. v. Benitez, 200 So. 2d 194, 196, 199 (Fla. App. 2d Dist. 1967) (holding that under the Florida Constitution, a taking by over-flight occurred because conversations were impossible, television reception was disturbed, sleep was interrupted, fuel residue was deposited on property, and vibrations affected the residential structure)).

value…."[172] The Texas Supreme Court held that "the trial court incorrectly stated the law by equating a fair-market-value decline without a taking without considering the overflights' immediate and direct effects on the land's surface."[173] The court held that evidence of civilian overflights alone is not enough for there to be an unconstitutional taking.[174] The evidence, *inter alia*, "failed to show that civilian overflight effects caused or contributed to the land's market-value decline," and the decline in market-value by itself did "not establish a constitutional taking."[175] Furthermore, there was no evidence that the overflights "interfered with the use of TCLC's property as a landfill."[176]

C. COMPENSATION FOR WATER DAMAGES

C.1. Claims in Inverse Condemnation for Flooding Damages

If land is flooded because of a public project "the flooding is treated as a taking within the constitutional sense."[177] Flooding is a physical taking, not a regulatory taking.[178] Thus, " 'where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation….' Construction by the state which causes flooding on abutting private property may constitute a taking where the flooding is a 'permanent invasion' of land amounting to an appropriation."[179]

In an inverse condemnation case alleging flooding damages it has been held that a property owner does not have to show "that the governmental defendant deprived the plaintiff of all use and enjoyment of the property at issue," only that there was "[a] 'substantial interference' with the use and enjoyment of property…."[180] Although "a claim for inverse condemnation requires a showing that the governmental acts alleged to constitute a taking of private property were done with the intent to take the property for a public use,"[181] the government's intent may be inferred if "the natural and ordinary consequence of [the government's] action was the substantial interference with property rights."[182]

An inverse claim may be available to a property owner when there is intermittent but recurrent flooding of property.

> Whether occasional flooding is of such frequency, regularity, and permanency as to constitute a *taking* and not merely a temporary invasion for which the landowner should be left only to a possible recovery of damages is a question of degree, and each case must stand on its own peculiar facts…." *Flooding is permanent if it imposes "a servitude of indefinite duration," even if intermittent…. Thus, intermittent flooding may, under some circumstances, constitute a taking….*[183]

Even if a claim relates to a 100-year flood, there may be a permanent invasion of property resulting in a taking when highway structures forseeably increased the extent of flooding on an owner's property.[184]

> The frequency of the flooding is not, in itself, determinative of a taking. "There is no difference of kind, but only of degree, between a permanent condition of continual overflow…and a permanent liability to intermittent but inevitably recurring overflows…." The 100 year flood is, by statistical definition, an inevitably recurring event. Thus, if the structures causing the overflow are permanent, the overflow which occurs with the 100 year flood constitutes a permanent invasion.[185]

It has been held that even if an owner's tort claims against the transportation department for negligent design, construction, trespass, and nuisance causing flooding are barred by a provision of state law,[186] the

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[172] *Id.* at 240.

[173] *Id.* at 241.

[174] *Id.* at 242 (*citing, e.g.*, Persyn v. United States*,* 34 Fed. Cl. 187, 207 (1995) (observing that a significant decrease in the property's market value "'as a direct result of the overflights'" is a prerequisite for recovery (*quoting* Boardman v. United States*,* 180 Ct. Cl. 264, 376 F.2d 895, 899 (1967)); Hoyle v. City of Charlotte, 276 N.C. 292, 172 S.E.2d 1, 23–24 (N.C. 1970) (relying on the physical effects of over-flights, including noise, to conclude that over-flights affected the property's market value)).

[175] 73 S.W.3d at 243.

[176] *Id.*

[177] 5 NICHOLS ON EMINENT DOMAIN § 16.08[1], at 16-94–16-95; *see also* Rourke v. Central Mass. Elec. Co., 177 Mass. 46, 58 N.E. 470 (Mass. 1900).

[178] Modern, Inc. v. Fla. Dep't of Transp*.*, 2006 U.S. Dist. LEXIS 45946, at *12 (*citing* Washoe County, Nev. v. United States*,* 319 F.3d 1320, 1326 (Fed. Cir. 2003) (explaining distinction between regulatory and physical takings) and *quoting* Lingle v. Chevron U.S.A., Inc*.,* 544 U.S. 528, 538, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005)).

[179] 2006 U.S. Dist. LEXIS 45946, at 12 (*quoting* Lingle v. Chevron U.S.A., Inc*.,* 544 U.S. 528, 538, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) and *citing* Washoe County, Nev. v. United States*,* 319 F.3d 1320, 1326 (Fed. Cir. 2003) (explaining distinction between regulatory and physical takings)).

[180] Vokoun v. City of Lake Oswego, 335 Or. 19, at 26, 56 P.3d 396, 400 (2002) (holding that the evidence was sufficient to show that the natural and ordinary consequence of the city's construction of the storm-drain was to destabilize plaintiffs' property, which had been stable prior to the construction).

[181] 335 Or. at 27, 56 P.3d at 401.

[182] *Id*. at 29, 56 P.3d at 402.

[183] Nolan and Noland v. City of Eagan*,* 673 N.W.2d 487, 492 (Minn. Ct. App. 2003) (emphasis supplied) (*quoting* Nelson v. Wilson, 239 Minn. 164, 172, 58 N.W.2d 330, 335 (1953) (concluding that a taking occurred when the state's construction of dams resulted in periodic flooding and land remained wet and flooded for several years); Spaeth v. City of Plymouth, 344 N.W.2d 815, 822 (Minn. 1984) (citations omitted)).

[184] Lea Co. v. N.C. Bd. of Transp*.,* 57 N.C. App. 392, 397, 291 S.E.2d 844, 847–48 (1982).

[185] *Id.* at 398, 291 S.E.2d at 848–49 (*quoting* United States v. Cress, 243 U.S. 316, 328, 37 S. Ct. 380, 385, 61 L. Ed. 746, 753 (1917)).

[186] Nolan and Noland v. City of Eagan*,* 673 N.W.2d at 497 (*citing* MINN. STAT. § 541.051(1)(a)).

owner may still have a claim in inverse condemnation for flooding damages caused by government action. Moreover, it has been held that if the owner has a negligence claim it is not improper for the trial court to submit the inverse condemnation claim to the jury without first adjudicating the negligence claim.[187] A limitation on damages in a state's tort claims act has been held not to apply to a claim in inverse condemnation for flooding damages, in part because "the statutory limitation would deprive claimants" of the value of their property taken in excess of the statutory limit and would deny them "just compensation in the form of the full fair market value taken."[188]

C.2. Claims Based on Alleged Improper Design, Construction, and Maintenance of Highway Facilities

A public entity may be held liable in inverse condemnation "if its design, construction, or maintenance of a public improvement poses an unreasonable risk of harm to the plaintiff's property, and the unreasonable aspect of the improvement is a substantial cause of damage…."[189]

In *Albers v. County of Los Angeles,*[190] involving claims for property damage resulting from a landslide in a prehistoric, known slide area—the subject of a federal government geological report published in 1946[191]—the court held that the damage was compensable for any "actual physical injury to real property proximately caused by the improvement as deliberately designed and constructed," regardless of whether the injury was foreseeable.[192]

In *Nolan and Noland v. City of Eagan,*[193] the court reversed the dismissal of a commercial property owner's claim that MnDOT and the City of Eagan negligently designed and constructed storm sewer systems in connection with highway construction and failed to exercise reasonable care in the maintenance, repair, and operation of the systems that had caused flooding.[194] The court held that allegations of "frequent, regular, and permanent flooding" were sufficient to survive a motion to dismiss.

However, in *Thomas v. City of Kansas City, Mo.,*[195] the owners alleged that flooding was caused by "negligently designed, constructed, and maintained sewer and drainage systems," owned in part by Kansas City and the City of Raytown.[196] Although the court held that the owners stated a claim for personal injuries caused by diversion of surface water and flooding because of the cities' unreasonable use of their property,[197] the owners failed to "plead their claim for property damages by invoking constitutional provisions protecting them from government acquisition of property without due process of law. Nevertheless, the owners did state a claim for *personal injuries*…for unreasonable use of the property belonging to the cities."[198]

In addition to inverse condemnation, a property owner possibly may recover damages based on the government's failure to abate a nuisance or for negligence in regard to flooding caused by the government's design of a drainage system that causes flooding of an owner's property. For example, if "'a municipality negligently constructs or undertakes to maintain a sewer or drainage system which causes the repeated flooding of property, a continuing abatable nuisance is established, for which the municipality is liable.'"[199] Moreover, "one is not barred from bringing an action for damages merely because [the property owner] purchases property in the vicinity of a nuisance."[200]

A claim for flooding damages may fail if it is shown that a highway facility such as a "culvert was designed and constructed in accordance with applicable standards."[201] In contrast, in *Kemna v. Kansas Department of Transportation*,[202] the transportation department "built an embankment which resulted in the loss of 28,000 square feet of waterway for a 350-acre drainage area."[203] The court, affirming the trial court's judgment for the landowners, held that there was "sufficient evidence…to show that KDOT had…failed to design its improvements in accordance with the generally accepted and prevailing engineering standards in existence at the time."[204] Both the *Knospe* and *Kemna* cases

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[187] Vokoun v. City of Lake Oswego, 189 Or. App. 499, 506, 76 P.3d 677, 681 (Or. Ct. App. 2003) (decision on remand).

[188] *Id.* at 511, 76 P.3d at 684.

[189] Arreola v. County of Monterey, 99 Cal. App. 4th 722, 739, 122 Cal. Rptr. 2d 38, 51 (Cal. App. 6th Dist. 2002). The court held that it was the counties' "long standing policy" to allow the project to deteriorate that caused the damage. *Id.,* 99 Cal. App. 4th at 741, 122 Cal. Rptr. 2d at 53.

[190] 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965).

[191] *Id.* at 254, 398 P.2d at 131, 42 Cal. Rptr. at 91.

[192] *Id.* at 263, 398 P.2d at 137, 42 Cal. Rptr. at 97.

[193] 673 N.W.2d 487 (Minn. Ct. App. 2003).

[194] *Id.* at 491.

[195] 92 S.W.3d 92 (Mo. App. W. Dist. 2002). The owners had appealed the dismissal of their claim for damages and injunctive relief caused by surface water flooding that was caused by the condition of two municipalities' property. The owners alleged that prior to 1998 their property had experienced problems with flooding and that they had notified the cities but that in July and October 1998, "groundwater mixed with sewage overflowed and spilled out of a ditch and entered the Thomases' home; and that this continued to occur during periods of rain in 1999 and 2000." *Id.* at 94.

[196] *Id.* at 94.

[197] *Id.* at 102.

[198] *Id.* at 99.

[199] Martin v. City of Fort Valley, 235 Ga. App. 20, 508 S.E.2d 244, 245 (1998) (citations omitted).

[200] Lea Co. v. N.C. Bd. of Transp*.,* 57 N.C. App. at 402, 291 S.E.2d at 851. The court rejected the department's attempted "moving to the nuisance" defense in an inverse condemnation or nuisance action. *Id.*, 57 N.C. at 403, 291 S.E.2d at 851.

[201] Knospe v. New York, 862 N.Y.S.2d 808, 2005 NY Slip Op 51804U, at *2, 9 Misc. 3d 1126A, at 1126A (N.Y. Ct. Cl. 2005).

[202] 19 Kan. App. 2d 846, 877 P.2d 462 (1994).

[203] *Id.* at 851, 877 P.2d at 465.

[204] *Id.* at 850, 877 P.2d at 465.

discussed immediately above appear to have been based solely on defendants' negligence rather than inverse condemnation.

C.3. Claims Based on Alleged Improper Construction, Reconstruction, or Maintenance

A transportation department's improper construction or reconstruction of highway facilities or improper maintenance of the same may give rise to an inverse condemnation claim for damages caused by flooding of property affected by the alteration of the flow or quantity of surface water. In *Taylor v. State,*[205] the property owners alleged that the transportation department's construction with respect to two bridges caused flooding on their property "rendering it useless for any commercial purpose."[206] The court stated that in Louisiana

> La. Civ. Code art. 655 provides that "an estate situated below is bound to receive the surface waters that flow naturally from an…estate situated above unless an act of man has created the flow." Additionally, La. Civ. Code art. 656 provides in part that "the owner of the dominant estate may not do anything to render the servitude more burdensome." Furthermore, the owner of the dominant estate "cannot stop [water running through it] or give it another direction and is bound to return it to its ordinary channel *where it leaves his estate*." La. Civ. Code art. 658.[207]

In *Taylor* the court agreed that the "DOTD has not increased the total volume flowing through the Taylors' property…. However, DOTD has changed the natural course of the flow by redirecting the water…."[208] Consequently,

> [w]hile DOTD returned the water to its ordinary channel, DOTD did not comply with the mandate of La. Civ. Code art. 658 in that it returned the water to its ordinary channel some 400 feet south of its property and not before the water left its property. While the total volume flowing through the Taylors' property remains the same, the water arrives at the Taylors' property much more quickly than before.[209]

The court amended the award on damages but otherwise affirmed the judgment in favor of the owners.[210]

In *Cops v. City of Kaukauna,*[211] the owners, who alleged that flooding in the basement of their building with no prior history of flooding was caused by the city's and the Wisconsin Department of Transportation's "improper reconstruction of a bridge," sued for negligence, nuisance, and inverse condemnation.[212] The court held that "for a taking to be compensable, the property owner must be deprived of all, or practically, all, of the beneficial use of the property or any part."[213] Because the plaintiffs alleged what the cost would be "to *attempt* to restore the property,"[214] the complaint stated a cause of action against the city and the DOT. The court stated that "[i]f the attempt fails, the flooding may constitute a taking, and if can be repaired, it may be mere damage," an issue to be resolved on summary judgment or at trial.[215]

Unlike in the *Cops* case, there may be a history of flooding at the site where there are new or reconstructed highway facilities. If so, unless it is established that the new construction or reconstruction has increased the flow of surface water, the transportation department may be held not liable in inverse condemnation for flooding damages. For example, in *Brandywood Housing Ltd. v. Texas Department of Transportation,*[216] the property owner claimed that the department's reconstruction of a nearby highway caused an apartment complex to flood. However, there was a history of flooding at the location of the housing complex.[217]

In affirming the trial court's ruling that the evidence failed to show that the 1995 reconstruction increased the preexisting flooding problems,[218] the court stated that

> [a] "taking or damaging" by flooding is a specific type of inverse condemnation…. In such cases, an issue about causation may be raised if the evidence shows that the property was subject to flooding both before and after the government's action…. In Ansley [*v. Tarrant County Water Control & Imp. Dist. No. 1*, 498 S.W.2d 469, 475 (Tex. Civ. App.—Tyler 1973), writ ref'd n.r.e.], the court noted: If the land was previously subject to inundation, and after the [governmental action] was still subject to inundation, it has been held that the owner was not entitled to recover for the damages caused thereby, unless the inundation after [the governmental action] was greater in extent than it previously had been.[219]

In regard to maintenance, because government action must relate to a public use for there to be liability in inverse condemnation, maintenance activity also may give rise to complaints regarding flooding. "A public entity's maintenance of a public improvement constitutes the constitutionally required public use so long as it is the entity's deliberate act to undertake the particu-

[205] 879 So. 2d 307 (La. App. 3d Cir. 2004).

[206] *Id.* at 311.

[207] *Id.* at 316 (emphasis in original).

[208] *Id.* at 317.

[209] *Id.*

[210] *Id.* at 320. *See also* Shade v. Mo. Highway and Transp. Dep't*,* 69 S.W.3d 503, 507 (Mo. App. W. Dist. 2001 (reconstruction project elevated the height of the grade of the highway, which allegedly "materially changed and altered the flow of surface water from the [owners'] property and property surrounding [owners'] property").

[211] 2002 Wis. App. 241, 257 Wis. 2d 937; 652 N.W.2d 132 (Wis. App. 2002).

[212] 2002 Wis. App. 241, at P1.

[213] 2002 Wis. App. 241, at P8.

[214] 2002 Wis. App. 241, at P8, P9 (emphasis supplied).

[215] 2002 Wis. App. 241, at P10.

[216] 74 S.W.3d 421 (Tex. App. 1st Dist. 2001).

[217] *Id.* at 423.

[218] *Id.* at 426.

[219] *Id.* (emphasis supplied).

lar plan or manner of maintenance."[220] Thus, maintenance activity also may give rise to claims based on flooding.

C.4. Liability for Diversion of Surface Water

As explained in *Nichols on Eminent Domain*, if a "flood-control structure was designed to protect the injured property, the plaintiff must demonstrate unreasonable conduct by the government entity that is responsible for construction or maintenance of the structure."[221] On the other hand, "[i]f the flood-control structure was designed to protect property other than the injured property, the plaintiff need not demonstrate unreasonable conduct, and the typical rules of inverse condemnation apply," with certain exceptions.[222] One such exception is the "common enemy doctrine" that "provides that the owner of land that is subject to flooding is entitled to erect defense barriers to protect the land from the increased discharge or velocity of water."[223]

Although it is beyond the scope of this report to discuss in detail the common enemy doctrine and the doctrine of reasonable use with respect to liability for surface water, in recent cases the courts have adopted the rule of reasonable use. The rule of reasonable use

> provides that each possessor of land is legally entitled to make reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others; however, *the possessor incurs liability when the harmful interference with the flow of surface waters is unreasonable*…. The rule of reasonable use does not purport to lay down specific rights with respect to surface waters, but "leaves each case to be determined on its own facts, in accordance with general principles of fairness and common sense."[224]

In a case in which the owners alleged that flooding was caused by "negligently designed, constructed, and maintained sewer and drainage systems" owned in part by two cities, the court held that the owners stated a claim for personal injuries caused by diversion of surface water and flooding as a result of the cities' unreasonable use of their property causing damage to the owners' property.[225] Relying on *Heins Implement Co. v. Missouri Highway and Transportation Comm'n,*[226] the court noted that "[i]n *Heins* the court discarded the 'common enemy' doctrine as to surface waters and adopted the 'rule of reasonable use.'"[227]

The court explained that although

> *Heins* did not affect all claims of trespass related to water, *Heins* did change the analysis with regard to claims based on diversion of surface water. The Court in *Heins* held, with regard to a claim of property damage against a governmental entity having the power of eminent domain, that the proper remedy for surface water flooding is an action in inverse condemnation….[228]

In *Dickgieser v. Washington,*[229] the owners sued in inverse condemnation regarding logging on state lands located adjacent to the owners' property that resulted in flooding of the plaintiffs' property.[230] The state argued that, because the owners' claim for inverse condemnation was "based on surface water flooding," the property owners "also must produce evidence demonstrating that the Department artificially collected, channeled, and discharged surface water onto their property in a manner different from the natural flow, thereby causing substantial injury to the land…."[231] The court reviewed the law in the state of Washington on liability for damage caused by surface water from neighboring properties, and stated:

> A governmental body ordinarily is not liable for consequential damages to neighboring properties due to increased surface water flows if the damages arise only from changes in the character of the surface resulting from the opening of streets and public facilities…. However, *the government may be liable if it concentrates and gathers water into artificial drains or channels and discharges it upon adjoining lands in quantities greater than or in a manner different from the natural flow…. Further, the flow of surface water along natural drains may be hastened or incidentally increased by artificial means, so long as the water is not ultimately diverted from its natural flow on the other's property….* In *Wilber Development Corp. v. Les Rowland Construction, Inc.*, 83 Wn. 2d 871, 876, 523 P.2d 186 (1974) this court held that if water is "collected and deposited upon the land in a different manner" than before development, compensation to the property owner may be required. *Thus, in the proper case, damage caused by surface water may support an inverse condemnation action.*[232]

The court held that there were material facts in dispute "regarding whether the Department's logging activity concentrated and gathered water into artificial

[220] Arreola v. County of Monterey*,* 99 Cal. App. 4th at 742, 122 Cal. Rptr. 2d at 53 (*citing* Bauer v. County of Ventura, 45 Cal. 2d 276, 284–85, 289 P.2d 1 (1955)).

[221] 9 NICHOLS ON EMINENT DOMAIN § 34.03[2][e], at 34-56-1.

[222] *Id*.

[223] *Id.*

[224] Thomas v. City of Kansas City, Mo., 92 S.W.3d 92, 98 (Mo. App. W. Dist. 2002) (citations omitted) (emphasis supplied).

[225] *Id.* at 94.

[226] 859 S.W.2d 681 (Mo. 1993) (en banc).

[227] 92 S.W.3d at 98 (*citing* Heins Implement Co. v. Mo. Highway and Transp. Comm'n, 895 S.W.2d 681, 688–90 (Mo. 1993)).

[228] *Id.* at 98.

[229] 153 Wash. 2d 530, 105 P.3d 26 (Wash. 2005).

[230] *Id.* at 532, 105 P.3d at 27.

[231] *Id.* at 542, 105 P.3d at 32 (citation omitted).

[232] *Id.* at 542–43, 105 P.3d at 32–33 (emphasis supplied), (*citing* Phillips v. King County, 136 Wash. 2d 946, 958–59, 968 P.2d 871 (1998); 18 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.144, at 538 (3d rev. ed. 1963); B&W Constr., Inc. v. City of Lacey, 19 Wash. App. 220, 223, 577 P.2d 583 (1978)).

channels or drains and discharged it onto the Dickgiesers' land in quantities greater than or in a different manner than the natural flow."[233]

The case of *Albers v. County of Los Angeles*[234] held that the inverse condemnation plaintiff was entitled to compensation without regard to fault. As explained by an appellate court in California in *Arreola v. County of Monterey,*[235] the *Albers* case left open an

> exception [that] involved the circumstances, peculiar to water law, in which a landowner had a right to inflict damage upon the property of others for the purpose of protecting his or her own property. Such circumstances included the erection of flood control measures (the common enemy doctrine) and the discharge of surface water into a natural watercourse (the natural watercourse rule). Under private water law analysis, these rules immunized the landowner from liability for resulting damage to downstream property.[236]

However, as the *Arreola* court explained, the case of

> Belair [v. Riverside County Flood Control Dist., 47 Cal. 3d 550, 563-564, 253 Cal. Rptr. 693, 764 P.2d 1070 (1988)] modified Albers and adopted a rule of reasonableness to be applied in the context of flood control litigation. Belair determined that application of the Albers rule of strict liability would discourage needed flood control projects by making the entity the insurer of the property the project was designed to protect…. Belair held: "[W]here the public agency's design, construction or maintenance of a flood control project is shown to have posed an unreasonable risk of harm to the plaintiffs, and such unreasonable design, construction or maintenance constituted a substantial cause of the damages, plaintiffs may recover regardless of the fact that the projects purpose is to contain the 'common enemy' of floodwaters…." Under Belair, the public entity is not immune from suit, but neither is it strictly liable.[237]

The *Arreola* court further explained that in *Locklin v. City of Layfette,*[238] the California Supreme Court held "that the privilege to discharge surface water into a natural watercourse (the natural watercourse rule) was a conditional privilege, subject to the *Belair* rule of reasonableness."[239] The *Locklin* court set forth certain factors for determining when the government's action was reasonable:

> (1) The overall public purpose being served by the improvement project; (2) the degree to which the plaintiff's loss is offset by reciprocal benefits; (3) the availability to the public entity of feasible alternatives with lower risks; (4) the severity of the plaintiff's damage in relation to risk-bearing capabilities; (5) the extent to which damage of the kind the plaintiff sustained is generally considered as a normal risk of land ownership; and (6) the degree to which similar damage is distributed at large over other beneficiaries of the project or is peculiar only to the plaintiff.[240]

In *Arreola*, involving claims by about 300 businesses and individuals, the court affirmed a judgment for the plaintiffs with respect to "extensive damage caused when the Pajaro River Levee Project (the Project) failed during a heavy rainstorm in 1995."[241] A river channel had become clogged due to increased vegetation that had not been removed.[242] The allegations against the state were that the drainage culverts under the highway were too small.[243] When the river overtopped the levee the back side gave way; "[w]hen the levee failed, the floodwaters ran onto the historically flooded valley floor until they reached the Highway 1 embankment"; the culverts were overwhelmed, resulting in more flooding than otherwise would have occurred.[244]

Although the *Arreola* court found that the *Belair* test "modified the general rule when it decided that a rule of reasonableness, rather than the extremes of strict liability or immunity, was appropriate in cases involving flood control projects,"[245] the rule of reasonableness did not apply to the state's conduct with respect to the culverts.

> The general rule is that a public entity is liable for inverse condemnation regardless of the reasonableness of its conduct…. *Belair* modified the general rule when it decided that a rule of reasonableness, rather than the extremes of strict liability or immunity, was appropriate in cases involving flood control projects….[246]

Thus, the *Belair* rule of reasonableness did not apply to the state's action.[247] The state was held "liable in tort and inverse condemnation for damage caused when Highway 1 obstructed the path of the floodwater on its way to the sea."[248] The court noted that in regard to the state's obstruction of the flood plain, "[t]raditionally, a lower landowner that obstructs a natural watercourse is liable for damages that result from that obstruction."[249] Here, the state had foreseen, moreover, that water would back up at the location even without a flood. The court held that the state could not avoid liability, regardless of the fact of the levee's failure.

> State cannot avoid liability for the 1995 flood because the Project failed rather than because the storm overwhelmed it. State was expected to design its drainage for a 100-year storm. Since a flood was almost certain to occur in the event of a 100-year storm, State, as a downstream ri-

[233] 153 Wash. 2d at 543, 105 P.3d at 33.

[234] 62 Cal. 2d 250, 42 Cal. Rptr. 89, 398 P.2d 129 (1965).

[235] 99 Cal. App. 4th 722, 122 Cal. Rptr. 2d 38 (2002).

[236] *Id*. at 738–39, 122 Cal. Rptr. 2d at 50.

[237] 99 Cal. App. 4th at 738–39, 122 Cal. Rptr. 2d at 50–51 (citations omitted) (emphasis supplied).

[238] 7 Cal. 4th 327, 350, 867 P.2d 724, 27 Cal. Rptr. 2d 613 (1994).

[239] 99 Cal. App. 4th at 739, 122 Cal. Rptr. 2d at 51.

[240] 7 Cal. 4th at 368–69, 867 P.2d at 750, 27 Cal. Rptr. at 639.

[241] 99 Cal. App. 4th at 730, 122 Cal. Rptr. 2d at 44.

[242] *Id.* at 733, 734, 122 Cal. Rptr. 2d at 46, 47.

[243] *Id.* at 731, 122 Cal. Rptr. 2d at 44.

[244] *Id.* at 736, 122 Cal. Rptr. 2d at 49.

[245] *Id.* at 751, 122 Cal. Rptr. 2d at 60.

[246] *Id.*

[247] *Id.* at 754, 122 Cal. Rptr. 2d at 63.

[248] *Id.* at 730, 122 Cal. Rptr. 2d at 44.

[249] *Id.* at 755, 122 Cal. Rptr. 2d at 64 (citation omitted).

> parian landowner, had a duty to design the highway bypass to avoid obstructing the geologic floodplain. Therefore, it does not matter that the storm that generated the flood in this case was of a lesser magnitude and should have been contained by the Project. State had a duty to anticipate the consequences of a 100-year storm and design accordingly.[250]

The state also did not have any immunity for design under California Goverment Code 830.6, the state's design immunity statute for public improvements, in part because the state did not offer "substantial evidence of reasonableness" on which a "public employee could have approved a design that did not take flooding into account."[251] As for the counties' involvement, the court held, in affirming the trial court's judgment, that the trial court properly considered the *Locklin* factors in finding that it was the counties' "long standing policy" to allow the Project to deteriorate, a policy that caused the damage as a result of the Project's failure.[252]

Similarly, there was a taking caused by flooding in an Oklahoma case involving the closing of a culvert that resulted in "regular flooding" of the owner's property.[253] The court held that a leasehold interest may be subject to a taking and that the leaseholder may have a cause of action in inverse condemnation. Furthermore, the court stated that "business losses are admissible to prove the diminution in fair market value of the property taken."[254] Although the state argued that the culvert had become a natural watercourse, the court affirmed a jury verdict awarding $160,000 in connection with the taking.[255]

C.5. Miscellaneous Issues Associated with Claims for Flooding Damages

C.5.a. Date of Accrual of Cause of Action for Flooding Damages

Because flooding may be recurrent, there may be an issue regarding when the owner's cause of action accrued for purposes of applicable statutes of limitations with respect to damages to real property and to personal property. In *Shade v. Missouri Highway and Transportation Commission,* [256] a reconstruction project by the commission that elevated the height of the grade of the highway was alleged to have "materially changed and altered the flow of surface water from the [owners'] property and property surrounding [owners'] property."[257] One issue was whether the action was time-barred, as the trial court had held in granting the commission's motion for summary judgment.[258]

The court addressed "whether each flood event created a new cause of action. This determination depends upon the type of damage sustained by the real estate, *i.e.*, if it is permanent or temporary."[259]

> *If the damage to the property is permanent, the cause of action accrues when the effect of the injury becomes manifest*…. The damage "will admit of but one recovery, which will obviously include all damages, past, present, and prospective…." On the other hand, because a temporary nuisance can be abated at any time, the period of limitations "runs anew from the accrual of the injury from every successive invasion of interest…."[260]

The court held that the damage was permanent, not temporary, and thus there was only one cause of action.[261] "[T]he damage may not be ascertainable on the date of the first flood. It may well be that it would only become 'apparent by the passage of time that the intermittent flooding was of a permanent nature.'"[262] Although claims for damage to personal property were subject to a 5 year statute of limitations, rather than a 10 year statute of limitations, the court agreed that

[250] *Id.* at 756, 122 Cal. Rptr. 2d at 65.

[251] *Id.* at 759, 122 Cal. Rptr. 2d at 67.

[252] *Id.* at 741, 122 Cal. Rptr. 2d at 53.

[253] Perkins Whistlestop, Inc. v. State *ex rel*. DOT, 1998 OK Civ. App. 7, 954 P.2d 1251 (Okla. Ct. Civ. App. 1997).

[254] *Id.* at *10, 954 P.2d at 1255 (citations omitted).

[255] *Id.* at *1, *11, 954 P.2d at 1253, 1255.

[256] 69 S.W.3d 503 (Mo. App. W. Dist. (2001)).

[257] *Id.* at 507.

[258] As for the claim for damages to the real property, the court held that the statute of limitations was 10, not 5, years.

> No limitation period is contemplated by either the United States or Missouri Constitutions, and we find no specific limitation period set forth in a statute that applies to real property inverse condemnation claims. We hold that the statute of limitations in real property inverse condemnation cases such as the one at bar must not be shorter than that required for the entity with the power of eminent domain to obtain a prescriptive easement on the property. The time required to obtain a prescriptive easement is ten years…. The statute of limitations for real property inverse condemnation actions, then, must also be ten years….

69 S.W.3d at 512–13 (*citing* Phillips v. Sommerer, 917 S.W.2d 636, 638 (Mo. App. W. Dist. 1996); Corbell v. State *ex rel.* Dep't of Transp., 856 P.2d 575, 579 (Okla. Ct. App. 1993) ("To hold otherwise would be to allow the taking entity to effectively gain title, or at least some property interest, short of the prescriptive period."); Underwood v. State *ex rel*. Dep't of Transp., 849 P.2d 1113, 1117 (Okla. Ct. App. 1993); Barker v. St. Louis County, 340 Mo. 986, 104 S.W.2d 371, 374–77 (Mo. 1937) (finding that a state statute was invalid to the extent that it permitted private property to be taken for public use in a period shorter than that required to adversely possess the property); Annotation, 26 A.L.R. 4th 68, *State Statute of Limitations Applicable to Inverse Condemnation or Similar Proceedings by Landowner to Obtain Compensation for Direct Appropriation of Land Without the Institution or Conclusion of Formal Proceedings Against Specific Owner,* §§ 6[a] and 7[a]. In *Shade* the court held that the statute of limitations for damage to personal property was five years. *Id.* at 514.

[259] 69 S.W.3d at 513.

[260] *Id.* (citations omitted) (emphasis supplied).

[261] *Id.*

[262] *Id.* at 514 (*quoting* Barnes v. United States*,* 210 Ct. Cl. 467, 538 F.2d 865, 873 (Ct. Cl. 1976)). The court remanded because it was unable to determine from the record "with any degree of certainty when the various causes of action were capable of ascertainment." *Id.* at 515.

"damages to personal property are compensable in an inverse condemnation proceeding."[263]

C.5.b. Ripeness of the Claim in Inverse Condemnation for Flooding Damages

In an Illinois case a beneficiary and a trustee of a family trust sued in federal court in connection with the defendants' construction about 20 years earlier of a roadway and water main.[264] The owner had never been compensated for "the loss of Trust property, whether in connection with the construction of [the road], the pooling of water on the property, or the construction of the water main."[265] The construction of the road caused water to pool on the property and to create wetlands.[266] The plaintiffs, asserting claims, *inter alia*, under 42 U.S.C. § 1983[267] and the Fifth Amendment, challenged the original taking of property accomplished by a city ordinance in 1978, which at the time the Popps had failed to challenge.[268] However, the court held that the Popps' claim in federal court "even at this late date, is premature" for lack of ripeness.[269] Thus, the court dismissed the inverse condemnation and due process claims, holding that "Illinois provided adequate procedures for remedying the injuries alleged; because the Popps have not used those procedures, they cannot bring their claims in this Court…. The Court reaches the same conclusion with respect to the Popps' due process claims."[270]

Also in regard to the ripeness doctrine, as one authority notes, "[t]he courts, especially the federal courts, have made it very clear that they do not want to see cases involving challenges to land use laws and regulations until after all administrative remedies for relief have been pursued."[271]

C.5.c. Proof of Causation Required for a Claim for Flooding Damages

Causation must be established in an inverse condemnation claim for flooding damages. "To prove causation in a 'taking or damaging' case involving preexisting flooding, the plaintiff is required to show the following: (1) the government's action caused the flooding to increase, and (2) that the increased flooding caused a diminished market value of the property."[272] As held by a California court, the "injuries must have been proximately caused by the public improvement as deliberately constructed and planned."[273] It has been held that even a 100-year flood is "legally foreseeable" by a transportation department when designing flood control devices.[274]

As stated in a North Carolina case, in which the transportation department was held liable for damages to property caused by a 100-year flood, the North Carolina Court of Appeals stated that the

> [p]laintiff must first prove that defendant could reasonably foresee the overflow. Defendant assigns error to the conclusion that the flood here was a "reasonably foreseeable and recurring [event]." The [trial] court concluded that the interest taken by defendant is maximally measured by the overflow of waters occasioned by a 100 year flood, since the flooding here was at approximately 100 year flood levels. This conclusion is supported by the findings which in turn are supported by competent evidence in the record…. Defendant does not dispute that a 100 year flood is one which, as a matter of statistical probability, can be anticipated to occur once in every 100 years. *A foreseeable flood is not an extraordinary one, but "one, the repetition of which, although at uncertain intervals, can be anticipated…."*[275]

However, in a case in which the owner knew that the property had some history of flooding prior to the owner's purchase of an apartment complex, and the property continued to flood after the department's completion of highway reconstruction,[276] the owner failed to

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[263] *Id.* at 516 (*citing* Warner/Elektra/Atlantic Corp. v. County of DuPage, Ill., 771 F. Supp. 911, 914 (N.D. Ill. 1991); Hawkins v. City of La Grande, 102 Or. App. 502, 795 P.2d 556, 559 (Or. Ct. App. 1990), *aff'd in part, rev'd in part on other grounds*, 315 Or. 57, 843 P.2d 400 (Or. 1992); Shelby County v. Barden, 527 S.W.2d 124, 132 n.4 (Tenn. 1975); Sutfin v. California, 261 Cal. App. 2d 50, 67 Cal. Rptr. 665, 666–68 (Cal. App. 3d Dist. 1968)).

[264] Popp v. City of Aurora, 2000 U.S. Dist. LEXIS 5708 (N.D. Ill. 2000).

[265] *Id.* at *4.

[266] *Id.*

[267] The court ruled that the § 1983 claims were time barred. *Id*. at *24, 29.

[268] *Id.* at *4.

[269] *Id.* at *14.

[270] *Id.* at *20–21 (*citing* Forseth v. Village of Sussex, 199 F.3d 363, 369 (7th Cir. 2000) ("Although we have recognized the potential for a plaintiff to maintain a substantive due process claim in the context of land use decisions, …we have yet to excuse any substantive due process claim in the land-use context from Williamson's ripeness requirements."); Unity Ventures v. County of Lake, 841 F.2d 770, 776 (7th Cir. 1998) (Ripeness applies to procedural due process claims as well as takings and substantive due process claims. The court stated that it would "not evaluate the adequacy of the procedures available to the plaintiffs before they have availed themselves of those procedures.")).

[271] 8 NICHOLS ON EMINENT DOMAIN § 14E.07[3], at 14E-90.

[272] Brandywood Hous. Ltd. v. Tex. DOT, 74 S.W.3d at 426.

[273] Arreola v. County of Monterey, 99 Cal. App. 4th at 738, 122 Cal. Rptr. 2d at 50 (*citing* Holtz v. Superior Court*,* 3 Cal. 3d 296, 304, 90 Cal. Rptr. 345, 475 P.2d 441 (1970)).

[274] Lea Co. v. N.C. Bd. of Transp*.*, 57 N.C. App. at 397, 291 S.E.2d at 848.

[275] *Id.* (citations omitted) (emphasis supplied). The court stated that

> [t]he conclusion is further supported by the finding, to which defendant did not except, that defendant's own *Handbook of Design for Highway Drainage Structure* requires it to "check the effect of the 100 year flood when designing box culverts under interstate highways and make adjustments to the design criteria as necessary." *Id.*

[276] Brandywood Hous. Ltd. v. Tex. DOT, 74 S.W.3d at 423.

prove that "TexDOT's reconstruction was a 'cause-in-fact' of the flooding."[277]

> "If the land was previously subject to inundation, and after the [governmental action] was still subject to inundation, it has been held that the owner was not entitled to recover for the damages caused thereby, unless the inundation after [the governmental action] was greater in extent than it previously had been."[278]

Thus, if the property "would have flooded even without the [highway's] reconstruction…, it cannot be said that TexDOT's action was a 'cause in fact' of Brandywood's damage, unless TexDOT's reconstruction exacerbated the flooding…."[279] The court concluded that the "evidence was legally sufficient to show that the 1995 reconstruction of the roadway did not increase the preexisting flooding problems."[280]

An expert may be required to prove that the highway department caused an owner's property to flood. However, in *Commissioner of Transportation v. BRW Management, LLC,*[281] the court held that a plaintiff's expert's reliance on a highway department's expert's work was insufficient to establish causation.

> While an expert may express an opinion on any subject upon which he is qualified drawn from whatever sources he chooses to use, the value of that opinion, while admissible, is jeopardized by the fact that he performed no study, no survey or other related services and utilized the work expressed in the report of an opposing expert. This is a serious flaw in the expert's opinions in the eyes of this court and it is certainly less than persuasive.[282]

Thus, the plaintiff's claim failed because the plaintiff's expert's "opinions were based on an interpolation" of the state's expert, also a hydrologist, who conducted a hydrological survey of the property and the water conditions, and thereafter provided a copy of the report to the owner's expert.[283]

C.5.d. Trespassing on an Owner's Property in Response to a Flooding Emergency

Incidents of flooding may require the responsible government agency to take action to protect neighboring property, including acts of trespass and damage to other property. In a Louisiana case in which a city dug three drainage ditches on the plaintiffs' property without the owners' consent[284] because of the flooding of a road that threatened a neighborhood,[285] the court held that the plaintiffs were entitled to damages in inverse condemnation.[286] In addition, because the city committed a trespass the owners were entitled also to "mental anguish damages under general tort law."[287] Finally, "because the City/Parish committed an 'intentional act,' its actions [were] excluded under its excess insurance policy's 'intentional act' exclusion."[288]

D. COMPENSATION FOR POLLUTION DAMAGES

When a condemning authority causes pollution it may be liable in inverse condemnation for a taking. One of the more common forms of pollution damages is water pollution affecting an owner having littoral rights. One issue is whether the pollution is permanent or temporary. If the pollution is temporary or intermittent, it may be possible to abate the pollution, in which case a recovery may be had only for past injury.[289] If a condemning authority does not have sovereign immunity, the owner's action may be in tort. If a condemning authority does have sovereign immunity, the owner may have a recovery in inverse condemnation, because the landowner has lost full use of his property, at least during the period the pollution was not abated, and is entitled compensation for a taking.[290]

In *Duffield v. DeKalb County,*[291] an inverse condemnation case for damages caused by noxious odors as well as noise from a water pollution control plant, the odors and noise affected the property before the owners purchased it, but the odors and noise worsened after the owners' purchase.[292] Nevertheless, the court held that the owners had stated a claim because the condition was not a temporary one.[293] Although the owners purchased the property "subject to the burden" of an existing condition of odors and noise, the pleadings "tend[ed] to show an increased 'burden'" thereafter.[294]

[277] *Id.* at 424.

[278] *Id.* at 426 (*quoting* Ansley v. Tarrant County Water Control & Imp. Dist. No. 1, 498 S.W.2d 469, 475 (Tex. Civ. App., Tyler 1973), *writ ref'd n.r.e.*) (some citations omitted).

[279] *Id.*

[280] *Id.* at 427.

[281] 2003 Conn. Super. LEXIS 1863 (Danbury Dist. 2003) (Unrept.) (owner alleged that construction of a new highway would cause increased water drainage and flooding of the owner's property).

[282] *Id.* at *8–9 (footnote omitted).

[283] *Id.*

[284] Williams v. City of Baton Rouge, 731 So. 2d 240, 243 (1999).

[285] *Id.* at 246.

[286] *Id.*

[287] *Id.* at 254.

[288] *Id.*

[289] 4A NICHOLS ON EMINENT DOMAIN, § 14A.08[1], at 14A-173–74.

[290] Sandell v. Town of New London, 119 N.H. 839, 409 A.2d 1315 (1979).

[291] 242 Ga. 432, 249 S.E.2d 235 (1978).

[292] *Id.* at 432, 249 S.E.2d at 236.

[293] *Id.* at 434, 249 S.E.2d at 237 (*citing* Ingram v. City of Acworth, 90 Ga. App. 719, 84 S.E.2d 99 (1954) (odors); Warren Co. v. Dickson, 185 Ga. 481, 195 S.E. 568 (1938) (noise); Holman v. Athens Empire Laundry Co., 149 Ga. 345, 100 S.E. 207 (1919) (smoke); Kea v. City of Dublin, 145 Ga. 511, 89 S.E. 484 (1916) (odors)).

[294] *Id.* at 436, 249 S.E.2d at 238.

E. COMPENSATION FOR EROSION DAMAGES

The most expected type of erosion from a highway project would be the erosion of soil that is not vegetated during construction. A prime example of damage from this type of erosion would be silt flowing into ponds, lakes, or wetlands.

In an erosion case in California, the State "concede[d] that there [had] been a substantial decrease in depth of water over plaintiff's submerged land, but assert[ed] that it [did] not result from deposit of material from the highway cuts and fills."[295] The court held that the jury was properly instructed "that the state is liable for any additional erosion of materials proximately caused by the highway or its construction to be 'carried down by winter rains…and deposited on the lands of' plaintiff."[296] The court affirmed the jury's verdict that there was not a taking.

An important issue in an erosion case, however, is the date the cause of action accrued for purposes of determining whether an action is time-barred. A constitutional right may be barred by a statute of limitations.[297]

[A] cause of action

> "accrues after the full extent of the Plaintiff's loss of use and enjoyment of [the premises] becomes apparent…." "The actual date of taking, although not readily susceptible to exact determination, is to be fixed at the point in time at which the impairment, of such a degree and kind as to constitute a substantial interference with plaintiff's property interest, *becomes apparent."*[298]

In a case involving siltation of a lake, there was an issue when the siltation occurred and the cause of action accrued. In ruling that the trial court erred in granting a summary judgment to the transportation department, the court held that

> where there is continuous governmental activity that damages private property, it makes sense to utilize a "'date of stabilization'" of the impact as the date of taking, as has been done by courts in other jurisdictions…. "This method measures the date of the governmental 'taking' as of the point in time when the damaging activity has reached a level which substantially interferes with the owner's use and enjoyment of his property…." Prior to the time of stabilization, landowners may be uncertain whether the governmental invasion was of such a degree that they should seek compensation. Furthermore, fixing the date of taking at an earlier time may lead to piecemeal assessments of the damages because the landowner will not know when the causative factors of the damage will stabilize. After the damage has stabilized, however, the landowner will be well-situated to evaluate the full extent of the damage to his or her property and the amount of compensation necessary to redress the damage.[299]

The Supreme Court of Idaho held in an erosion case that a taking may have occurred based on a single event that "triggered the running of the limitation period" rather than additional activity occurring after the statute of limitations expired that "causes interference with the property… [that] activate[s] a new statute of limitations period."[300]

F. COMPENSATION FOR INTERFERENCE WITH VISIBILITY OR VIEW

F.1. Loss of Visibility

Generally an owner of land abutting a public street has easements of light, air, and view over the street.[301] If a governmental agency interferes with light, air, and view of abutting owners, the government's action may result in a constitutional taking,[302] but as long as the interference is reasonable the court may find that there has not been a taking.[303] Claims based on loss of visibility arise more often in connection with commercial property, whereas claims based on loss of view tend to arise more frequently in regard to residential property.[304]

The possible legal approaches to claims for loss of visibility were summarized in 2006 in *Regency Outdoor Advertising, Inc. v. City of Los Angeles.*[305] The city planted palm trees on city-owned property along a public street that Regency claimed "made several of its roadside billboards less visible…."[306] Regency thus claimed "that it possesse[d] an abutter's right to have

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[295] Arques v. California*,* 199 Cal. App. 2d 255, 256; 18 Cal. Rptr. 397, 398 (Cal. App. 1st App. Dist. 1962).

[296] *Id.* at 257, 18 Cal. Rptr. at 399.

[297] Higginson v. Wadsworth, 128 Idaho 439, 442 915 P.2d 1, 4 (1996) (*citing* United States v. Dickinson*,* 331 U.S. 745, 67 S. Ct. 1382, 91 L. Ed. 1789 (1947)).

[298] *Id.* at 442, 915 P.2d at 4 (emphasis in original) (*quoting* Tibbs v. City of Sandpoint*,* 100 Idaho 667, 671, 603 P.2d 1001, 1005 (1979)).

[299] Hulsey v. Dep't of Transp.*,* 230 Ga. App. 763, 766, 498 S.E.2d 122, 126 (1998) (emphasis supplied) (*citing* 5 NICHOLS ON EMINENT DOMAIN (1997) § 18.16, at 110–11; United States v. Dickinson, 331 U.S. 745, 747–49, 67 S. Ct. 1382, 91 L. Ed. 1789 (1947); Smart v. City of Los Angeles, 112 Cal. App. 3d 232, 169 Cal. Rptr. 174, 176 (Cal. App. 2d Dist. 1981)).

[300] Higginson v. Wadsworth*,* 128 Idaho at 443, 915 P.2d at 5.

[301] Williams v. State, 65 Misc. 2d 943, 319 N.Y.2d 551 (Ct. Cl. 1971); Bramson v. Bara, 33 Ohio Misc. 186, 293 N.E.2d 577 (Ct. Com. P1. 1971).

[302] Willamette Ironworks v. Or. Ry. and Navigation Co., 26 Or. 224, 228, 37 P. 1016, 1017 (1894); *see also* KAMO Elec. Coop., Inc. v. Cushaud, 416 S.W.2d 646, 654 (Mo. App., Kan. City Dist. 1967) (*aff'd*, 455 S.W.2d 513 (1970)) (holding that "the jury should have been permitted to consider whether unsightliness of the powerline was 'directly injurious' to defendants' property, and thereby affected its market value").

[303] State Dep't of Transp. v. Suit City of Aventura, 774 So. 2d 9, 13–14 (Fla. App. 3d Dist. 2000).

[304] 4 NICHOLS ON EMINENT DOMAIN § 13.22[1], at 13-193. For cases involving loss of visibility, *see* 4 NICHOLS ON EMINENT DOMAIN §§ 13.21 [1], [2], and [3], at 13-186–13-192.

[305] 39 Cal. 4th 507, 139 P.3d 119, 46 Cal. Rptr. 3d 742 (2006), *modified*, 2006 Cal. LEXIS 12176, 2006 Cal. Daily Op. Service 9650 (Cal. 2006) (not affecting the judgment).

[306] *Id.* at 512, 139 P.3d at 121, 46 Cal. Rptr. 3d at 744.

its billboards seen from the adjacent public road."[307] The Supreme Court of California noted that there were categories of "[c]ases discussing whether abutter's rights include a right to maintain the visibility of property adjoining a public way…."[308] As the court explained, some courts recognize a "'right to visibility' in situations in which a private party has obstructed a road or sidewalk so as to substantially impair the visibility of an abutting business's wares or signage."[309] Another category of cases "recognize[s] a compensable visibility interest when government action that includes a partial physical taking of a landowner's property impairs the visibility of its remainder, as seen from the adjacent road."[310] A third category, into which the *Regency* case fell, concerns government action

> having the sole allegedly injurious effect of reducing the visibility of roadside property as seen from the street. The virtually unanimous rule applied in this class of cases provides that any such impairment to visibility does not, in and of itself, constitute a taking of, or compensable damage to, the property in question.[311]

Where loss of visibility is compensable, it has been held that the loss is not a separate element of damages but simply one of the factors that may considered in regard to the highest and best use of the subject property. Thus, in *City of Lee's Summit v. R and R Equities, LLC*,[312] the city appealed from a trial court's judgment awarding $600,000 to the Huffs after a jury trial. At issue in part was loss of visibility and exposure of the property after the city took 4.4 acres of the Huffs' property to widen a road.[313] "The lack of visibility and exposure resulted from the United States Army Corps of Engineers' requiring a buffer zone of vegetation and trees to mitigate the impact that the road's improvement would have on a stream and wetlands on the Huffs' property."[314] Allegedly the taking and the buffer zone reduced the highest and best use of the property from "multi-use or mixed-use development, including high density and low density residential with an emphasis on commercial development…to low density residential."[315]

Although the court reversed the trial court, *inter alia*, because the trial court admitted evidence of a sale of church property as a comparable sale,[316] the court held that the trial court did not err in admitting the Huffs' evidence regarding loss of visibility. The reason was that "[n]one of the witnesses assigned a value to the lost visibility nor were they asked to do so. Rather, they presented it to explain how lost visibility had caused a change in the highest and best use of the property."[317]

The court's decision was based on its analysis of the law regarding loss of visibility only when the loss has a "bearing on the condemned land's highest and best use."[318] The court stated:

> Loss of visibility to a property's passers-by is not itself a compensable item of damage in a condemnation action. This is because such a claim is inextricably related to a non-existent property right in traffic…. Nonetheless, this does not mean that it is of no significance in a condemnation action….

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[307] *Id.* at 517, 139 P.3d at 124, 46 Cal. Rptr. 3d at 748.

[308] *Id.* The court reviewed the principal categories of cases, stating:

> The first and most ancient class of cases involves private parties who place, within or along a street, an obstruction that impairs the visibility of roadside property. Courts have sometimes treated these impediments as akin to nuisances and afforded relief to the abutting landowner. The second and third categories of cases both involve public defendants, and sound in eminent domain or inverse condemnation rather than in nuisance. The second type of dispute involves physical takings of private property, or substantial impairments of the access rights enjoyed by abutting landowners, that also happen to reduce the visibility of the affected private property. In this second scenario, some courts have identified a "right to be seen," regarding the lost visibility as a type of damage associated with the physical taking or loss of access. The third set of cases concerns government action that impairs only the visibility of abutting property, without infringing upon any other recognized property right. In this latter context—typified by the present case—the virtually unanimous rule provides that there is no freestanding right to be seen, and that the government need not pay compensation for any lessened visibility.

Id.

[309] *Id.* at 518, 139 P.3d at 125, 46 Cal. Rptr. 3d at 749 (*citing*, *e.g.*, Bischof v. Merchants' Nat. Bank, 75 Neb. 838, 106 N.W. 996, 997–98 (1906); Perry v. Castner, 124 Iowa 386, 100 N.W. 84, 87 (1904); First Nat. Bank v. Tyson, 133 Ala. 459, 32 So. 144, 150 (1902)).

[310] *Id.* at 519, 139 P.3d at 126, 46 Cal. Rptr. 3d at 750 (*citing* State by Comm'r v. Weiswasser, 149 N.J. 320, 693 A.2d 864, 876 (1997); State by Humphrey v. Strom, 493 N.W.2d 554, 561 (Minn. 1992); 8,960 Sq. Feet v. Dep't of Transp., 806 P.2d 843, 848 (Alaska 1991); State v. Lavasek, 73 N.M. 33, 385 P.2d 361, 364–65 (1963); People v. Loop, 127 Cal. App. 2d 786, 803, 274 P.2d 885 (1954); People v. Ricciardi, 23 Cal. 2d 390, 399, 144 P.2d 799 (1943)); *but see* State v. Schmidt, 37 Tex. Sup. Ct. J. 47, 867 S.W.2d 769, 774 (Tex. 1993).

[311] *Id.* at 520, 139 P.3d at 126, 46 Cal. Rptr. 3d at 750 (*citing*, *e.g.*, Stagni v. State *ex rel*. Dep't of Transp., 812 So. 2d 867, 871 (La. App. 5th Cir. 2002); Moreton Rolleston, Jr. Living Trust v. Dep't of Transp., 242 Ga. App. 835, 531 S.E.2d 719, 722 (2000); Reid v. Jefferson County, 672 So. 2d 1285, 1290 (Ala. 1995); In re Condemnation by Del. River Port Auth., 667 A.2d 766, 768 (Pa. Commw. Ct. 1995); Adams Outdoor Adver. v. Dep't of Transp., 112 N.C. App. 120, 434 S.E.2d 666, 668 (1993); Outdoor Adver. Ass'n of Tenn. v. Shaw, 598 S.W.2d 783, 788 (Tenn. Ct. App. 1980); Filler v. City of Minot, 281 N.W.2d 237, 244 (N.D. 1979); Malone v. Commw., 378 Mass. 74, 389 N.E.2d 975, 979 (1979); Troiano v. Colo. Dep't of Highways, 170 Colo. 484, 463 P.2d 448, 455 (1969); Kansas City v. Berkshire Lumber Co., 393 S.W.2d 470, 474–75 (Mo. 1965); Randall v. City of Milwaukee, 212 Wis. 374, 249 N.W. 73, 76 (1933)).

[312] 112 S.W.3d 38 (Mo. App. W. Dist. 2003).

[313] *Id.* at 40.

[314] *Id.*

[315] *Id.*

[316] *Id.* at 46.

[317] *Id.* at 44.

[318] *Id.*

"It may be said…that noise and speed, increased traffic and their resulting inconveniences are neither elements of damages nor of benefits and they are not proper matters of proof or for the jury's consideration…. But, …it may with other factors affect future use and therefore market value…."

[T]he mention of elements that are not separately compensable, including lost visibility, is permissible when they bear on the condemned property's highest and best use….

Visibility is not a protected property right that is a separately compensable item of damage in a condemnation action. Evidence of lost visibility is proper because of its bearing on the condemned land's highest and best use….[319]

Visibility of an owner's property from the highway is different from the owner's view from the property that may have been obstructed by a highway project. In a 2005 decision by the Colorado Court of Appeals, it appears that loss of visibility of an owner's property from a highway may be a factor to consider with respect to severance damages even if there no reduction in the highest and best use of an affected property. Thus, in *Department of Transportation of Colorado v. Marilyn Hickey Ministries,*[320] the transportation department had taken approximately 10,000 square ft of a church's property. The defendant, also referred to in the opinion as the Happy Church, appealed "the trial court's orders denying damages for loss of visibility of the subject property from Interstate 25 resulting from the construction of a concrete retaining wall…."[321] The Colorado Court of Appeals agreed with the defendant that the trial court "erred in finding that damages resulting from a loss of visibility into the property are not compensable."[322]

When there is a partial taking of a landowner's property, the landowner is entitled to compensation for injury to the remainder of the property…. When there is a reduction in the property value of the remainder, the property owner should be compensated for "all damages that are the natural, necessary and reasonable result of the taking."[323]

The Colorado Supreme Court saw the matter quite differently and reversed. The court "granted certiorari to determine whether the court of appeals erred in ruling that the landowner, part of whose property is being taken by eminent domain for a state transportation project, may recover damages for the impairment of passing motorists' view of the remainder of the landowner's property."[324] First, the court held that the Court of Appeals erroneously relied on *La Plata Electric Association v. Cummins,*[325] in which the court "held that '[a] property owner should be compensated for all damages that are the natural, necessary and reasonable result of the taking.'"[326] Second, the court ruled that the controlling precedent was *Troiano v. Colorado Department of Highways,*[327] in which the court held that "because a landowner has no continued right to traffic passing its property, the landowner likewise has no right in the continued motorist visibility of its property from a transit corridor."[328]

The court explained that

a public transit corridor like I-25 is an always evolving multi-modal point of access to a city's transportation infrastructure. The state's police power enables continued modifications to its public transportation systems and the "[r]ight of access is subject to reasonable control and limitation," … "[L]ogically it would be inconsistent" to recognize a right to visibility but no right to have the traveling public pass one's property.[329]

The Colorado Supreme Court also relied on a 2007 decision by the Utah Supreme Court in *Ivers v. Utah Department of Transportation,*[330] in which the court held that "landowners do not have a protected interest in the visibility of their property from an abutting road, even if part of their land has been taken in the process."[331]

Finally, the Colorado Supreme Court observed that the landowner in the *Marilyn Hickey Ministries* case did not

claim a diminution in aesthetic value because the retaining wall obstructs its view from the remaining property out toward I-25. Nor could it reasonably claim that a view of a busy interstate freeway had any inherent aesthetic value. Rather, the sole basis of its claim is that motorists passing along a narrow 650 foot strip of land have a diminished view of the remainder property. La Plata did not recognize a right to visibility looking in toward one's property. As we stated above, La Plata only involved the loss of aesthetic value when taking an easement for an electric transmission line and all of the resulting damages following from such a taking….The lost visibility claimed by the landowner in Troiano and by the Happy Church is nothing more than an access claim.[332]

It has been held also that diminution in business or loss of sales may not be used to calculate the damages to the remainder for loss of visibility. In *Delaware v. Catawba Associates,*[333] after a taking of the owners' property, the view of the owners' restaurant from the

[319] *Id.* at 43–44 (citations omitted) (emphasis supplied).

[320] 129 P.3d 1068 (Colo. Ct. App. 2005), *rev'd and remanded*, 159 P.3d 111 (Colo. 2007).

[321] 129 P.3d at 1070.

[322] *Id.*

[323] *Id.* (*quoting* La Plata Elec. Ass'n v. Cummins, 728 P.2d 696, 700 (Colo. 1986)).

[324] DOT of Colo. v. Marilyn Hickey Ministries, 159 P.3d 111, 112.

[325] 728 P.2d 696 (Colo. 1986).

[326] 159 P.3d at 113 (citation omitted).

[327] 170 Colo. 484, 463 P.2d 448 (1969).

[328] 159 P.3d at 113.

[329] *Id.* at 114 (citations omitted).

[330] 2007 UT 19, 154 P.3d 802 (2007).

[331] *Id.* at P12, 154 P.3d at 805.

[332] DOT v. Marilyn Hickey Ministries, 159 P.3d at 115 (footnote omitted).

[333] 2005 Del. Super. LEXIS 62 (2005) (Unrept.).

road was partly obstructed.[334] An expert for the owner concluded that the value of the land was reduced because of lower rental value owing to the restaurant's reduced sales after the taking.[335] However, the court held that in Delaware, "[t]he owner is not entitled to compensation for the value of the business conducted on the land taken."[336]

> This rule is based on the fact that the business owner is free to open his or her business in another location, …and this is so even if the business cannot be successfully relocated. Evidence regarding the business is relevant only to the extent that it illustrates one of the uses to which the land may be put.[337]

Thus, the expert's report was inadmissible:

> While Delaware courts have allowed the admission of evidence of pre-taking gross sales to help establish economic rent, they have not permitted the introduction of loss sales after the taking to calculate the residual value of the property….
>
> [T]he owner is not entitled to compensation for the taking or even destruction of the business, because the business is entirely distinct from the market value of the land upon which it is conducted….[338]

In *Regency*, *supra*, the court held that Regency had no right of visibility that required the payment of compensation. Moreover, "Regency cannot claim unfair surprise from the plantings. Local governments have long planted trees along roads for aesthetic reasons…."[339] The *Regency* court observed also that the plantings had not reduced the value of the parcels of land on which the billboards were erected.[340] Although Regency had a property interest separate and apart from the respective owners' interest in the parcels of land, Regency's separate, identifiable property interest did not give rise to a right to compensation.

> Through its lease agreements Regency has acquired a property interest acutely sensitive to impairments to visibility. But as a general matter, "we do not believe that a property owner, confronted with an imminent property regulation, can nullify…a legitimate exercise of the police power by leasing narrow parcels or interests in his property so that the regulation could be characterized as a taking only because of its disproportionate effect on the narrow parcel or interest leased."[341]

F.2. Loss of View

Government action that obstructs the view from an affected property, depending on the circumstances, may constitute a taking.[342]

In *City of Ocean City v. Maffucci,*[343] the defendants owned beachfront duplexes on Wesley Avenue in Ocean City.[344] The city instituted a condemnation action to take an 80 ft strip of beach in front of 2825 Wesley Avenue, in which the Spadaccinos were first floor tenants, to permit the building of new sand dunes. The sand dunes completely obstructed the view of the ocean and eliminated direct access to the beach.[345] The city's expert testified that "because beach view and access rights have no value, loss of riparian (littoral) rights did not devalue the property…. He testified that there is no difference in value between beachfront and non-beachfront property."[346] Needless to say, the defendants' expert disagreed,[347] as did the court.

> [O]cean view, beach access, use and privacy are fundamental considerations in valuing beachfront property.
>
> Indeed every other jurisdiction which has considered this issue has held that loss of view, loss of access, loss of privacy and loss of use are compensable. For example, in *Pierpont Inn, Inc. v. State*, 70 Cal. 2d 282, 74 Cal. Rptr. 521, 449 P.2d 737, 745–46 (1969), *overruled on other grounds*, *Los Angeles County, Metro. Transportation Authority v. Continental Dev. Corp.*, 16 Cal. 4th 694, 66 Cal. Rptr. 2d 630, 941 P.2d 809 (1997), the California Supreme Court held that a property owner's loss of view and access to the beach, resulting from a partial taking for freeway construction, were proper elements of severance damages.[348]

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[334] *Id.* at *2.

[335] *Id.*

[336] *Id.* at *7 (footnotes omitted).

[337] *Id.* (footnotes omitted).

[338] *Id.* at *8 (footnote omitted) (*citing* Ableman v. State, 297 A.2d 380, 383 (Del. 1972); Wilmington Hous. Auth. v. Nos. 312-314 East Eighth Street, 55 Del. 252, 191 A.2d 5, 11 (Del. Super. Ct. 1963)).

[339] Regency Outdoor Adver., Inc., v. City of Los Angeles*,* 39 Cal. 4th at 522, 139 P.3d at 128, 46 Cal. Rptr. 3d at 752.

[340] *Id.*

[341] *Id.* at 523, 139 P.3d at 128, 46 Cal. Rptr. 3d at 753, (*quoting* Adams Outdoor Adver. v. East Lansing, 463 Mich. 17, 614 N.W.2d 634, 639 (2000)). *See also* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 327, 122 S. Ct. 1465, 1481, 152 L. Ed. 2d 517, 543 (2002) (reiterating that "'taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated").

[342] For cases on loss of view, see 4 NICHOLS ON EMINENT DOMAIN § 13.22[1], [2], and [3], at 13-193–13-197.

[343] 326 N.J. Super. 1, 740 A.2d 630 (1999).

[344] *Id.* at 4, 740 A.2d at 631.

[345] *Id.* at 4, 740 A.2d at 632.

[346] *Id.* at 5, 740 A.2d at 632.

[347] *Id.* at 14, 740 A.2d at 637.

[348] *City of Ocean City*, 326 N.J. at 19–20, 740 A.2d at 641 (footnote omitted). *See also* the following cases cited in the opinion: Butler v. State, 973 S.W.2d 749, 757 (Tex. App. 3d Dist. 1998) (holding that landowners, part of whose property was taken for construction of approach lanes to an elevated highway, could receive compensation for the diminution in value of the remaining property caused by creation of an unattractive "aesthetic view" from the remainder of the property); Tiffany v. Town of Oyster Bay, 234 N.Y. 15, 136 N.E. 224, 225 (1992) (stating that "rights of reasonable, safe, and convenient access to the water…commonly belong to riparian ownership"); Bd. of Trustees of Internal Improvement Trust Fund v. Sand Key Assocs. 512 So. 2d 934, 936 (Fla. 1987) (holding that riparian and littoral rights include "the right of access to the water" and "the right to an unobstructed view of the water"); State *ex rel*. State Highway Comm'n v. Hesselden Inv. Co., 84 N.M. 424,

As one authority states, "[i]t generally appears that a loss of view is a factor to consider in awarding compensation if there has been a partial taking of the landowner's property."[349] However, "[m]any courts have denied compensation for loss of view when (1) none of the landowner's property was taken, and (2) the public improvement involved a highway,"[350] in part because "parties purchasing land adjacent to public roadways should anticipate that future development…may impair their view."[351]

G. MISCELLANEOUS

G.1. Privacy and Security

An owner's privacy and security that are reduced as a result of a taking are normally taken into consideration only to the extent they are included in the diminution in value to the remainder.[352] There is, however, some authority holding that if a property is a special use property that is dependent upon privacy and security then loss of privacy and security, may be allowed as a separate item of damage to show a reduction of the property's highest and best use for that purpose, even to the extent that the loss renders the remainder almost valueless.[353]

G.2. Spatter

So-called spatter damage, i.e., snow, slush, and ice being spattered onto the landowner's remaining property, is normally considered to be a general damage, i.e., one shared in common with other property owners; however, a landowner may be able to show that such damage is unique to the affected property.[354]

G.3. Fear

Certain types of takings can cause landowners who occupy the remaining property to be fearful as a result of the use of the easement acquired.[355] Unless a fear is based on provable fact generally believed by the public, it appears that the courts do not consider fear as an element of damage because it is too remote and speculative.[356] However, there is some authority for permitting evidence of fear if there is a general public fear of subsequent problems that will be caused, for example, by the improvement, such as electromagnetic fields causing health problems.[357] It has been held that if the element of fear is to be admitted, it is only one factor to be considered and is not to be given an independent value of its own.[358]

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504 P.2d 634, 637 (1972) (holding that loss of view, impaired ingress and egress, and circuitous indirect access were compensable consequential elements of damages on partial taking); Dennison v. State, 22 N.Y.2d 409, 293 N.Y.S.2d 68, 239 N.E.2d 708, 710–11 (1968) (holding that it was proper when a taking of a portion of land for highway resulted in loss of privacy, seclusion, and view to consider traffic noise, lights, and odors as factors in determining the decrease in the value to the remaining property); S.C. State Highway Dep't v. Touchberry, 248 S.C. 1, 148 S.E.2d 747, 749–50 (1966) (holding that plaintiff's loss of view of his farmland and loss of breeze to the remainder of the property, are compensable severance damages after a partial taking); Thiesen v. Gulf, F. & A. Ry. Co., 75 Fla. 28, 78 So. 491, 501 (1917) (stating that "[t]he common-law riparian proprietor enjoys [the] right [of ingress and egress], and that of unobstructed view over the waters, and in common with the public the right of navigating, bathing, and fishing")).

[349] 4 NICHOLS ON EMINENT DOMAIN § 13.22[2], at 13-194.

[350] *Id*. § 13.22[3], at 13-197.

[351] *Id*.

[352] Trustees of Boston Univ. v. Commonwealth, 286 Mass. 57, 62, 64–65, 190 N.E. 29 (1934).

[353] Newton Girl Scout Council v. Mass. Turnpike Auth., 335 Mass. 189, 138 N.E.2d 769 (1956).

[354] State of Mo., *ex rel*. State Highway Comm'n v. Franchise Realty Interstate, 577 S.W.2d 925 (Mo. App. W. Dist. 1979).

[355] Annotation, *Fear of Powerline, Gas or Oil Pipeline or Related Structure in Easement Condemnation Proceeding*, 23 A.L.R. 4th 631 (1983).

[356] Ne. Gas Transmission Co. v. Tersana Acres, 144 Conn. 509, 134 A.2d 253 (1957).

[357] W. Farmers Elec. Co-op v. Enis, 1999 Ok. Civ. App. 111, 993 P.2d 787 (2d Div. 1999).

[358] *Id.* at *15, 16, 993 P.2d at 793 (remanding for a new trial).

SECTION 4

REGULATORY TAKINGS AND RELATED ISSUES AND DEFENSES

"The general rule at least is, that while property may be regulated to a certain extent, *if regulation goes too far it will be recognized as a taking*."[1]

[1] Pa. Coal v. Mahon, 260 U.S. 393, 415–16, 43 S. Ct. 158, 160, 67 L. Ed. 2d 332, 326 (1922) (Holmes, J.) (emphasis supplied).

A. INVERSE CONDEMNATION CLAIMS FOR REGULATORY TAKING

A.1. Regulation Under the Police Power

Eminent domain, as stated, is the right of the government to take private property for public use.[2] When private property is taken for public use, however, just compensation is required to be paid to the owner.[3] As addressed more fully in Section 1.D.3, *supra*, the police power is the exercise of the sovereign right of a government to promote "order, safety, health, morals, and the general welfare of society within constitutional limits."[4] The exercise of the police power may give rise to a claim that the landowner has suffered a diminution in value of his or her property because of the subject regulation, ordinance, or statute. The police power is a broad one, giving government a very effective tool with which to govern. Unlike the exercise of eminent domain, an exercise of the police power does not give rise to the property owner's right to compensation. However, as "'[b]road and comprehensive as are the police powers of the state…it may not successfully be contended that the power may be so exercised as to infringe upon or invade rights safeguarded by constitutional provisions.'"[5]

With respect to both the exercise of the power of eminent domain and of the police power, both must be exercised for a public use, although the concept of what is a public use has been defined broadly.[6] The difficulty lies in determining where the police power ends and eminent domain begins. If the government has taken or damaged an owner's property in the constitutional sense, the property owner may institute an action in inverse condemnation and claim compensation in the same manner as if the government had brought a condemnation proceeding to take the subject property.

It should be noted, as discussed in Section 1.G, *supra*, that what constitutes a compensable taking may differ under various state laws and decisions and may differ as well from federal standards. Moreover, the discussion of state cases herein does not include the views of all the states on a given issue but rather provides examples of how some states have resolved a particular issue.

[2] *See* MacVeagh v. Multnomah County, 126 Or. 417, 270 P. 502 (1928).

[3] *See* discussion in § 1.D, *supra*.

[4] Lincoln Fed. Labor Union v. Nw. Iron & Metal Co., 149 Neb. 507, 523, 31 N.W.2d 477, 487 (1948), *aff'd*, 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212 (1949) (*quoting* 16 C.J.S., *Constitutional Law* § 174).

[5] Colman v. Utah State Land Bd., 795 P.2d 622, 627 (Utah 1990) (*quoting* Bountiful City v. De Luca, 77 Utah 107, 119, 292 P. 194, 199–200 (1930)).

[6] *See* discussion in § 1.G, *supra*.

A.2. Recent Decisions Regarding Alleged Regulatory Takings

As explained in the next subsections, the U.S. Supreme Court has defined takings that may give rise to an inverse condemnation claim as categorical or *per se* takings and as noncategorical takings. However, regardless of the type of regulatory taking alleged by property owners, claimants appear to have been unsuccessful for the most part. With respect to such claims against transportation departments for regulatory takings, in a 2006 Illinois case a state statute allowed the state transportation agency to prepare and record maps setting forth a right-of-way for a proposed highway.[7] The statute also required property owners within the proposed right-of-way to give notice if they planned to develop their property so that the department would be able to exercise its option to commence eminent domain proceedings. After a landowner's required notification to the department, the department had up to 165 days to decide whether to acquire the owner's property by purchase or condemnation.[8] During the statutory period for the department to make its decision, the landowner was not allowed to pursue development.[9] The court ruled that the statutory procedure was not a regulatory taking.[10] Likewise, in a 2005 Wisconsin case it was held that the transportation department's enactment of setback restrictions was not a taking.[11]

With respect to various kinds of land-use regulations, a number of claims based on an alleged regulatory taking recently have been unsuccessful. For instance, claimants in Minnesota were not successful in establishing an unconstitutional taking with respect to the enactment of land-use regulations classifying wetlands near the subject property as a natural environment lake and the imposition of a temporary moratorium on construction in a 100-year flood plain.[12] Elsewhere, a 21-month moratorium on building permits did not constitute a taking as mere government decision-making is not a taking.[13] In New York a town planning board's conditioning of approval for a proposed building site on acceptance of a conservation restriction on development was not a taking.[14] In California, the imposition of a condition on the property owner's request to activate a well, which limited the amount of

[7] Davis v. Brown, 221 Ill. 2d 435, 851 N.E.2d 1198 (2006).

[8] *Id.* at 445, 851 N.E.2d at 1205.

[9] *Id.*

[10] *Id.* at 447, 851 N.E.2d at 1206.

[11] Wis. Builders Ass'n v. Wis. Dep't of Transp., 285 Wis. 2d 472, 505, 702 N.W.2d 433, 448 (2005).

[12] Miskowiec v. City of Oak Grove, 2004 Minn. App. LEXIS 1236, at *16 (Mich. App. 2004) (Unrept.).

[13] Wild Rice River Estates, Inc. v. City of Fargo, 2005 N.D. 193, *P14, 705 N.W.2d 850, 855 (2005).

[14] Smith v. Town of Mendon, 4 N.Y.3d 1, 14, 822 N.E.2d 1214, 1221, 789 N.Y.S.2d 696, 703 (2004).

water that the owner could extract from the aquifer beneath the owner's property, was not a taking.[15] It was not a regulatory taking in Georgia when a property owner consented to the deposit of sludge on the owner's property without knowing that the county had begun depositing not just sludge but toxic waste on the property.[16] In California a county range ordinance forcing property owners to accept the physical invasion of their property by their neighbors' cattle did not constitute a taking where the owners had the right to keep cattle off their property with a lawful fence.[17]

In other recent claims for alleged regulatory takings, property owners appear to have been mostly unsuccessful. In a California case, property owners were not entitled to recover lost rental income when the owners were prevented from charging increased rent by a rent control ordinance that was later determined to be unconstitutional. The reason was that during the period the rent control ordinance was in effect, the owners had not been denied a reasonable rate of return.[18] In Michigan it has been held that the government's alleged failure to abate a fire hazard is not a regulatory taking.[19]

Inverse condemnation claims for regulatory takings have failed also when the property right allegedly taken was held not to be a property right for takings analysis. Thus, state law may be relevant in such cases on what constitutes property. For example, a state license is not a property right protected under a takings clause; moreover, an intangible interest in a business is not a proper subject of a claim for an alleged regulatory taking.[20]

Finally, for there to have been an unconstitutional taking, the taking must be a continuous and permanent invasion or interference with an owner's property right. As held in Pennsylvania and other states, a temporary delay is not a taking for the period of time that the government was successful at the trial court level in enjoining the owners from developing their property without the municipality's approval.[21] As seen in subsections B.12 and B.13, *infra*, other forms of government delay, as well as temporary takings, are not takings.

[15] Allegretti & Co. v. County of Imperial*,* 138 Cal. App. 4th 1261, 1279–80, 42 Cal. Rptr. 3d 122, 136 (Cal. App. 4th Dist. 2006), *review denied,* 2006 Cal. LEXIS 9142 (Cal., July 26, 2006), *cert. denied*, 127 S. Ct. 960, 166 L. Ed. 2d 706 (2007).

[16] McElmurray v. Augusta-Richmond County, 274 Ga. App. 605, 607, 618 S.E.2d 59, 62 (Ga. Ct. App. 2005).

[17] Herzberg v. County of Plumas, 133 Cal. App. 4th 1, 17, 34 Cal. Rptr. 3d 588, 599 (Cal. App. 3d Dist. 2005).

[18] Hillsboro Prop. v. City of Rohnert Park, 138 Cal. App. 4th 379, 41 Cal. Rptr. 3d 441 (Cal. App. 1st Dist. 2006).

[19] Safeco Prop. & Casualty Ins. Co. v. City of Detroit, 2006 Mich. App. LEXIS 705, at *4 (Mich. Ct. App. 2006) (Unrept.).

[20] Kafka v. Mont. Dep't of Fish, Wildlife and Parks, 2005 Mont. Dist. LEXIS 729, at **43, **54 (12th Judicial Dist., Hill County 2005).

[21] *In the Matter of Condemnation of Certain 3.5 Acres Land*, 870 A.2d 400, 409–10 (Commw. Ct. Pa. 2005).

A.3. Categorical Takings of Private Property

"Almost all of the Supreme Court's holdings on regulatory takings involve the adoption of ordinances, regulations, or other legislation that limit development or regulate land use."[22] The Supreme Court of Idaho has observed that "courts have long held that governmental conduct not involving the physical appropriation of property may so interfere with private interests in property as to constitute a taking."[23]

It was in 1922 in *Pennsylvania Coal Co. v. Mahon*[24] that Justice Holmes sought to articulate a test for regulatory takings when he wrote that "if regulation goes too far it will be recognized as a taking."[25] Later Supreme Court cases have explained that *categorical* or *per se* takings occur when there is a permanent invasion by the government of an owner's property no matter how slight[26] or when a regulation "'denies all economically beneficial or productive use of land.'"[27] Furthermore, *noncategorical* or "case-specific takings …involve consideration of the economic impact of the regulation, the [regulation's] interference with reasonable investment-backed expectations, and the character of the regulation."[28]

The Wisconsin Court of Appeals[29] deems there to be four categories of takings: 1) those requiring an owner to suffer a permanent physical invasion of his or her property (e.g., *Loretto*[30]); 2) those that are not a permanent physical invasion of the owner's property, as in *Loretto*, *supra*, but that deprive an owner of *all* "economically beneficial use" of his or her property (e.g., *Lucas*[31]); 3) those that are case specific and require an *ad hoc* balancing of factors under the U.S. Supreme Court's holding in *Penn Central Transportation Co. v.*

[22] STS/BAC Joint Venture v. City of Mt. Juliet, Tenn., 2004 Tenn. App. LEXIS 821, at *15–16 (Tenn. App. 2004).

[23] City of Coeur d'Alene v. Simpson, 142 Idaho 839, 846, 136 P.3d 310, 318 (2006) (*citing* Pa. Coal Co. v. Mahon, 260 U.S. 393, 414–15, 43 S. Ct. 158, 67 L. Ed. 322 (1922)).

[24] 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 2d 332 (1922).

[25] *Mahon*, 260 U.S. at 415, 43 S. Ct. at 160, 67 L. Ed. 2d at 326.

[26] Loretto v. Teleprompter Manhattan CATV Corp*.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982).

[27] Miskowiec v. City of Oak Grove*,* 2004 Minn. App. LEXIS 1236, at *8 (*quoting* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 2893, 120 L. Ed. 2d 798, 812 (1992)).

[28] *Id.* (*citing* Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978); *see also* Agins v. City of Tiburon, 447 U.S. 255, 261–62, 100 S. Ct. 2138, 2141–42, 65 L. Ed. 2d 106 (1980)).

[29] *See* discussion in Wis. Builders Ass'n v. Wis. Dep't of Transp., 285 Wis. 2d 472, 702 N.W.2d 433 (2005).

[30] Loretto v. Teleprompter Manhattan CATV Corp*.,* 458 U.S. 419, 432, 102 S. Ct. 3164, 73 L. Ed. 2d 868, 880 (1982).

[31] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016, 112 S. Ct. 2886, 2894, 120 L. Ed. 2d 798, 813 (1992).

City of New York;[32] and 4) those that involve land-use exactions (e.g., *Nollan*[33] *and Dolan*[34]).

The subsections that follow embrace the Wisconsin court's analysis above by discussing two forms of categorical takings, noncategorical takings that do not come within the previous categories that must be evaluated based on a balancing of the *Penn Central* factors, and exactions as a specific form of regulatory takings.

A.3.a. Direct Appropriation or Physical Invasion of Private Property by Government: The Loretto Holding

As stated, there are two kinds of categorical takings. The first type of categorical taking in which compensation is required is when there is a "direct governmental appropriation or physical invasion of private property,"[35] such as occurred in *Loretto v. Teleprompter Manhattan CATV Corp.*[36] In *Loretto* a New York law required a landlord to permit a cable television company to install its cable facilities on the landlord's property, for which the landlord, pursuant to a ruling of the State Commission on Cable Television, could charge no more than $1.00.[37] The Supreme Court held that the cable installation on the property as required by law constituted a taking under the traditional test that a "permanent physical occupation" of private property as required by the government in that case is a taking.[38]

As stated in *Brown v. Legal Foundation of Washington*,[39]

> "'[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner…regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary…. Similarly, when the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants…; or when its planes use private airspace to approach a government airport…, it is required to pay for that share no matter how small.'"[40]

Therefore, if the government physically possesses or invades private property, "the government has a 'categorical duty' to compensate the owner for a taking."[41] Even a temporary invasion or appropriation of property by the government is compensable, because "[i]t is now well settled that a temporary, non-final deprivation of property is…a 'deprivation' within the terms of the Fourteenth Amendment."[42] Thus, for instance, it has been held that a "[t]emporary loss of use of the remainder area is treated in the same manner as a permanent loss" for which compensation is required.[43]

Finally, a majority of the cases hold that government agencies having the power of eminent domain may enter private property for the purpose of conducting examinations and surveys.[44] Such authority is often granted by statute. However, a condemnor should acquire a temporary easement if land is being entered for the purpose of drilling holes and removing soil samples or if other invasive acts are to be performed that do not come within the definition of a survey.[45]

A.3.b. Deprivation of All Economically Beneficial Use of the Property: The Lucas *Test*

"A second categorical rule applies to regulations that completely deprive an owner of '*all* economically beneficial use' of [the] property."[46] When governmental regulations go too far and become too "onerous," the "'effect is tantamount to a direct appropriation and ouster…and…such regulatory takings may be com-

[32] 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978).

[33] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

[34] Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

[35] Allegretti & Co. v. County of Imperial, 42 Cal. Rptr. 3d at 128 (*quoting* Lingle v. Chevron USA, Inc., 544 U.S. at 536, 125 S. Ct. at 2081, 161 L. Ed. 2d at 887).

[36] 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 868 (1982).

[37] *Id.* at 421, 423-24, 102 S. Ct. at 3169, 73 L. Ed. 2d at 874.

[38] *Id.* at 428, 437, 102 S. Ct. at 3172, 3177, 73 L. Ed. 2d at 877, 883–84.

[39] 538 U.S. 216, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (2003).

[40] *Id.* at 233–34, 123 S. Ct. at 1418, 155 L. Ed. 2d at 393 (emphasis supplied) (citations omitted) (*quoting* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321–23, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002).

[41] Herzberg v. County of Plumas, 133 Cal. App. 4th 1, 13, 34 Cal. Rptr. 3d 588, 596 (Cal. App. 3d Dist. 2005) (*citing* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537, 125 S. Ct. 2074, 161 L. Ed. 2d 876, 887 (2005); Brown v. Legal Found. of Wash., 538 U.S. 216, 233, 123 S. Ct. 1406, 155 L. Ed. 2d 376, 393 (2003); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432, 102 S. Ct. 3164, 73 L. Ed. 2d 868, 880 (1982); Kaiser Aetna v. United States, 444 U.S. 164, 176, 100 S. Ct. 383, 62 L. Ed. 2d 332, 344 (1979) (*per se* rule recognizes owner's right to exclude others as "one of the most essential sticks in the bundle of rights that are commonly characterized as property").

[42] 1A NICHOLS ON EMINENT DOMAIN § 4.5[2], at 4-27, 28 (3d ed. 2007).

[43] 4A NICHOLS ON EMINENT DOMAIN § 14A.01[1], at 14A-3.

[44] 9 NICHOLS ON EMINENT DOMAIN § 32.06, at 32-25.

[45] *Id.* at 32-27–28. *See id.* § 6.01 [16][a]. *See also* Robinson v. Ark. Game & Fish Comm'n, 263 Ark. 462, 565 S.W.2d 433 (1978) (reversing a trial court's order requiring a landowner to allow the Commission's employees to enter the owner's property in connection with the Commission's plan to construct a new lake bordering the owner's property); Cathey v. Ark. Power & Light Co., 193 Ark. 92, 97 S.W.2d 624 (1936) (holding that highway department's right-of-way did not authorize an electric power company to erect lines in the right-of-way without paying damages as the owner was entitled to damages for each additional "servitude").

[46] Allegretti & Co. v. County of Imperial, 138 Cal. App. 4th at 1270, 42 Cal. Rptr. 3d at 128 (emphasis in original) (*quoting Lingle*, 544 U.S. at 538, 125 S. Ct. at 2081, 161 L. Ed. 2d at 888 (*quoting Lucas,* 505 U.S. at 1019, 112 S. Ct. at 2895, 120 L. Ed. 2d 814) (some internal quotation marks omitted).

pensable under the Fifth Amendment.'"[47] Although there is no "exact formula to establish a de facto taking, there must be some action by the government specifically directed toward the plaintiff's property that has the effect of limiting the use of the property."[48]

In *Lucas v. South Carolina Coastal Council,*[49] discussed in more detail below, a landowner challenged regulations intended to prevent erosion that restricted private development on state beaches. The U.S. Supreme Court held that compensation could be required "if, on remand, the state court found that the development regulations were restrictive enough to amount to a taking of the beachfront property."[50]

However, prior to the U.S. Supreme Court's decision in *Lucas*, *supra*, the Court decided *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles.*[51] The First English Evangelical Lutheran Church of Glendale owned land in Los Angeles County on which it operated a campground called Luther Glen as a retreat area and recreational center for handicapped children. In 1978 a flood destroyed all of the buildings in the campground. Thereafter, Los Angeles County adopted an interim ordinance, prohibiting the construction or reconstruction of any building in an interim flood protection area, including the campground.[52] Shortly after the adoption of the ordinance, the landowner filed suit in inverse condemnation seeking compensation, alleging that the ordinance deprived the church of all use of the campground.[53] The trial court granted summary judgment to the county on the inverse condemnation claim based on the Supreme Court's holding in *Agins v. Tiburon.*[54] The California Court of Appeals affirmed and the California Supreme Court denied review.

The U.S. Supreme Court addressed the issue solely on the basis of the pleadings. The Court left for a decision on remand the issue of whether the landowner had been deprived of all use of the property but held that "invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy."[55] On remand the California Court of Appeals held that there was no taking because the interim ordinance did not deny the owner all uses and protected the highest of public purposes in prevention of death and injury.[56]

Returning now to the discussion of the seminal *Lucas* case, *supra*, the Supreme Court in *Lucas* affirmed its earlier holdings in both *Agins* and *First English Evangelical Lutheran Church of Glendale*. In *Lucas* the landowner purchased two lots in 1986 on a South Carolina barrier island with the intention of building single-family homes. In 1988 the state legislature enacted the Beachfront Management Act, which barred the landowner from erecting any habitable structures on the land.[57] The landowner filed an inverse condemnation action, claiming that the state's action was a taking because it deprived the owner of all economic use of the property.

The purpose of the South Carolina legislation was to protect the beaches from erosion from the ocean, wind, and various other causes.[58] According to a lower court, the landowner's lots had been rendered valueless by the state's enforcement of the Act.[59] In upholding the Act, the Supreme Court of South Carolina applied the principle of "harmful" or "noxious" use and held that the Act was merely an exercise of the state's police power to mitigate harm to the public interest that did not result in an unconstitutional taking.[60]

The Supreme Court reversed and remanded. The Court recognized that there is often no distinction between a "harm-preventing" regulation that is noncompensable and a "benefit-conferring" regulation that is compensable.[61] The Court held, however, that

> [w]hen it is understood that "prevention of harmful use" was merely our early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings"—which require compensation—from regulatory deprivations that do not require compensation. *A fortiori* the legislature's recitation of a noxious-use justification cannot be the basis for departing from our *categorical rule that total regulatory takings must be compensated*. If it were, departure would virtually always be allowed.[62]

[47] *Id.* (*quoting Lingle*, 544 U.S. at 537, 125 S. Ct. at 2081, 161 L. Ed. 2d at 887).

[48] Steel Assocs., Inc. v. City of Detroit, 2005 Mich. App. LEXIS 2553, at *3 (Mich. Ct. App. 2005) (citations omitted), *appeal denied*, 2006 Mich. LEXIS 530 (Mich., Mar. 27, 2006).

[49] 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

[50] *See* Manning v. Mining and Minerals Div., 140 N.M. 528, 531, 144 P.3d 87, 90 (N.M. 2006) (*citing Lucas*, 505 U.S. at 1027-30, 112 S. Ct. 2886, 120 L. Ed. 2d 798), *cert. denied*, 127 S. Ct. 663, 166 L. Ed. 2d 513 (2006).

[51] 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987).

[52] *Id.* at 307, 107 S. Ct. at 2381, 96 L. Ed. 2d at 259.

[53] *Id.* at 308, 107 S. Ct. at 2382, 96 L. Ed. 2d at 259.

[54] Agins v. City of Tiburon, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980).

[55] 482 U.S. at 322, 107 S. Ct. at 2389, 96 L. Ed. 2d at 268.

[56] First English Evangelical Lutheran Church of Glendale v. County of L.A., 210 Cal. App. 3d 1353, 1372, 258 Cal. Rptr. 893, 905 (Cal. App. 2d Dist. 1989).

[57] Lucas v. S.C. Coastal Council, 505 U.S. at 1006, 112 S. Ct. at 2889, 120 L. Ed. 2d at 808.

[58] *Id.* at 1022, 112 S. Ct. at 2897, 120 L. Ed. 2d at 817.

[59] *Id.* at 1007, 1009, 1019–1020, 112 S. Ct. at 2890, 2896, 120 L. Ed. 2d at 809, 815.

[60] *Id.* at 1020, 112 S. Ct. at 2896, 120 L. Ed. 2d at 816 (*citing* Mugler v. Kansas, 123 U.S. 623, 8 S. Ct. 273, 31 L. Ed. 205 (1887)).

[61] *Id.* at 1024, 1025, 112 S. Ct. at 2897, 2898, 120 L. Ed. 2d at 818.

[62] *Id.* at 1026, 112 S. Ct. at 2898–99, 120 L. Ed. 2d at 819 (some emphasis in original; some emphasis supplied).

In determining how to distinguish between "harm-preventing" regulations and "benefit-conferring" regulations, the Court turned to the common law.

> Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved…—though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title…. We believe similar treatment must be accorded confiscatory regulations, *i.e.*, regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.[63]

The result of the Court's decision was that South Carolina could not impose the regulation on the land unless it could meet the above test. On remand the Supreme Court of South Carolina held that "the sole issue on remand from this Court to the circuit level is a determination of the actual damages Lucas has sustained as the result of his being temporarily deprived of the use of his property."[64]

A balancing of factors, as required in a situation of a noncategorical, *Penn Central*-type taking, discussed below, is not required "where a governmental regulatory action permanently eliminates an economic value from an entire piece of property by prohibiting all economically beneficial use"; such an action is a "*per se*" or "total regulatory taking."[65] However, as explained in subsection B.5, *infra*, in the absence of a *Lucas* total taking of all economically viable use of the property, the *Penn Central* analysis is to be applied in a "fact specific inquiry" into the alleged taking.[66]

In 2004 in *Miskowiec v. City of Oak Grove, supra,* the Minnesota Court of Appeals distinguished an ordinance and moratorium from South Carolina's Beachfront Management Act that was at issue in the *Lucas* case, because in *Miskowiec* the appellants' "property ha[d] several productive uses."[67] Indeed, "the district court found that instead of a decline in value, the property actually appreciated in value since appellants purchased it."[68] (Interestingly, however, the property "was unbuildable" even before the enactment of the subject regulation affecting the property.[69])

As explained in the next subsection, there has not been a *Lucas*-type taking unless the government regulation at issue deprives the owner of all economically viable use of his or her property. Regulation that diminishes, even destroys, the value of a business operated on the owner's property also typically is not a taking within the meaning of *Lucas*. A Montana court recently considered the meaning of *Lucas* in 2005 in *Kafka v. Montana Department of Fish, Wildlife and Parks,*[70] observing that the Supreme Court "explicitly distinguished cases like the one at bar, in which the effect of the regulation fell on the *commercial viability of a business*,"[71] and stating that "lower courts have recognized that *the categorical taking rule applies only to claimed takings of land*."[72]

A.4. Maps of Reservation and Deprivation of Economically Viable Use

Many courts have dealt with the issue of whether maps of reservation are constitutional.[73] Under *Lucas*, of course, the critical question is whether a challenged regulation has "deprived landowners of 'all economically viable use' of their property."[74] Most courts that have considered statutes and ordinances authorizing maps of reservation such as those used by transportation departments or other government agencies have held that the laws are not *facially* unconstitutional.[75] However, "nearly every reported case has found that the reservations as *applied* preclude any economically viable use of the mapped lands and constitute a taking without just compensation."[76]

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[63] *Id.* at 1028–29, 112 S. Ct. at 2900, 120 L. Ed. 2d at 821 (citations omitted) (footnote omitted).

[64] Lucas v. S.C. Coastal Council, 309 S.C. 424, 427, 424 S.E.2d 484, 486 (1992).

[65] STS/BAC Joint Venture v. City of Mt. Juliet, 2004 Tenn. App. LEXIS 821, at *12 (Tenn. Ct. App. 2004).

[66] *Id.* at *12–13.

[67] 2004 Minn. App. LEXIS 1236, at *16. (See note 27, *infra*.)

[68] *Id.*

[69] *Id.*

[70] 2005 Mont. Dist. LEXIS 729, at **54–55 (12th Judicial Dist., Hill County 2005).

[71] *Id.* at **55 (emphasis supplied).

[72] *Id.* (emphasis supplied) (*citing* Unity Real Estate Co. v. Hudson, 178 F.3d 649, 674 (3d Cir. 1999), *cert. denied*, 528 U.S. 963, 120 S. Ct. 396, 145 L. Ed. 2d 309 (1999)).

[73] It should be noted that pre-1999 cases on the subject may have been superseded by decisions of the U.S. Supreme Court. *See* 8A NICHOLS ON EMINENT DOMAIN § 17.04[1], at 17-42 (3d ed. 2008) (also noting that in the 5-year period prior to 1999 there were virtually no cases of right-of-way reservations other than the exaction cases that usually involve requirements for outright dedication).

[74] Smith v. Town of Mendon, 4 N.Y.3d at 9, 822 N.E.2d at 1217, 789 N.Y.S.2d at 699 (*quoting* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 720, 119 S. Ct. 1624, 1644, 143 L. Ed. 2d 882, 912 (1999)). *See also Lucas,* 505 U.S. at 1019, 112 S. Ct. at 22895, 120 L. Ed. 2d at 815 ("[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.")).

[75] 8A NICHOLS ON EMINENT DOMAIN § 17.04[2][a], at 17-43 (3d ed. 2008) ("Only three states have held these laws to be unconstitutional on their face.")

[76] *Id.*

According to *Nichols on Eminent Domain,* "[t]he few map statues that have been held not to constitute a taking (1) limit the duration of the reservation and (2) allow the owner an opportunity to develop the mapped lands by obtaining a variance."[77] Furthermore, "the courts have focused on whether the particular reservation imposes a 'reasonable' burden on the affected landowner."[78] The shorter the length of the reservation, then the more likely it is that the reservation will be held to be reasonable. "The cases generally find that a complete prohibition on development, even for a one year period, is a taking for which compensation must be paid."[79] The majority of cases have held the mapping statutes to be unconstitutional.[80] For example, in New York such statutes consistently have been held to be unconstitutional.[81] On the other hand, the Wisconsin Supreme Court has upheld Wisconsin reservation statutes "but expressly noted that [the] statutes did not completely forbid private development on reserved land."[82]

In 2006 in *Davis v. Brown,*[83] the Supreme Court of Illinois upheld a provision of the Illinois Highway Code that authorized the state transportation agency to prepare and record maps that established the approximate location and widths of rights-of-way for future highway projects.[84] In *Davis* the Department of Transportation prepared and recorded such a map. With respect to Section 4-510 of the statute the

> plaintiffs allege[d] that…those landowners whose property falls within the right-of-way established by a map must give notice to the Department if they plan to develop their property; that once a landowner has so notified the Department, the Department has the option to commence eminent domain proceedings against the landowner; that this "option to take" has "no time constraints"; and that no compensation is provided to landowners under the statute for the creation of the "option to take." Two plaintiffs…further allege…that they would like to develop their property but have not done so for fear that if they give notice to the Department, as required by section 4-510, the Department will commence eminent domain proceedings against them.[85]

The landowners challenged the constitutionality of the statute facially and as applied, complaining that the landowners received "no compensation for the creation of the 'option to take'" for the benefit of the transportation department.[86] However, the department "maintain[ed] that section 4-510 imposes no economic restrictions on any landowner's property."[87] The court, however, disagreed, finding that the rights created under the statute that benefited the state imposed a "potential economic restriction" on a landowner's property.[88] Nevertheless, the court agreed with the reasoning of a New Jersey appellate court, which had dealt with a similar statutory scheme emphasizing a beneficial policy that was designed to reduce the cost of public acquisition and that also had a limited time frame.[89] The Supreme Court of Illinois held "that under section 4-510 the limited reservation period which follows a landowner's notification to the Department does not constitute a regulatory taking."[90]

Furthermore, the court held that the section was not facially unconstitutional. The court explained that

> [t]o establish the facial invalidity of section 4-510, plaintiffs must show that the statute has an effect on the economic viability of every parcel of land that might fall under a right-of-way map. See Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295, 69 L. Ed.2d 1, 28, 101 S. Ct. 2352, 2370 (1981) (in a facial takings challenge, the question is whether the "'mere enactment'" of the statute constitutes a taking). Plaintiffs have not met this standard.[91]

The court held that the statute was not a *per se* taking:

> [T]he most that can be said with respect to the facial impact of section 4-510, that is, the impact the statute has on every landowner in every right-of-way map, is that the statute creates the *possibility* of a 165-day reservation period. We cannot say, as a matter of law[] that the mere potential of a 165-day reservation period amounts to a *per se* regulatory taking for every landowner who falls within a right-of-way map. Accordingly, we reject plaintiffs' facial takings challenge to section 4-510.[92]

A.5. Noncategorical Takings: The *Penn Central* Test

In addition to the two categorical types of takings discussed previously, a third category of regulation may constitute a taking. Indeed, "[m]ost regulatory takings claims are of the non-categorical type, which have been analyzed under rules set out by the United States Supreme Court in *Penn Central*."[93]

In brief, in *Penn Central Transportation Co. v. New York City*, *supra*, the Landmarks Preservation Commission denied Penn Central's application to build an office atop its property, Grand Central Terminal in New York, by reason of New York City's Landmark Preservation Law. Previously the terminal and location had been designated a landmark and a landmark site respec-

[77] *Id*.

[78] *Id*.

[79] *Id*.

[80] *See id*. § 17.04[2][b][i], at 17-44, *et seq.*

[81] *Id*. § 17.04[2][b][i].

[82] *Id*. § 17.04[2][c], at 17-53.

[83] 221 Ill. 2d 435, 851 N.E.2d 1198 (2006).

[84] *Id.* at 437, 851 N.E.2d at 1200.

[85] *Id.* at 440, 851 N.E.2d at 1202.

[86] *Id.*

[87] *Id.* at 445, 851 N.E.2d at 1205.

[88] *Id.*

[89] *Id.* at 446, 851 N.E.2d at 1206 (*citing* Kingston East Realty Co. v. State, 133 N.J. Super. 234, 336 A.2d 40 (1975)).

[90] *Id.* at 447, 851 N.E.2d at 1206.

[91] *Id.*

[92] *Id.* at 448, 851 N.E.2d at 1207.

[93] City of Coeur d'Alene v. Simpson*,* 142 Idaho at 847, 136 P.3d at 318.

tively under the applicable New York City laws.[94] Penn Central challenged the denial in the courts but the U.S. Supreme Court affirmed the judgment below that Penn Central's property had not been taken without just compensation.

In part, the Court held that

> New York City law does not interfere in any way with the present uses of the Terminal….
>
> [T]o the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied *all* use of even those pre-existing air rights….
>
> [T]he application of New York City's Landmarks Law has not effected a "taking" of appellants' property. The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties.[95]

Thus, in light of *Penn Central* and its progeny, for a noncategorical taking, the owner must show "the magnitude" of a regulation's economic impact and the degree to which it interferes with legitimate property interests.[96] There is "no precise rule" in cases involving land-use regulations; "a weighing of private and public interests" is required to determine whether a regulatory taking has occurred.[97]

As observed in *County of Alameda, supra,*

> [w]here government action merely regulates the use of the property, "'compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole.'" There is no precise rule for determining when land use regulations effect a taking of property, and the answer to the question requires a weighing of private and public interests…. Determining whether the challenged regulatory restriction constitutes a compensable taking necessitates "[a]n individualized assessment of the impact of the regulation on a particular parcel of property and its relation to a legitimate state interest…."[98]

In a noncategorical taking, as a result of the Supreme Court's decision in *Penn Central*, regulations affecting an owner's property may be subject to "*ad hoc*, factual inquiries" under the so-called *Penn Central* factors.[99]

> Primary among those factors are "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations…." In addition, the 'character of the governmental action'—for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good"—may be relevant in discerning whether a taking has occurred…. The *Penn Central* factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules.[100]
>
> The *Penn Central* factors or inquiries seek to
>
> "identify regulatory actions that are functionally equivalent to the classic taking in which the government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights."[101]

Thus, if there is not a physical invasion of the owner's property or a regulation imposed on it that "deprive[s] the property owner of all economic use of the property," the offending regulation must be evaluated using the *Penn Central* factors.[102] However, "*Penn Central* emphasized three factors in particular: (1) '[t]he economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'"[103]

The California Supreme Court has identified other nonexclusive factors based on *Penn Central* and other U.S. Supreme Court cases that may be relevant considerations in a particular case of an alleged *Penn Central* regulatory taking.[104] These include:

> "(1) whether the regulation 'interfere[s] with interests that [are] sufficiently bound up with the reasonable expectations of the claimant to constitute "property" for Fifth Amendment purposes'…; (2) whether the regulation affects the existing or traditional use of the property and

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[94] Penn Cent. Transp. Co. v. N.Y. City, 438 U.S. at 115, 98 S. Ct. at 2655, 57 L. Ed. 2d at 645.

[95] *Id.* at 136–38, 98 S. Ct. at 2666, 57 L. Ed. 2d at 657.

[96] City of Coeur d'Alene v. Simpson, 142 Idaho at 853, 136 P.3d at 324.

[97] County of Alameda v. Superior Court*,* 133 Cal. App. 4th 558, 566, 34 Cal. Rptr. 3d 895, 900 (Cal. App. 1st Dist. 2005) (citations omitted).

[98] *Id.* (emphasis in original) (*quoting* Hensler v. City of Glendale*,* 8 Cal. 4th 1, 10, 876 P.2d 1043, 1048 (1994) (*quoting* Yee v. Escondido*,* 503 U.S. 519, 522–23, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992))), and *citing* Milagra Ridge Partners, Ltd. v. City of Pacifica*,* 62 Cal. App. 4th 108, 116, 72 Cal. Rptr. 2d 394 (1998); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348, 106 S. Ct. 2561, 2566, 91 L. Ed. 2d 285, 294 (1986) (noting that the Court has no "set formula" to determine where regulation ends and a taking begins)).

[99] Allegretti & Co. v. County of Imperial*,* 138 Cal. App. 4th at 1270, 42 Cal. Rptr. 3d at 128.

[100] *Id.* at 1270–71, 42 Cal. Rptr. 3d at 128–29 (*quoting Lingle*, 544 U.S. at 539, 125 S. Ct. at 2081–82, 161 L. Ed. 2d at 888) (some internal quotation marks omitted).

[101] *Id.* at 1271, 42 Cal. Rptr. 3d at 129 (*quoting Lingle,* 544 U.S. at 542, 125 S. Ct. at 2082, 161 L. Ed. 2d at 888).

[102] *Id.* at 1277, 42 Cal. Rptr. 3d at 133.

[103] *Id.* (*quoting* Kavanau v. Santa Monica Rent Control Bd., 16 Cal. 4th 761, 775, 941 P.2d 851 (1997). In regard to the *Penn Central* factors, *see also STS/BAC Joint Venture,* 2004 Tenn. App. LEXIS 821, at *13–14.

[104] Herzberg v. County of Plumas, 133 Cal. App. 4th 1, 14, 34 Cal. Rptr. 3d 588, 597 (Cal. App. 3d Dist. 2005).

> thus interferes with the property owner's 'primary expectation'…; (3) 'the nature of the State's interest in the regulation'…and, particularly, whether the regulation is 'reasonably necessary to the effectuation of a substantial public purpose'… (4) whether the property owner's holding is limited to the specific interest the regulation abrogates or is broader…; (5) whether the government is acquiring 'resources to permit or facilitate uniquely public functions,' such as government's 'entrepreneurial operations' …; (6) whether the regulation 'permit[s the property owner]…to profit [and]…to obtain a "reasonable return" on…investment'…; (7) whether the regulation provides the property owner benefits or rights that 'mitigate whatever financial burdens the law has imposed'…, (8) whether the regulation 'prevent[s] the best use of [the] land'…; (9) whether the regulation 'extinguish[es] a fundamental attribute of ownership'…; and (10) whether the government is demanding the property as a condition for the granting of a permit…."[105]

The purpose of *Penn Central* balancing is "to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"[106] Thus, under a *Penn Central* "ad hoc factual inquiry" the court may find "that a particular regulation 'goes too far' and constitutes a taking."[107]

In the context of an alleged regulatory taking, a property right in the form of a business conducted on the owner's property is not accorded the same treatment as a property right in the land. A government regulation may diminish or destroy the value of an ongoing business without giving rise to a regulatory taking and a requirement of compensation. "[T]he fact that a regulatory change may impair a business, or even force it into bankruptcy, is not conclusive evidence that a taking has occurred."[108]

Although an owner must recognize that a "new regulation [may]…render his property economically worthless," the rule is different with respect to land.[109] If government regulation destroys all economically viable use of land the regulation will give rise to a *Lucas*-type regulatory taking. However, real property is subject to regulation without the government necessarily having to pay compensation as a consequence of regulating the property. It is recognized that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community…."[110] Nevertheless, regulation may only go so far, because "[i]n the case of land…the notion that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause…."[111]

Depending on the circumstances, a significant diminution in value of a property caused by a regulation may or may not constitute a taking.[112] In a case of less than a total taking of property caused by government regulation, under *Penn Central* there must be a factual inquiry based on the "'the owner's entire property holdings at the time of the alleged taking, not just the adversely affected portion.'"[113] As another court emphasizes, the issue is "'whether the regulation destroys or derogates any fundamental attribute of property ownership, including the right to possess, to exclude others, to dispose of property, or to make some economically viable use of the property.'"[114]

As for one of the *Penn Central* factors—economic impact—in *Allegretti, supra,* involving a government permit issued to an owner to activate a well but which limited the amount of water the owner could extract beneath the owner's property, a California court found that the owner had "not demonstrated any economic impact from the limitation other than unspecific lay testimony regarding reduced profits…."[115] Moreover, the owner had "not demonstrated compensable interference with 'distinct investment backed expectations,' another of the *Penn Central* factors.[116] As for loss of profits as a result of a permit restriction, the "claim of loss of anticipated profits or gain is not compensable," as the claim shows no more than a "'possible restriction upon

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[105] Kavanau v. Santa Monica Rent Control Bd., 16 Cal. 4th 761, 775, 941 P.2d 851, 860 (1997) (internal citations omitted).

[106] Herzberg v. County of Plumas*,* 133 Cal. App. 4th at 15, 34 Cal. Rptr. 3d at 598 (*quoting* Palazzolo v. Rhode Island, 533 U.S. 606, 617–18, 121 S. Ct. 2448, 2457–58, 150 L. Ed. 2d 592, 607 (2001) and *citing* Yee v. City of Escondido, 503 U.S. 519, 522–23, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992)).

[107] Kafka v. Dep't of Fish, Wildlife & Parks*,* 2005 Mont. Dist. LEXIS 729, at **58.

[108] *Id.* at **59.

[109] *Id.* at **60–61 (citation omitted).

[110] Paradise, Inc. v. Pierce County, 124 Wash. App. 759, 772, 102 P.3d 173, 180 (2004), *review denied*, 154 Wash. 2d 1027, 120 P.3d 73 (2005) (citations omitted).

[111] 2005 Mont. Dist. LEXIS 729, at **61 (citation omitted).

[112] Allegretti & Co. v. County of Imperial, 138 Cal. App. 4th at 1278, 42 Cal. Rptr. 3d at 135 (*citing* Concrete Pipe and Products of Cal., Inc. v. Constr. Laborers Pension Trust for Southern Cal*.* 508 U.S. 602, 645, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993) (*citing* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926) (approximately 75 percent diminution in value); Hadacheck v. Sebastian, 239 U.S. 394, 405, 36 S. Ct. 143, 60 L. Ed. 348 (1925) (92.5 percent diminution)). *See also* Long Beach Equities, Inc. v. County of Ventura, 231 Cal. App. 3d 1016, 1036, 282 Cal. Rptr. 877 (Cal. App., 2d Dist. 1991).

[113] *Id.* at 1277, 42 Cal. Rptr. 3d at 134 (*quoting* Buckley v. Cal. Coastal Comm'n*,* 68 Cal. App. 4th 178, 193, 80 Cal. Rptr. 2d 562, 572 (1998) (*citing* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497, 107 S. Ct. 1232, 1248, 94 L. Ed. 2d 472 (1987)).

[114] Paradise, Inc. v. Pierce County*,* 124 Wash. App. at 768, 102 P.3d at 178 (*quoting* Edmonds Shopping Ctr. Assocs. v. City of Edmonds, 117 Wash. App. 344, 362, 71 P.3d 233, 241 (2003)).

[115] Allegretti & Co. v. County of Imperial, 138 Cal. App. 4th at 1278, 42 Cal. Rptr. 3d at 135.

[116] *Id. at* 1279, 42 Cal. Rptr. 3d at 135 (citations omitted).

more economic uses of [the] property.'"[117] As explained in Section 4.A.8, *infra*, an owner when seeking compensation for a regulatory taking may not separate his or her rights in the property to show damage and a taking. That is, the regulation must be shown to damage the owner's entire property, not just one of the owner's rights appurtenant to the property.

A.6. Application of the Consequential Damages Rule

In 2005 the Iowa Supreme Court applied the consequential damages rule in finding that a rezoning of business property had not resulted in an unconstitutional taking of the owners' property. Although recognizing the *Penn Central* and *Lingle v. Chevron USA Inc*.[118] cases, as well as *Griggs v. County of Allegheny*,[119] the court stated that

> [t]he consequential damages rule provides that "in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision." *N. Transp. Co. of Ohio v. City of Chicago*, 99 U.S. 635, 642, 25 L. Ed. 336, 338 (1878); *see also Barbian*, 694 F.2d at 486 n.8; *Hansen v. United States*, 65 Fed. Cl. 76, 102-06 (2005) (recognizing that takings jurisprudence relies on general tort concepts such as causation to evaluate liability and holding that for a taking to be cognizable, causation, "that is a direct, as opposed to an indirect or consequential, appropriation or seizure of property," must be shown; "test simply requires proof that the government is the cause-in-fact of the harm for a taking to occur").[120]

The court held that "the consequential damages rule applies here," as the damage about which the owners complained was not the rezoning of the property but the later action of a business causing a nuisance.[121]

A.7. The Supreme Court's Rejection of the "Substantially Advances a State Interest" Test: The *Lingle* Holding

Whether the government's action or regulation "substantially advances a state interest" is no longer the court's standard to access an unconstitutional taking.[122]

In *Agins v. City of Tiburon,*[123] the U.S. Supreme Court had held that a regulatory taking may occur when an "ordinance does not substantially advance legitimate state interests."[124] In *Agins* the landowners sought to have city zoning ordinances declared unconstitutional because they effected a taking of their property without just compensation. The ordinances in question placed the landowners' property in an area to be devoted to single-family housing and open space. The density restriction would have permitted the landowners to build between one and five single-family residences on their 5-acre tract.[125] The landowners contended that the land in Tiburon had the highest value of suburban property in the state of California and that their land had the highest value of all.[126] The landowners further alleged that the rezoning prevented its development for any purpose.[127]

The California Supreme Court had affirmed the dismissal of the case for failure to state a cause of action, holding that the zoning ordinances had not deprived the landowners of their property without compensation and that the city had acted reasonably in making municipal-planning decisions.[128] The U.S. Supreme Court, which affirmed the decision, held that "the zoning laws were facially constitutional. They bore a substantial relationship to the public welfare, and their enactment inflicted no irreparable injury upon the landowner…. In this case, the zoning ordinances *substantially advance legitimate governmental goals*."[129]

In *Agins* the Court approved a two-prong test for regulations to be noncompensable: 1) they must bear a relationship to the public welfare, and 2) they must substantially advance legitimate governmental "interests" or "goals."[130] In upholding the decision of the California Supreme Court, the *Agins* Court further stated:

> The appellants have alleged that they wish to develop the land for residential purposes, that the land is the most expensive suburban property in the State, and that the best possible use of the land is residential…. The California Supreme Court has decided, as a matter of state law, that appellants may be permitted to build as many as five houses on their five acres of prime residential property. At this juncture, the appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials. Thus, it cannot be said that the impact of general land-use regulations has denied appellants the "justice and fairness" guaranteed by the Fifth and Fourteenth Amendments.[131]

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[117] *Id.* at 1279, 42 Cal. Rptr. 3d at 136 (*quoting* Terminal Plaza Corp. v. City and County of San Francisco, 177 Cal. App. 3d 892, 912, 223 Cal. Rptr. 379, 391 (Cal. App. 1st Dist. 1986)).

[118] 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

[119] 369 U.S. 84, 82 S. Ct. 531, 7 L. Ed. 2d 585 (1962).

[120] Harms v. City of Sibley, 702 N.W.2d 91, 100 (Iowa 2005).

[121] *Id.* at 101.

[122] Allegretti & Co. v. County of Imperial, 138 Cal. App. 4th at 1280, 42 Cal. Rptr. 3d at 136.

[123] 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980). *See also* Wild Rice River Estates, Inc. v. City of Fargo, 2005 N.D. 193, at *P13, 705 N.W.2d 850, 854, *cert. denied*, 2006 U.S. LEXIS 3923 (2006) (also noting that *Lingle* disavows the "stand alone" regulatory takings test announced in *Agins*).

[124] *Id.* at 261, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106, 112 (1980) (overruled as discussed in § 4).

[125] *Id.* at 257, 100 S. Ct. at 2410, 65 L. Ed. 2d at 110.

[126] *Id.* at 258, 262, 100 S. Ct. at 2140, 2142, 65 L. Ed. 2d at 110, 113.

[127] *Id.* at 258, 259, 100 S. Ct. at 2140, 2141, 65 L. Ed. 2d at 110, 111.

[128] Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25 (1979).

[129] 447 U.S. at 261, 100 S. Ct. at 2142, 65 L. Ed. 2d at 112 (citation omitted) (emphasis supplied).

[130] *Id.*

[131] *Id.* at 262–63, 100 S. Ct. at 2142, 65 L. Ed. 2d at 113 (citation omitted).

Some decisions after *Agins,* but preceding the Supreme Court's decision in *Lingle*, discussed below, state that "when something less than all economically viable use has been destroyed," a "government regulation may still constitute a taking if such regulation 'does not substantially advance legitimate state interests.'"[132]

In contrast, in 2004 in a pre-*Lingle* case, the New York Court of Appeals in *Smith v. City of Mendon*[133] reviewed the development condition at issue (the conditioning of approval for a proposed building on the owner's site on the owner's acceptance of a conservation restriction on any development) based on the standard articulated by the Supreme Court in *Agins, supra.* The *Smith* court considered whether "the conservation restriction at issue substantially advances a legitimate government purpose—environmental preservation," but held that "a regulatory action need only be reasonably related to a legitimate governmental purpose to satisfy the 'substantially advance' standard,"[134] language that appears to have been a departure from the *Agins*' holding.

The New York Court of Appeals may have been prescient, because in 2005 in *Lingle v. Chevron USA Inc.,*[135] the Supreme Court disavowed the *Agins'* test of whether a government action that "substantially advance[s] state interests" is valid as a "stand-alone regulatory takings test."[136] In *Lingle,* involving a statute in Hawaii that capped the rent that oil company Chevron could charge to dealers leasing oil company-owned service stations, the Supreme Court made it very clear that the *Agins'* "'substantially advances' formula is not only *doctrinally* untenable as a takings test—its application as such also present serious practical difficulties."[137] The Court's holding in *Lingle* applies to all manner of takings regardless of whether they are categorical as in *Loretto* or *Lucas* or noncategorical as in *Penn Central*.[138] Thus, as to all takings of a regulatory nature, the *Agins'* formula "is not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation."[139]

Although some courts may opine that the *Agins'* formula still applies in cases involving exactions,[140] the Supreme Court in *Lingle* was very clear in explaining that although it may appear that the *Agins'* formula "played a role in our decisions in *Nollan*…and *Dolan*," the court "did not apply the 'substantially advances' test that is the subject of today's decision."[141] Furthermore, the Court took care to explain that "[a]lthough *Nollan* and *Dolan* quoted *Agins'* language…the rule those decisions established is entirely distinct from the 'substantially advances' test we address today."[142]

> [W]e reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories discussed above—by alleging a "physical" taking, a *Lucas*-type "total regulatory taking," a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*.[143]

As a Wisconsin court affirmed, "[i]n light of *Lingle*, the theory that a regulation effects a taking for Fifth Amendment purposes if it does not substantially advance a legitimate state interest is no longer valid."[144] Likewise, in discussing a regulatory taking and the applicability of the *Penn Central* factors, the Supreme Court of Iowa has explained that

> [i]t should be noted that in Lingle v. Chevron USA, the Supreme Court removed from the takings inquiry the "substantially advances" test, articulated in *Agins v. City of Tiburon*…relied on by the district court in this case as part of its analysis under Penn Central. That test derived from due process, not takings, principles and thus "is not a valid method of discerning whether private property has been 'taken' for purposes of the *Fifth Amendment*…." The regulatory takings tests, expressed in Loretto….Lucas…and Penn Central…"aim[] to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain…." By contrast, the "substantially advances" test "probes the regulation's underlying validity…." Whereas the takings clause allows property to be taken for public use in exchange for just compensation, "no amount of compensation" can authorize a regulation that is "so arbitrary as to violate due process…." Accordingly, Agins' "substantially advances" test "has no proper place in our takings jurisprudence…." It was apparently the "character of the governmental action" prong of the Penn Central test which courts read to justify inquiry into the relative goodness of the action. In fact, in the context in which that phrase is found, "character of the governmental action" referred to whether the alleged taking was via regulation or a physical invasion….This is what the Court corrected in Lingle.[145]

In sum, in *Lingle* the Supreme Court held that whether a governmental regulation substantially ad-

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[132] *STS/BAC Joint Venture*, 2004 Tenn. App. LEXIS 821, at *15 (*quoting Del Monte Dunes at Monterey, Ltd.*, 526 U.S. at 705, 119 S. Ct. at 1636, 143 L. Ed. 2d at 902 (1999)).

[133] 4 N.Y.3d 1, at 14, 822 N.E.2d at 1221, 789 N.Y.S.2d at 703.

[134] *Id.*

[135] 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

[136] *Id.* at 540, 125 S. Ct. at 2083, 161 L. Ed. 2d at 889.

[137] *Id.* at 544, 125 S. Ct. at 2085, 161 L. Ed. 2d at 892 (emphasis in original).

[138] *See id.* at 538–39, 545, 125 S. Ct. at 2081, 161 L. Ed. 2d at 887.

[139] *Id.* at 545, 125 S. Ct. at 2085, 161 L. Ed. 2d at 892.

[140] *See, e.g.*, Herzberg v. County of Plumas, 133 Cal. App. 4th at 14, n.9, Cal. Rptr. 3d at 597, n.9 (observing that "outside the land use exaction context the 'substantially advances' formula is not a valid takings test").

[141] Lingle v. Chevron USA, 544 U.S. at 546, 125 S. Ct. at 2086, 161 L. Ed. 2d at 893.

[142] *Id.* at 547, 125 S. Ct. at 2086, 161 L. Ed. 2d at 893.

[143] *Id.* at 548, 125 S. Ct. at 2087, 161 L. Ed. 2d at 894.

[144] Wis. Builders Ass'n v. Wis. DOT, 285 Wis. 2d at 501, 702 N.W.2d at 447.

[145] City of Coeur d'Alene v. Simpson, 142 Idaho at 847, n.5, 136 P.3d at 318, n.5 (citations omitted) (emphasis supplied).

vances governmental interests or goals is neither a stand-alone nor an otherwise proper test for determining whether a challenged regulation constitutes an unconstitutional taking.

A.8. The "Whole Parcel" Rule in Defining the Relevant Property

The effect of a regulation alleged to constitute a taking must damage all of the owner's rights in his or her parcel property, regardless of whether the taking is a categorical or a noncategorical taking.

In *Wild Rice River Estates, Inc. v. City of Fargo,*[146] involving a 21-month moratorium on the issuance of building permits, the court stated that it had "adopted the parcel-as-a-whole rule";[147] thus, "'in determining whether a restriction constitutes a taking, courts look to the effect of the restriction on the parcel as a whole, rather than to the effect on individual interests in the land.'"[148] As stated in *Smith, supra,* involving a town planning board's conditioning of approval for a proposed building site on the owners' acceptance of a conservation restriction,

> the Supreme Court has been reluctant to engage in spatial "conceptual severance" in determining whether a regulation or government action deprives a property owner of all economically viable uses of the property…. Hence, we look to the effect of the government action on the value of the property *as a whole*, rather than to its effect on discrete segments of the property….[149]

The *Smith* court held that the conservation restriction was not a dedication of the type found in the exaction cases, as there was no actual dedication of the owner's property.[150] Thus, as the *Smith* case preceded the *Lingle* case in 2005, the *Smith* court applied the *Agins*' standard in finding that there had been no constitutional taking, but also found that there had been no taking under the *Penn Central* holding.[151]

In *City of Coeur d'Alene v. Simpson,*[152] the issue was whether a categorical *Lucas* or a noncategorical *Penn Central* taking had occurred. The case illustrates that the whole parcel approach may be complicated by transfers of parcels that may or may not have been *bona fide*. The case involved city ordinances prohibiting construction of fences and other structures within 40 ft of the shoreline. The city had issued a stop-work order on construction that was within 40 ft of the shoreline of Lake Coeur d'Alene in violation of city ordinances called the "Shoreline Regulations," which regulated construction and placement of objects on the area south of Lakeshore Drive.[153] The affected property consisted of two tax lots of several parcels each separated by Lakeshore Drive that from 1928 to 2001 had been conveyed together and that shared a single street address. The parcel north of Lakeshore Drive consisting of four lots was referred to as the "upland parcel."[154] The trial court had concluded that the 40 ft setback requirement did not constitute a taking but there was a question of fact "whether the ordinance deprived the property of all economically viable use."[155] Afterwards, one of the Simpsons formed a corporation called Beach Brothers and named the Simpsons' adult sons as sole shareholders; the parents then quitclaimed the "waterward" parcel, the parcel south of Lakeshore Drive, to Beach Brothers. In another opinion, the trial court ruled, *inter alia*, that there had been no taking because when the upland and waterward parcels were considered together, "they retained value" and served the legitimate purpose of preserving the shoreline's aesthetic features.[156]

Among the issues the Supreme Court of Idaho had to consider were the value of the property taken and "how to define the unit of property 'whose value is to furnish the denominator of the fraction.'"[157] That is, the issue was "what constitute[d] the relevant property."[158]

The fact of the transfer of the property to Beach Brothers was not the issue: "[T]he fact that an owner acquires property after a regulation has been enacted does not necessarily bar a claim that the regulation has effected a taking."[159] (*See*, however, discussion of the standing doctrine in Section 4.C.3, *infra*.) However, in finding that there had been no taking the trial court had decided that the transfer to Beach Brothers had no effect, because "the transfer to Beach Brothers, Inc. was to benefit the Simpsons as the owners of the upland parcel…. [T]he real property is in fact owned and operated as a conceptual and practical unit."[160] The Supreme Court of Idaho did consider the Beach Brothers transaction to have a potential effect on the decision.[161]

Although the city argued that the waterward parcel enhanced the value of the upland parcel, the court stated that "any benefit the waterward parcel confers upon the upland parcel will not be seen by Beach Brothers."[162] There was no evidence of an "illegal split,"

[146] 2005 N.D. 193, 705 N.W.2d 850 (2005), *cert. denied*, 547 U.S. 1130, 126 S. Ct. 2039, 164 L. Ed. 2d 783 (2006).

[147] *Wild Rice River Estates, Inc.,* 2005 N.D. 193, *P17, 705 N.W.2d at 856.

[148] *Id.* (*quoting* Grand Forks-Trail Water Users, Inc. v. Hjelle, 413 N.W.2d 344, 346 (N.D. 1987)).

[149] Smith v. Town of Mendon, 4 N.Y.3d at 14, 822 N.E.2d at 1221, 789 N.Y.S.2d at 703 (emphasis in original) (*citing* Dist. Intown Props. Ltd. P'ship v. Dist. of Columbia, 198 F.3d 874, 887 (D.C. Cir. 1999); *Penn Central,* 438 U.S. at 130–31, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)).

[150] *Id.* at 11, 822 N.E.2d at 1219, 789 N.Y.S.2d at 701.

[151] *Id.* at 14–15, 789 N.E.2d at 1221, 789 N.Y.S.2d at 703.

[152] 142 Idaho 839, 136 P.3d 310 (2006).

[153] *Id.* at 842, 136 P.3d at 313.

[154] *Id.*

[155] *Id.* at 843, 136 P.3d at 314.

[156] *Id.* (*citing Lucas*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)).

[157] *Id.* at 847–48, 136 P.3d at 318–19 (citation omitted).

[158] *Id.* at 848, 136 P.3d at 319 (citation omitted).

[159] *Id.*

[160] *Id.*

[161] *Id.* at 849, 136 P.3d at 320.

[162] *Id.*

as Beach Brothers was a separate entity and the transaction was made with estate planning and personal liability issues in mind.[163] However, in remanding the case, the court held that "the circumstances of the transfer may be entirely relevant to the denominator inquiry,"[164] the numerator-denominator approach being discussed in the next subsection.[165]

The court directed that on remand the trial court would need to weigh a variety of factors concerning the transfer to Beach Brothers to determine what constituted the relevant property. Among the factors were the timing of the transfer,[166] the extent to which the property was to be developed as a whole,[167] the economic independence of the parcel of property,[168] the presence of a road dividing the parcels,[169] the separate treatment of the parcels for tax purposes,[170] and other factors discussed in the opinion.[171]

Another example of the whole parcel approach is *Allegretti & Co. v. County of Imperial*. A property owner may have the right to draw water from his property but a permit restriction on the amount that may be withdrawn from a well to be activated by the owner does not constitute a taking.[172] "Importantly, the basis for this factual inquiry 'is the owner's entire property holdings at the time of the alleged taking, not just the adversely affected portion….' Thus the relevant parcel is Allegretti's 2,400 acres, and not merely its right to draw water from it…." [173]

[163] *Id.*

[164] *Id.*

[165] The court explained that the transaction appeared to be a regular one, but the court could not

> say, however, that the transfer and fact of separate ownership by themselves necessarily end the inquiry. Indeed, the City has questioned the purpose of the transfer and we believe the circumstances of the transfer may be entirely relevant to the denominator inquiry. To explain: a rule that separate ownership is always conclusive against the government would be powerless to prevent landowners from merely dividing up ownership of their property so as to definitively influence the denominator analysis. It is not pure fantasy to imagine a scenario wherein halfway through a takings suit, Landowner agrees with Company to transfer a parcel of Beachacre–which appears, as the waterward parcel does here, to be separate from Landowner's other parcel–with a wink-and-a-nod agreement to transfer back after the suit or to jointly manage, use, and develop the property.

Id.

[166] *Id.* at 850, 136 P.3d at 322.

[167] *Id.* at 851, 852, 136 P.3d at 322, 323.

[168] *Id.* at 852, 136 P.3d at 323.

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] 138 Cal. App. 4th 1261 at 1278, 142 Cal. Rptr. 3d at 134.

[173] *Id.* at 1277, 42 Cal. Rptr. 3d at 134 (*citing* Buckley v. Cal. Coastal Comm'n*,* 68 Cal. App. 4th 178, 193, 80 Cal. Rptr. 2d 562 (Cal. App. 2d Dist. 1998) (*citing* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987)); *see* Fla. Rock Indus. Inc. v. United States*,* 45 Fed. Cl. 21, 33 (1999).

In sum, the relevant parcel is the owner's entire property, not just one of the owner's rights in the property.

A.9. The Numerator-Denominator Approach

As observed in one case involving an application for a game-farm license, "[t]he Supreme Court has described takings analysis by analogy to a fraction in which the denominator is the value of the land prior to the regulation and the numerator is its value afterward."[174] In *City of Coeur d'Alene, supra,* the case involving city ordinances prohibiting construction of structures within 40 ft of a lake's shoreline, it was observed that there is much difficulty "in ascertaining any definitive test for defining the denominator parcel."[175] Thus, "[i]dentifying the denominator parcel is no easy task."[176] However, as long as the value of the numerator of the fraction is more than zero, a categorical claim fails under *Lucas*.[177] That is, a "categorical taking claim" fails if land retains "substantial economic value."[178]

Courts have rejected the "conceptual severance" theory pursuant to which "whole units of property may be divided for the purpose of a takings claim."[179] As discussed above, a single parcel is not to be divided to determine "'whether rights in a particular segment have been entirely abrogated.'"[180] The affected interest must be "considered in light of established principles of state property law."[181] As discussed in Section 4.A.8, *supra*, in *City of Coeur d'Alene*, the court had to consider the effect of the transfer of a parcel to a separate family corporation. Because of the court's remand, the city would be afforded an opportunity to present evidence on several factors, but the Idaho Supreme Court did hold that the record on appeal had "not support[ed] the district court's conclusion that the denominator consisted of

[174] Kafka v. Dep't of Fish, Wildlife & Parks, 2005 Mont. Dist. LEXIS 729, at **56 (*citing* Keystone Bituminous Coal Ass'n, 480 U.S. at 497, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987)).

[175] City of Coeur d'Alene v. Simpson, 142 Idaho at 848, n.6, 136 P.3d at 319, n.6 (*citing* John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535 (1994) (noting the courts' failure to explain the basis for their methodology and their inconsistent application of factors)).

[176] *Id.*

[177] Kafka v. Dep't of Fish, Wildlife & Parks, 2005 Mont. Dist. LEXIS 729, at **57.

[178] *Id.* (*citing Tahoe Sierra Pres. Council*, 535 U.S. at 330, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002) (*citing Lucas*, 505 U.S. at 1019, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (*Lucas* rule limited to cases of "complete elimination of value")); *and Palazzolo*, 533 U.S. at 631, 121 S. Ct. at 2464, 150 L. Ed. 2d at 616 ("A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property economically idle.").

[179] City of Coeur d'Alene v. Simpson, 142 Idaho at 848, 136 P.3d at 319.

[180] *Id.* (*quoting Penn Central*, 438 U.S. at 130, 98 S. Ct. at 2662, 57 L. Ed. 2d at 652).

[181] *Id.*

both parcels at issue" (referred to in the opinion as the upland and waterward parcels).[182]

A.10. Property Rights Not Considered as Property in a Regulatory Taking Claim

Although the meaning of property is discussed elsewhere in this digest, (*see* Section 1.F, *supra*), "[a] threshold inquiry into an owner's title is generally necessary to the proper analysis of a takings case, whether of a regulatory or physical nature…."[183] Although property rights may be property rights within the meaning of the Due Process Clause, such rights may not be considered necessarily to be property rights in a takings analysis.[184] Something less than a property right in fee simple, of course, may be a property right subject to a taking. For example, an easement, whether express or implied, across property is a property right for which a claim may be asserted in an inverse condemnation action.[185] Other kinds of rights may not be property rights for which compensation is required in the event of a regulatory taking. As one court emphatically stated, for takings purposes licenses "are privileges and not vested rights…. A license that is subject to revocation or modification is not property protected by the Taking Clause."[186]

As explained in *Kafka*, *supra,* "[t]he Taking Clause has been interpreted by the United States Supreme Court in *Lucas* to protect those interests in property that were elements of ownership of the property at common law."[187] Thus, "[a]n intangible interest in a business has never been held to be a proper subject of a regulatory taking claim."[188]

> Courts have not viewed a business as the property subject to a taking claim. Rather, they have viewed the ability to carry on a business as one of the elements of an interest in other property such as real estate or goods. One probable reason for this view is that, as Plaintiffs' experts appear to believe, the only basis for valuing the damages arising from a taking of the business would revolve around estimation of future profitability of the business.[189]

In *Kafka* the court held that a game-farm license "was never part of the common law property right that inhered" in the owner's land."[190] The state does not owe "compensation for injury to the value of a business that exists only because the legislature allowed [the business]."[191]

A.11. Public Nuisance Exception to Claims for Regulatory Takings

Under the *Lucas* holding, "a regulation does not result in a compensable taking if the state can demonstrate that [a] regulation only bans conduct that constitutes a public nuisance pursuant to 'background principles of nuisance and property law.'"[192] Although in an Arizona case the property owners argued that the nuisance exception was inapplicable in a partial regulatory taking subject to "*Penn Central*'s ad hoc balancing test," an appellate court disagreed.[193] The court held that the nuisance exception was "equally applicable to all takings claims, including partial regulatory takings that would otherwise be analyzed pursuant to the *Penn Central* test."[194] Thus, "the nuisance exception is a complete bar to a Fifth Amendment Takings claim."[195] For there to be a taking, the "protected property interest…[must be] one that inhered in the title acquired by the claimant when he purchased the property…."[196] Thus, a defense based on the nuisance exception to regulatory takings is a "threshold matter before reaching the *Penn Central* analysis."[197] In applying the exception, "[t]he relevant question is whether [a property

[182] *Id.* at 849, 136 P.3d at 320.

[183] Kim v. City of N.Y., 90 N.Y.2d 1, 6, 681 N.E.2d 312, 314, 659 N.Y.S.2d 145, 147 (1997).

[184] Kafka v. Dep't of Fish, Wildlife & Parks, 2005 Mont. Dist. LEXIS 729, at **45–46 (*citing* Corn v. City of Lauderdale Lakes, 95 F.3d 1066, 1075 (11th Cir. 1996), *cert. denied*, 522 U.S. 981, 118 S. Ct. 441, 139 L. Ed. 2d 378 (1997) (right to complete construction project not property under Taking Clause) and Pittman v. Chicago Bd. of Educ*.,* 64 F.3d 1098, 1104 (7th Cir. 1995), *cert. denied*, 517 U.S. 1243, 116 S. Ct. 2497, 135 L. Ed. 2d 189 (1996) (teacher tenure not property under the Taking Clause)).

[185] Colman v. Utah State Land Bd, 795 P.2d at 922 (1990).

[186] Kafka v. Dep't of Fish, Wildlife & Parks, 2005 Mont. Dist. LEXIS 729, at **46. *See also* Conti v. United States, 291 F.3d 1334, 1340 (Fed. Cir. 2002), *cert. denied*, 537 U.S. 1112, 123 S. Ct. 904, 154 L. Ed. 2d 785 (2003) (revocation of gillnetting permit not a taking); Allied-General Nuclear Servs. v. United States, 839 F.2d 1572, 1577 (Fed. Cir. 1988), *cert. denied,* 488 U.S. 819, 109 S. Ct. 61, 102 L. Ed. 2d 39 (1988) (refusal to process construction permit for nuclear plant not a taking).

[187] *Id.* at **47 (*citing Lucas*, 505 U.S. at 1027–31, 112 S. Ct. 2886, 120 L. Ed. 2d 798).

[188] *Id.* at **49.

[189] *Id.* at **50.

[190] *Id.* at **52.

[191] *Id.*

[192] Mutschler v. City of Phoenix, 212 Ariz. 160, 164, 129 P.3d 71, 75 (Ariz. App., 1st Div. 2006) (citation omitted).

[193] *Id.*

[194] *Id.* (*citing* Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1347 (Fed. Cir. 2004) ("It is a settled principle of federal takings law that under the *Penn Central* analytic framework, the government may defend against liability by claiming that the regulated activity constituted a state law nuisance without regard to the other *Penn Central* factors."); Raceway Park, Inc. v. Ohio*,* 356 F.3d 677, 683 (6th Cir. 2004) (noting, before engaging in *Penn Central* analysis, that "we could appropriately end our Takings Clause analysis here, as there is no taking if there is no private property in the first place."); Machipongo Land & Coal Co. v. Dep't of Envtl. Protection, 569 Pa. 3, 43, 799 A.2d 751, 774 (2002) ("If the Commonwealth is able to show that the Property Owner's proposed use of the stream would unreasonably interfere with the public right to unpolluted water, the use, as a nuisance, may be prohibited without compensation.")).

[195] 212 Ariz. at 165, 129 P.3d at 76.

[196] *Id.*

[197] *Id.*

owner] could have been restrained from operating [its] business in a common-law action for public nuisance."[198] In sum, "public nuisances are not protectable property interests under the Fifth Amendment" and thus may not serve as a basis for a claim for an unconstitutional taking.[199]

A.12. Whether Delay Caused by Litigation Concerning a Regulatory Taking Is a Taking

Government decisions asserting jurisdiction or requiring permits contested by landowners may result in litigation and lengthy delays. Even if a landowner prevails in the litigation, the owner is unlikely to have a claim for a taking caused by a delay stemming from the government's action and the subsequent successful litigation opposing the government's position. As stated by the Supreme Court in *First English Evangelical Lutheran Church of Glendale, supra,* "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like" usually will not constitute a taking.[200]

In *Landgate, Inc. v. California Coastal Commission,*[201] the court "consider[ed] whether a delay in the issuance of a development permit partly owing to the mistaken assertion of jurisdiction by a government agency is a type of 'temporary taking' contemplated in *First English*."[202] The court stated that "the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking,"[203] and that "virtually every court that has examined the issue has concluded, for various reasons and under various theories, that a regulatory mistake resulting in delay does *not*, by itself, amount to a taking of property."[204]

In *Landgate* the critical difference between that case and *First English Evangelical Lutheran Church of Glendale* was that in *Landgate*, "'the mere assertion of regulatory jurisdiction by a government body does not constitute a regulatory taking.'"[205] In contrast to *First English,*

> [h]ere, there was a postponement of development pending resolution of a threshold issue of the development approval process—whether the lot was legal—and not a final decision denying development. In *First English*, on the other hand, the Supreme Court assumed that the ordinance in question categorically denied all property owners within its purview the right to develop their property. Development was assumed to be denied in *First English*, in other words, even though there was no dispute about a threshold issue in the development approval process, as there was in this case, that would be a legitimate basis for postponing approval of development. The postponement of Landgate's development therefore does not constitute a temporary taking of property as that doctrine was conceived in *First English*.[206]

In *Allegretti, supra,* the court held that "[t]he permit condition [at issue], imposed under [the] County's police power for the purpose of conserving groundwaters and preventing their undue waste, had an objectively sufficient connection to that valid governmental interest"[207] and that "such lengthy [litigation] delays can be part of the normal regulatory process."[208] Therefore, as held in *Allegretti*, "[a] landowner can have no reasonable expectation that there will be no delays or bona fide differences of opinion in the application process for development permits."[209]

The fact that the government's assertion of jurisdiction may have been erroneous does not in and of itself give rise to an unconstitutional regulatory taking: "litigation is a normal part of the regulatory process when the public agency prevails but a per se temporary taking when the public agency loses has no basis in either logic or Supreme Court precedent."[210]

A.13. Claims for Regulatory Takings Based on a Government Moratorium or Delay

In the context of regulatory takings, the issue has arisen as to whether a government moratorium or the government's delay in making a decision affecting a

[198] *Id.* Therefore, a city ordinance that made the operation of a live sex act business illegal as a public nuisance was not a regulatory taking. 212 Ariz. at 167; 129 P.3d at 78.

[199] *Id.* at 167, 129 P.3d at 78.

[200] First English Evangelical Lutheran Church of Glendale, 482 U.S. at 321, 107 S. Ct. at 2389, 96 L. Ed. 2d at 268. *See also Allegretti*, 138 Cal. App. 4th at 1282, n.11, 42 Cal. Rptr. 3d at 137, n.11.

[201] 17 Cal. 4th 1006, 73 Cal. Rptr. 2d 841, 953 P.2d 1188 (1998), *cert denied,* 525 U.S. 876, 119 S. Ct. 179, 142 L. Ed. 2d 146 (1998).

[202] *Id.* at 1010, 953 P.2d at 1190. The case centered on the plaintiff's effort to build a large home in Malibu Hills.

[203] *Id.* at 1017, 953 P.2d at 1195 (*citing* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985)).

[204] *Id.* at 1018, 953 P.2d at 1195 (emphasis in original) (*citing* Littoral Dev. Co. v. S.F. Bay Conservation etc. Comm'n, 33 Cal. App. 4th 211, 221–22, 39 Cal. Rptr. 2d 266 (Cal. App. 2d Dist. 1995); Del Oro Hills v. City of Oceanside, 31 Cal. App. 4th 1060, 1080, 37 Cal. Rptr. 2d 677 (Cal. App. 4th Dist. 1995); Jacobi v. City of Miami Beach, 678 So. 2d 1365, 1367 (Fla. App., 3d Dist. 1996); Cannone v. Noey, 867 P.2d 797, 801 (Alaska 1994); Dumont v. Town of Wolfeboro, 137 N.H. 1, 622 A.2d 1238, 1244 (1993); Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 801–02 (Fed. Cir. 1993); Steinbergh v. City of Cambridge, 413 Mass. 736, 604 N.E.2d 1269, 1274–77 (1993); Smith v. Town of Wolfeboro, 136 N.H. 337, 615 A.2d 1252, 1257–58 (1992); Lujan Home Builders v. Orangetown, 150 Misc. 2d 547, 568 N.Y.S.2d 850, 851 (Sup. Ct. Rockland County 1991)).

[205] *Id.* at 1027, 953 P.2d at 1201 (*quoting Riverside Bayview Homes, Inc.,* 474 U.S. 121, 126, 106 S. Ct. 455, 459, 88 L. Ed. 2d 419, 426 (1985).

[206] *Id*. at 1029–30, 953 P.2d at 1203.

[207] Allegretti and Co. v. County of Imperial, 138 Cal. App. 4th at 1283, 42 Cal. Rptr. 3d at 138.

[208] *Id.* at 1283, 42 Cal. Rptr. 3d at 139 (*citing* Calprop Corp. v. City of San Diego, 77 Cal. App. 4th 582, 600–01, 91 Cal. Rptr. 2d 792 (Cal. App. 4th Dep't 2000)).

[209] *Id.* at 1284–85, 42 Cal. Rptr. 3d at 140.

[210] Landgate, Inc. v. Cal. Coastal Comm'n. 17 Cal. 4th at 1031, 953 P.2d at 1204.

property owner may be compensable as a temporary taking. Regulations may result in temporary interference with an owner's property right and give rise to a claim for compensation for a temporary taking. Except in the most unusual circumstances, an owner is not likely to recover for an alleged regulatory taking caused by a reasonable moratorium or delay.

In *Tahoe-Sierra Preservation Council, Inc. v. Taho*e *Reg'l Planning Agency,* [211] the Tahoe Regional Planning Agency imposed two moratoria totaling 32 months on development in the Lake Tahoe Basin while it was formulating a comprehensive land-use plan for the area. The petitioners argued that the *Lucas* categorical rule applied, i.e., that a taking occurs when a regulation deprives an owner of "all economically beneficial uses" of his land.

The Supreme Court held that the government-imposed moratoria at issue in the case did not constitute a taking.

> It may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism. But given the fact that the District Court found that the 32 months required by TRPA to formulate the 1984 Regional Plan was not unreasonable, *we could not possibly conclude that every delay of over one year is constitutionally unacceptable. Formulating a general rule of this kind is a suitable task for state legislatures*. In our view, *the duration of the restriction is one of the important factors that a court must consider* in the appraisal of a regulatory takings claim, but with respect to that factor as with respect to other factors, the "temptation to adopt what amount to *per se* rules in either direction must be resisted."[212]

In *Wild Rice River Estates*, *supra*, the Supreme Court of North Dakota dealt with an inverse condemnation claim arising out of the city's 21-month moratorium on the issuance of building permits and held that that the moratorium did not constitute a taking of the plaintiffs' property.[213] The court affirmed the trial court's analysis that focused in part on the fact that the moratorium did not "single out" the plaintiffs' property but was temporary "until local, State and Federal officials could adequately review a flood plain management [plan] for the area so devastated by the 1997 flood."[214] The court in *Wild Rice River Estates* quoted the Supreme Court's decision in *Tahoe-Sierra Preservation Council*: "[M]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are incidents of ownership. They cannot be considered as a taking in the constitutional sense."[215] Nevertheless, implicit in the *Wild Rice River Estates* case is that there may be situations of temporary takings that could be compensable. "An extraordinary delay in governmental decisionmaking coupled with bad faith on the part of the governmental body may result in a compensable taking of property."[216]

In *In the Matter of Condemnation by the Municipality of Penn Hills of Allegheny County, Etc.*,[217] the property owners sought to recover damages "for the period of time during which Penn Hills had prevailed in the trial court, which had enjoined Property Owners from developing their property without Penn Hills' approval."[218] However, "[a] temporary restriction on an owner's use of his property is…*not a total taking*."[219]

The *Penn Hills* court held that "'[a] taking does not result merely because a regulation deprives an owner of the most profitable use of his or her property…. [A] moratorium on development does not constitute a per se taking of property requiring compensation.'"[220] The court held that the trial court's order under review "did not totally forbid construction on the Property; rather, it required that Property Owners obtain the approval of both municipalities in which the property was located…."[221] Furthermore, "'a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.'"[222]

In *Hillsboro Properties v. City of Rohnert Park,*[223] the court sustained the trial court's dismissal of an inverse condemnation action in which landlords sought to recover rents in excess of the rent control ceiling for a period during which an ordinance, later held to be unconstitutional, was in force.[224] The appellate court held that a regulation that "bears 'a reasonable relation to a proper legislative purpose' so long as the law does not

[211] 535 U.S. 302, 306, 122 S. Ct. 1465, 1470, 152 L. Ed. 517, 530.

[212] *Id.* at 341–42, 122 S. Ct. at 1489, 152 L. Ed. 2d at 552–53 (footnotes omitted) (emphasis supplied) (*quoting Palazzolo,* 533 U.S. at 636, 121 S. Ct. at 2467, 150 L. Ed. 2d at 619 (O'Connor, J., concurring)).

[213] Wild Rice River Estates v. City of Fargo, 2005 N.D. 193, at *P1, 705 N.W.2d at 852.

[214] *Id.* at *P23, 705 N.W.2d at 858.

[215] *Id.* at *P18–19, 705 N.W.2d at 858 (*quoting Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 332, 122 S. Ct. at 1484, 152 L. Ed. 2d at 546).

[216] *Id.* at *P26, 705 N.W.2d at 859 (*citing* Bass Enters. Prod. Co. v. United States*,* 381 F.3d 1360, 1366 (Fed. Cir. 2004); Wyatt v. United States, 271 F.3d 1090, 1098 (Fed. Cir. 2001); Apollo Fuels, Inc. v. United States, 54 Fed. Cl. 717, 737 (2002); Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (S.C. 2005)).

[217] 870 A.2d 400 (Pa. Commw. Ct. 2005).

[218] *Id.* at 401.

[219] *Id.* at 408 (emphasis in original) (*citing Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 332, 122 S. Ct. at 1484, 152 L. Ed. 2d at 546).

[220] *Id.* at 409 (*quoting* Nolen v. Newtown Township, 854 A.2d 705, 708 (Pa. Commw. Ct. 2004)).

[221] *Id*.

[222] *Id.* at 409 (*quoting Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 332, 122 S. Ct. at 1484; 152 L. Ed. 2d at 546).

[223] 138 Cal. App. 4th 379, 41 Cal. Rptr. 3d 441 (Cal. App. 1st Dist. 2006).

[224] *Id.* at 384, 41 Cal. Rptr. 3d at 444.

deprive investors of a 'fair return' and thereby become 'confiscatory'"[225] is not an unconstitutional taking.

There is authority that if a regulation deprives the owner or owners of all economically beneficial use of their property as occurred in the *Lucas* case, discussed in subsection B.2.b, *supra*, there may be a claim for a temporary taking. Following the U.S. Supreme Court's reversal and remand in *Lucas,* the Supreme Court of South Carolina dealt with the issue of whether Lucas was entitled to damages for the temporary period Lucas was denied all beneficial use of his property.[226] In its decision on remand, the court stated that in the absence of the U.S. Supreme Court's "intervention and reversal Lucas would have been unable to obtain further state-court adjudications with respect to a temporary taking."[227] Furthermore, the court stated that the Supreme Court's decision "created for Lucas a cause of action for the temporary deprivation of the use of this property" and that "Coastal Council has not persuaded us that any common law basis exists by which it could restrain Lucas' desired use of his land."[228] The court's remand to the circuit level directed that the parties could "present evidence of the actual damages Lucas has sustained as a result of the State's temporary nonaquisitory taking of his property without just compensation."[229] The court did not "dictate any specific method of calculating the damages…."[230]

Depending on the circumstances, it may be possible for a claimant to obtain compensation for a lengthy, temporary delay as a result of government action in situations bordering on a total or permanent taking. For example, in 2005 in *Steel Associates, Inc., supra,* the plaintiff "submitted evidence that the city took affirmative acts that interfered with plaintiff's ability to do business under its lease."[231] The evidence showed that "between 1992 and 2003, because of its inability to modernize, the value of its business diminished substantially,"[232] evidence that was sufficient for the jury to conclude that the city's affirmative actions were a "substantial cause of plaintiff essentially going out of business."[233] A verdict of $4 million was upheld.[234]

B. "EXACTIONS" OF PROPERTY RIGHTS AS COMPENSABLE REGULATORY TAKINGS

Exactions are defined as "land-use decisions conditioning approval of development on the dedication of property to public use."[235] An exaction is a forced dedication of property, usually by a developer who is required to dedicate some of the land to acquire a permit or to gain approval of a development plan.

Although exactions are not new to the law, they came into prominence after World War II in the United States as a result of the mass movement of people from the cities to the suburbs. As large cities began to lose population, the governments of smaller cities and towns were confronted with rapidly expanding population. The governments needed to find new sources of revenue to meet the necessary outlays for capital improvements. One means widely used by governments and accepted by the courts was the requirement of a developer's dedication of land or payment of money before receiving approval of a development plan. Depending on the terms of the enabling act and the scope of the regulations under the act, governments required dedications for streets, storm and sanitary sewers, water mains, curbs and gutters, and drainage systems, as well as for sites for schools, playgrounds, parks, and recreational areas. Although exactions most often relate to right-of-ways, exactions also may be required for parks and green space and to meet other public needs.

By regulation or by imposition of a condition, a government entity may exact a concession in real property before granting an application, for example, to partition or develop land. Thus, "when a landowner proposes to develop private property in a way that would create a burden on a public interest, the government generally may, by exercise of the police power, prohibit the development."[236] A land-use regulation that is prohibitory in nature does not amount to a taking if it does not "'deny an owner economically viable use of his land.'"[237] On the other hand, the government may "protect the public interest at risk by conditioning approval of the development on some concession by the landowner—such as a concession of property interests–that mitigates the public burden" of the proposed development.[238]

Two important cases that establish a two-pronged "nexus" and "rough proportionality" test applicable to whether there has been a regulatory taking resulting from an exaction are *Nollan v. California Coastal*

[225] *Id.* at 384, 41 Cal. Rptr. 3d at 445 (*quoting* Kavanau v. Santa Monica Rent Control Bd., 16 Cal. 4th 761, 771, 66 Cal. Rptr. 2d 672, 941 P.2d 851 (1997)).

[226] Lucas v. S.C. Coastal Council, 309 S.C. 424, 424 S.E.2d 484 (1992).

[227] *Id.* at 426, 427, 424 S.E.2d at 486.

[228] *Id.*

[229] *Id.*

[230] *Id.*

[231] Steel Assocs., Inc. v. City of District, 2005 Mich. App. LEXIS 2553, at *4 (Unrept.).

[232] *Id.* at *6–7.

[233] *Id.* at *7.

[234] "Where there has been a permanent taking, the fair market value of the land is often appropriate compensation…. For a temporary taking, there are 'five basic rules for measuring damages[:] …rental return, option price, interest on lost profit, before-after valuation, and benefit to the government.'" *Id.* at *19–20 (citations omitted).

[235] City of Monterey, Ltd. v. Del Monte Dunes*,* 526 U.S. 687, 702, 119 S. Ct. 1624, 1635, 143 L. Ed. 2d 882, 900 (1999)).

[236] Hammer v. City of Eugene, 202 Or. App. 189, 192, 121 P.3d 693, 694 (Or. Ct. App. 2005) (*citing Nollan*, 483 U.S. at 834–36, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987)).

[237] *Id.* at 202, 121 P.3d at 695 (*quoting* Nollan v. Cal. Coastal Comm'n*,* 483 U.S. at 834, 107 S. Ct. at 3147, 97 L. Ed. 2d at 687) *(quoting Agins,* 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106, 112 (1980)).

[238] *Id.* at 192, 121 P.2d at 695.

Commission[239] and *Dolan v. City of Tigard*.[240] In *Nollan* the Court considered a case in which the landowners applied to the California Coastal Commission for a permit to rebuild a house located between two public beaches. The Coastal Commission granted the permit upon the condition that the landowners grant an easement to the public allowing the public to pass across the landowners' land between the two public beaches.[241] The landowners challenged the condition that the trial court struck down but the California Court of Appeal reinstated on the basis that the condition did not violate the Fifth Amendment.[242]

In reversing, the U.S. Supreme Court held that

> the *lack of nexus* between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land-use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion."[243]

As seen, under the *Nollan* decision a government regulation must bear some logical nexus to the condition imposed before it will pass constitutional muster. In *Dolan* the Court refined the *Nollan* nexus test. In *Dolan* the city, in reviewing an application from the landowner to redevelop her site to nearly double the size of her store, conditioned "approval of her building permit on the dedication of a portion of her property for flood control and traffic improvements."[244] In imposing the requirements, the City Planning Commission found it to be "reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development…."[245] The Commission further stated that "anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and flood plain…."[246] Based on these findings the Commission found that these requirements were relevant to the landowners' plan to intensify development on the site. After the Oregon Supreme Court upheld the requirements, the U.S. Supreme Court granted *certiorari*.

In reversing the decision below, the Supreme Court rejected the "reasonable relationship" doctrine adopted by many jurisdictions prior to its review of the *Dolan* case.

> We think the "reasonable relationship" test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.*[247]

In reaching the above holding, the *Dolan* Court concluded that the city had not met the burden of showing that the additional vehicle and bicycle trips generated by the development reasonably related to the required dedication.[248]

With respect to the *Nollan* and *Dolan* precedents, it is important to recall that in 2005 in *Lingle v. Chevron USA Inc.*[249] the Supreme Court held that the *Agins'* "substantially advance legitimate state interests" test[250] was no longer valid.[251] The *Lingle* Court made it clear, as discussed in Section 4.A.7, *supra*, that its reversal of course with respect to the *Agins'* test did not affect its decisions in *Nollan* and *Dolan*. Thus, "[i]n light of *Lingle*, the theory that a regulation effects a taking for Fifth Amendment purposes if it does not substantially advance a legitimate state interest is no longer valid," but the *Nollan* and *Dolan* cases "establish a distinct test for a regulatory taking that remains viable."[252]

To summarize briefly, in the *Nollan* and *Dolan* cases the Supreme Court developed a two-prong test for exaction cases: "The first prong concerns simply whether the exaction and prohibition share a common purpose, …whether they have an 'essential nexus.'"[253] The second prong is the rough proportionality test; that is, the "exaction and the projected impact of the proposed development [must] be similar in magnitude."[254] With an exaction, a city, for example, "must make some sort of

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[239] 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

[240] 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

[241] Nollan v. Cal. Coastal Comm'n, 483 U.S. at 827, 107 S. Ct. at 3143, 97 L. Ed. 2d at 683.

[242] *Id.*

[243] *Id.* at 837, 107 S. Ct. at 3149, 97 L. Ed. 2d at 689 (citations omitted) (emphasis supplied).

[244] Dolan v. City of Tigard, 512 U.S. at 377, 114 S. Ct. at 2312, 129 L. Ed. 2d at 311.

[245] *Id.* at 381, 114 S. Ct. at 2314, 129 L. Ed. 2d at 314.

[246] *Id.* at 382, 114 S. Ct. at 2315, 129 L. Ed. 2d at 314.

[247] *Id.* at 391, 114 S. Ct. at 2319, 129 L. Ed. 2d at 320 (emphasis supplied).

[248] *Id.* at 395–96, 114 S. Ct. at 2321–12, 129 L. Ed. 2d at 323.

[249] 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

[250] Agins v. City of Tiburon, 447 U.S. at 260, 100 S. Ct. at 2141, 65 L. Ed. 2d at 112.

[251] Lingle v. Chevron USA Inc., 544 U.S. at 545–46, 125 S. Ct. at 2085–86, 161 L. Ed. 2d at 892–93.

[252] Wis. Builders Ass'n v. Wis. DOT, 285 Wis. 2d at 501, 702 N.W.2d at 447.

[253] Hammer v. City of Eugene, 202 Or. App. at 193, 121 P.2d at 695 (*quoting Nollan*, 483 U.S. at 837, 107 S. Ct. 3148, 97 L. Ed. 2d at 689).

[254] *Id.*

individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[255] As the court explained in the Hammer Case, when "a conveyance of property interests that is required by the government as a condition to approval of a development application…furthers the same end that would justify prohibiting the proposed development and is roughly proportional to its projected impact," the required conveyance by the landowner is not a taking.[256]

The question has arisen, however, whether the absence of the government's rough proportionality findings prior to a regulatory exaction establishes *ipso facto* that an unconstitutional taking has occurred. In *Hammer v. City of Eugene,*[257] the city had not made its rough proportionality finding prior to the imposition of a land-use condition. The city argued that "when a property owner brings an action for inverse condemnation after the government has conditionally approved a development proposal," the government may demonstrate "after the fact that rough proportionality existed at the time of the exaction" in part because the claimant did not pursue an administrative appeal.[258] The *Hammer* court agreed, echoing the Supreme Court's opinion in *Lingle*, *supra*, because the Takings Clause does not include any procedural requirements.

> We cannot conclude that the Court intended to create a rule with such profound consequences merely by implication and in a case in which the rule had no application.
>
> We also reject plaintiff's underlying premise that the Takings Clause itself compels the government to make rough proportionality findings at the time that it imposes an exaction on a development application….
>
> If the framers had intended for the Takings Clause to include a procedural requirement, there would have been no need to prohibit deprivations of property "without due process of law…."
>
> [T]he *Takings Clause* is concerned not with process, but rather with substantive restrictions on government authority…. [P]laintiff's argument that the government is required to follow particular procedures when imposing exactions sounds in due process, not in takings jurisprudence.[259]

In *Hammer* the court made an observation that may be relevant to other inverse condemnation actions: "an inverse condemnation claimant cannot prevail merely by showing that the government failed to follow condemnation procedures; he or she must show that the government actually took property."[260]

As stated, in *Smith v. Mendon*, *supra*, the New York Court of Appeals declined "to extend the concept of exaction [to a situation] where there is no dedication of property to public use and the restriction merely places conditions on development."[261] The *Smith* court held that the government's requirement in that case was "a modest environmental advancement at a negligible cost to the landowner [that] does not amount to a regulatory taking."[262]

Consistent with *Smith, supra*, the Court of Appeals of Wisconsin stated, in holding that certain regulations of the Department of Transportation were not unconstitutional takings:

> Wisconsin Builders, in essence, is arguing for a significant extension of Nollan and Dolan, but the Supreme Court has at least twice emphasized that it has not extended the standard applied there beyond the specific context of those cases. See *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702, 143 L. Ed. 2d 882, 119 S. Ct. 1624 (1999) ("we have not extended the rough-proportionality test of Dolan beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use"); and *Lingle*, 125 S. Ct. at 2086 (citing Del Monte Dunes approvingly on this point). We decline to extend the *Nollan/Dolan* standard to a context far removed from the facts of those cases.
>
> We also observe that the rough proportionality standard of Dolan requires that, in an adjudicative context, the government make "an individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." 512 U.S. at 391. This standard does not, by its very terms, appear to apply to the facial challenge to a regulation, where there are no facts regarding any individual landowner. Wisconsin Builders does not present an argument that resolves this incompatibility.
>
> We conclude that the *Nollan/Dolan* standard does not apply to Wisconsin Builders' facial challenge to the setback restrictions. We therefore do not take up DOT's argument that the special exception condition is permissible under that standard.[263]

Thus, it appears that the *Nolan* and *Dollan* two-prong test has not been applied outside the context of exactions.

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[255] Dolan v. City of Tigard*,* 512 U.S. at 391, 114 S. Ct. at 2319–20, 129 L. Ed. 2d at 320.

[256] 202 Or. at 193, 121 P.3d at 695.

[257] 202 Or. App. 189, 121 P.3d 693 (2005).

[258] *Id.* at 194, 121 P.3d at 696.

[259] *Id.* at 196, 121 P.3d at 697 (citations omitted) (emphasis supplied) (*citing* Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 195 n.14, 105 S. Ct. 3108, 3121, n.14, 87 L. Ed. 2d 126, 144, n.14 (1985) (Court noting that unlike the Due Process Clause, the Takings Clause "has never been held to require pretaking process….").

[260] 202 Or. App. at 197, 121 P.3d at 697 (*citing* MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986) ("Appellant must establish that the regulation has in substance 'taken' his property….").

[261] 4 N.Y.3d at 12, 822 N.E.2d at 1219, 789 N.Y.S.2d at 701.

[262] *Id.* at 15, 822 N.E.2d at 1221, 789 N.Y.S.2d at 703.

[263] Wis. Builders Ass'n v. Wis. DOT, 285 Wis. 2d at 503–04, 702 N.W.2d at 448 (emphasis supplied).

C. DEFENSES AND OTHER ISSUES RELATING TO INVERSE CONDEMNATION

C.1. Statute of Limitations

The applicable statute of limitations for a claim in inverse condemnation will vary from state-to-state. Thus, state statutes and judicial decisions must be consulted.

In *Department of Forests, Parks and Recreation v. Town of Ludlow Zoning Board,*[264] the landowner Lysobey sought to obtain year-round access to his property, which abutted a public road on land leased by the Department of Forest, Parks and Recreation to Okemo Mountain, Inc., for use as a ski trail during the ski season.[265] However, as explained by the court, the evidence established that Lysobey's access rights had been taken decades earlier in the 1960s and before Lysobey owned the property.[266] Thus, the court agreed that

> *because the taking occurred* many years before Lysobey purchased his property and *more than six years* before he sought redress for being denied winter vehicular access to the property, he is foreclosed from obtaining damages for the alleged deprivation by both his lack of standing and the expiration of the applicable limitations period.[267]

Similarly, in a California case it was held that an inverse condemnation brought 20 years after a prior owner's dedication of land made at the time of a condition placed on a permit for development was time barred.[268]

The problem is not only in knowing the proper time in a particular state within which a claim in inverse condemnation must be filed but also in knowing when the statute actually commences to run. The "general rule is that when the government takes possession of property before it acquires title to that property, the former event constitutes the act of taking the property"; it is the interference with the property right that creates a right to commence inverse condemnation proceedings, "'not the realization of the extent of damages'";[269] and "[t]he takings date in an inverse condemnation action involving loss of access to property is the date on which the government physically interferes with the access."[270]

The date that is determined to be the date of the taking is crucial. The determination of the "takings date" is a question of fact. In 1993 the Missouri Supreme Court held that in an inverse condemnation action the statute began to run not with the end of the project but when the landowner first should have been aware of the taking.[271] Later, in *Randolph v. Missouri Highways and Transportation Commission,*[272] an appellate court affirmed a trial court's ruling that a subsequent flooding did not constitute a new cause of action because "'a cause of action for inverse condemnation accrues once the fact of damage is capable of ascertainment,'" i.e., in that case when the first flooding occurred as a result of a highway construction project.[273]

Finally, it should be noted that if property is taken as a result of administrative action, "[c]ompliance with procedural writ requirements 'remains a necessary predicate to institution of inverse condemnation proceedings.'"[274] Furthermore, "the absence of a timely writ petition by the prior owner 'results in a waiver of any inverse condemnation and related claims' for the successor in interest."[275]

C.2. Ripeness Requirement

Although an action may be filed too late and be barred by the applicable statute of limitations, it is possible also for a claimant in inverse condemnation to file too soon, *i.e*., before a claim is ripe. The issue of ripeness may arise in the context of an alleged regulatory taking resulting from administrative action, because a property owner normally must avail himself or herself of any administrative procedures, reviews, or appeals applicable to the challenged regulation or condition. In general, "ripeness is a prerequisite to justicibility"; thus, for example, "where a zoning ordinance includes a procedure for obtaining a variance from the prescribed requirements, a regulatory takings claim is not ripe until the landowner has requested and has been denied the variance."[276] "[A] regulatory takings claim does not become ripe upon enactment of the regulation" at issue.[277] A claim "remains unripe until the landowner

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[264] 177 Vt. 623, 869 A.2d 603 (2004).

[265] *Id.* at 623, 869 A.2d at 604.

[266] *Id.* at 625, 869 A.2d at 606.

[267] *Id.* (emphasis supplied).

[268] Serra Canyon Co., Ltd. v. Cal. Coastal Comm'n, 120 Cal. App. 4th 663, 666, 16 Cal. Rptr. 3d at 110, 111 (Cal. App., 2d Dist. 2004), *review denied*, 2004 Cal. LEXIS 10222 (Cal. 2004), *cert. denied*, 544 U.S. 1044, 125 S. Ct. 2251, 161 L. Ed. 2d 1079 (2005) (*citing* Ojavan Investors, Inc. v. Cal. Coastal Comm'n, 26 Cal. App. 4th 516, 32 Cal. Rptr. 2d 103 (1994)).

[269] Dep't of Forests, Parks & Recreation v. Town of Ludlow Zoning Bd., 177 Vt. at 625, 869 A.2d at 606 (*quoting* Beer v. Minn. Power & Light Co., 400 N.W.2d 732, 735 (Minn. 1987)).

[270] *Id.* (*citing* De Alfy Props. v. Pima County, 195 Ariz. 37, 985 P.2d 522, 524 (Ariz. App. 2d Div. 1998) (holding that inverse condemnation claim for taking of property owner's right of access accrued when government cut off or substantially impaired access); Kirby Forest Indust., Inc. v. United States, 467 U.S. 1, 5, 104 S. Ct. 2187, 2191, 81 L. Ed. 2d 1, 7 (1984) (holding that a landowner "has a right to bring an 'inverse condemnation' suit to recover the value of the land on the date of the intrusion by the Government").

[271] Heins Implement Co. v. Mo. Highways and Transp. Comm'n, 859 S.W.2d 681 (Mo. 1993) (en banc).

[272] 224 S.W.3d 615 (Mo. App. W. Dist. 2007).

[273] *Id*. at 618 (citing Shade v. Mo. Highways and Transp. Comm'n, 695 S.W.3d 503, 514 (Mo. App. W. Dist. 2001).

[274] Serra Canyon Co., Ltd. v. Cal. Coastal Comm'n, 120 Cal. App. 4th 663, at 669, 16 Cal. Rptr. 3d 110, at 114 (citations omitted).

[275] *Id.* (citations omitted).

[276] City of Coeur d'Alene v. Simpson, 142 Idaho at 845, 136 P.3d at 316.

[277] *Id.* at 846, 136 P.3d at 317.

takes the reasonable and necessary steps to allow the regulating agency to consider development plans and issue a decision, thereby determining the extent to which the regulation actually burdens the property."[278]

As a California appellate court observed in *Serra Canyon Co., Ltd., supra*, "an unjust takings claim ripens when (1) the administrative agency makes a final decision regarding the property owner's ability to develop the land, and (2) the property owner timely sought recompense through available state procedures."[279]

A recent example of when a landowner's inverse condemnation action was not ripe is *County of Alameda*, *supra*. The case involved a landowner's failure to submit a development proposal following passage by county voters of an initiative to preserve open space in the county. The question was whether the owner's "regulatory taking action [could proceed] before the County ha[d] the opportunity to decide and explain the reach of" the initiative.[280] The owner argued that the initiative, known as Measure D, "deprived it of *all* economically viable uses of its property" and that "it was excused from the usual requirement of submitting a development application…."[281] The court, however, held that

> "[a] final decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of 'all economically beneficial use' of the property…or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred…." Simply put, a court cannot say whether a regulation goes too far in restricting the use of property unless it knows how far the regulation goes….[282]

The lack of ripeness is not cured because of an intervening preliminary injunction. In *Murray v. Oregon*,[283] the landowners did not complete the regulatory process and pursue all available administrative remedies for approval of the development of their property. When the government obtained an injunction against the property owners because of their unauthorized mining activities,[284] it was held that "the issuance of the injunction did not cause plaintiff's inverse condemnation claim to become ripe."[285]

> Before it can be determined…if government regulations have gone so far as to constitute a taking, there must be a final decision from the government regulatory body regarding the application of the regulations to the property at issue…. [I]t follows from the nature of a regulatory claim that an authoritative determination of how the regulation applies to the property is an essential prerequisite to asserting a takings claim in court. If there are available administrative procedures through which landowners may seek to modify the effects of regulations on the use of their property and those procedures provide a possibility that development could occur on the property, the land owners must pursue those administrative procedures before a takings claim may be considered "ripe."[286]

A property owner, as in *County of Alameda, supra,* may argue that an application or appeal is not necessary because such action is futile; for example, because an "ordinance leaves the [government] with no discretion to permit any other uses."[287] Not only is it the plaintiff's burden to demonstrate futility,[288] but also the "futility exception is 'extremely narrow.'"[289] The exception "is not triggered by the mere possibility, or even the probability, that the responsible agency will deny the requested development permit."[290] In *County of Alameda* the submission of an application was not excused based on the futility exception to the ripeness requirement, because "the County has not had the opportunity to explain the reach of the challenged regulation, and [the court] was not persuaded that all possible uses of the Property are in fact known."[291]

However, as "the law does not require the doing of a futile or useless act,"[292] it may be possible for a property owner to show that pursuing other nonjudicial avenues prior to the inverse condemnation claim would have been futile. In a Michigan case involving an alleged taking of the plaintiff's leasehold interest in property located adjacent to the Detroit City Airport, the court stated that "it was clear from the evidence that the city was not going to permit any new construction or remod-

[278] *Id.* (citation omitted).

[279] Serra Canyon Co., Ltd. v. Cal. Coastal Comm'n, 120 Cal. App. 4th at 671, 16 Cal. Rptr. 3d at 115 (*citing* Williamson County Reg'l Planning Comm'n, 473 U.S. 172, 186, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985) [*superseded by statute as stated in* Sprint Spectrum L.P. v. City of Carmel, 361 F.3d 998 (7th Cir. 2004)]; Daniel v. County of Santa Barbara, 288 F.3d 375, 381 (9th Cir. 2002); Hensler v. City of Glendale, 8 Cal. 4th 1, 10–11, 876 P.2d 1043 (1994)).

[280] County of Alameda v. Superior Court, 133 Cal. App. 4th 558, at 566, 34 Cal. Rptr. 3d 895, at 900.

[281] *Id.* at 564, 34 Cal. Rptr. 3d at 898 (emphasis in original).

[282] *Id.* at 567, 34 Cal. Rptr. 3d at 901 (citations omitted).

[283] 203 Or. App. 377, 124 P.3d 1261 (Or. Ct. App. 2005), *review denied,* 340 Or. 672, 136 P.3d 742 (2006).

[284] *Id.* at 384, 124 P.3d at 1265.

[285] *Id.* at 391, 124 P.3d at 1269.

[286] *Id.* at 390–91, 124 P.3d at 1268–69 (some internal quotation marks omitted) (*citing* Boise Cascade Corp. v. Bd. of Forestry, 164 Or. App. 114, 129, 991 P.2d 563 (Or. Ct. App. 1999), *rev. denied*, 331 Or. 244, 18 P.3d 1099 (2000), *cert. denied*, 532 U.S. 923, 121 S. Ct. 1363, 149 L. Ed. 2d 291 (2001); Nelson v. City of Lake Oswego, 126 Or. App. 416, 421, 869 P.2d 350 (Or. Ct. App. 1994)).

[287] County of Alameda v. Superior Court, 133 Cal. App. 4th at 568, 34 Cal. Rptr. 3d at 902.

[288] Murray v. Oregon, 203 Or. App. at 392, 124 P.3d at 1270.

[289] 133 Cal. App. 4th at 568, 34 Cal. Rptr. 3d at 902 (citation omitted).

[290] *Id.*

[291] *Id.* at 569, 34 Cal. Rptr. 3d at 902.

[292] Steel Assocs., Inc. v. City of Detroit, 2005 Mich. App. LEXIS 2553, at *16 (citation omitted).

eling on the property" that would have enabled the plaintiff to process larger coils of steel."[293]

C.3. Lack of Standing

According to one court, citing numerous authorities, "it is well-settled law that the right to recover damages in condemnation proceedings 'belongs solely to the person owning or having an interest in the land at the time of the taking and it does not run with the land.'"[294]

The court explained that the rule's rationale is that

> "['w]hen the government interferes with a person's right to possession and enjoyment of his property to such an extent so as to create a 'taking' in the constitutional sense, a right to compensation vests in the person owning the property at the time of such interference. This right has the status of property, is personal to the owner, and does not run with the land if he should subsequently transfer it without an assignment of such right. The theory is that where the government interferes with a person's property to such a substantial extent, the owner has lost a part of his interest in the real property. Substituted for the property loss is the right to compensation. When the original owner conveys what remains of the realty, he does not transfer the right to compensation for the portion he has lost without a separate assignment of such right. If the rule were otherwise, the original owner of damaged property would suffer a loss and the purchaser of that property would receive a windfall. Presumably, the purchaser will pay the seller only for the real property interest that the seller possesses at the time of the sale and can transfer."[295]

However, the court in *City of Coeur d'Alene*, *supra*, stated that "the fact that an owner acquires property after a regulation has been enacted does not necessarily bar a claim that the regulation has effected a taking."[296] It may be noted also that in *Loretto*, *supra*, the case involving New York's requirement that landlords permit installation of cable television cables on their property, the appellant did not discover the existence of the cable until after she had purchased the property but there does not seem to have been an issue regarding whether the subsequent purchaser Loretto had standing to challenge a taking that occurred before her acquisition of the affected property. Indeed, the issue of appellant's standing to bring the claim is not discussed. Although not directly on point, the court did state that "[i]t is constitutionally irrelevant whether appellant (or her predecessor in title) had previously occupied this space, since a 'landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land.'"[297]

C.4. Doctrine of *Res Judicata*

The doctrine of *res judicata* in the context of eminent domain and inverse condemnation means that when a condemnation proceeding is tried, all issues and damage to the property are deemed to have been litigated and determined and, thus, a subsequent inverse condemnation action will not lie against the condemning authority. Thus, the general rule is that in a partial taking an award for the landowner is a bar to the owner's subsequent claim for consequential damages to the remainder. Typically, for the *res judicata* doctrine to apply there are four elements that must be satisfied to preclude a later action. It must be shown that

> (1) the prior action was decided on the merits, (2) there was a final decision entered in the prior action, (3) the matter contested in the second case was or could have been resolved in the first case, and (4) the two actions involve the same parties or their privies.[298]

In eminent domain and inverse condemnation proceedings, however, whether the *res judicata* doctrine applies depends on whether damages allegedly incurred after the original taking were foreseeable at the time of the original taking. *State v. Parchman*[299] is illustrative. The *Parchman* controversy had begun as an ordinary condemnation in which Parchman opposed a proposed drainage channel across his property. Although Parchman testified that the channel would damage his property, he testified only in general terms. The state's highway engineer, apparently in the course of explaining the proposed construction, specifically negated the likelihood of overflows from the channel. After the prediction proved to be incorrect, the property owner began the instant suit because of flooding. The *Parchman* court permitted a second recovery on these facts on the basis that the damage was not such that the plaintiff "ought reasonably to have foreseen the alleged conse-

[293] *Id.*

[294] Dep't of Forests, Parks, & Rec. v. Town of Ludlow Zoning Bd., 177 Vt. at 626, 869 A.2d at 607 (*quoting* 11A E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 32.132, at 269 (3d ed. 2000)); *see also* NICHOLS ON EMINENT DOMAIN § 5.01[5][d], at 5-37 ("[I]f the parcel of land from which the taking is made changes hands after the taking has occurred but before compensation has been paid, the right to receive the compensation does not run with the land."); Canney v. City of St. Petersburg, 466 So. 2d 1193, 1195 (Fla. Ct. App. 2d Dist. 1985) ("Damages to compensate for the taking of land or for injury to land not taken belong to the one who owns the land at the time of the taking or injury."); Crede v. City of Oak Grove, 979 S.W.2d 529, 534 (Mo. App. W. Dist. 1998) (damage claim based on inverse condemnation does not pass to subsequent grantees of land); Riddock v. City of Helena, 212 Mont. 390, 687 P.2d 1386, 1388 (Mont. 1984) ("The only person entitled to recover damages for condemnation is the owner of the land at the time of the taking."); Hoover v. Pierce County, 79 Wash. App. 427, 903 P.2d 464, 469 (Wash. Ct. App. 1995) ("Because the right to damages for an injury to property is a personal right belonging to the property owner, the right does not pass to a subsequent purchaser unless expressly conveyed.").

[295] *Id. (quoting* Brooks Inv. Co. v. City of Bloomington, 305 Minn. 305, 232 N.W.2d 911, 918 (Minn. 1975)).

[296] City of Coeur d'Alene v. Simpson*,* 142 Idaho at 848, 136 P.3d at 319 (citation omitted).

[297] 458 U.S. at 438, n.16, 102 S. Ct. at 3177, n.16, 73 L. Ed. 2d at 884, n.16 (citation omitted).

[298] Steel Assocs., Inc. v. City of Detroit, 2005 Mich. App. LEXIS, at *10.

[299] 216 S.W.2d 655 (Tex. Civ. App. 1948).

quential damages to the remainder of the land by reason of the overflows."[300]

In *Wright v. Jackson Municipal Airport Authority,*[301] involving a *de facto* taking by an airport authority of an avigation easement and a later condemnation of the owner's land by the authority, the court held that the doctrine of *res judicata* did not apply, because "[t]he two actions involved different issues, burden of proof and evidence."[302]

More recently, in *Steel Associates, Inc., supra,* the court also denied the applicability of the doctrine of *res judicata* in an inverse condemnation action. Although the first two prongs[303] of the *res judicata* test were satisfied, the third and fourth[304] prongs were not.

> [T]he present claims could not have been litigated in *Merkur I* because the city successfully foreclosed litigation of those claims. While Merkur could have cross-appealed that issue, as the city now argues, the fact remains that the *Merkur I* trial was concluded without plaintiff's rights being presented and protected.[305]

The *res judicata* doctrine also arises in direct condemnation proceedings. It has been held, however, that the doctrine may not apply if there are "changed circumstances."

> Although the doctrine of *res judicata* applies to condemnation actions, the doctrine is not readily applicable to those cases in which a condemning authority seeks to bring a second condemnation action to acquire a part of the same land for which the courts in a prior condemnation action against the same party determined that the condemning authority had failed to prove a public use or public necessity. Those cases possess a unique character to which the doctrine is not readily applied—in that, as time passes from the entry of the judgment in a condemnation action, changes may occur which would add new and important factors to be considered in a determination of whether a proposed taking in a subsequent action is for a public purpose and whether the particular land sought is necessary for that public purpose. The change in circumstances may present an entirely new case for determination even though the same issues involving public use and public necessity had been determined in a prior condemnation action between the same parties involving the same land.[306]

In a case in which a public agency was unsuccessful in a prior condemnation proceeding because the agency was unable to show that the taking was for a public purpose, the agency was not barred from commencing a second action soon thereafter to acquire the land or a portion thereof. The court was persuaded that the second action was in good faith and that there had been a change of circumstances.[307] Besides the "substantial reduction" in the parcel sought to be taken, the "mere passage of time [and] changes in the use and requirements of an airport facility" may constitute the necessary changed circumstances that preclude the application of the doctrine of *res judicata* to a second proceeding involving the same property.[308]

C.5. Doctrine of Sovereign Immunity

A few of the recent cases reviewed for this report presented a question of sovereign immunity in the context of regulatory takings.

According to the Supreme Court of New Mexico in 2006, in a case involving mining regulations, although the *Lucas*, *Palazzolo*, and *Tahoe-Sierra Preservation Council*, *Inc.* cases, *supra*, "did not explicitly address the issue of state sovereign immunity, these three cases demonstrate the Court's thinking, and inform our own on that subject, because in each case the possibility of a compensatory claim against the state was at the center of the controversy."[309] As for other authority,

> [i]n *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 316 n.9, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987), the Supreme Court suggested that the Fifth Amendment's Takings Clause trumps state sovereignty. *See generally* 1 Laurence H. Tribe, *American Constitutional Law* § 6-38, at 1272 (3d ed. 2000) (suggesting that based on *First English* the Takings Clause "trumps state (as well as federal) sovereign immunity"). The Court made clear that "the compensation remedy is required by the Constitution," and rejected the argument that the Takings Clause could only be enforced by injunctive relief.[310]

The New Mexico Supreme Court held that both U.S. Supreme Court precedents and "New Mexico constitutional and statutory law…support[] the proposition that sovereign immunity does not bar takings claims when asserted against the state for just compensation, at least in certain situations."[311] In so holding, the court rejected the state's argument that "if the agency is not given the power of eminent domain…but is guilty of a

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[300] *Id*. at 656.

[301] 300 So. 2d 805 (1984).

[302] *Id.* at 808.

[303] Steel Assocs., Inc. v. City of Detroit, 2005 Mich. App. LEXIS, at *10 ("(1) the prior action was decided on the merits, (2) there was a final decision entered in the prior action….").

[304] *Id.* at *10–11 ("(3) the matter contested in the second case was or could have been resolved in the first case, and (4) the two actions involve the same parties or their privies").

[305] *Id.* at *12–13 (footnote omitted).

[306] Oakes Mun. Airport Auth. v. Wiese*,* 265 N.W.2d 697, 700 (N.D. 1978).

[307] *Id.* at 701.

[308] *Id.*

[309] Manning v. Mining & Minerals Div.*,* 140 N.M. 528, 531, 2006 NMSC 27, at **16, 144 P.3d 87, at 90.

[310] *Id.* at 532, 2006 NMSC 27, at **17, 144 P.3d at 91 (citation omitted). The *Manning* court did recognize that

> [i]n a later case, a plurality of the Supreme Court noted it was not yet decided if sovereign immunity was a bar to Takings Clause claims. City of Monterey v. Del Monte Dunes, 526 U.S. 687, 714, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999) (plurality opinion) (citing *First English*, 482 U.S. at 316, n. 9). *See generally* Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067, 1077 (2001) (arguing that the Supreme Court has left the issue open).

Id., n.3.

[311] *Id.* at 532, 2006 NMSC 27, at **19, 144 P.3d at 91.

regulatory taking…, then the private individual is without a remedy in state court, even though both the State and Federal Constitutions obligate the State to pay."[312] In rejecting the sovereign immunity defense the court stated that

> such legislation cannot insulate the state from providing just compensation for takings that do not involve formal eminent domain powers…. If we were to relieve the state from paying for takings when agencies do not have statutory eminent domain authority, then paradoxically we would bar practically every regulatory taking claim against a state agency.[313]

In an earlier case, the Supreme Court of Utah held that the State and Southern Pacific Railroad did not have sovereign immunity for an inverse condemnation claim that arose out of the alleged destruction of an underwater brine-canal that the owner of an easement maintained on the bed of the Great Salt Lake.[314]

In 2006 in *Manning v. Mining and Minerals Division, supra,* a sovereign immunity defense was advanced by the State based on the U.S. Supreme Court's decision in *Alden v. Maine*.[315] The *Alden* decision did not arise under the Fifth Amendment, however. The issue in *Alden* was whether an individual's claim for damages against the State under the Fair Labor Standards Act was barred by sovereign immunity. Although the *Alden* Court "held that a private individual cannot sue an unconsenting state in state court for money damages under a law created by Congress pursuant to its Article 1 powers, such as the FSLA,"[316] no such issue was presented in the *Manning* case because "the just compensation claim stems directly from the text of the Constitution through the Fifth and Fourteenth Amendments."[317] The *Manning* court held that "*Alden* did not alter the historical practice of applying the Takings Clause to the states, and nothing in that opinion permits a state to bar a claim for 'just compensation' from its courts."[318] The court stated that "no other jurisdiction post-*Alden*, federal or state, has held that Takings Clause claims are barred by state constitutional sovereign immunity."[319] Also rejected was the state's claim "that there must be a specific waiver of immunity before the state can be sued for 'just compensation' under the Takings Clause…. [T]he Fifth Amendment is 'self-executing.'"[320]

Property owners who seek to recover damages for a *negligent* taking or damaging of property may be faced with the defense of sovereign immunity. In *Evatt v. Texas Department of Transportation,*[321] the homeowners in Texas contended that their homes were flooded as a result of the transportation department's construction methods on a nearby construction project.[322] The court recognized that under the doctrine of sovereign immunity, "the state and its agencies cannot be sued in the courts of Texas without the consent of the state in the form of a constitutional or statutory exception."[323] As discussed in subsection A.1, *supra*, the *Evatt* court held that *negligence* that contributes to property damage does not amount to a taking, that only an *intentional* act by the government may give rise to an inverse condemnation action.[324]

C.6. Inverse Condemnation and Other Remedies

A condemnor generally is required to pay compensation to owners for all property the condemnor takes or damages,[325] whether the damage is temporary or permanent[326] or whether a taking was legal or illegal.[327] Whenever it is alleged that an activity of a transportation department or other government agency has caused damage to an owner's property, depending on applicable law of the state in question, the property owner may seek damages in an action for nuisance or

[312] *Id.* 2006 NMSC 27, at **20, 144 P.3d at 91.

[313] *Id.* 2006 NMSC 27, at **21, 144 P.3d at 91.

[314] Colman v. Utah State Land Bd., 795 P.2d at 630, 634.

[315] 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999) (holding, *inter alia*, that states' sovereign immunity from suit neither derives from nor is limited by the terms of the Eleventh Amendment but rather is a fundamental aspect of the sovereignty enjoyed by the states before the Constitution that the states continue to retain; neither the structure of the Constitution nor the powers delegated to Congress under Article I of the Constitution include the power to subject nonconsenting states to private suits for damages in the states' own courts).

[316] As quoted in the *Manning* case, 140 N.M. at 533, 2006 NMSC 27, at *24, 144 P.3d at 92.

[317] *Id.* at 534, 2006 NMSC 27, at *26, 144 P.3d at 93.

[318] *Id.* at 535, 2006 NMSC 27, at *32, 144 P.3d at 94.

[319] *Id.,* 2006 NMSC 27, at *33, 144 P.3d at 94 (*citing* Benson v. State, 2006 S.D. 8, 710 N.W.2d 131 (2006); *Boise Cascade*, 164 Or. App. 114, 991 P.2d 563 (Or. Ct. App. 1999) [*review denied,* 331 Or. 244, 18 P.3d 1099 (2000), *cert. denied,* 532 U.S. 923, 121 S. Ct. 1363, 149 L. Ed. 2d 291 (2001)]; SDDS, Inc. v. State, 2002 SD 90, 650 N.W.2d 1, 9 (S.D. 2002) (both holding that sovereign immunity does not bar just compensation claims brought against the state in state court, even after the *Alden* decision). *See also* First Union Nat. Bank v. Hi Ho Mall Shopping Ventures, Inc., 273 Conn. 287, 295, 869 A.2d 1193, 1197–98 (Conn. 2005) (holding that a foreclosure claim on a municipal tax lien asserted against the state was barred by sovereign immunity, but sovereign immunity would not bar the bank from seeking "just compensation for the state's taking of its property as a result of the allegedly unpaid taxes" under the Takings Clause as applied to the states under the Fourteenth Amendment)).

[320] *Id.* at 538, 2006 NMSC 27, at *43, 144 P.3d at 97; *see also Colman*, 795 P.2d at 630 (holding that Utah Const. art. I, § 22 is self-executing, meaning it does not require legislative enactment to be recognized by the courts).

[321] 2006 Tex. App. LEXIS 4268 (Tex. App. 11th Dist. 2006), *review denied*, 2006 Tex. LEXIS 854 (Tex. 2006).

[322] *Id*. at *1.

[323] *Id.* at *4.

[324] *Id.* at *8, 9.

[325] 6A NICHOLS ON EMINENT DOMAIN § 28.03[1], at 28-71.

[326] *Id*.

[327] *Id.* § 28.03[2], at 28-71.

trespass;[328] in tort, for example, as provided by statute in California for a dangerous condition of public property with a claim in inverse condemnation;[329] in a statutory action for inverse condemnation; or in a constitutional action for inverse condemnation.[330]

Inverse condemnation, however, fills the gap for landowners who have no remedy in tort and did not receive compensation in a condemnation action. That is, if sovereign immunity has not been waived for a specific action in tort, the landowner in all likelihood will be left with an inverse condemnation as the sole remedy. In *Heins Implement Co., supra,* the landowner suffered flooding as a result of the improper design of a drainage structure, causing more frequent and deeper flooding than before.[331] The court stated that

> the record reflects that the cause was tried and submitted as an inverse condemnation claim. As it happens, [the] submission was entirely correct, because MHTC is empowered to exercise the right of eminent domain….
>
> [W]e hold that when, as a result of a public works project, private property is damaged by an unreasonable diversion of surface waters, whether by design or by mistake, the owner may bring an action for inverse condemnation.[332]

In *George Ward Builders, Inc. v. City of Lee's Summit,*[333] the plaintiff alleged "that the lighting system at a park located next to its properties creates an extreme level of light pollution that interferes with the use and enjoyment of its properties."[334] The court relied on *Heins Implement Co., supra,* and *Byrom v. Little Blue Valley Sewer District*[335] in holding that if a public entity has the power of eminent domain, the "proper remedy for damage to private property caused by a nuisance maintained [by such public entity] is an action in inverse condemnation."[336] As held in *Shade v. Missouri Highway & Transportation Commission,*[337] "[t]he effect of the court's holding in *Heins* was to remove inverse condemnation actions from the realm of tort liability and set them in a constitutional context, *i.e*., preventing the taking of private property for public use without compensation."[338]

C.7 Injunctive Relief as an Alternative to Compensation

Eastern Enterprises v. Apfel[339] illustrates that remedies other than money, such as a declaratory judgment and injunctions, may be available when a regulation results in an unconstitutional taking. In 1992 Congress enacted the Coal Industry Retiree Health Benefit Act of 1992, which retroactively imposed an obligation on the Eastern Enterprises to pay retirement benefits to retired coal miners.[340] Eastern Enterprises Petitioner had not been in the coal mining business since 1965 but was being billed over $5 million as its share for the first year of the Act. Even though the case dealt with interpretation of contracts, due process, and retroactivity, the Supreme Court ultimately concluded that the law effected a taking of the Petitioner's property that entitled the Petitioner to a declaratory judgment and an injunction enjoining the law's application to the Petitioner.[341]

More recently, in 2005 in *Albahary v. City of Bristol*,[342] an award of injunctive relief in lieu of monetary damages to compensate property owners in an inverse condemnation proceeding barred the owners from litigating a claim subsequently for monetary damages for the same taking under the doctrines of *res judicata* and collateral estoppel or issue-preclusion.

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[328] "[A] continuing trespass or nuisance may ripen into a constitutional taking of property within the ken of constitutional provisions prohibiting the taking of property without the payment of just compensation." City of Jacksonville v. Schumann, 167 So. 2d 95, 102 (Fla. App. 1st Dist. 1964) (holding that residents could bring an action for inverse condemnation against a city for the expanded use of an airport that caused a nuisance to residents and resulted in a loss of their property values). *See also* 3 NICHOLS ON EMINENT DOMAIN § 8.01[4][a], at 8-30.

[329] Smith v. County of Los Angeles, 214 Cal. App. 3d 266, 262 Cal. Rptr. 754 (Cal. App. 2d Dist. 1989) (affirming judgment for damages against county and county waterworks district for homeowners whose homes were destroyed by a landslide after construction of a roadway near their homes for inverse condemnation, dangerous condition of public property, and nuisance). *See also* Morris v. California*,* 89 Cal. App. 3d 962, 153 Cal. Rptr. 117 (Cal. App. 2d Dist. 1979) (explaining that "[g]overnmental monetary liability in tort in this state is exclusively statutory in origin" and that

> [g]enerally speaking, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes: (1) the property was in a dangerous condition at the time of the injury; (2) the injury was proximately caused by the dangerous condition; (3) the dangerous condition created a reasonably foreseeable risk of the kind of injury that occurred; and (4) the public entity had actual or constructive notice of the dangerous condition under section 835.2, a sufficient time prior to the injury, to have taken measures to protect against the dangerous condition).

[330] Dishman v. Neb. Pub. Power Dist., 240 Neb. 452, 454, 482 N.W.2d 580 (1992). *See generally* 6A NICHOLS ON EMINENT DOMAIN § 28.01, *et seq*. ("Remedies of Owners").

[331] Heins Implement Co v. Mo. Highway & Transp. Comm'n*.,* 859 S.W.2d 681, at 691.

[332] *Id.* (citations omitted) (footnote omitted) (emphasis supplied).

[333] 157 S.W.3d 644 (Mo. App. W.D. 2004).

[334] *Id.* at 646.

[335] 16 S.W.3d 573 (Mo. 2000) (en banc).

[336] 157 S.W.3d at 646.

[337] 69 S.W.3d 503 (Mo. App. W.D. 2002).

[338] *Id.* at 510.

[339] 524 U.S. 498, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998).

[340] 524 U.S. at 513, 118 S. Ct. at 2141, 141 L. Ed. 2d at 464.

[341] 524 U.S. at 522, 118 S. Ct. at 2145, 141 L. Ed. 2d 470.

[342] 276 Conn. 426, 444, 886 A.2d 802, 813 (2005).

SECTION 5

SPECIAL PROBLEMS IN TRANSPORTATION, LAND ACQUISITION, AND USE

I doubt if any Alabama judge or Justice has had his or her property acquired by eminent domain as often as I have. The federal government acquired property in which I owned an interest for the impoundment of Lake Eufaula (Lake Walter F. George) and later to establish a Canadian Goose Fly Way (the Eufaula Wildlife Refuge). The State of Alabama acquired property in which I owned an interest to create the Barbour County Wildlife Refuge and to extend and widen two roads (U.S. Highway 431 and Alabama Highway 165). Because of this personal experience, I am keenly aware of the supreme and plenary sovereign power of eminent domain.

"The sovereign power of eminent domain is inherent in government as such, requiring no constitutional recognition, and is as indestructible as the state itself; and 'that all private property, tangible and intangible, is held subject to the exercise of the right by the sovereign power….'"[1]

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[1] Alabama v. Howington, 859 So. 2d 1093, 1094 (Ala. 2002) (Houston, J., dissenting) (arguing that the state's right of eminent domain cannot be forever terminated because a lawyer in attempting to appeal a probate court's order failed to timely file the notice of appeal in the probate office but filed it instead in the circuit court's office) (*quoting* Adirondack Ry. v. New York, 176 U.S. 335, 346–47, 20 S. Ct. 460, 464, 44 L. Ed. 492, 499 (1900)).

A. OVERVIEW OF SPECIAL PROBLEMS DISCUSSED IN THIS SECTION

Section 5 discusses a number of special issues that may arise in the context of eminent domain proceedings or inverse condemnation actions.

Section 5.B discusses the theories that have been used in support of excess condemnation when the transportation department takes more land that is actually necessary for a public improvement. Section 5.B also discusses the practice pursuant to which the government takes land belonging to one owner and uses it as just compensation when taking the land and/or access of another owner.

Section 5.C discusses condemnation blight that may result because of a transportation department's planning and precondemnation activities. A property owner may attempt to bring an inverse condemnation case alleging that condemnation blight has resulted in a taking of his or her property prior to the date of a *de jure* taking of the property. Alternatively, in a *de jure* condemnation the property owner may seek to exclude a loss of the market value of the property caused by condemnation blight when determining the value of the property as of the date of the *de jure* taking.

Although Section 2 discussed inverse condemnation claims for damages caused by flooding resulting from transportation projects, Section 5.D discusses the rules applicable to the liability of a transportation department for damages caused by surface water.

Section 5.E discusses the Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs Act ("Uniform Relocation Act" or "URA") and payments to property owners and owners forced to relocate because of federal or federally assisted projects. Section 5.E also discusses relocation assistance caused by a federally funded project, as well as federal land acquisition policies with which states must comply to receive federal funds.

Section 5.F discusses payments to public utilities for relocation from the highway right-of-way, including in connection with relocation caused by federal-aid highway projects.

Finally, Section 5.G addresses control of outdoor advertising and in particular issues arising under the Highway Beautification Act of 1965 regarding the prohibition, restriction, or removal of billboards and other forms of outdoor advertising.

B. EXCESS AND SUBSTITUTE CONDEMNATION

B.1. Theories of Excess Condemnation

Excess condemnation may be defined as that property "contiguous to a highway but outside of the right-of-way required for the actual, immediate, physical location and construction of the highway."[2] "Excess condemnation is an exercise of eminent domain wherein the condemning authority takes more land than actually is necessary for the public improvement."[3] Excess condemnation has been permitted when the extra taking is for a public use.[4] As discussed herein, if a public use has been demonstrated the courts are inclined to defer to a legislative judgment regarding what land is reasonably necessary in the condemnor's judgment for the project or improvement. It should be noted that with respect to excess and substitute condemnation, the breadth of statutory language is important as it may be permissible to acquire excess or substitute property and later sell or dispose of it.[5] It is reported, for example, that in Wisconsin, the transportation department has used joint-acquisition to justify the acquisition in fee of very large parcels for interim use and subsequent conveyance of part to others. It is further reported that the transportation department and a certain redevelopment authority have entered into a joint cooperative agreement. The transportation department uses its own authority as well as the authority of its partner to acquire a large parcel in fee. The joint authority is used mostly for staging during a 4-year project, with only a 1/6 portion retained permanently for the facility itself. The remainder is conveyed to the redevelopment authority after the transportation department completes the pro-

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[2] *Acquisition of Land for Future Highway Use: A Legal Analysis*, HRB Special Report 27 (1957), at 46.

[3] Gary P. Johnson, *Comment: The Effect of the Public Use Requirement on Excess Condemnation*, 48 TENN. L. REV. 370, 370 (1981), hereinafter cited as "Johnson."

[4] *See* Johnson, *supra* note 3, at 379.

[5] *See, e.g.,* WIS. STAT. 84.09(1) (2007):

> The department may acquire by gift, devise, purchase or condemnation any lands for establishing, laying out, widening, enlarging, extending, constructing, reconstructing, improving and maintaining highways and other transportation related facilities, or interests in lands in and about and along and leading to any or all of the same; and after establishment, layout and completion of such improvements, the department may convey such lands thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such lands so as to protect such public works and improvements and their environs and to preserve the view, appearance, light, air and usefulness of such public works. Whenever the department deems it necessary to acquire any such lands or interests therein for any transportation related purpose, it shall so order and in such order or on a map or plat show the old and new locations and the lands and interests required, and shall file a copy of the order and map with the county clerk and county highway committee of each county in which such lands or interests are required or, in lieu of filing a copy of the order and map, may file or record a plat in accordance with s. 84.095. *For the purposes of this section the department may acquire private or public lands or interests in such lands. When so provided in the department's order, such land shall be acquired in fee simple….*

(Emphasis supplied).

ject that extends over many years.[6]

There are three theories on which condemnors have relied to support an excess taking: the remnant theory, the protective theory, and the recoupment theory.[7] Regardless of the theory, "where an excess appropriation of private property is sought it must be shown by the appropriating agency that the excess property sought is reasonably necessary for furtherance of the public use or improvement."[8] Such authority may be provided by a state's constitution or by statute in furtherance of state constitutional authority. For example, the Ohio Constitution, Article 18, Section 10 provides:

> A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law.

B.1.a. The Remnant Theory

As explained by one court, [u]nder the "remnant" theory of appropriation, where an agency's [appropriation] of all or parts of a parcel, for public use, leaves fragments of land which are rendered useless or valueless by the appropriation, so that the appropriating agency would have to pay for the entire parcel including the fragments, [the] appropriation of the fragments is permitted.[9] A *physical remnant* is a remainder in such condition that it "has little practical value to the landowner because it is small, odd-shaped, or landblocked."[10] It should be noted, however, that it has been held that a statute that is not narrowly drafted, that does not define properly what a remnant is, and that fails to connect a taking to a public purpose is unconstitutional.[11] Furthermore, even though a state's statute may permit a condemnor "to take more land 'than is needed for actual construction in the laying out [of] highways or streets,'" a constitutional provision or statute authorizing excess condemnation does not permit a condemnor "to condemn…excess land long after [the street] has been laid out and thrown open to the public…."[12]

Although "[t]he physical remnant theory is widely accepted," two new economically oriented theories of remnant acquisition have developed: economic remnants and financial remnants.[13] *Economic remnants* have value after the part necessary for the public improvement is used, thus securing an economic advantage of the government. [14] As with the taking of a physical remnant, there must be statutory authorization permitting the condemning authority to take the entire parcel and not just the necessary portion thereof. Furthermore, a landowner may object to a condemnor's petition to appropriate a parcel of the owner's land on the basis that the condemnor has failed to take an uneconomic remnant.[15] Statutes have been upheld that permit the taking of an entire parcel as the least expensive alternative to the condemnor.[16]

For example, California Code of Civil Procedure § 1240.410 (2007) provides:

> (a) As used in this section, *"remnant" means a remainder or portion thereof that will be left in such size, shape, or condition as to be of little market value*.
>
> (b) Whenever the acquisition by a public entity by eminent domain of part of a larger parcel of property will

[6] With respect to a particular parcel for which the above information was received, the parcel had already been identified as blighted property.

[7] *See* Johnson, *supra* note 3, at 382. Although the article questions the rationale, the author enumerates a fourth theory: "the broader public purpose theory…of excess condemnation [that] can be recognized in recent federal cases. These cases allow the government to take excess land not needed for the particular project in order to achieve broad public purposes associated with the original condemnation." *Id.* at 381–82 (*citing* United States *ex rel.* Tenn. Valley Auth. v. Two Tracts of Land, 532 F.2d 1083 (6th Cir. 1976) (conveyed for development); Midkiff v. Tom, 483 F. Supp. 62 (D. Hawaii 1979) (redistribution of land holdings); United States *ex rel*. Tenn. Valley Auth. v. Welch, 327 U.S. 546, 66 S. Ct. 715, 90 L. Ed. 843 (1946) (physical, social, economic development)). *See also* Montana v. Chapman, 152 Mont. 79, 84, 446 P.2d 709, 712 (1968) (discussing the three theories used to support excess takings).

[8] Village of Holland v. Yoder, 1990 Ohio App. LEXIS 333, at *11 (Ohio App. 6th Dist. 1990), (*citing* City of East Cleveland v. Nau, 124 Ohio St. 433, 179 N.E. 187 (Ohio 1931)).

[9] *Id.* at *5, n.1 (*citing* Cincinnati v. Vester, 33 F.2d 242 (6th Cir. 1929), *aff'd,* 281 U.S. 439, 50 S. Ct. 369, 74 L. Ed. 950 (1930)).

[10] Johnson, *supra* note 3, at 382, 383 (*citing* People v. Thomas, 108 Cal. App. 2d 830, 836, 239 P.2d 914, 917 (Cal. Ct. App. 1952) (describing a physical remnant as small, irregular in shape, and in a location inaccessible to the owner)).

[11] *See* City of Richmond v. Carneal, 129 Va. 388, 403–04, 106 S.E. 403, 408–09 (1907) (holding state statute unconstitutional as permitting a taking without a public use when the city had sought to condemn land for a boulevard and additional land that was to be replatted and resold).

[12] *In the Matter of the Application of the City of Rochester*, 237 N.Y.S. 147, 155, 227 A.D. 151, 155 (N.Y. 1929).

[13] Johnson, *supra* note 3, at 384 (*See also* Note, *An Expanded Use of Excess Condemnation*, 21 U. PITT. L. REV. 60, 62 (1959)).

[14] Johnson, *supra* note 3, at 384 (*citing* United States *ex rel.* Tenn. Valley Auth. v. Welch, 327 U.S. 546, 66 S. Ct. 715, 90 L. Ed. 843 (1946); People *ex rel*. Dep't of Pub. Works v. Superior Court, 68 Cal. 2d 206, 436 P.2d 342 (Cal. 1968); State v. Buck, 94 N.J. Super. 84, 226 A.2d 840 (N.J. App. 1967)).

[15] *See* State v. Howington, 859 So. 2d 1093 (Ala. 2003).

[16] *See, e.g.,* State by Commissioner of Transp. v. William G. Rohrer, Inc., 80 N.J. 462, 466, 404 A.2d 29, 31 (N.J. 1979), (*quoting* N.J. STAT. ANN. § 20:3-37 (1979); *Buck*, 94 N.J. Super. at 87–88, 226 A.2d at 842–43 (holding that the State must pay not only for the land it takes but also for the land it damages)).

> leave a remnant, the public entity may exercise the power of eminent domain to acquire the remnant in accordance with this article.
>
> (c) Property may not be acquired under this section if the defendant proves that the public entity has a reasonable, practicable, and economically sound means to prevent the property from becoming a remnant.[17]

Financial remnants relate to severance damage. When the payment for the land taken for the public improvement plus the cost of any damage to the remainder would nearly equal the value of the property, the law permits the acquisition of the entire property.[18] In *People, ex rel Department of Public Works v. Superior Court of Merced County,*[19] ("*Rodonis*" case), "the California Supreme Court created the notion of a financial remnant…a specific type of economic remnant in which the severance costs to the remnant property approach or exceed the costs of condemning the entire parcel."[20] In *Rodonis* the court held with respect to a taking of .65 acres of the Rodonis's property for a freeway that the department also could take the remaining 54 landlocked acres.[21] In the *Rodonis* case the court accepted the department's argument that if the department were allowed to condemn the entire parcel, the Rodonises would receive full value for the property; that "the risk of excessive severance damages will be eliminated"; and that ultimately the department would be able "to reduce the cost of the freeway by selling the part of the parcel not needed for freeway purposes."[22]

The landowners argued that "excess condemnation must be limited to parcels that may properly be deemed remnants with respect to which the public interest in avoiding fragmented ownership comes into play…."[23] However, the court held that the statute in question "validly authorizes the trial court to proceed with the action to condemn the 54 acres," but that the trial court

> must refuse to condemn the property if it finds that the taking is not justified to avoid excessive severance or consequential damages. The latter holding will assure that any excess taking will be for a public use and preclude the department from using the power of excess condemnation as a weapon to secure favorable settlements.[24]

In the *Rodonis* case the court recognized that the 54 ac was not a physical remnant but "a financial remnant: its value as a landlocked parcel is such that severance damages might equal its value…. There is no reason to restrict this theory to the taking of parcels negligible in size and to refuse to apply it to parcels negligible in value."[25] Other courts have not followed the *Rodonis* case, ostensibly in part because of differences in the applicable statutory language. In a Montana case the court affirmed a judgment limiting the amount of property that could be appropriated by the state.[26] The remainder that the state wanted to take was ten times the size of the parcel needed for the project. The court distinguished the *Rodonis* ruling on the basis that "the California statute requires the remainder to be…'of little value to its owner' while the Montana statute provides that the remainder be 'of little market value.'"[27] The court held not only that there was not a total loss of value but also agreed with the trial court that "broadening the 'remnant' theory…raise[es] serious constitutional questions."[28]

Similarly, in a Michigan case the court held that, although an excess taking of a remnant was lawful, "economic considerations alone" were not a sufficient justification.[29] "[A] condemnation based solely on the theory that it would save money 'was a wrong theory or basis upon which to determine the question of necessity….'"[30] As in the Montana case the court's opinion was that the Michigan statute differed materially from the statute at issue in the *Rodonis* case:

> In Michigan, the agency may acquire an entire parcel only if the practical value or utility of the remaining or excess portion of the parcel would be "destroyed" by a more limited acquisition…. Our statutes are consistent with the "physical remnant theory" of condemnation which allows the agency to take the remaining fragments of land which because of their size or location would be of no use or value to the original owner. *The alternative economic and financial remnant theories which allow condemnation on the basis of the expense to the condemnor require a different statutory authority not found in Michigan.*[31]

Thus, although the majority view appears to be that physical remnants may be taken, depending on the jurisdiction the applicable statutory authority may not be so broad as to permit the taking of a remnant under the financial remnant theory.

B1.b. The Protective Theory

Excess condemnation may be utilized to protect the public from the risk of an unsafe highway environment

[17] Emphasis supplied.

[18] People, *ex rel* Dep't of Public Works v. Superior Court of Merced County, 68 Cal. 2d 206, 221, 436 P.2d 342, 351–52 (Cal. 1968) (holding that the trial court must refuse to condemn the property if the court found that a taking was not justified to avoid excessive severance or consequential damages).

[19] 68 Cal. 2d 206, 436 P.2d 342 (Cal. 1968).

[20] Johnson, *supra* note 3, at 386 (citation omitted).

[21] 68 Cal. 2d at 212–13, 436 P.2d at 346.

[22] 68 Cal. 2d at 208–09, 436 P.2d at 343–44.

[23] 68 Cal. 2d at 209, 436 P.2d at 344.

[24] 68 Cal. 2d at 210, 436 P.2d at 344–45.

[25] 68 Cal. 2d at 212–13, 436 P.2d at 345.

[26] Montana v. Chapman, 152 Mont. 79, 446 P.2d 709 (1968).

[27] *Id.* at 83, 446 P.2d at 712.

[28] *Id.* at 84, 446 P.2d at 712.

[29] Nelson Drainage Dist. v. Filippis, 174 Mich. App. 400, 406, 436 N.W.2d 682, 685 (Mich. Ct. App. 1989).

[30] *Id.* at 407, 436 N.W.2d at 685 (*quoting* Grand Rapids Bd. of Ed. v Baczewski, 340 Mich. 265, 272, 65 N.W.2d 810 (Mich. 1954)).

[31] *Id.* at 407–08, 436 N.W.2d at 686 (emphasis supplied), (*quoting* MICH. COMP. LAWS §§ 213.54, 213.365; MSA 8.265(4), 8.261(5)).

that could result from a more limited taking.[32] Moreover, "[u]nder the 'protective' theory of excess appropriation an appropriating agency may take land adjacent to the proposed public improvement where it deems it necessary for preserving the public improvement."[33] As one article explains:

> Under the protective theory excess land adjacent to the public improvement but unnecessary to its construction is taken so that the government may control the use of that land either by holding the property or by selling it with the appropriate use restrictions attached…. The constitutionality of this concept is well settled because purposes such as protection and preservation of public improvements are well within the broad definition of public use. Therefore, challenges to this type of taking often raise the issue whether condemnation for protective purposes is within the statutory grant of authority to condemn.
>
> The most common grant of authority to condemn for protective purposes has been to state highway commissions for the development of safe highways. States have responded to the great increase in traffic volume and high-speed expressways with a variety of enactments that specifically authorize condemnation of areas adjacent to highway projects. Some statutory grants of authority are very broad. *The grants of excess condemnation in Missouri, New Jersey, New York, Ohio, Pennsylvania, and Wisconsin are so broad that they encompass excess condemnation for public uses such as airports, slum clearance, and parking lots as well as for highways. Nine states have highway legislation which specifies that excess condemnation promoting safe roads and enhancing their beauty will be a public use.* Delaware, New Hampshire, Vermont, and Tennessee limit excess condemnation for highway purposes to controlled-access highways. Over half the states have some variation of the Model Controlled-Access Highway Act, which allows takings that are in the best interest of the public.[34]

Although a New Jersey case more directly concerns the economic remnant theory, the New Jersey Supreme Court has pointed out in a case in which a partial taking left a remnant "drained … of all economic worth"[35] that the *landowner* should be protected from risks posed by a remnant. The court held that even though the state had not sought to condemn the entire property, the state had the authority to condemn the entire property. Thus, under the applicable New Jersey statutes the remnant may be appropriated when it has "little or no economic value" or the remnant "*is so situated that the cost of acquisition to the State will be practically equivalent to the total value of the whole parcel of land.*"[36] The court, moreover, ruled that the *landowner* should be allowed to elect to receive the full value of the property and convey it to the state. The court reasoned that the "valueless remnant, with its exposed and unoccupied building left in the hands of the condemnee, poses a serious risk…. [of] property damage or personal injury for which the landowner might be liable…. The condemnee is entitled to be relieved of this risk."[37]

B.1.c. The Recoupment Theory

A third theory is the recoupment theory. Although the recoupment theory permits a condemning authority to condemn property for the purpose of selling it after completion of the project to reduce the overall cost of the public improvement, the theory does not appear to have widespread acceptance in the United States.[38]

> In the parlance of eminent domain jurisprudence such is normally referenced as a "recoupment" sale, and universally frowned upon as an unconstitutional condemnation in excess of that which is necessary for public use (except in those situations where peculiar provisions of a state constitution expressly authorize it). "Thus, the basis of recoupment theory is that the government may finance public improvements by condemning more land than is needed and then sell the surplus at a price enhanced by the improvement. The aim here is to recoup the cost of the public project." 2A Nichols § 7.06[7][d], supra, at 7-184.[39]

There is a dearth of recent cases upholding the use of the recoupment theory. As one article states,

> *[a]lthough recoupment is used frequently in Europe to finance public projects, it has not been used widely in the United States*. Recoupment has been used, however, in conjunction with other theories of condemnation. For example, the city may take several physical remnants, replat the boundaries, and then resell the property. In those cases, however, the recoupment motive is usually secondary. In most cases the acceptability of the initial action makes the subsequent sale acceptable because it is only secondary or incidental. The exercise of excess condemnation for the sole purpose of recoupment is the most difficult action to justify under the federal constitution. Only

[32] *See* Johnson, *supra* note 3, at 382, 389–90 (*citing* Forest Preserve Dist. v. Wike, 3 Ill. 2d 49, 119 N.E.2d 734 (1954) (protect and preserve a forest area)).

[33] Village of Holland v. Yoder, 1990 Ohio App. LEXIS 333, at *5 (citation omitted).

[34] Johnson, *supra* note 3, at 388–89 (emphasis supplied) (footnotes omitted).

[35] State by Commissioner of Transp. v. William G. Rohrer, Inc., 80 N.J. 462, 464, 404 A.2d 29, 30 (1979).

[36] 80 N.J. at 466, 404 A.2d at 31 (emphasis in original), (*quoting* N.J. STAT. ANN. §§ 20:3-37, 27:7-22.6).

[37] 80 N.J. at 466–67, 404 A.2d at 31.

[38] *See* Johnson, *supra* note 3, at 391–93 (*citing*, however, Atwood v. Willacy County Nav. Dist., 271 S.W.2d 137 (Tex. Civ. App. 1954) (excess condemnation and sale allowed district to be self-supporting); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 72, 33 S. Ct. 667, 57 L. Ed. 1063 (1913) (sale was incidental purpose); Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth., 12 N.Y.2d 379, 389, 190 N.E.2d 402, 405 (1963) (incidental revenue production); Ryan v. Louisville & N. Terminal Co., 102 Tenn. 111, 125, 50 S.W. 744, 747 (1899) (purely incidental right)).

[39] State *ex rel.* Wash. State Convention & Trade Ctr. v. Evans, 136 Wash. 2d 811, 841–42, 966 P.2d 1252, 1267 (1998) (Sanders, J, dissenting).

some of the state constitutions authorizing excess condemnation are broad enough to allow recoupment.[40]

Recoupment appears to have been the motive in *Cincinnati v. Vester,*[41] in which the U.S. Supreme Court affirmed the Sixth Circuit's decision enjoining the city's condemnation proceedings for the alleged purpose of widening a street. As the Court observed, it had appeared to the trial and appellate courts that "the sole purpose" of the takings of the landowners' property by the city was "recoupment by the resale of the properties in question of a large part of the expense of the street widening," and that the takings were not "for a public use 'within the meaning of that term as it heretofore has been held to justify the taking of private property.'"[42]

In *State ex rel. State Highway Department v. 9.88 Acres of Land,*[43] the condemnor recognized that the cost of an entire parcel would be as much as paying just compensation for a portion of the land and for damages for denial of access from the remainder. Thus, the Delaware Highway Department argued "that it [would be] uneconomical to compel it to pay such an amount and not obtain the land, itself, which it could possibl[y] thereafter sell to private persons, thus recouping some of the cost."[44] However, the court rejected the department's attempted taking under the recoupment theory:

> The recoupment theory is rejected by at least the majority of the states which still adhere to the doctrine that private property may be taken for public purposes only when the taking authority has an immediate public use for the property, or has plans for a public use of the property in the foreseeable future. In our opinion, the Highway Department has no foreseeable future use for this excess land and, consequently, may not take it through the power of eminent domain.[45]

Notwithstanding some courts' rejection of the recoupment theory, there are cases in which "profits made by the government from the sale of excess property have been upheld and will not defeat a project that has a public use."[46] More recently, in a condemnation of property for the expansion of a convention center, the Supreme Court of Washington upheld the planned private uses of the property on the basis that they were incidental to the public use. A dissenting opinion in the case argued that the use was really private, not public. "As found by the trial court, the unnecessary or "surplus" portion of the property to be condemned is, as part of the same transaction, to be resold to a private entrepreneur for his private use subject only to an easement servitude for the aerial estate reserved in the government."[47]

The dissenting justice, who maintained that a taking for a recoupment violated the state's constitution, wrote that "[o]nly six state constitutions authorize the condemnation of land in excess of that actually needed for public use, and Washington is not one of them."[48]

Finally, a state statute may authorize a condemnor that has acquired property in good faith to sell it later. For example, in North Carolina

> "When any property condemned by the condemnor is no longer needed for the purpose for which it was condemned, it may be used for any other public purpose or may be sold or disposed of in the manner prescribed by law for the sale and disposition of surplus property." …When a town condemns land for some public use, there is always a potential that unforseen (though perhaps foreseeable) events will frustrate that use. To require *certainty* that the land condemned will be put to the intended public use would be to doom to failure most such proceedings at their conception.[49]

Thus, although acquiring property for the purpose of recoupment may fail to satisfy the state's construction of the public use and necessity requirements, it appears

[40] Johnson, *supra* note 3, at 391–92 (footnotes omitted) (emphasis supplied).

[41] 281 U.S. 439, 50 S. Ct. 360, 74 L. Ed. 950 (1930).

[42] *Id.* at 444, 50 S. Ct. at 362, 74 L. Ed. at 954.

[43] 253 A.2d 509 (Del. 1969).

[44] *Id.* at 510.

[45] *Id.* at 511 (emphasis supplied) (rejecting also the department's attempted use of the remnant theory as a basis for the taking because a remnant must be "practically worthless." *Id*. *See also* E. L. Strobin, Annotation, *Right to Condemn Property in Excess of Needs for a Particular Purpose*, 6 A.L.R. 3d 297 (1966).

[46] Johnson, *supra* note 3, at 380 (*citing* United States v. Chandler Dunbar Wales Power Co., 229 U.S. 53, 66 33 S. Ct. 667, 57 L. Ed. 1063 (1913); Cottrill v. Myrick, 12 Me. 222, 233 (Me. 1835); Gardner Water Co. v. Town of Gardner, 185 Mass. 190, 194, 69 N.E. 1051, 1053 (Mass. 1904); Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth., 12 N.Y.2d 379, 389, 190 N.E.2d 402, 405 (N.Y. 1963)). *See* HTK Mgmt., LLC v. The Seattle Popular Monorail Auth., 155 Wash. 2d 612, 637–38, 121 P.3d 1166, 1179–80 (2005) (apparently agreeing with the condemnor that City of Cincinnati v. Vester, 281 U.S. 439, 50 S. Ct. 360, 74 L. Ed. 950 (1930), was distinguishable on the basis that in *Vester* the city had no public use at all for the property except for possible recoupment). *See also* Bond v. City of Baltimore, 116 Md. 683, 685, 82 A. 978, 980 (Md. 1911) (holding that a statute in part permitting the city "to acquire by purchase or otherwise…property in and adjacent to said highway, and to dispose of property so acquired not in bed of said highway" was a valid power); Miller v. Town of Pulaski, 114 Va. 85, 89, 75 S.E. 767, 769 (1912)

> (Conceding that the property condemned will furnish more power than the town needs now, or will need for years to come, it does not appear that less than the whole could have been condemned, and the evidence tends to show that if there was any taking at all the whole property must be condemned.)

[47] Washington v. Evans, 136 Wash. 2d 811, 840, 966 P.2d 1252, 1266 (1998).

[48] *Id.* at 843, n.14, 966 P.2d at 1267, n.14 (Sanders, J. dissenting) (identifying Massachusetts, Missouri, New York, Ohio, Rhode Island, and Wisconsin and stating that "three of these six—Massachusetts, New York, and Rhode Island—require that an excess condemnation be specifically approved as such by the legislative body").

[49] Town of Highlands v. Hendricks, 164 N.C. App. 474, 481, 596 S.E.2d 440, 445–46 (N.C. Ct. App. 2004), *rev. denied*, 2004 N.C. LEXIS 1137 (N.C. 2004) (*quoting* N.C. GEN. STAT. § 40A-10 (2003)).

that property that has been acquired but not used may be sold later by the condemnor.

B.2. Uneconomic Remnants and Federal Real Property Acquisition Policy

The principle that no more land shall be taken than is needed for a public improvement for highway purposes appears in 23 U.S.C. § 109(f) (2007).

> The Secretary shall not, as a condition precedent to his approval under section 106 of this title, require any State to acquire title to, or control of, any marginal land along the proposed highway in addition to that reasonably necessary for road surfaces, median strips, bikeways, gutters, ditches, and side slopes, and of sufficient width to provide service roads for adjacent property to permit safe access at controlled locations in order to expedite traffic, promote safety, and minimize roadside parking.[50]

Notwithstanding the above section, Section 301 of the Real Property Acquisition Policies Act[51] provides that

> [i]f the acquisition of only a portion of a property would leave the owner with an uneconomic remnant, the head of the Federal agency concerned shall offer to acquire that remnant. For the purposes of this chapter, an uneconomic remnant is a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner's property and which the head of the Federal agency concerned has determined has little or no value or utility to the owner.[52]

The legislative history indicates that the purpose behind the enactment of Section 301(9) was to effect substantial justice for landowners left with marginal land after a taking and to premise the acquisition of such property on established principles of eminent domain law relating to allowable excess condemnation.[53] To bring about state compliance with federal land acquisition policies, the states are required as a condition of receiving federal assistance to give assurances that they will comply "to the greatest extent practicable under State law" with the provisions of the Uniform Relocation Act, Title III of which is the Real Property Acquisition Policies Act.[54] Thus, unless lacking authority under local law to do so, the states are required as a condition of receiving federal funding for the acquisition of right-of-way to offer to acquire a remnant when the acquisition of only part of the property would leave the landowner with an uneconomic remnant.[55] Although the acquisition of land under the remnant theory was new to federal law, the theory has a long history under state law as both a creature of statute and the law of excess condemnation.

As stated in *Georgia 400 Industrial Park, Inc. v. Department of Transportation,*[56] the Real Property Acquisition Policies Act "'creates no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation.'"[57] "'[T]he section is no more than a statement by Congress of what it perceives to be the preferred method of dealing with landowners when the government wants to acquire their land.'"[58] Furthermore, the Georgia Relocation Assistance and Land Acquisition Policy Act[59] "does not create a private right of action in favor of a [Condemnee] but merely addresses policies that should guide state agencies when they acquire real property for federal-aid projects."[60]

B.3. Excess Condemnation and Public Use and Necessity

Notwithstanding the foregoing theories supporting the practice of excess condemnation, the ability of condemning authorities to take private property is governed by the Fifth and Fourteenth Amendments of the U.S. Constitution and the various state constitutions. For example, Louisiana's constitution prohibits the taking of private property for private purposes.[61] It is a universal requirement that to qualify for a condemnation a taking must be for a public use or public purpose as opposed to a private use or purpose.[62] However, as

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[50] 23 U.S.C. § 109(f) (2007). 23 U.S.C. § 106 (2007) pertains to approval by the U.S. Secretary of Transportation of plans, specifications, and estimates.

[51] P.L. No. 91-646, 84 Stat. 1894 (Jan. 2, 1971) (codified at 42 U.S.C. § 4651(9) (2007)).

[52] 42 U.S.C. § 4651(9) (2007).

[53] *See* Report of the House Committee on Public Works, H.R. NO. 91-1656, *as reprinted in* 1970 U.S.C.C.A.N. 5850.

[54] 42 U.S.C. § 4655(a)(1) (2007).

[55] *See* 42 U.S.C. § 4651(9) (2007).

[56] 274 Ga. App. 153, 616 S.E.2d 903 (Ga. Ct. App. 2005).

[57] *Id.* at 158, 616 S.E.2d at 908 (*quoting* 42 U.S.C. § 4602(a)). *See also* Tenn. Gas Pipeline Co. v. New England Power, C.T.L., Inc., 6 F. Supp. 2d 102, 104–05 (D. Mass. 1998) (stating that courts have consistently held that this provision does not create any rights in condemnees); Portland Natural Gas Transmission System v. 4.83 Acres of Land, 26 F. Supp. 2d 332, 336 (D. N.H. 1998) (noting the provision does not create any substantive rights and could not be cited as an "impediment to an eminent domain action"); United States v. 410.69 Acres of Land, Etc., 608 F.2d 1073, 1074, n.1 (5th Cir. 1979) (emphasizing Congress's clear intent that this provision creates no rights in landowners).

[58] *Id.* (*quoting* Benton v. Savannah Airport Comm'n, 241 Ga. App. 536, 539, 525 S.E.2d 383, 386 (Ga. Ct. App. 1999)).

[59] GA. CODE ANN. § 22-4-9.

[60] *Id.* at 158–59, 616 S.E.2d at 908–09 (internal quotation marks omitted).

[61] *See* LA. CONST., § 4, providing in part that

> [p]roperty shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question.

[62] *See* HTK Mgmt., LLC v. The Seattle Popular Monorail Auth., 155 Wash. 2d 612, 651, 121 P.3d 1166, 1186 (2005) (acknowledging that this rule has been called a "universal rule"), (*citing* City of Tacoma v. Humble Oil & Ref. Co., 57 Wash. 2d 257, 356 P.2d 586 (1960)); Daniels v. Area Plan Comm'n, 306

seen in Section 1, *supra*, the definition of what constitutes a public use or purpose has been broadened by the courts. Indeed, the consensus seems to be that "[t]he definition of public use…expanded greatly as a result of slum clearance and urban redevelopment."[63] As the New Jersey Supreme Court stated in an excess condemnation case, "in New Jersey, especially in recent years, both the Legislature and the courts have adopted an extremely liberal and comprehensive interpretation of public use."[64]

A condemnor, however, pursuing excess condemnation may not be able in every case to meet the requirements of public use and necessity. For example, in *Village of Holland v. Yoder, supra*, the property owners alleged that an excess taking by the village was contrary to law. Although the village had appropriated real property for the stated purpose of relocating Railroad Street and for other unspecified purposes, the landowners alleged

> that the appropriation of their property was not for the public purposes stated, which was the relocation of Railroad Street to solve traffic and noise problems, but rather for underlying non-public purposes including providing assistance to Solar Con in the expansion of its business, controlling the future industrial development of the area, and gaining profits from the future sale or lease of the property.[65]

Evidence at a "necessity hearing showed that Solar Con was interested in expanding its business and constructing a new building on its property," and that the village had assisted the company financially with its expansion and sought to acquire additional land to alleviate parking problems for the company that would be caused by the expansion.[66] The appellate court held that there was "competent, credible evidence to support the trial court's findings that the excess appropriation was not for [a] public purpose, [that it] was not justified under either the remnant or the protective theories, …that [the] appellant abused its discretion in appropriating the excess property,"[67] and that under the applicable statute the village had "failed to give any reason for the appropriation of property beyond what was actually needed for the relocated road."[68]

By comparison, however, in 2005 the Supreme Court of Washington addressed the public use and necessity requirements in connection with an excess condemnation case and upheld a taking in spite of some aspects of private use associated with the taking. In *HTK Management, L.L.C. v. Seattle Popular Monorail Authority*,[69] involving a taking of property by the Seattle Popular Monorail Authority for the Seattle Monorail Project (SMP), the property owner HTK argued that the trial court's finding of public use and necessity was improper. HTK argued that although SMP could condemn "a fee interest in the property comprising the monorail footprint," SMP "should have been limited to a multi-year lease on the remainder."[70] HTK also argued that SMP "should have decided to condemn a fee interest in only the portion of the property that was likely to contain the monorail station and to condemn an easement interest in the remainder of the property that is to be used for construction staging and development of the Green Line alignment."[71]

The court stated that it had developed a three-part test to evaluate eminent domain cases: "For a proposed condemnation to be lawful, the condemning authority must prove that (1) the use is really public, (2) the public interest requires it, and (3) the property appropriated is necessary for that purpose."[72] The court explained that whether a taking is for a public use is a judicial question,[73] but that "determinations by the condemning authority as to the type and extent of property interest necessary to carry out the public purpose have historically been considered legislative questions and are thus analyzed under the third prong of the test"—namely whether the property being taken is necessary for that purpose.[74] Accordingly, the court agreed with SMP that "a condemning authority's decision as to the type and extent of property interest is a legislative question."[75] If a court reviews a government's decision

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F.3d 445, 459–50 (7th Cir. 2002) (discussing public purpose or use and noting that the "Fifth Amendment is a requirement that the government not take property for private purposes"), (*citing* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984); Thompson v. Consol. Gas Utils. Corp., 300 U.S. 55, 80, 57 S. Ct. 364, 81 L. Ed. 510 (1937); Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239, 251–52, 25 S. Ct. 251, 49 L. Ed. 462 (1905); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158, 17 S. Ct. 56, 41 L. Ed. 369 (1896); Calder v. Bull, 3 U.S. 386, 388, 1 L. Ed. 648, 649 (1798) (Chase, J.) (noting that because "it is against all reason and justice, for a people to entrust a Legislature with such powers" to enact "a law that takes property from A and gives it to B," the legislature cannot be presumed to have such powers))).

[63] Johnson, supra note 3, at 374 (citing Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 214–16 (1978)).

[64] State by Commissioner of Transp. v. William G. Rohrer, Inc., 80 N.J. at 465, 404 A.2d at 30–31 (citations omitted).

[65] Village of Holland v. Yoder, 1990 Ohio App. LEXIS 333, at *3.

[66] *Id.* at *6.

[67] *Id.* at *12–13.

[68] *Id.* at *14.

[69] *In re Seattle Monrail Auth.,* 155 Wash. 2d 612, 121 P.3d 1166 (2005).

[70] *Id.* at 616, 121 P.3d at 1168.

[71] *Id.* at 630, 121 P.3d at 1175.

[72] *Id.* at 629, 121 P.3d at 1174–75 (citations omitted).

[73] *Id.* 121 P.3d at 1175 (*quoting* WASH. CONST. art. I, § 16 and *citing* Dickgieser v. State, 153 Wash. 2d 530, 535, 105 P.3d 26, 29 (2005)).

[74] *Id.* at 630, 121 P.3d at 1175.

[75] *Id.* at 631, 121 P.3d at 1175 (*citing* St. Andrew's Episcopal Day Sch. v. Miss. Transp. Comm'n, 806 So. 2d 1105, 1111 (Miss. 2002) (selection of the particular land to condemn as well as the amount of land necessary are legislative questions to be determined by the condemning authority); Regents of

on necessity as a legislative question, it becomes quite difficult for the condemnee to overturn the government's decision on necessity. A "declaration of necessity by a proper municipal authority is conclusive in the absence of actual fraud or arbitrary and capricious conduct, as would constitute constructive fraud."[76]

The court agreed that a taking of the entire property was necessary as maintained by SMP, even if not all of the property was used for the monorail station, because "the record indicates that the remaining portion of the property could be used for at least 10 years for construction and remediation of property in downtown Seattle."[77] Even if there was a possibility that SMP would sell some surplus property, such a possibility did not defeat the character or nature of the taking: "HTK points to no authority that requires a condemning authority to have a public use planned for property *forever*."[78] Thus, the court held "that SMP's determination to condemn a fee interest in KTK's property is a legislative question."[79] Although SMP had indicated at a public community hearing that "a portion of HTK's property might yield 'surplus property,' suitable for Associated Development,"[80] the court held that the taking was reasonably necessary. The court, moreover, held that "[t]he record support[ed] SMP's contentions that it needs all of the property for a substantial period of time to build and construct a monorail station and may need all of it indefinitely."[81]

B.4. Substitute Condemnation

Substitute condemnation permits a state or other agency having the power of eminent domain to take land under an agreement to compensate an owner with land—to be taken in condemnation from another property owner—instead of compensating the owner with money.[82]

Substitute condemnation therefore is compensation in kind, *i.e*., replacing the land taken with other land rather than money.[83] It should be noted that a jurisdiction may prohibit the practice of substitute condemnation on the basis that the practice constitutes the taking of private property for a private purpose.[84]

Two concepts appear to have been used by the courts to uphold the constitutionality of substitute condemnation: the separate-public-use doctrine and the incident-to-the-taking doctrine.

The separate-public-use doctrine allows the condemnation of a third person's land for the purpose of compensating the owner of land required for a public use, if the latter's activity on the third person's land will itself constitute a public use, as may occur with respect to takings by railroads or utilities or for a school. The incident-to-the-taking doctrine is not limited to situations in which the first taking is from a public or quasi-public corporation. As seen in the discussion in prior sections, there may be a taking of one neighbor's property to provide access to a condemned parcel to avoid the condemned property being landlocked, in which event the condemnor would have to acquire the entire property.

There may be an objection to substitute condemnation on the basis that the property of the ultimate condemnee is not being taken for the public use of the condemnor but for the private use of another person in violation of the Fifth and Fourteenth Amendments to

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Univ. of Minn. v. Chicago & Nw. Transp. Co., 552 N.W.2d 578 (Minn. Ct. App. 1996) (analyzing whether university demonstrated that proposed taking is "necessary" under the legislative standard of review); Westrick v. Approval of Bond of Peoples Natural Gas Co., 103 Pa. Commw. 578, 581, 520 A.2d 963, 965 (Pa. Commw. 1987) ("[A]dministrative decisions of a condemnor concerning the amount, location, or type of estate condemned are not subject to judicial review unless such decisions are in bad faith, arbitrary, capricious, or an abuse of power."); Concept Capital Corp. v. Dekalb County, 255 Ga. 452, 453, 339 S.E.2d 583, 584 (Ga. 1986) (court following the rule that "'[i]n the absence of bad faith, the exercise of the right of eminent domain rests largely in the discretion of the authority exercising such right, as to the necessity, and what and how much land shall be taken'") (*quoting* City of Atlanta v. Heirs of Champion, 244 Ga. 620, 621, 261 S.E.2d 343, 344 (Ga. 1979)); City of New Ulm v. Schultz, 356 N.W.2d 846, 849 (Minn. Ct. App. 1984) (holding that the city need only show that acquiring a fee interest rather than an easement was a reasonable means of acquiring airport protection privileges); City of Phoenix v. McCullough, 24 Ariz. App. 109, 114, 536 P.2d 230, 235 (Ariz. Ct. App. 1975) ("[W]e believe the rule to be that a condemnor's determination of necessity should not be disturbed on judicial review in the absence of fraud or arbitrary and capricious conduct.")).

[76] *In re Seattle Monrail Auth*. 155 Wash. 2d at 629, 121 P.3d at 1175 (citations omitted).

[77] *Id.* at 633, 121 P.3d at 1176.

[78] *Id.* at 634, 121 P.3d at 1177 (emphasis in original).

[79] *Id.* at 635, 121 P.3d at 1177.

[80] *Id.* at 634, 121 P.3d at 1178.

[81] *Id.* at 638, 121 P.3d at 1178.

[82] *See* N.C. State Highway Comm'n v. Farm Equip. Co., Inc., 281 N.C. 459, 474, 189 S.E.2d 272, 281 (N.C. 1972) (holding that a railroad only had the power to condemn land for a right-of-way, which could only be an easement, and the highway commission could not exercise any more power than the railroad).

[83] *See* Town of Highlands v. Hendricks, 164 N.C. App. 474, at 480, 596 S.E.2d 440, at 445 (holding that although the case was one of direct and not substitute condemnation, the latter means is "a valid exercise of a power of eminent domain only when the substitution of other property is the sole method by which the owner of land taken for public use can be justly compensated, and the practical problems resulting from the taking can be solved").

[84] *See* Ark. State Highway Comm'n v. Alcott, 260 Ark. 225, 539 S.W.2d 432 (1976) (holding that because the Commission's witnesses testified that the purpose of the condemnation was to provide a private driveway, the taking was not for a public use); *see*, *however*, Dowling v. Erickson, 278 Ark. 142, 644 S.W.2d 264 (Ark. 1983) (noting that ARK. STAT. ANN. § 76-110 (1981) sets forth the procedures for establishing a road when an owner has no access to his land and upholding a county court decision for the condemnation of a portion of a landowner's property for a public access road to an adjoining property totally encircled by the other landowner's property); *see also* LA. CONST. § 4).

the U.S. Constitution. Nevertheless, there is statutory authority for substitute condemnation that has been upheld and applied by the courts.[85] According to one source with respect to substitute condemnation, although "the question of public use and necessity are so entwined as to be inseparable,"[86] there must be a "close factual connection between the taking" of one party's land with the taking of the other party's land.[87]

Substitute condemnation has been used to provide access to another owner's property.[88] For example, where one property owner became landlocked as the result of an appropriation, a New York court held that it was permissible under a provision of New York's Highway Law "to acquire by appropriation such property as may be necessary to re-establish private access to other property where such access has been destroyed by an acquisition of part of the other property for the reconstruction or maintenance of a State highway."[89] According to the court, "the substitute condemnation is, in fact, incident to the original taking," as well as for a "public purpose."[90] "Although the concept of substitute condemnation has not been the subject of explicit judicial approval in this State, the courts have consistently recognized the validity of appropriations of property for quasi-private use."[91] The use of substitute condemnation has been rejected where the court found that a highway commission had abused its discretion.[92]

Because utilities often are located adjacent to public highways within their own rights-of-way, it may be necessary to acquire land for the purpose of relocating utilities as needed for highway construction.[93] When a highway is widened or its character is changed from conventional to limited access, substitute right-of-way may have to be obtained for a utility as the only practical and measurable method of compensation.[94] Even if there is no specific statutory authorization (i.e., the right to condemn for substitute right-of-way for utilities), the courts have upheld the use of condemnation for such purposes.[95]

The use of substitute condemnation has been upheld also for the purpose of relocating tracks of a railroad[96] or arranging an exchange of sites for a railroad right-of-way.[97]

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[85] *See* United States *ex rel.* TVA v. Welch, 327 U.S. at 546, 554, 66 S. Ct. at 719, 90 L. Ed. at 849 ("And when serious problems are created by its public projects the government is not barred from making a common sense adjustment in the interests of all the public); Dohany v. Rogers, 281 U.S. 362, 366, 50 S. Ct. 299, 301, 74 L. Ed. 904, 910 (1930) ("It is enough that although the land is to be used as a right of way for a railroad, its acquisition is so essentially a part of the project for improving a public highway as to be for a public use."); Brown v. United States, 263 U.S. 78, 81–82, 44 S. Ct. 92, 68 L. Ed. 171 (1923) ("It was a natural and proper part of the construction of the dam and reservoir to make provision for a substitute town as near as possible to the old one…. The incidental fact that in the substitution and necessary adjustment of the exchanges, a mere residuum of the town-site lots may have to be sold does not change the real nature of what is done…."); Pitznagle v. W. Ry. Co., 119 Md. 673, 679–80, 87 A. 917, 919–20 (Md. 1913)

> ([I]t was not intended by the framers of the Constitution that there should be no adequate relief from the conditions that we have mentioned, resulting from the taking of said private road for public use. The condemnation of a part of this land, here sought to be condemned, for a substitute private road or way is incident to and results from the taking, by reason of public necessity, of the existing private road for public use, and the use of it for such purposes should, we think, be regarded as a public use within the meaning of the Constitution.).

[86] N.C. State Highway Comm'n v. Farm Equip. Co., Inc., 281 N.C. 459, at 470, 189 S.E.2d at 278.

[87] *Id.*

[88] *See, e.g.*, N.C. State Highway Comm'n v. Asheville Sch., Inc., 276 N.C. 556, 563–64, 173 S.E.2d 909, 914–15 (N.C. 1970) (permitting substitute condemnation to provide access to private property that otherwise would have been landlocked by the construction of a nonaccess highway).

[89] KJC Realty, Inc. v. New York, 69 Misc. 2d 99, 100, 329 N.Y.S.2d 252, 254 (N.Y. Sup. Ct. 1972), *aff'd*, 32 N.Y.2d 664, 295 N.E.2d 797 (N.Y. 1973).

[90] 69 Misc. 2d at 102, 329 N.Y.S.2d at 256.

[91] *Id.* at 101, 329 N.Y.S.2d at 254–55 (*citing* Ross v. New York, 291 N.Y.S.2d 926, 30 A.D. 2d 681 (N.Y. App. Div. 1968), *aff'd*, 23 N.Y.2d 807, 244 N.E.2d 877 (N.Y. 1969); Courtesy Sandwich Shop v. Port of N.Y. Auth., 12 N.Y.2d 379, 190 N.E.2d 402 (N.Y. 1963); Cannata v. City of New York, 11 N.Y.2d 210, 182 N.E.2d 395 (N.Y. 1962), *app. dismissed*, 371 U.S. 4, 83 S. Ct. 28, 9 L. Ed. 2d 48 (1962); Cuglar v. Power Auth. of State of N.Y., 4 Misc. 2d 879, 163 N.Y.S.2d 902 (N.Y. Sup. Ct. 1957), *aff'd*, 164 N.Y.S.2d 686, 4 A.D. 2d 801 (N.Y. App. Div. 1957), *aff'd*, 3 N.Y.2d 1006, 147 N.E.2d 733 (N.Y. 1957); Kaskel v. Impellitteri, 306 N.Y. 73, 115 N.E.2d 659 (N.Y. App. Div. 1953); Matter of Watkins v. Ughetta, 78 N.Y.S.2d 393, 273 A.D. 969 (N.Y. App. Div. 1948), *aff'd*, 297 N.Y. 1002, 80 N.E.2d 457 (N.Y. 1948)).

[92] Miss. State Highway Comm'n v. Morgan, 248 Miss. 631, 637–38, 160 So. 2d 77, 79 (Miss. 1964) (holding that the state highway commission abused its discretion condemning an easement).

[93] *See* Benton v. State Highway Dep't, 111 Ga. App. 861, 143 S.E.2d 396 (Ga. Ct. App. 1965) (involving the relocation of gas lines); United States v. 10.47 Acres, 218 F. Supp. 730 (D. N.H. 1953) (involving substitute water system for a municipality).

[94] *See* § 5F, *infra*.

[95] Dep't of Transp. v. Livaditis, 129 Ga. App. 358, 364, 199 S.E.2d 573, 578 (Ga. Ct. App. 1973) (stating that the condemnor had the power to condemn land as "substituted compensation" to minimize damages to be paid to the condemnees). *See also* Missouri v. Eakin, 357 S.W.2d 129, 134–35 (Mo. 1962) (upholding substitute compensation by a state to a utility in part to meet the public welfare objectives of a highway project).

[96] Hinson v. Dep't of Transp., 230 Ga. 314, 317, 196 S.E.2d 883, 885 (Ga. 1973).

[97] Langenau Mfg. Co. v. Cleveland, 159 Ohio St. 525, 528–29, 533, 112 N.E.2d 658, 659–60, 661 (Ohio 1953) (holding that the condemnation "for a substitute private road or way [was] incident to and results from the taking, by reason of public necessity of the existing private road for public use…within the meaning of the Constitution"). *See also* George D. Harter Bank of Canton v. Muskingum Watershed Conservancy Dist., 53 Ohio App. 315, 4 N.E.2d 996 (Ohio 1935) (upholding right of the district to condemn property for relocation of railroad track pursuant to statutory authorization).

Finally, the principle of substitute condemnation has been upheld to enable the government to acquire land having deposits that were suitable for use in the construction of a public dam to be located near the property to be taken.[98]

C. PLANNING AND PRECONDEMNATION ACTIVITIES—CLAIMS FOR CONDEMNATION BLIGHT

C.1. Introduction

Condemnation blight may occur as the result of the complex and often lengthy planning of a highway project.[99] Condemnation blight may be defined as the result of the government's noninvasive action that nevertheless causes a decline in the value of property between the date the property is first *considered* for public acquisition and the date the property is *actually* acquired.[100] Condemnation blight also may be defined as "the impairment of marketability caused by the knowledge that any ownership interest in the property is short lived."[101] A cause of action in inverse condemnation may arise prior to the actual condemnation of the property if a complaint alleges that the property owner has been deprived of all, or substantially all, of the beneficial use of the property.[102] However, a property owner may be unable to meet his or her burden of proof on the issue of deprivation of all or substantially all of the owner's use of the property.[103] The wording of the applicable inverse condemnation statute also may be a significant factor.[104]

Although the U. S. Supreme Court held in *Monogahela Navigation Co. v. United States*[105] that just compensation does not include payment for condemnation blight, there has been considerable evolution in the law on this subject since 1893. Although there is a legal basis in some jurisdictions on which a property owner may claim either that there has been a *de facto* taking of his or her property or that the valuation of property in eminent domain proceedings must take into account the effect of condemnation blight on the property's value, the legal test or standard applicable to such a claim, as will be discussed, is quite high.

The general rule is that the announcement of a projected public improvement, together with preparation of plans and maps showing the property in question as being within the limits of the project without any interference with the owner's use, does not constitute a compensable taking even though the project may reduce the marketability of the property.[106] The general rule both excludes an inverse condemnation action[107] and sets the date for the value of the property to be acquired as of the date of condemnation of the property.[108] Nevertheless, "[s]everal jurisdictions have recognized landowners' claims for condemnation blight, usually on an 'inverse condemnation' theory.'" Some courts, thus, find that there was a *de facto* taking at a date earlier than the actual taking.[109]

In the subsections that follow, cases are discussed first that apply the most restrictive rule, followed by a discussion of somewhat less restrictive rules that have been applied in other cases. Although the following subsections attempt to categorize the cases by the rule that the courts have followed, in some instances the courts have altered the language of the rule or used language applicable to more than one rule concerning when a *de facto* taking has occurred because of condemnation blight.

C.2. No Taking Absent a Direct Invasion or Restriction on the Use of Property

Courts have responded to condemnation blight claims in a variety of ways. Some courts apply the "rigid rule that compensation is valued at the date of the actual appropriation of property."[110] As the Supreme Court of Texas has observed, courts in other states as well as courts in its own state "have determined that government action which may result in a future loss of prop-

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[98] Harwell v. United States, 316 F.2d 791, 792–93 (10th Cir. 1963).

[99] The planning phase involves various precondemnation activities such as completion of demographic, topographic, and other preliminary studies; preparation of maps and surveys; designation of route alignment; appraisals of affected property; negotiations with owners for purchase of land; and the holding of corridor and design hearings to name just some of the likely precondemnation activities.

[100] *See* Jackovich Revocable Trust v. State, Dep't of Transp., 54 P.3d 294, 296 n.3 (Alaska 2002) (*citing* 8A NICHOLS ON EMINENT DOMAIN § 18.04(3) (3d ed. 1998)).

[101] *See* Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1435-36 (2006) (*citing* Robert H. Freilich, *Planning Blight: The Anglo-American Experience*, 29 URB. LAW. vii, xi–xiv (1997)).

[102] Howell Plaza, Inc. v. State Highway Comm'n, 66 Wis. 2d 720, 226 N.W.2d 185 (1975).

[103] *See* Howell Plaza, Inc. v. State Highway Comm'n, 92 Wis. 2d 74, 284 N.W.2d 887 (Wis. 1979).

[104] *See also* discussion of regulatory takings in § 4, *supra*.

[105] *See* 148 U.S. 312, 326, 13 S. Ct. 622, 37 L. Ed. 463 (1893), *noted in* Bell & Parchomovsky, *supra* note 101, at 1436–37.

[106] *See* Jackovich Trust v. State, 54 P.3d at 303–04 (Ala. 2002); Thurow v. City of Dallas, 499 S.W.2d 347, 348 (Tex. Ct. Civ. App. 1973).

[107] Thurow v. City of Dallas, 499 S.W.2d at 348.

[108] *See* City of Cleveland v. Carcione, 118 Ohio App. 525, 531–32, 190 N.E.2d 52, 56–57 (Ct. App. 1963).

[109] Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 697 (2005) (*citing* City of Buffalo v. J.W. Clement Co., N.Y.2d 241, 269 N.E.2d 895 (1971); Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966)).

[110] *See* discussion in Serkin, *supra* note 109, at 697 (*citing* Kirby Forest Indust., Inc. v. United States, 467 U.S. 1, 14–15, 104 S. Ct. 2187, 81 L. Ed. 2d 1 (1984); United States v. 3.95 Acres of Land, 470 F. Supp. 572, 574 (N.D. Cal. 1972) (mem.)).

erty does not give rise to a present cause of action…."[111] Moreover, the court noted that other jurisdictions have held that "publicly targeting a property for condemnation, resulting in economic damage to the owner, generally does not give rise to an inverse condemnation cause of action unless there is some *direct restriction* on use of the property."[112] One reason, of course, is that

> [s]ound public policy supports this result. Construction of public-works projects would be severely impeded if the government could incur inverse-condemnation liability merely by announcing plans to condemn property in the future. Such a rule would encourage the government to maintain the secrecy of proposed projects as long as possible….[113]

A case recognizing a restrictive rule applicable to condemnation blight cases is *City of Buffalo v. J.W. Clement Co*.[114] In *J.W. Clement*, on being advised over a period of several years that its property would be taken for a redevelopment project, the plaintiff began the acquisition and development of a new site for its business. Over time the subject area slated for redevelopment fell into a state of general disrepair. "Indeed, the city's principal appraisal witness acknowledged that by reason of the threat of condemnation property values were drastically reduced."[115] In holding that there had not been a *de facto* taking, the New York Court of Appeals stated:

> Although the condemning authority is generally not liable to a condemnee until title to the property is officially taken…it has long been recognized by the courts of this State that the constitutional provision against the taking of property without just compensation may be violated without a physical taking. Indeed, injuries which in effect deprive individuals of full or unimpaired use of their property may constitute a taking in the constitutional sense…. Thus, we held in *Forster* v. *Scott*…that whenever a *law* deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment that materially affect its value, it deprives him of his property within the meaning of the Constitution. And it is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property, so long as it affects its free use and enjoyment or the power of disposition at will of the owner. These words are pervasive and would at first blush require affirmance herein. *However, the concept of de facto taking has traditionally been limited to situations involving a direct invasion of the condemnee's property or a direct legal restraint on its use…and to hold that there can be a de facto appropriation absent a physical invasion or direct legal restraint would, needless to say, be to do violence to a workable rule of law*. It is our view that only the most obvious injustice compels such a result. The Appellate Division, discerning so substantial an interference with the use of the subject property, found the essential elements of ownership to have been destroyed and held that the city's action constituted a *de facto* taking. We firmly disagree with that determination.[116]

The court held that the evidence did not show that there had been a "most obvious injustice" depriving the owner of the use of the property, thereby reversing the appellate court, which had held that there had been a *de facto* taking because the "essential elements of ownership" had been "destroyed."[117] In reversing, the Court of Appeals stated:

> The facts herein fail to disclose any act upon the part of the condemning authority which could possibly be construed as an assertion of dominion and control. Indeed, it cannot be said that the city, by its actions, either directly or indirectly deprived Clement of its possession, enjoyment or use of the subject property. We simply have a manifestation of an intent to condemn and such, even considering the protracted delay attending final appropriation, cannot cast the municipality in liability upon the theory of a "taking" for there was no appropriation of the property in its accepted legal sense.[118]

The *J.W. Clement* case stands for the proposition that there can be no *de facto* taking unless the government has impaired the use of the property either by a physical invasion of or by a direct legal restraint on the property. The court explained, however, that there could be "interferences short of physical invasion of the condemnee's property [that] may…be sufficient to constitute a taking…where the property has been the subject of some direct legal restraint on its use…."[119] However, "the idea that there can be a *de facto* taking in the absence of a physical invasion or direct legal restraint is not without current support and finds some viability in the decisions of sister States and the broader pronouncements of other courts…."[120]

Nevertheless, the Court of Appeals used language that implied that a *de facto* taking could be cognizable in the courts, as discussed in the next subsection, if there has been a substantial destruction of the owner's

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[111] Westgate, Ltd. v. State, 843 S.W. 2d 448, 1992 Tex. LEXIS 160, at *10 (Tex. 1992) (*citing* Allen v. City of Texas City, 775 S.W.2d 863, 865 (Tex. Ct. App. 1989); Hubler v. City of Corpus Christi, 564 S.W.2d 816 (Tex. Ct. Civ. App. 1978)).

[112] *Id.* at *12 (emphasis supplied) (*citing* Kirby Forest Indus. v. United States, 467 U.S. at 14–16, 104 S. Ct. 2187, 81 L. Ed. 2d 1; Hood v. Chadick, 272 Ark. 444, 615 S.W.2d 357 (1981); Sproul Homes of Nev. v. State, 96 Nev. 441, 611 P.2d 620 (1980); City of Chicago v. Loitz, 61 Ill. 2d 92, 329 N.E.2d 208 (1975); Orfield v. Hous. & Redevelopment Auth., 305 Minn. 336, 232 N.W.2d 923 (1975); Bakken v. State, 142 Mont. 166, 382 P.2d 550 (1963); Littman v. Gimello, 115 N.J. 154, 557 A.2d 314 (1989); Empire Constr., Inc. v. City of Tulsa, 1973 OK 66, 512 P.2d 119 (1973)).

[113] Westgate, Ltd. v. State, 1992 Tex. LEXIS 160, at *13.

[114] 28 N.Y.2d 241, 269 N.E.2d 895 (1971), *appeal after remand*, 337 N.Y.S.2d 642, 40 A.D. 2d 753 (App. Div. 1972), *app. dismissed*, 31 N.Y.2d 958, 293 N.E.2d 252 (1972).

[115] *Id.* at 249, 269 N.E.2d at 900.

[116] *Id.* at 253–54, 269 N.E.2d at 902 (citations omitted) (emphasis supplied).

[117] *Id.*

[118] *Id.* at 255, 269 N.E.2d at 903.

[119] *Id*. at 256, 269 N.E.2d at 904.

[120] *Id*. at 257, 269 N.E.2d at 904 (citations omitted).

beneficial use and enjoyment of the property. "Despite these divergent lines of authority, the policy of this State has been to deny recovery *in the absence of a substantial impairment of the claimant's right to use or enjoy the property* at any time prior to the date of final appropriation."[121] However, in the next sentence the court seemed to retreat from recognizing such a rule.

> Accordingly, the mere announcement of impending condemnations, coupled as it may well be with substantial delay and damage, does not, in the absence of other acts which may be translated into an exercise of *dominion and control* by the condemning authority, constitute a *taking* so as to warrant awarding compensation.[122]

As stated, although some language in the *J.W. Clement* opinion suggests that the government's substantial impairment of the use of the property caused by condemnation blight would be a basis for an inverse condemnation claim for a *de facto* taking, other language indicates that any substantial impairment of use and enjoyment must be the result of a physical invasion of the property by the government or a direct legal restraint. As discussed in subsection C.7, *infra*, although the owner may be unable to establish a *de facto* taking caused by condemnation blight, the *J.W. Clement* decision does stand for the proposition that if there is an eventual *de jure* condemnation of the property in eminent domain, the *valuation* of the property may be determined so as to exclude depreciation in value caused by precondemnation activities.

More recently, in *Westgate, Ltd. v. State*, *supra*, the Supreme Court of Texas stated that it previously had not addressed the issue of whether there could be a taking or damaging under the Texas Constitution, Article 1, Section 17, when "the government has not directly restricted use of the landowner's property," a direct restriction meaning "an actual physical or legal restriction on the property's use, such as a blocking of access or denial of a permit for development."[123] Westgate's claim was based on "a decline in the marketability of the property caused by the government's proposal to condemn in the future;"[124] thus, the court found cases cited by Westgate to be inapposite because Westgate's cases involved a direct restriction on a landowner's present use of his or her property,[125] a situation that was not present in the *Westgate, Ltd*. case.

C.3. No Taking Absent a Substantial Interference With the Beneficial Use and Enjoyment of the Property

Although the courts may state the rule in slightly different ways, the majority view in those jurisdictions recognizing that condemnation blight may give rise to a claim for a *de facto* taking appears to be that there has not been a taking unless the owner proves that the precondemnation activities caused a substantial interference with the owner's use and enjoyment of his or her property. The mere announcement of a plan or project generally will not suffice to satisfy the substantial impairment test.

For example, in *Selby Realty Company v. City of San Buenaventura,*[126] a city and county adopted a plan indicating the general location of existing and proposed streets, including the extension of one street over one parcel of the plaintiff's property.[127] As of the date of the California Supreme Court's decision, the city and county had not taken any action with respect to the plan. The court held that the adoption of the plan, a legislative act, did not amount to a taking of the property.[128]

> The adoption of a general plan is several leagues short of a firm declaration of an intention to condemn property. It is too clearly established to require extensive citation of authority that under certain circumstances a governmental body may require the dedication of property as a condition for its development…and it may not be necessary for the county to acquire the land by eminent domain even if it is ultimately used for a public purpose.
>
> *In order to state a cause of action for inverse condemnation*, there must be an invasion or an appropriation of some valuable property right which the landowner possesses and *the invasion or appropriation must directly and specially affect the landowner to his injury*…. The county has not placed any obstacles in the path of plaintiff in the use of its land. Plaintiff has not been refused permission by the county to build on or subdivide its county land, and its posture is no different than that of any other landowner along the streets identified in the plan. Furthermore, the plan is subject to alteration, modification or ultimate abandonment, so that there is no assurance that any public use will eventually be made of plaintiff's property.[129]

One policy reason for the court's holding is that

> [i]f a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of these several authorized plans, the process of community planning would either grind to

[121] *Id.* (emphasis supplied).

[122] *Id.* (emphasis supplied).

[123] Westgate, Ltd. v. State, 1992 Tex. LEXIS 160, at *8.

[124] *Id.* at *8–9.

[125] *See id.* at *7 (citing cases that involved government action directly restricting present use: City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978) (denial of permit for development); City of Waco v. Texland Corp., 446 S.W.2d 1 (Tex. 1969) (material and substantial denial of access caused by construction of a viaduct adjacent to property); San Antonio River Auth. v. Garrett Brothers, 528 S.W.2d 266 (Tex. Ct. Civ. App. 1975) (denial of permit for a sewer installation)).

[126] 10 Cal. 3d 110, 514 P.2d 111 (1973).

[127] *Id.* at 115, 514 P.2d at 114.

[128] *Id.* at 118, 514 P.2d at 116.

[129] *Id.* at 119–20, 514 P.2d at 117 (citations omitted) (emphasis supplied).

> a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land.[130]

A case illustrating the application of the substantial impairment test caused by condemnation blight resulting from unreasonable delay on the part of an agency is *Washington Market Enterprises, Inc. v. City of Trenton.*[131] The city had commenced a redevelopment project, including the development of a mall; the city later designated the mall area to be a blighted area, and for several years the city acquired property within the redevelopment area. However, the city never took the plaintiff's property. Finally, about 10 years after commencing the redevelopment project, the city notified the plaintiff that the project would be abandoned. The plaintiff's inverse condemnation action alleged that tenants began moving out of its building in direct response to the condemnation when threatened initially, that after the declaration of blight the area deteriorated rapidly with its building generating a fraction of its former rentals, and that thereafter it was impossible to secure tenants.[132]

"The court held that where planning for urban redevelopment is clearly shown to have had such a severe impact as *substantially to destroy the beneficial use* which a landowner has made of his property, then there has been a "taking of property" within the meaning of that constitutional phrase."[133]

Thus, the court expanded the concept of *de facto* taking to include a situation in which there had been neither a physical invasion nor a direct legal restraint on the use of the owner's property. The court restricted the expanded concept of a taking caused by condemnation blight to a situation in which the beneficial use of the property has been substantially destroyed. The expanded rule on *de facto* takings in these circumstances did not apply to a mere diminution in value of the property.[134]

Another case in which the test of substantial destruction of the owner's use of the property was upheld is *Lincoln Loan Co. v. State Highway Commission.*[135] In *Lincoln Loan Co*., the plaintiff argued that the Oregon State Highway Commission had taken its property "in the process of the construction of [a freeway] by allegedly placing a 'cloud of condemnation' over the property, which resulted in a 'condemnation blight' and a de facto taking, not of the possession of the property, but of a substantial use and benefit thereof."[136] Specifically, the plaintiffs alleged that about 10 years prior to their complaint the defendant had declared that the plaintiff's property was necessary for the project and gave other precondemnation notices, including one that stated that "no compensation would be awarded for improvements to said real property" needed for the project.[137]

The court held that the complaint stated a cause of action:

> Plaintiff has alleged adequate facts which indicate a *substantial interference by the state with the use and enjoyment of its property.* The combination of the acts alleged in plaintiff's complaint, the alleged pervasive extent of that combination of acts and the alleged duration of those acts over a ten year period unite to allege *a substantial interference with the use and enjoyment* of its property by plaintiff.[138]

Furthermore, quoting a Pennsylvania case, the court stated that

> "[r]ecognizing, as we do, that the Commonwealth is required to publicize and hold hearings in advance of the initiation of formal condemnation proceedings, we believe that when these hearings and this publicity cause the owner of a property to lose tenants *to such an extent that the property no longer generates sufficient income to pay the taxes, which, in turn, leads to a threatened loss of the property*, that property owner has a right to the appointment of viewers to award it compensation for its property."[139]

Thus, the question in *Lincoln Loan* was whether the precondemnation activity constituted a taking: "It will be for the trier of fact to determine whether the evidence establishes an interference with the use and enjoyment of its property by plaintiff substantial enough to constitute a taking."[140]

As discussed in the next subsection, the courts in Alaska require evidence that the condemnor's precondemnation activity included a manifestation that *specific property* would be condemned for a project. Thus, in connection with the substantial impairment test, the minimum standard in Alaska is that "the government must have publicly announced a present intention to condemn specific properties…and it must have done something that substantially interferes with the landowners' use and enjoyment of their properties."[141] On the other hand, the Supreme Court of Alaska has not ruled out the possibility of a taking caused by other precondemnation governmental activity.

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[130] *Id.* at 120, 514 P.2d at 117 (footnote omitted).

[131] 68 N.J. 107, 343 A.2d 408 (1975).

[132] 68 N.J. at 110–12, 343 A.2d at 409–10.

[133] 68 N.J. at 110, 343 A.2d at 409 (emphasis supplied).

[134] *See* 68 N.J. at 113–15, 343 A.2d at 411–12.

[135] 274 Or. 49, 545 P.2d 105 (1976).

[136] *Id*. at 51, 545 P.2d at 106.

[137] *Id.*

[138] *Id.* at 57, 545 P.2d at 109 (emphasis supplied) (*citing* Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968); Klopping v. City of Whittier, 8 Cal. 3d 39, 53, 500 P.2d 1345, 1356 (1972); City of Detroit v. Cassese, 376 Mich. 311, 317–18, 136 N.W.2d 896, 900 (1965); City of Cleveland v. Carcione, 118 Ohio App. 525, 532, 190 N.E.2d 52, 56–57 (Ohio App. 8th Dist. 1963); Conroy-Prugh Glass Co. v. Commonwealth Dep't of Transp., 456 Pa. 384, 321 A.2d 598, 602 (1974); Luber v. Milwaukee County, 47 Wis. 2d 271, 278–79, 177 N.W.2d 380, 384 (1970)).

[139] *Id.* at 57, 545 P.2d at 109 (emphasis supplied) (*quoting* Conroy-Prugh Glass Co. v. Commonwealth Dep't of Transp., 456 Pa. 384, 392–93, 321 A.2d 598, 602 (1974)).

[140] *Id.* at 58, 545 P.2d at 110.

[141] Jackovich Revocable Trust v. State, Dep't of Transp., 54 P.3d at 300–01(footnotes omitted).

> [W]e recognized in *Homeward Bound* that pre-condemnation governmental activity could in theory amount to a temporary taking that would entitle an owner to compensation even if the plan to condemn were abandoned. One can imagine that pre-condemnation publicity could depress income actually realized from improved commercial property, leading to a temporary taking that requires compensation. But it is not so obvious what standards should be applied to such a claim. How long must an owner endure such publicity before it becomes a compensable temporary taking? What decline in value is large enough to be cognizable? Our decisions do not answer those questions.[142]

In appears that to meet the substantial impairment test in Pennsylvania the landowner must demonstrate "exceptional circumstances." In *Pepper Center v. Blair County Convention and Sports Facilities Authority,*[143] the trial court found that the construction of a convention center near the plaintiff's property had permanently changed the rural character of the property. However, the appellate court reversed, holding that under the Eminent Domain Code a *de facto* taking only "occurs when an entity clothed with the power of eminent domain has, by even a non-appropriative act or activity, substantially deprive[d] an owner of the beneficial use and enjoyment of his property."[144] The court furthermore held that there must be "exceptional circumstances" causing the substantial deprivation, a test not satisfied by the facts of the case.[145] Here, the owner had not been deprived of the beneficial use of the property, whose highest and best use was still as a residence.[146]

Once more, there are variations in how the substantial impairment test is phrased. In a case in which an airport authority announced publicly in 1994 the proposed expansion of the airport, which included the property that WBF Associates had purchased 4 years earlier for residential development, the Supreme Court of Pennsylvania held: "the Airport Authority failed to show that WBF continued to have full and normal use of the condemned property as established by the use to which it was devoted prior to the declaration…."[147] Thus, the court held that a *de facto* taking had occurred.

C.4. No Taking Absent a Concrete Manifestation of Intent to Take a Specific Property

For the owner to be successful in an inverse condemnation case based on precondemnation activity, some courts will require that the activity specifically target the property of the owner seeking to recover for a *de facto* taking. For example, in *Jackovich Revocable Trust v. State, Department of Transportation, supra,* the property owners' inverse condemnation claims alleged that information published by the state regarding its intention to acquire land for a highway project deprived the owners of the "full use and enjoyment of their properties, reduced the value of their properties, and constituted *de facto* takings."[148] Eventually, however, the transportation department abandoned the plan. The department argued that there was no evidence of its intention to condemn the plaintiffs' "specific properties."[149] The court agreed that "the publicity in this case does not satisfy the 'concrete intention' test."[150] In so holding, the court stated that there was

> *no evidence the state actively interfered with the beneficial use* of these properties by (1) limiting their development, improvement, or occupancy; (2) denying the landowners any permits needed to develop, improve, or use these properties; (3) notifying tenants they would have to vacate or would be compensated for vacating; or (4) informing the owners that in event of condemnation, they would not be compensated for maintaining or improving their properties. Instead, the common thread in the landowners' superior court affidavits is that they are unable to sell their properties and that they lost rental income because pre-condemnation announcements discouraged buyers and renters and made improvements infeasible or economically imprudent.[151]

For the court in this case the absence of "'objective manifestations of the government's intention to take the property [were] critical to the decision whether there was a taking.'"[152]

The *Jackovich* court pointed out that in *Selby Realty Co.*, *supra*, the California Supreme Court similarly had held that the mere enactment of a general plan showing proposed streets extending through private property did not constitute a taking because there was "'no present concrete indication that the county…intends to acquire the property by condemnation.'"[153]

C.5. No Taking Absent a Substantial Decline in the Value of the Property

There is authority "that property should be valued in a statutory condemnation proceeding without regard to devaluation caused by the government's pre-condemnation activities."[154] In some jurisdictions there

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[142] *Id.* at 300 (footnote omitted).

[143] 805 A.2d 51 (Pa. Commw. Ct. 2002), *appeal denied*, Genter v. Blair County Convention & Sports Facilities Auth., 2003 Pa. LEXIS 951 (2003).

[144] *Id.* at 55 (citation omitted).

[145] *Id.* at 56.

[146] *Id.* at 56–57.

[147] I*n Re: De Facto Condemnation and Taking of Lands of WBF Assoc*., 588 Pa. 242, 258, 903 A.2d 1192, 1201 (2006).

[148] 54 P.3d at 295.

[149] *Id.* at 296.

[150] *Id.* at 297.

[151] *Id.* at 298 (emphasis supplied).

[152] *Id.* (*quoting* Homeward Bound, Inc. v. Anchorage Sch. Dist., 791 P.2d 610, 614 (Alas. 1990)).

[153] *Id.* at 299 (*quoting Homeward Bound, Inc.*, 791 P.2d at 614).

[154] Westgate, Ltd. v. State, 1992 Tex. LEXIS 160, at *14 n.4, (*citing* Lange v. State, 86 Wash. 585, 547 P.2d 282 (1976) (*en banc*); City of Fort Worth v. Corbin, 504 S.W.2d 828 (Tex. 1974)).

is an exception if condemnation blight has devalued an owner's property to such an extent that the property is virtually worthless.

Thus, in *Washington Market Enterprises, supra,* the question was whether there could be a taking in the absence of "a physical invasion of the property or a direct legal restraint on its use."[155] In 1958 Trenton undertook a feasibility study for redevelopment of part of the downtown area; in 1967 an area that was declared to be blighted included the plaintiff's property. Although declaring an area to be blighted does not constitute a taking, there may be a taking "where, in addition to the declaration of blight, other related activities together with the passage of time are said to have shorn property of literally all or most of its value."[156]

The court pointed out that "[m]any cases, while not finding any taking prior to a condemnation award or some form of physical appropriation, have nonetheless allowed the property owner to include the loss he has suffered in the determination of the damages to which he becomes ultimately entitled in eminent domain proceedings."[157] In remanding the case the court held that the plaintiff would have to show that the precondemnation activity *substantially destroyed the value of the property* and the approximate date that the destruction of value occurred, as the value of the property would have to be determined "as of the date of the hypothesized taking…."[158]

In the above New Jersey case, the court observed a substantial-destruction-of-value test in determining whether precondemnation activity resulted in a *de facto* taking. California appears to have set a somewhat lower standard in allowing an owner to recover for damage to property allegedly caused by delay in instituting direct condemnation. That is, the value of the property does not have to be substantially destroyed for there to be a recovery for condemnation blight; a diminution in value may suffice. For example, in *Klopping v. City of Whittier*,[159] an action in inverse condemnation to recover, although the city instituted proceedings to acquire properties from the plaintiffs for the purposes of a parking district, the city later dismissed the proceedings. However, at the time of the dismissal the city publicly announced that it intended to resume the action in the future, thus continuing the threat of condemnation with respect to the properties.[160] The plaintiffs alleged that "the fair market value of their properties was diminished," that "they were unable to fully use their properties and suffered a loss of rental income," and that the causes of the damages were the precondemnation activities and government statements.[161]

The court held that such allegations were not sufficient to state a cause of action for a *de facto* taking of the entire properties, but that the plaintiffs were entitled to recover damages if they established that the city either unreasonably delayed condemnation proceedings or was guilty of other unreasonable conduct prior to condemnation:

> [W]hen the condemner acts unreasonably in issuing precondemnation statements, either by excessively delaying eminent domain action or by other oppressive conduct, our constitutional concern over property rights requires that the owner be compensated. This requirement applies even though the activities which give rise to such damages may be significantly less than those which would constitute a de facto taking of the property so as to measure the fair market value as of a date earlier than that set statutorily by Code of Civil Procedure section 1249.[162]

The court held

> that a condemnee must be provided with an opportunity to demonstrate that (1) the public authority acted improperly either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation; *and* (2*) as a result of such action the property in question suffered a diminution in market value*.[163]

Under the *Klopping* doctrine, even though the property owner may not recover for a *de facto* taking of the entire property, the owner may recover for a diminution in the market value of the property if it can be shown that the public agency acted unreasonably in delaying condemnation after an announcement of an intention to condemn. In the *Klopping* case, of course, the threat of government appropriation of the property did not cease with the city's abandonment of condemnation proceedings that the city finally had instituted. The *Klopping* opinion indicates that the standard for finding a loss of value of property is not as high as the standard for finding that precondemnation activity has caused the owner to suffer a *de facto* taking.

C.6. Factors Considered in Determining Whether Precondemnation Activities Resulted in a *De Facto* Taking

In *City of Chicago v. Loitz,*[164] the court recognized that a "distinct minority" of federal and state courts had held that "various precondemnation activities [are] sufficient to constitute a *de facto* 'taking' of private prop-

[155] Wash. Market Enter. v. City of Trenton*,* 68 N.J. at 110, 343 A.2d at 409.

[156] *Id.* at 115*,* 343 A.2d at 412.

[157] *Id.* at 121, 343 A.2d at 412 (*citing In re Elmwood Park Project Sect. 1, Group B*, 376 Mich. 311, 136 N.W.2d 896 (1965); City of Buffalo v. J.W. Clement Co., Inc*.*, 28 N.Y.2d 241, 269 N.E.2d 895 (1971); City of Cleveland v. Carcione, 118 Ohio App. 525, 190 N.E.2d 52 (Ohio App. 8th Dist. 1963); Cleveland v. Hurwitz, 19 Ohio Misc. 184, 249 N.E.2d 562 (Probate 1969)).

[158] *Id.* at 123–24, 343 A.2d at 416, 417 (emphasis supplied).

[159] 8 Cal. 3d 39, 500 P.2d 1345 (1972).

[160] *Id.* at 42–43, 500 P.2d 1348.

[161] *Id.* at 53, 500 P.2d 1355–56.

[162] *Id.* at 51–52, 500 P.2d 1355.

[163] *Id.* at 52, 500 P.2d at 1355 (emphasis supplied).

[164] 61 Ill. 2d 92, 93, 329 N.E.2d 208, 209 (1975) (responding to the city's suit to demolish two buildings on the plaintiffs' property, the plaintiffs counterclaimed alleging that the city's ordinance authorizing a street realignment constituted a taking.)

erty."[165] The court held that although condemnation proceedings were never initiated, the general rule is that "mere planning or plotting in anticipation of a public improvement does not constitute a 'taking' or damaging of the property affected."[166] In another case, it was held that a government declaration that the plaintiffs' property was a potential site for a hazardous waste facility did not constitute a taking. "Government plans ordinarily do not constitute invasion or taking of property."[167] Furthermore, "decreases in the value of property during governmental deliberations, absent extraordinary delay, are incidents of ownership and do not constitute a taking."[168] The court reiterated its view

> that a compensable taking can occur when governmental action substantially destroys the beneficial use of private property…. [Nonetheless], it is only when "the threat of condemnation has had such a substantial effect as to destroy the beneficial use that a landowner has made of his property, [that] there has been a taking of property within the meaning of the Constitution."[169]

Bad faith on the part of the government is another factor that may be considered. It has been held that an act of bad faith in dealing with the property owner is sufficient to establish a *de facto* taking based on a date earlier than the date of the *de jure* taking.[170] Indeed, one article argues that "courts explicitly compensating for condemnation blight usually do so only after finding that the government acted in bad faith."[171]

Several jurisdictions have adopted the position that precondemnation activities constitute a taking when the government "*unreasonably delays* the actual acquisition."[172] In some jurisdictions, precondemnation publicity that impairs the marketability of property may constitute an "imputed taking" even without a showing of unreasonable delay.[173] However, in other jurisdictions a property owner may have a claim "only where the precondemnation publicity in effect renders the property worthless." [174]

Negligence has been urged as a factor to consider in determining whether precondemnation activity resulted in a *de facto* taking. For example, in *Westgate, Ltd.*, *supra*, the property owner argued that "the government was negligent in failing to warn Westgate of the highway project before Westgate constructed the shopping center."[175] However, the court held that a "failure to warn, *absent any showing of bad faith*, was not a taking or damaging of property, since it resulted in no restriction on the property's use."[176]

C.7. Effect of Condemnation Blight on Valuation of Property in Condemnation Proceedings

The general rule is that "compensation is paid for the value of property as of the day it is actually taken, rather than the day on which the taking was announced."[177] However, as seen in the *J.W. Clement Co.* case in New York and the *Klopping* case in California, even though the evidence may be insufficient for the court to rule that there has been a *de facto* taking, assuming there is an eventual *de jure* taking of an owner's property, the owner may be able to recover in the condemnation proceedings for the loss of value of the property caused by the government's precondemnation activities. Thus, it may be possible to use the actual day of the taking of the property but "disentangle[] the depreciation in market value due to the government's action" so as to exclude the loss caused by condemnation blight in the calculation of total compensation.[178] A rationale for the above rule is that because "[t]he so-called 'scope of the project rule' provides that the government need not pay for any *increase* in a property's fair market value resulting from the government ac-

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[165] *Id.* at 97, 329 N.E.2d at 212 (*citing* Drakes Bay Land Co. v. United States, 424 F.2d 574 (Ct. Cl. 1970); Foster v. City of Detroit, 405 F.2d 138 (6th Cir. 1968); R.J. Widen Co. v. United States, 357 F.2d 988 (Ct. Cl. 1966); Foster v. Herley, 330 F.2d 87 (6th Cir. 1964); Eleopoulos v. Richmond Redevelopment Agency, 351 F. Supp. 63 (N.D. Cal. 1972); Haczela v. City of Bridgeport, 299 F. Supp. 709 (D. Conn. 1969); Inmobiliaria Borinquen, Inc. v. Garcia Santiago, 295 F. Supp. 203 (D. P.R. 1969); Sayre (*ex rel*. Liberty Mortgage Corp.) v. United States, 282 F. Supp. 175 (N.D. Ohio 1967) (mem.); *In re Elmwood Park Project*, 376 Mich. 311, 136 N.W.2d 896 (1965); Conroy-Prugh Glass Co. v. Commonwealth Dep't of Transp., 456 Pa. 384, 321 A.2d 598 (1974); *In re Philadelphia Parkway*, 250 Pa. 257, 95 A. 429 (1915); *In re Commonwealth's Crosstown Expressway*, 3 Pa. Commw. 1, 281 A.2d 909 (1971)).

[166] 61 Ill. 2d at 97, 329 N.E.2d at 211 (citations omitted).

[167] Littman v. Gimello, 115 N.J. 154, 161, 557 A.2d 314, 318 (1989) (citations omitted).

[168] 115 N.J. at 163, 557 A.2d at 319.

[169] 115 N.J. at 164, 557 A.2d at 319 (internal quotation marks omitted) (citations omitted).

[170] *See* Foster v. City of Detroit, 405 F.2d 138 (6th Cir. 1968); *see also* Jackovich Revocable Trust v. State, Dep't of Transp., 54 P.3d 294 (Alaska 2002) (discussing bad faith acts by the government).

[171] Serkin, *supra* note 109, at 710 (*citing Klopping,* 8 Cal. 3d at 44–45, 500 P.2d at 1349–50).

[172] Westgate, Ltd. v. State, 1992 Tex. LEXIS 160, at *14 (*citing Klopping*, 8 Cal. 3d 39, 500 P.2d 1345 (1972); Nadler v. City of Mason City, 387 N.W.2d 587 (Iowa 1986); *In re Elmwood Park Project*, 376 Mich. 311, 136 N.W.2d 896 (1965); City of Sparks v. Armstrong, 103 Nev. 619, 748 P.2d 7 (1987); Lincoln Loan Co. v. State, 274 Or. 49, 545 P.2d 105 (1976)).

[173] *Id.* at *14 n.4 (*citing* Ehrlander v. State, 797 P.2d 629 (Alaska 1990)).

[174] *Id.* (*citing* Horak v. State, 171 Conn. 257, 368 A.2d 155 (1976); Wash. Market Enters., Inc. v. City of Trenton, 68 N.J. 107, 343 A.2d 408 (1975); Conroy-Prugh Glass Co. v. Commonwealth, 456 Pa. 384, 321 A.2d 598 (1974)).

[175] 1992 Tex. LEXIS 160, at *20-21.

[176] *Id.* at *21 (emphasis supplied).

[177] Bell & Parchomovsky, *supra* note 101, at 1435.

[178] Serkin, *supra* note 110, at 697 (citations omitted).

tion,"[179] it is only fair that the property owner not have to suffer a *loss* because of the government's precondemnation announcement and associated activity.

In *Klopping*, although the court held that there had not been a taking, the condemnee was not left without a remedy, according to the New York Court in the *JW Clement* case:

> Indeed, the aggrieved property owner has a remedy where it would suffer severely diminished compensation because of acts by the condemning authority decreasing the value of the property…. In such cases *where true condemnation blight is present, the claimant may introduce evidence of value prior to the onslaught of the "affirmative value-depressing acts"…of the authority and compensation shall be based on the value of the property as it would have been at the time of the de jure taking, but for the debilitating threat of condemnation….* This, in turn, requires only that there be present some proof of affirmative acts causing a decrease in value and difficulty in arriving at a value using traditional methods….
>
> Thus, when damages are assessed on the claim for the de jure appropriation, the claimant's property should be evaluated not on its diminished worth caused by the condemnor's action, but on its value except for such "affirmative value-depressing acts" of the appropriating sovereign.[180]

In 2005 in *Savage v. Palm Beach County,*[181] an appellate court agreed with the property owners that it was error for the trial court to exclude expert testimony on "'property blight' and its effect on the value of the condemned property."[182] Two government districts apparently reached an agreement that one would obtain the necessary permits to construct improvements to a drainage system affecting property in an area known as "Unit 11."[183] The permits were not obtained, resulting in the property being unsuitable for residential development. After the county eventually initiated condemnation actions, the property owners hired two engineers, one of whom concluded that "Palm Beach County appears to have conspired with other Federal and State agencies" to prevent any building in the area so that it would return to its natural state—a wildlife area.[184] In holding that the trial court improperly excluded the expert testimony, the court stated that the rule in Florida was that "'the threat of condemnation restricts the owner's economic use of property in the interim leading to the actual taking'"[185] and that "'a condemning authority cannot benefit from a depression in property value caused by a prior announcement of the intent to condemn.'"[186]

In *City of Cleveland v. Carcione,*[187] following an ordinance authorizing an urban renewal plan, the city "pursued a policy of demolishing buildings piecemeal in the area" that was the direct cause of the decline in the gross income of the Carcione property.[188] The court held that the property had to be valued not at the time of the trial, when the property was "virtually abandoned, vandalized and badly deteriorated, in the midst of a wasteland," but as it had existed at the time the city took "any affirmative steps to effectuate" the urban renewal project.[189]

> "Where one entire plan has been adopted for a public improvement and from the inception a certain tract of land has been actually included therein, the owner of such tract in a condemnation proceeding therefor is not entitled to an increased value which may result from the improvement, where its appropriation is a condition precedent to the existence of the improvement…."
>
> The reverse of such a situation—the depreciation in value of a parcel of property at the time appropriated where the property is included in a general plan of condemnation to carry out a specific program of the condemnor—is analogous in principle and should, we believe, invoke the application of a parallel rule of law.[190]

In the *Littman* case the court observed that "the holding in *Washington Market* clearly contemplates a reduction in value to 'near zero'…."[191] The court in *Littman* also addressed some of the factors that must be balanced to determine whether there has been "a compensable-taking claim flowing from pre-condemnation activity,"[192] such as "extraordinary delay or other unreasonable conduct on the part of the condemning authority"[193] or "the imminence of condemnation" that may cause a property owner to be more "inclined to take or refrain from taking action."[194]

As stated in *Klopping, supra,* "[t]he length of time between the original announcement and the date of actual condemnation may be a relevant factor in determining whether recovery should be allowed for blight or

[179] Serkin, *supra* note 110, at 698 (emphasis supplied) (*citing* Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 477–78, 93 S. Ct. 791, 35 L. Ed. 2d 1 (1973)).

[180] Buffalo v. J.W. Clement Co., 28 N.Y.2d at 257–8, 269, N.E.2d at 905 (citations omitted) (emphasis supplied).

[181] 912 So. 2d 48 (Fla. App. 4th Dist. 2005), *rehearing denied*, 2005 Fla. App. LEXIS 17584 (2005).

[182] *Id.* at 49.

[183] *Id.*

[184] *Id.* at 50.

[185] *Id.* at 52 (*quoting* State Road Dep't v. Chicone, 158 So. 2d 753, 756 (Fla. 1963)).

[186] *Id.* (*quoting* Dep't of Transp. v. Gefen, 636 So. 2d 1345, 1346 (Fla. 1994) (citations omitted)). It may be noted that the court agreed that the experts' "references to 'government conspiracies' and 'collusion' were inappropriate. However, the court could have restricted the use of that terminology without striking the experts' testimony completely." *Id.*

[187] 118 Ohio App. 525, 190 N.E.2d 52 (Ohio App. 8th Dist. 1963).

[188] *Id.* at 527, 190 N.E.2d at 54.

[189] *Id.* at 530, 190 N.E.2d at 56.

[190] *Id.* at 531–32, 190 N.E.2d at 56 (citations omitted).

[191] Littman v. Gimello, 115 N.J. 154, at 166, 557 A.2d at 320 (1989) (some internal quotation marks omitted) (citation omitted).

[192] *Id.*

[193] *Id.*

[194] *Id.,* 557 A.2d at 321.

for other oppressive acts by the public authority designed to depress market value."[195]

Klopping involved actions in inverse condemnation for damages caused by the city prior to the eventual condemnation of the plaintiffs' properties.[196] After having instituted condemnation suits for financial reasons, the city council approved the dismissal of the pending condemnation actions of the plaintiffs' properties. The court ruled that the city's precondemnation activities, namely "the precondemnation publicity…directly aimed at plaintiffs' properties and not at an undesignated area," did not constitute condemnation blight.[197] However, the court emphasized that the plaintiffs were not arguing that the subject properties should be treated actually as having been taken at an earlier date. "Rather plaintiffs submit that any decrease in the market value caused by the precondemnation announcements should be disregarded and that the property should be valued without regard to the effect of the announcements on the property."[198]

In *Klopping* the court reasoned that since appreciation in value following the announcement of a condemnation project is to be disregarded, "it follows that where there is decline in value such decreases are likewise to be disregarded. This can be accomplished only by *allowing* testimony as to what decline, if any, was due to any announcements made prior to condemnation."[199] The court concluded that "a public authority is not required to compensate a landowner for damages to his property occurring after the announcement if the injury is not unreasonably caused by the condemning agency; interest is likewise to run not from the announcement but from the valuation date."[200] However, "a condemnee must be provided with an opportunity to demonstrate that (1) the public authority acted improperly either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation; and (2) as a result of such action the property in question suffered a diminution in market value."[201]

[195] Klopping v. Whittier*,* 8 Cal. 3d at 45, 500 P.2d at 1350 n.1 (citation omitted).

[196] Although the court reversed and remanded a judgment dismissing one of the plaintiff's actions, the court affirmed the dismissal of the other plaintiff's action because his land was taken in a condemnation action preceding the judgment below in this case. *See Klopping,* 8 Cal. 3d at 56–59, 500 P.2d at 1359–60.

[197] 8 Cal. 3d at 45, 500 P.2d at 1350.

[198] 8 Cal. 3d at 47, 500 P.2d at 1351.

[199] 8 Cal. 3d 48, 500 P.2d at 1352–53.

[200] 8 Cal. 3d at 52, 500 P.2d at 1355.

[201] *Id.* (footnote omitted).

D. RULES ON LIABILITY FOR SURFACE WATER

D.1. Relevance of the Rules of Liability for Surface Water

"Surface waters are 'waters of a casual or vagrant character having a temporary source, and which diffuse themselves over the surface of the ground, following no definite course or defined channel.'"[202] Surface water causing damage to an owner's property may give rise to a claim in inverse condemnation or, depending on the jurisdiction, a claim in strict liability or for negligence, trespass, or nuisance.[203] For example, according to courts in Washington, there is strict liability for diverting surface water: "[A] landowner has no right to divert naturally occurring water from his to another's land and to cause harm thereby, irrespective of the diligence and care used in erecting the diversion."[204] Although other claims may be included, it appears that most claims against transportation departments are in inverse condemnation. Of course, property owners also are liable for flooding highways; correlative duties are imposed on owners of land and users to protect highways from flooding or water damage.[205]

[202] Gunstone v. Jefferson County, 2004 Wash. App. LEXIS 499, at *10 n.2 (Wash. Ct. App. 2004) (Unrept.), *review denied*, 152 Wash. 2d 1030, 103 P.3d 200 (2004) (*quoting* Dahlgren v. Chicago, Milwaukee & Puget Sound Ry. Co., 85 Wash. 395, 405, 148 P. 567, 570 (1915)).

[203] *See,* e.g., Collier v. City of Oak Grove, 2007 Mo. App. LEXIS 643, *21 (Ct. App. 2007), *rev'd on other grounds*, 246 S.W.3d 923 (2008) (reiterating the rule in Missouri that "'when private property is damaged by a nuisance operated by an entity having the power of eminent domain, the proper remedy is an action in inverse condemnation'") (*quoting* Heins v. Mo. Highway and Transp. Comm'n, 859 S.W.2d 681, 693 (Mo. 1993))). By comparison, in *Gunstone*, *supra*, the court held that the plaintiffs' inverse condemnation action was "redundant" because if the "Gunstones prove either negligence or strict liability, they will recover." *Gunstone*, 2004 Wash. App. LEXIS 499, at *28.

[204] Gunstone v. Jefferson County, 2004 Wash. App. LEXIS 499, at *22 (footnote omitted).

[205] *See, e.g.,* Wis. Stat. 88.87(3)(a) and (b) (2007):

> (3)(a). It is the duty of every owner or user of land who constructs any building, structure or dike or otherwise obstructs the flow of stream water through any watercourse or natural or man-made channel or obstructs the flow of surface water through any natural or man-made channel, natural depression or natural draw through which surface waters naturally flow:
>
> 1. To provide and at all times maintain a sufficient drainage system to protect a downstream highway or railroad grade from water damage or flooding caused by such obstruction, by directing the flow of surface waters into existing highway or railroad drainage systems; and
>
> 2. To protect an upstream highway or railroad grade from water damage or flooding caused by such obstruction, by permitting the flow of such water away from the highway or railroad grade substantially as freely as if the obstruction had not been created.
>
> (3)(b). Whoever fails or neglects to comply with a duty imposed by par. (a) is liable for all damages to the highway or rail-

Although inverse condemnation for claims caused by flooding are discussed in Section 2, *supra*, of the report, a public entity confronted with a claim for a taking of an owner's property caused by surface water will need to be aware of the rule in its jurisdiction on liability for surface water, whether based on a statute or a judicial precedent. Thus, in a case in which highway construction had the effect of channeling the excess flow of two streams instead of permitting the water to spread naturally over the land, a Louisiana court stated that

> La. Civ. Code art. 655 provides that "an estate situated below is bound to receive the surface waters that flow naturally from an estate situated above unless an act of man has created the flow." Additionally, La. Civ. Code art. 656 provides in part that "the owner of the dominant estate may not do anything to render the servitude more burdensome." Furthermore, the owner of the dominant estate "cannot stop [water running through it] or give it another direction and is bound to return it to its ordinary channel *where it leaves his estate*." La. Civ. Code art. 658.[206]

The court held that although the department had "returned the water to its ordinary channel, DOTD did not comply with the mandate of La. Civil Code art. 658 in that it returned the water to its ordinary channel some 400 feet south of its property" and "the water arrives at the Taylors' property much more quickly" than previously.[207] Thus, the court agreed that the owners were entitled to just compensation.[208]

In *Kohlbeck v. Wisconsin Department of Transportation,*[209] the court addressed the surface water issue, stating that

> [s]ection 88.87 creates an obligation on state and local governments to refrain from obstructing natural drainage when constructing and maintaining highways….
>
> The essence of this provision is that DOT is prohibited from "impeding the general flow of surface water or stream water in any unreasonable manner." *When DOT fails to follow this requirement, an injured property owner "may bring an action in inverse condemnation under ch. 32 or sue for such other relief, other than damages, as may be just and equitable*" if DOT fails to remedy the problem on its own.[210]

In *Kohlbeck* the property owners alleged that a transportation department project had "diverted surface and ground water to their property, causing environmental contamination,"[211] and forcing the property owners to install a higher curb to prevent more water from entering their property. The court held that the owners had stated a claim for injunctive relief and that they were not barred from seeking injunctive relief for "an ongoing problem…[that] is…a permanent occupation of their property."[212] Moreover, the court held that "DOT cannot convert the Kohlbecks' request for an injunction into one for damages by simply pointing out that the Kohlbecks have made efforts to protect their property on their own."[213]

D.2. Rules Applicable to Surface Water

There are four rules that have been applied to liability for surface water causing damage to the property of an adjacent or downstream landowner: the common enemy rule, the modified common enemy rule, the civil law rule, and the reasonable use rule. In general, according to one source, these rules mean:

1. The Common Enemy Doctrine: all landowners can divert or block diffused surface water without liability.
2. Modified Common Enemy: landowners are not liable for diverting water unless they block a natural drainway, collect water and channel it, or fail to exercise due care.
3. Civil Law or Natural Flow: a landowner who interferes with the natural flow of diffused surface water is liable.
4. Reasonable Use: landowners will not be liable so long as the resulting interference with the plaintiff's land is not unreasonable.[214]

The law on liability for surface water developed from the common law principles governing the duty and liability of a landowner.[215] The doctrines are associated closely with the law of real property and "such terms as easements, the dominant estate, the servient estate, and servitudes…."[216] Application of these rules has been vexing because of the lack of uniformity in legislation

road grade caused by such failure or neglect. The authority in charge of maintenance of the highway or the railroad company which constructed or maintains the railroad grade may bring an action to recover such damages. An action under this paragraph shall be commenced within the time provided by s. 893.59 or be barred.

[206] Taylor v. State, 879 So. 2d 307, 316 (La. App. 3d Dist. 2004) (alteration in original).

[207] *Id.* at 317.

[208] *Id. See*, however, Satari v. Comm'r of Transp., 2002 Conn. Super. LEXIS 22, at *12 (Super. Ct. 2002) (Unrept.) (holding that the state's evidence was more persuasive that there was no significant impact to the drainage area after the taking and reconstruction of the highway). The *Satari* case is instructive in regard to the kind of soil studies and other expert evidence and testimony that were used successfully by the transportation department to rebut the claim for surface water damages.

[209] 256 Wis. 2d 235, 647 N.W.2d 277 (Ct. App. 2002).

[210] *Id.* at 241, 647 N.W.2d at 280 (emphasis supplied).

[211] *Id.* at 240, 647 N.W.2d at 279.

[212] *Id.*

[213] *Id.* at 245, 647 N.W.2d at 281 (footnote omitted).

[214] Wendy B. Davis, *Diffused Surface Water: Reasonable Use Has Become the Common Enemy* 5 (Berkeley Elec. Press, Working Paper No. 13, 2003), available at http://law.bepress.com/expresso/eps/13/.

[215] *See* Tom Clark Chevrolet v. Pa. Dep't of Envtl. Prot., 816 A.2d 1246 (Pa. Commw. 2003); *see also* Fazio v. Fegley Oil Co. Inc., 714 A.2d 510 (Pa. 1998), *appeal denied*, 557 Pa. 656, 734 A.2d 863 (1999).

[216] Butler v. Bruno, 115 R.I. 264, 269, 341 A.2d 735, 738 (1975).

and court decisions. More recently, as discussed herein, many states either have modified the common enemy or civil law rule or adopted the reasonable use rule.

> However, [s]everal states impose even more complex schemes by statutes that use a different standard depending on whether the land is within city limits, or has been artificially improved, or if the water has reached a drainway. Some states impose different rules depending on whether the property is considered urban or rural.[217]

D.2.a. Common Enemy Rule and the Modified Common Enemy Rule

Under the common enemy doctrine, water is a common enemy of all landowners and each may confront surface water without liability for damages caused to other landowners.[218] According to an early case, under the *common enemy* doctrine

> [t]he obstruction of surface water or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil. This principle seems to have been lost sight of in the instructions given to the jury. While the right of the owner of land to improve it and to change its surface so as to exclude surface water from it is fully recognized, even although such exclusion may cause the water to flow on to a neighbor's land, it seems to be assumed that he would be liable in damages, if, after suffering the water to come on his land, he obstructed it and caused it to flow in a new direction on land of a conterminous proprietor where it had not previously been accustomed to flow. But we know of no such distinction. A party may improve any portion of his land, although he may thereby cause the surface water flowing thereon, whencesoever it may come, to pass off in a different direction and in larger quantities than previously. If such an act causes damages to adjacent land, it is *damnum absque injuria*.[219]

The Rhode Island Supreme Court has pointed out that "New Jersey was the first jurisdiction to describe the rule by employing the phrase 'common enemy.'"[220] The court observed that

> [s]everal courts in adopting this rule have said that it encourages the development and improvement of real estate and clearly delineates the rights of all interested parties. Concededly, litigation is kept to a minimum because in its application no one's rights are invaded. However, the simplicity of the rule does create problems, for, as one commentator has expressed it: "landowners are encouraged to engage in contests of hydraulic engineering in which might makes right, and breach of the peace is often inevitable."[221]

Thus, the common enemy doctrine "shields a landowner from liability only when he diverts water onto another's land for the *protection* of his own land."[222] The common enemy doctrine allows a landowner to do whatever is necessary to dispose of surface water without liability to another property owner.

The modified common enemy doctrine, on the other hand, excludes specific acts and analyzes the reasonableness of a party's conduct and whether a party's action was necessary under the circumstances.[223] The modification effectively curtailed the landowner's right, amounting to free reign to confront surface water without liability from any resulting damages. The reasonableness inquiry is merely an element of the modified doctrine and is not the substance of the doctrine.

No state applies the unmodified common enemy doctrine.[224] For example, in *Tom Clark Chevrolet, supra,* the plaintiff appealed from a grant of summary judgment in favor of the Pennsylvania Department of Transportation, resulting in a dismissal of a claim for flood damages to the plaintiff's property. The court acknowledged that Pennsylvania applies the rule that "regards surface waters as a common enemy which every landowner must fight to get rid of as best he may."[225] However, the court went on to state that "'it is clear that only where water is diverted from its natural channel or where it is unreasonably or unnecessarily changed in quantity or quality has the lower owner received a legal injury.'"[226]

In *Anderson v. Griffin* the court stated that under the common enemy doctrine, "a landowner may dispose of unwanted surface water without incurring liability for injury caused to adjacent land."[227] However, the state of Washington has made exceptions to the doctrine as

> 1) a landowner may not block a watercourse or natural drain way; (2) a landowner may not collect and discharge

[217] Davis, *supra* note 214, at 5 (footnotes omitted).

[218] Tom Clark Chevrolet v. Pa. Dep't of Envtl. Prot*.,* 816 A.2d 1251, 1252.

[219] Gannon v. Hargadon, 92 Mass. 106, 110 (1865).

[220] Butler v. Bruno*,* 115 R.I. at 268, 341 A.2d at 737 (*quoting* Town of Union v. Durkes, 38 N.J.L. 21 (1875)).

[221] 115 R.I. at 268, 341 A.2d at 737–38 (*quoting* Maloney & Plager, *Diffused Surface Water: Scourge or Bounty*, 8 NAT. RESOURCES J. 73, 78 (1968)).

[222] Gunstone v. Jefferson County*,* 2004 Wash. App. LEXIS 499, at *21 n.4 (Unrept.) (citation omitted) (emphasis in original).

[223] *See* Ostrem v. Alyeska Pipeline Service Co*.,* 648 P.2d 986, 990–91 (Alaska 1982).

[224] Although the Davis article states that "[o]nly Pennsylvania adheres to the Common Enemy rule without modification, and then only for land in urban areas," Davis, *supra* note 214, at 6 (*citing* Fazio v. Fegley Oil Co., Inc., 714 A.2d 510 (Pa. 1998)), the rule, nonetheless, includes a reasonableness inquiry. *Tom Clark Chevrolet*, 816 A.2d at 1253 ("[A] landowner in urban areas is liable for the effects of surface waters only where he either (a) artificially diverts the water from its natural channel, or (b) *unreasonably or unnecessarily increases the quantity or changes the quality of water discharged from his property*.") (citation omitted) (emphasis supplied).

[225] Tom Clark Chevrolet v. Pa. Dep't of Envtl. Prot*.*, 816 A.2d at 1252 (citation omitted).

[226] *Id.* (*quoting* Lucas v. Ford, 363 Pa. 153, 156, 69 A.2d 114, 116 (1949)).

[227] Anderson v. Griffin, 2002 Wash. App. LEXIS 2542, *10 (Ct. App. 2002) (Unrept.), 2005 Wash. App. LEXIS 1172 (Wash. Ct. App. 2005) (affirming trial court's decision on remand).

water onto their neighbors' land in quantities greater than or in a manner different from its natural flow; and (3) a landowner must exercise their rights with due care by acting in good faith and by avoiding unnecessary damage to the property of others.[228]

It appears that 12 states apply the common enemy doctrine but with state-specific modifications:[229] Alabama,[230] Arkansas,[231] the District of Columbia,[232] Indiana,[233] Kansas,[234] Maine,[235] Montana,[236] Nebraska,[237] Oklahoma,[238] South Carolina,[239] Virginia,[240] and Washington.[241]

D.2.b. Civil Law Rule

According to the civil law rule, a landowner's surface water may flow in its natural course over the property of another without incurring liability for any resulting damages.[242] The doctrine

> was first adopted in this country by Louisiana in 1812…. It is said to have its roots in Roman Law and the Napoleonic Code…. The rule is usually expressed in terms of an easement of natural drainage so that the owner of the lower land must accept the surface water which naturally drains onto his land but the upper owner may do nothing to increase the flow. Expressed in a more precise manner, the rule is that "A person who interferes with the natural flow of surface water so as to cause an invasion of another's interests in the use and enjoyment of his land is subject to liability to the others."[243]

Under the civil law rule "the owner of the dominant or higher land has a natural easement over the servient or lower land to allow surface water to flow naturally off the dominant estate and onto the servient estate."[244] Although the civil law rule has the advantage of predictability in that a landowner knows what his or her liability is from the beginning, the rule may serve to discourage development.[245] Furthermore, the application of the doctrine is difficult because of the need to know "the exact course of the 'natural flow' of the surface water…."[246]

In *Menzies v. Hall,* the Supreme Court of Georgia affirmed the trial court's order granting injunctive relief to alleviate excessive rain and surface water run-off and determining whether and how to require the defendant-appellant to abate the problem.[247] After acquiring possession of property above that of the plaintiff, the defendant removed grass and other vegetation and replaced it with gravel. In describing the civil law rule, the court stated that

> one land proprietor has no right to concentrate and collect [water], and thus cause it to be discharged upon the land of a lower proprietor in greater quantities at a particular locality, or in a manner different from that in which the water would be received by the lower estate if it simply ran down upon it from the upper by the law of gravitation.[248]

Because any improvements to or development of the property would most likely change the natural flow, some states have modified the civil law rule. In Illinois, an owner of a dominant agricultural land is permitted to increase or alter the flow of water upon a servient estate for purposes of husbandry of the dominant estate.[249] This modification has also been extended to development in urban and suburban settings, i.e., limiting liability where increased flow of surface waters is a result of development such as paving of streets or construction of houses.[250]

It appears that the following jurisdictions apply the civil law rule:[251] Arizona,[252] Colorado,[253] Georgia,[254]

[228] *Id.* (citations omitted).

[229] *C.f.,* Davis, *supra* note 214, at 8–9.

[230] Peak v. Parks, 886 So. 2d 97 (Ala. Ct. Civ. App. 2003); Wal-Mart Stores v. Langham*,* 794 So. 2d 1170 (Ala. Ct. Civ. App. 2001); Easterling v. Awtrey Building Corp*.,* 770 So. 2d 606 (Ala. Ct. Civ. App. 1999).

[231] Michael v. Roberson, 1998 WL 712745, *1 (Ark. App. 1998); Boyd v. Greene County, 7 Ark. App. 110, 644 S.W.2d 615 (Ct. App. 1983).

[232] Ballard v. Ace Wrecking Co., 289 A.2d 888 (D.C. 1971).

[233] Romine v. Gagle, 782 N.E.2d 369 (Ind. Ct. App. 2003), *rehearing denied*, 2003 Ind. App. LEXIS 453 (Ind. Ct. App. 2003); Pickett v. Brown, 569 N.E.2d 706 (Ind. Ct. App. 1991).

[234] Williamson v. Hays, 275 Kan. 300, 64 P.3d 364 (2003).

[235] Johnson v. Whitten, 384 A.2d 698 (Me. 1978).

[236] Mont. Dep't of Highways v. Feenan, 231 Mont. 255, 752 P.2d 182 (1988); Formicove, Inc. v. Burlington N., Inc., 207 Mont. 189, 673 P.2d 469 (1983).

[237] Schott v. Hennings, 2000 Neb. App. LEXIS 80, *1 (Neb. Ct. App. 2000) (Unrept.); Nu-Dwarf Farms, Inc. v. Stratbucker Farms, Ltd., 238 Neb. 395, 470 N.W.2d 772 (1991).

[238] Moneypenny v. Dawson, 2006 OK 53, 141 P.3d 549 (2006); Mattoon v. City of Norman, 1980 OK 137, 617 P.2d 1347, 1349 (1980).

[239] Silvester v. Spring Valley Country Club, 344 S.C. 280, 543 S.E.2d 563 (2001).

[240] Mullins v. Greer, 26 Va. 587, 311 S.E.2d 110 (1984); McCauley v. Phillips, 216 Va. 450, 219 S.E.2d 854 (1976).

[241] Anderson v. Griffin, 2002 Wash. App. LEXIS 2542, at *1; Currens v. Sleek, 138 Wash. 2d 858, 983 P.2d 626 (1999).

[242] *See* Bollweg v. Richard Marker Assocs.*,* 353 Ill. App. 3d 560, 574–75, 818 N.E.2d 873, 884–85 (Ill. Ct. App. 2004).

[243] Butler v. Bruno, 115 R.I. at 269, 341 A.2d at 738.

[244] Bollweg v. Richard Marker Assocs.*,* 353 Ill. App. 3d 560, 574–75, 818 N.E.2d 873, 884 (Ct. App. 2004).

[245] Butler v. Bruno, 115 R.I. at 269, 341 A.2d at 738 (citation omitted).

[246] *Id.*

[247] 281 Ga. 223, 637 S.E.2d 415 (2006).

[248] *Id.* at 224, n.1, 637 S.E.2d at 416, n.1.

[249] Dessen v. Jones*,* 194 Ill. App. 3d 869, 877, 551 N.E.2d 782, 786 (Ill. Ct. App. 1990).

[250] Templeton v. Huss, 57 Ill. 2d 134, 138–39, 311 N.E.2d 141, 143–44 (1974).

[251] *C.f.,* Davis, s*upra* note 214, at 8–9.

[252] See W. Maricopa Combine, Inc. v. Ariz. Dep't of Water Res., 200 Ariz. 400, 26 P.3d 1171 (Ariz. Ct. App. 2001); *see also* Gillespie Land & Irrigation Co. v. Gonzalez*,* 93 Ariz. 152, 379 P.2d 135, 146 (1963).

Idaho,[255] Illinois,[256] Iowa,[257] Louisiana,[258] Maryland,[259] Michigan,[260] New Mexico,[261] New York,[262] Oregon,[263] South Dakota,[264] Tennessee,[265] and Texas.[266]

D.2.c. Reasonable Use Rule

A majority of states have adopted the reasonable use rule that inquires solely into the reasonableness of the alleged infringement in light of competing party and state interests.[267] The factors are defined by each state and, when applied, permit flexibility in analysis that results in greater fairness than the other doctrines.

As an appellate court observed in *Thomas v. City of Kansas City, Missouri*,[268] a case involving a claim for surface water damage, the law on surface water, at least in Missouri, has changed.

> [I]n *Heins Implement Co. v. Missouri Highway and Transportation Commission*, 859 S.W.2d 681 (Mo. banc 1993)…the court discarded the "common enemy" doctrine as to surface waters and adopted the "rule of reasonable use…." That rule provides that each possessor of land is legally entitled to make reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others; however, *the possessor incurs liability when the harmful interference with the flow of surface waters is unreasonable…. The rule of reasonable use does not purport to lay down specific rights with respect to surface waters, but "leaves each case to be determined on its own facts, in accordance with general principles of fairness and common sense*."[269]

The change means that

> [t]he rule of reasonable use makes obsolete the negligence and trespass nomenclature in cases involving the diversion of surface waters, because the concepts of negligence and trespass are merged into, and made subject to, the rule of reasonable use. An attempt to plead a cause of action as to surface water flooding must plead the elements of unreasonable use. The rule of reasonable use is essentially a rule of nuisance law…. In *Heins*, the Supreme Court held that surface water rights and liabilities were not to be analyzed exclusively as property law questions, but were to be analyzed as a form of nuisance…. Under *Heins*, upper and lower landowners are to be treated alike and all questions of liability for actions taken with regard to surface water are to be analyzed under a reasonableness standard….[270]

In the *Thomas* case the court held that the petition stated a claim "[b]ecause the petition refers to the diversion of surface waters by unreasonable conduct causing flooding and damage…."[271]

In another case, *Graham v. Beverage P.C*,[272] in which the property owners alleged that the transportation department had altered the flow of surface water, the court held that a mandamus action was available to the property owners to compel the department to begin eminent domain proceedings.[273] However, a mandamus action was not available to compel the completion of promised construction of proper ditching and drainage to carry off the surface water that was being "blocked and ponded" on the plaintiff's property by a highway.[274]

In the *Graham* case, in regard to the owners' negligence claim, although holding that there were material facts in dispute that precluded summary judgment, the

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[253] Bittersweet Farms, Inc., v. Zimbelman, 976 P.2d 326 (Colo. Ct. App. 1998); Hoff v. Ehrlich, 511 P.2d 523 (Colo. Ct. App. 1973).

[254] Menzies v. Hall, 281 Ga. 223, 637 S.E.2d 415 (2006); McMillen Dev. Corp. v. Bull, 228 Ga. 826, 188 S.E.2d 491 (1972).

[255] Utter v. Gibbins, 137 Idaho 361, 48 P.3d 1250 (2002); Burgess v. Salmon River Canal Co., 119 Idaho 299, 805 P.2d 1223 (1991); Smith v. King Creek Grazing Assoc., 105 Idaho 644, 671 P.2d 1107 (1983).

[256] Bollweg v. Richard Marker Assocs., 353 Ill. App. 3d 560, 818 N.E.2d 873 (Ill. Ct. App. 2004); Dessen v. Jones, 194 Ill. App. 3d 869, 551 N.E.2d 782 (Ill. Ct. App. 1990).

[257] Grace Hodgson Trust v. McClannahan, 569 N.W.2d 397 (Iowa Ct. App. 1997); O'Tool v. Hathaway, 461 N.W.2d 161 (Iowa 1990).

[258] Robinson v. Lincoln Parish Police Jury, 899 So. 2d 636 (La. App. 2d Cir. 2005); Carr v. Oake Tree Apartments, 786 So. 2d 230 (La. App. 2d Cir. 2001); Eubanks v. Bayou D'Arbonne Lake Watershed Dist., 742 So. 2d 113 (La. App., 2d Cir. 1999).

[259] Mark Downs, Inc. v. McCormick Props., Inc., 51 Md. App. 171, 441 A.2d 1119 (Md. Ct. Spec. App. 1982); Sainto v. Potter, 222 Md. 263, 159 A.2d 632 (Md. Ct. App. 1960).

[260] Swanson v. Shagbark Dev., 2005 Mich. App. LEXIS 2665 (Mich. Ct. App. 2005) (Unrept.); Kernan v. Homestead Dev. Co., 232 Mich. App. 503, 591 N.W.2d 369 (Mich. Ct. App. 1998).

[261] Walker v. L.G. Everist, Inc., 102 N.M. 783, 701 P.2d 382 (N.M. Ct. App. 1985).

[262] Selter v. MCM Distrib., Inc., 749 N.Y.S.2d 94, 299 A.D. 2d 332 (N.Y. App. 2d Dep't 2002); Marzo v. Fast Trak Structures, Inc., 747 N.Y.S.2d 637, 298 A.D. 2d 909 (N.Y. App. 4th Dep't 2002); Lawrence Wolf, Inc. v. Kissing Bridge Corp., 733 N.Y.S.2d 322, 288 A.D. 2d 935 (N.Y. App. 4th Dep't 2001).

[263] Wimmer v. Compton, 277 Or. 313, 560 P.2d 626 (1977); Wellman v. Kelley, 197 Or. 553, 252 P.2d 816 (1953).

[264] Knodel v. Kassel Township, 1998 SD 73, 581 N.W.2d 504 (1998) (significant exceptions to general rule).

[265] Broyels v. Standifer, 2006 Tenn. App. LEXIS 768 (Tenn. Ct. App. 2006); Genua v. Emory Assocs., 2002 Tenn. App. LEXIS 289 (Tenn. Ct. App. 2002); Zollinger v. Carter, 837 S.W.2d 613 (Tenn. Ct. App. 1992).

[266] Tex. Woman's Univ. v. Methodist Hosp., 221 S.W.3d 267 (Tex. Ct. App. 2006); Jefferson County Drainage Dist. No. 6 v. Lower Neches Valley Auth., 876 S.W.2d 940 (Tex. Ct. App. 1994), writ denied (Jan. 12, 1995).

[267] Anderson v. Griffin, 2002 Wash. App. LEXIS 2542, at *1.

[268] 92 S.W.3d 92 (Mo. App. W. Dist. 2002).

[269] *Id.* at 98 (some citations omitted) (emphasis supplied).

[270] *Id.* (citations omitted).

[271] *Id.* at 100. The court noted that other claims may exist such as a claim for personal injury caused by a city's negligence in the performance of a proprietary function. *Id.*

[272] 211 W. Va. 466, 566 S.E.2d 603 (2002).

[273] *Id.* at 473, 566 S.E.2d at 610.

[274] *Id.,* n.11. The case was not time-barred "because the alleged negligence…constitutes continuing wrongful conduct from which continuing injuries emanate." *Id.,* 211 W. Va. at 477, 566 S.E.2d at 614.

court addressed West Virginia's rule regarding liability for surface water.

> Generally, under the rule of reasonable use, the landowner, in dealing with surface water, is entitled to take only such steps as are reasonable, in light of all the circumstances of relative advantage to the actor and disadvantage to the adjoining landowners, as well as social utility. Ordinarily, the determination of such reasonableness is regarded as involving factual issues to be determined by the trier of fact….
>
> When a plaintiff alleges that a defendant has caused or allowed surface water to damage the plaintiff, the mere fact that the water does not originate on the land of the defendant, does not, in and of itself, make the defendant's conduct "reasonable" under the test….[275]
>
> Furthermore, the court stated that
>
> [i]n the absence of a valid waiver or other contractual arrangement, altering the natural flow or drainage of surface water upon one's land such that the water causes damage to another party is not "reasonable" merely because the person altering the flow of water sought to protect his or her own property and did not intend to harm any other party.[276]

The *reasonable use* doctrine does not prescribe any specific rights or privileges concerning surface water; each case is determined on its own facts.

> Reasonableness is a question of fact, to be determined in each case by weighing the gravity of the harm to the plaintiff against the utility of the defendant's conduct…. Liability arises when the defendant's conduct is either (1) intentional and unreasonable; or (2) negligent, reckless, or in the course of an abnormally dangerous activity…. Perhaps the rule can be stated most simply to impose a duty upon any landowner in the use of his or her land not to needlessly or negligently injure by surface water adjoining lands owned by others, or in the breach thereof to pay for the resulting damages. The greatest virtue of the reasonable use standard is its ability to adapt to any set of circumstances while remaining firmly focused on the equities of the situation.[277]

In *Crowell v. Kogut*[278] the defendant averred that the plaintiff had not alleged that her interference with surface water was unreasonable as mandated by an earlier case, *Page Motor Co. v. Baker*.[279] The plaintiff countered that the reasonable use doctrine applied to repulsion of water, not to diversion of water as was the case here.[280] The law on repulsion and diversion of surface waters prior to *Page Motor* detailed the rights of adjacent landowners as follows:

> A landowner is under no duty to receive upon his land surface water from the adjacent properties but in the use or improvement of it he may repel such water at his boundary. On the other hand, he incurs no liability by reason of the fact that surface water falling or running onto his land flows thence to the property of others in its natural manner. *But he may not use or improve his land in such a way as to increase the total volume of surface water which flows from it to adjacent property, or as to discharge it or any part of it upon such property in a manner different in volume or course from its natural flow to the substantial damage of the owner of that property*.[281]

In *Crowell* the court explained that the above statement was a modified version of the common enemy doctrine and that it provided immunity to a landowner who repelled surface water but imposed liability on a landowner who diverted surface water so as to cause substantial damage to an adjacent landowner.[282] In adopting the reasonable use doctrine, the court observed that a repelling landowner would not be immune from liability any longer.[283] Instead, he or she would be "'entitled to take only such steps as are reasonable, in light of all circumstances of relative advantage to the actor and disadvantage to the adjoining landowners, as well as social utility.'"[284] Moreover, the rule of reasonable use only applied to repelling water, whereas a landowner who diverts surface water from its natural flow resulting in substantial damage to adjacent landowners is liable regardless of the reasonableness of his or her actions.

It appears that 21 states apply the reasonable use rule:[285] Alaska,[286] California,[287] Connecticut,[288] Delaware,[289] Florida,[290] Hawaii,[291] Kentucky,[292] Massachu-

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[275] *Id.* at 475, 566 S.E.2d at 612 (citation omitted)) (noting that the reasonable use test was adopted in Morris Assocs., Inc. v. Priddy, 181 W.Va. 588, 383 S.E.2d 770 (1989)).

[276] *Id.*

[277] Heins Implement Co. v. Mo. Highway & Transp. Comm'n, 859 S.W.2d 681, 689–90 (Mo. 1993) (citations omitted).

[278] 2005 Conn. Super. LEXIS 2783, at *3–4 (Super. Ct. 2005) (Unrept.).

[279] *See* 182 Conn. 484, 438 A.2d 739 (1980).

[280] 2005 Conn. Super. Lexis 2783, at *4.

[281] *Id.* at *4–5 (*quoting* Tide Water Oil Sales Corp. v. Shimelman, 114 Conn. 182, 189–90, 158 A. 229, 231 (1932) (emphasis in original)).

[282] *Id.* at *5 (citation omitted).

[283] *Id.* (citation omitted).

[284] *Id.* (*quoting* Ferri v. Pyramid Constr. Co, 186 Conn. 682, 686, 443 A.2d 478, 481 (1982)).

[285] C.f., Davis, *supra* note 214, at 8–9.

[286] Ostrem v. Alyeska Pipeline Serv. Co*.,* 648 P.2d 986 (Alaska 1982); Weinberg v. N. Alaska Dev. Corp*.,* 384 P.2d 450 (Alaska 1963) (adopting New Jersey Supreme Court's formulation of the rule in Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956)).

[287] Arreola v. County of Monterey*,* 99 Cal. App. 4th 722, 122 Cal. Rptr. 2d 38 (Cal. App. 6th Dist. 2002), *review denied*, 2002 Cal. LEXIS 6194 (Cal. Sept. 18, 2002); Locklin v. City of Lafayette, 7 Cal. 4th 327, 27 Cal. Rptr. 2d 613, 867 P.2d 724 (1994); Bunch v. Coachella Valley Water Dist., 15 Cal. 4th 432, 63 Cal. Rptr. 2d 89, 935 P.2d 796 (1997).

[288] Crowel v. Kogut*,* 2005 Conn. Super. LEXIS 2783, at *1.

[289] Weldin Farms, Inc. v. Glassman, 414 A.2d 500 (Del. 1980).

[290] Westland Skating Ctr., Inc. v. Gus Machado Buick, Inc., 542 So. 2d 959 (Fla. 1989).

[291] Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co., 100 Haw. 97, 58 P.3d 608 (2002); Cootey v. Sun Investment, Inc., 68 Haw. 480, 718 P.2d 1086 (1986).

setts,[293] Minnesota,[294] Mississippi,[295] Missouri,[296] Nevada,[297] New Hampshire,[298] New Jersey,[299] North Carolina,[300] North Dakota,[301] Ohio,[302] Rhode Island,[303] Utah,[304] West Virginia,[305] and Wisconsin.[306]

No present case law was located for either Vermont or Wyoming that applied any of the above rules.[307]

D.3. Other Rules Applicable to Liability for Surface Water

Most of the highway cases for damages caused by drainage have arisen because of the failure of public officials to control surface water properly; for example, in connection with highway construction, improvements, or facilities that caused a change in the natural flow of surface water.[308] There is authority that an

[292] Mason v. City of Mt. Sterling, Transp., 122 S.W.3d 500 (Ky. 2003), *rehearing denied*, 2004 Ky. LEXIS 22 (Ky. 2004) (noting that Kentucky follows a modified version of the civil law rule); Cabinet, Bureau of Highways v. Leneave, 751 S.W.2d 36 (Ky. Ct. App. 1988); Ky. Dep't of Highways v. S & M Land Co., 503 S.W.2d 495 (Ky. Ct. App. 1972); Klutey v. Commonwealth, Dep't of Highways, 428 S.W.2d 766 (Ky. Ct. App. 1967).

[293] Trenz v. Town of Norwell, 68 Mass. App. Ct. 271, 861 N.E.2d 777 (Mass. Ct. App. 2007); DeSanctis v. Lynn Water and Sewer Comm'n, 423 Mass. 112, 666 N.E.2d 1292 (1996); Triangle Center, Inc. v. Dep't of Pub. Works, 386 Mass. 858, 438 N.E.2d 798 (1982); Tucker v. Badoian, 376 Mass. 907, 384 N.E.2d 1195 (1978) (Kaplan, J., concurring) (announcing intention to replace common enemy rule with reasonable use doctrine).

[294] Wendinger v. Forst Farms, Inc., 662 N.W.2d 546 (Minn. Ct. App. 2003) (applying reasonable use doctrine in nuisance action); Gillette v. Peterson, 2004 Minn. App. LEXIS 614, at *1 (Minn. Ct. App. 2004) (Unrept.); Kral v. Boesch, 557 N.W.2d 597 (Minn. Ct. App. 1996); Evers v. Willaby, 444 N.W.2d 856 (Minn. Ct. App. 1989); Enderson v. Kelehan, 226 Minn. 163, 32 N.W.2d 286 (1948).

[295] Martin v. Flanagan, 818 S.W.2d 1124 (Miss. 2002); Hall v. Wood, 443 S.W.2d 834 (Miss. 1983).

[296] Klokkenga v. Carolan, 200 S.W.3d 144 (Mo. App., W. Dist. 2006) (noting that Missouri adopted the reasonable use doctrine to replace the common enemy doctrine); Heins Implement Co. v. Mo. Highway & Transp. Comm'n, 859 S.W.2d 681 (Mo. 1993).

[297] County of Clark v. Powers, 96 Nev. 497, 611 P.2d 1072 (1980).

[298] Dudley v. Beckley, 132 N.H. 568, 567 A.2d 573 (1989); Franklin v. Durgee, 71 N.H. 186, 51 A. 911 (1901).

[299] Posey v. Bordentown Sewerage Auth., 171 N.J. 172, 793 A.2d 607 (2002); Sheppard v. Frankford, 261 N.J. Super. 5, 617 A.2d 666 (N.J. App. 1992).

[300] Rainey v. St. Lawrence Homes, Inc., 174 N.C. App. 611, 621 S.E.2d 217 (N.C. Ct. App. 2005); BNT Co. v. Baker Precythe Dev. Co., 151 N.C. App. 52, 564 S.E.2d 891 (N.C. Ct. App. 2002); Pendergrast v. Aiken, 293 N.C. 201, 236 S.E.2d 787 (1977).

[301] Burlington N. and Santa Fe Ry. Co. v. Benson County Water Res. Dist., 2000 ND 182, 618 N.W.2d 155 (2000); Martin v. Weckerly, 364 N.W.2d 93 (N.D. 1985).

[302] Verchio v. Gregory, 2007 Ohio 832 (Ohio App., 8th Dist. 2007), *discretionary appeal not allowed*, 2007 Ohio 4884 (Ohio 2007); McGlashan v. Spade Rockledge Terrace Condo Dev. Corp., 62 Ohio St. 2d 55, 402 N.E.2d 1196 (Ohio 1980); Mays v. Moran, 1999 Ohio App. LEXIS 1245 (Ohio Ct. App. 1999), *cause dismissed*, 85 Ohio St. 3d 1468, 709 N.E.2d 173 (1999).

[303] Zannini v. Arboretum Dev., 1988 R.I. Super. LEXIS 197 (R.I. Super. Ct. 1988) (Unrept.); Butler v. Bruno, 115 R.I. 264, 341 A.2d 735 (1975).

[304] Lovendahl v. Jordan Sch. Dist., 2002 UT 130, 63 P.3d 705 (2002); Morgan v. Quailbrook Condo. Co., 704 P.2d 573 (Utah 1985).

[305] *In Re: Flood Litigation*, 216 W. Va. 534, 607 S.E.2d 863 (2004); Graham v. Beverage, 211 W. Va. 466, 566 S.E.2d 603 (2002).

[306] Osberg v. Kienitz, 292 Wis. 2d 485, 713 N.W.2d 191 (Wis. Ct. App. 2006); Getka v. Lader, 71 Wis. 2d 237, 238 N.W.2d 87 (1976); Wisconsin v. Deetz, 66 Wis. 2d 1, 224 N.W.2d 407 (1974).

[307] *See* Davis, *supra* note 214 (stating that neither jurisdiction applies any of the rules discussed) (*citing* Lee v. Brown, 357 P.2d 1106, 1109 (Wyo. 1960); Tompkins v. Byrtus, 72 Wyo. 537, 267 P.2d 753 (1954); Canton v. Graniteville Fire Dist. No. 4, 171 Vt. 551, 762 A.2d 808 (Vt. 2000)).

[308] *See* Semon v. City of Shreveport, 389 So. 2d 438 (La. App., 2d Cir. 1980) (judgment affirmed for homeowner in connection with construction of highway ramp); Beane v. Prince Georges County, 20 Md. App. 383, 315 A.2d 777 (Md. Ct. Spec. App. 1974) (record established an unreasonable use of surface water by the county that warranted injunctive relief); Musumeci v. State, 43 A.D. 2d 288, 351 N.Y.S.2d 211 (N.Y. App. 4th Dep't 1974) (state not immune for nuisance it caused by collecting water from its land into an artificial channel and discharging it onto the landowners' farms); Wells v. State Highway Comm'n, 503 S.W.2d 689 (Mo. 1973) (affirming judgment for the property owners in case in which extensive highway grading damaged owners' lake); Spradley v. S.C. State Highway Dep't, 256 S.C. 431, 182 S.E.2d 735 (1971) (affirming a judgment that surface water had resulted in a taking).

agency may have a responsibility to anticipate future needs with respect to surface water.[309]

Transportation agencies may avoid such claims for surface water damages by showing that they have engineered the project properly. The failure to do so may result in compensation being awarded to the affected property owner; for example, for an inadequate culvert.[310] In planning a project it may be necessary to perform a satisfactory analysis of drainage requirements;[311] in some circumstances to consider future development as well;[312] and to consider the possibility of soil erosion.[313]

Finally, although general transportation authorities may be held liable in inverse condemnation only for their own design and construction, even if the governmental authority had the right to review and approve the plans of a developer, there is some authority to the contrary.[314] For example, in *Arreola v. County of Monterey*[315] the court observed that the plaintiffs could recover if their damages were substantially caused by a public agency's design, construction, or maintenance of a flood control project that is shown to have posed an unreasonable risk of harm.[316] The *Arreola* court affirmed the jury's verdict that apportioned damages between the county and a separate legal entity after finding that the county exercised dominion and control over the project concurrently with the public entity.[317] Furthermore, the court stated that a "public entity is a proper defendant in an action for inverse condemnation if the entity substantially participated in the planning, approval, construction, or operation of a public project or improvement that proximately caused injury to private property."[318]

E. UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES FOR FEDERAL AND FEDERALLY-ASSISTED PROGRAMS

E.1. Uniform Relocation Assistance

The URA sets forth with respect to federal and federally-assisted programs the federal policies in subchapter II for relocation assistance and in subchapter III for the acquisition of real property.[319] With the URA, the Congress "intended to provide uniform relief from economic dislocation which occurs in the acquisition of real property for federal or federally assisted programs."[320] The URA's policies seek to provide for "fair, uniform and equitable treatment of all affected persons" as a "direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance."[321]

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[309] Gunstone v. Jefferson County, 2004 Wash. App. LEXIS 499, at *9 (noting that the duty to maintain culverts so as not to obstruct the natural flow of surface water includes removal of an obstruction within a reasonable time after actual or constructive notice); Arreola v. County of Monterey, 122 Cal. Rptr. 2d at 54, 99 Cal. App. 4th at 743 (discussing the imposition of liability in inverse condemnation actions where the public entity fails to maintain a project) (*citing* McMahan's of Santa Monica v. City of Santa Monica, 146 Cal. App. 3d 683, 194 Cal. Rptr. 582 (Cal. App. 2d Dist. 1983), *disapproved on other grounds*, 15 Cal. 4th 432, 935 P.2d 796 (Cal. 1997); Pacific Bell v. City of San Diego, 81 Cal. App. 4th 596, 96 Cal. Rptr. 2d 897 (Cal. App. 4th Dist. 1997) (involving a city's failure to accelerate its program of water main replacement where a water rate study showed that it was necessary to prevent deterioration of the system)). *See also* Dep't of Transp. v. Hanes, 448 So. 2d 1130, 1132 (Fla. App. 1st Dist. 1984)

> (DOT is responsible for coordination of the total highway and road system within the state, including the operation and maintenance of roads and culverts, drains, sluices, ditches, etc. See §§ 334.11; 334.03(7); 335.04(4); Florida Statutes. DOT is also charged with a responsibility for anticipating future needs within the total environment of the community. *See* § 334.211(2)(a) and (f), Florida Statutes. And as the governmental entity with operational and maintenance responsibility DOT is liable for torts related thereto. *See* § 337.29(3), Florida Statutes.).

[310] Heins Implement Co. Mo. Hwy. & Transp. Comm., 859 S.W.2d at 691.

[311] K & W Elect., Inc. v. Iowa, 712 N.W.2d 107 (Iowa 2006) (affirming judgment that the state was immune from tort liability because the highways were constructed in accordance with a generally recognized engineering standard, criterion, or design theory in existence at the time of the construction and inverse condemnation claim was barred by the statute of limitations).

[312] Dep't of Transp. v. Hanes, 448 So. 2d 1130, 1132 (Fla. App. 1st Dist. 1984).

[313] Casado v. Melas Corp., 69 N.C. App. 630, 318 S.E.2d 247 (N.C. Ct. App. 1984).

[314] *See* Cootey v. Sun Inv., 68 Haw. 480, 718 P.2d 1086 (1986).

[315] 99 Cal. App. 4th 722, 122 Cal. Rptr. 2d 38 (Cal. App. 6th Dist. 2002), *review denied*, 2002 Cal. LEXIS 6194 (Cal. 2002).

[316] *Id.* at 761, 122 Cal. Rptr. 2d at 69.

[317] *Id.* at 760, 122 Cal. Rptr. 2d at 68.

[318] *Id.* at 761, 122 Cal. Rptr. 2d at 69 (*citing* Wildensten v. East Bay Reg'l Park Dist., 231 Cal. App. 3d 976, 283 Cal. Rptr. 13 (Cal. App. 1st Dist. 1991) (applying the "substantial-participation" test)); Frustuck v. Fairfax, 212 Cal. App. 2d 345, 28 Cal. Rptr. 357 (Cal. App. 1st Dist. 1963) (involving a city's approval of a subdivision and drainage plans for private property)).

[319] 42 U.S.C. § 4601, *et seq.* (2007). *See also* Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs, 49 C.F.R. § 24, *et seq.* (2007).

[320] Nagi v. United States, 751 F.2d 826, 829 (6th Cir. 1985) (reversing a lower court that had upheld a determination by a state agency that persons relocated were ineligible for replacement housing benefits because of extended travel abroad) (*citing* Alexander v. United States Dep't of Hous. and Urban Dev., 441 U.S. 39, 99 S. Ct. 1572, 1581, 60 L. Ed. 2d 28 (1979)).

[321] *See* 42 U.S.C. § 4621(a)(2) and (b) (2007); *see also* 49 C.F.R. §§ 24.1 and 24.101 (2007) (setting for the purpose of the regulations and the applicability of acquisition requirements).

Thus, the subchapter on relocation assistance provides for the payment of certain moving and related expenses to persons who are relocated;[322] expenses in searching for a replacement business or farm and the reestablishment of a displaced farm, nonprofit organization, or small business;[323] replacement housing for homeowners;[324] replacement housing for tenants and certain other persons;[325] and housing replacement by a federal agency as a last resort.[326] The URA also permits a displaced person who is eligible for payments under 42 U.S.C. § 4622(a) to elect a fixed expense and dislocation allowance.[327]

As explained in more detail below, a displaced person means an individual, partnership, corporation, or association who moves from real property, or moves personal property from real property, in response to an acquiring agency's written notice of intent to acquire real property,[328] or because of the permanent displacement of a residential tenant, a small business, or a farm operation in connection with a federal or federally-assisted acquisition of real property.[329] During the early stages of development of any project subject to the Act, an acquiring agency is to develop information regarding the estimated number of covered owners to be displaced and afford them relocation advisory services.[330] These services are to include a determination of relocation needs of each person to be displaced and current information on the availability and purchase price of comparable replacement dwellings.[331]

The URA does not create property rights that otherwise do not exist but only grants certain benefits by virtue of property rights that exist under the law.[332] The URA requires all federal agencies[333] having acquisition programs or projects to establish regulations and procedures for relocation assistance to be provided to displaced persons and businesses.[334] For the most recent federal regulations promulgated pursuant to the URA, see 49 C.F.R. Part 24.[335]

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[322] 42 U.S.C. § 4622(a)(1)-(4) (2007). *See* 42 U.S.C § 4626 (2007) (addressing the potential lack of comparable replacement dwellings and authorizing greater payments than those authorized under §§ 4623 and 4624); 42 U.S.C. § 4630 (2007) (requiring as a condition for any federal assistance resulting in the displacement of any person that fair and reasonable payments, assistance, and comparable replacement dwellings will be available). *See also* 49 C.F.R. § 24.204 (2007) (concerning availability of comparable replacement dwelling before displacement); 49 C.F.R. § 24.205 (2007) (concerning relocation planning, advisory services, and coordination); 49 C.F.R. § 24.301 (2007) (concerning payment for actual reasonable moving and related expenses; 49 C.F.R. § 24.302 (2007) (concerning election of fixed payment for residential moving expenses); 49 C.F.R. § 24.303 (2007) (concerning related nonresidential eligible expenses); 49 C.F.R. § 24.304 (2007) (concerning payment for expenses actually incurred in nonresidential moves); 49 C.F.R. § 24.305 (2007) (concerning election of a fixed payment for nonresidential moving expenses); 49 C.F.R. § 24.403 (2007) (additional rules governing replacement housing payments); 49 C.F.R. § 404 (2007) (concerning replacement housing as a last resort); and 49 C.F.R. § 24.501-503 (2007) (concerning replacement housing payments in connection with mobile homes).

[323] *See* 42 U.S.C. § 4622(a)(2)-(4) (2007).

[324] *See* 42 U.S.C. § 4623 (2007). *See* 42 U.S.C. § 4624 (2007) (extending benefits to qualifying tenants and certain others). *See also* 49 C.F.R. § 24.401 (2007) (concerning replacement housing payment for 180-day homeowner-occupants); 49 C.F.R. § 24.402 (2007) (concerning replacement housing payment for 90-day occupants); 49 C.F.R. §§ 24.501–503 (2007) (extending benefits to displaced 180-day mobile-home owners and 90-day mobile home occupants).

[325] *See* 42 U.S.C. § 4624 (2007).

[326] *See* 42 U.S.C. § 4626 (2007).

[327] *See* 42 U.S.C. § 4622(b) (2007); *see* 42 U.S.C. § 4622(c) (2007) (providing for an election of a fixed payment for a displaced business or farm operation). *See also* 49 C.F.R. § 24.302 (2007) (concerning a fixed payment for residential moving expenses).

[328] *See* 49 C.F.R. § 24.203 (2007) (setting forth the notice requirements under the URA).

[329] *See* 42 U.S.C. §§ 4601(5)-(6) (2007); *see* 49 C.F.R. § 24.2(a)(9)(i) (2007). *Compare* 42 U.S.C. §§ 4601(5)-(6) (2007) and 49 C.F.R. 24.2(a)(9)(i) (2007) *with* 42 U.S.C. § 4601(6)(B) (2007) and 49 C.F.R. § 24.2(a)(9)(ii) (2007) (excluding from the definition of a displaced person an unlawful occupant or a subsequent occupant of property after it has been acquired). Note that 42 U.S.C § 4625 (2007) requires that planning of projects consider potential problems with any displaced persons, including providing such persons advisory services. *See also* 49 C.F.R. § 24.205 (2007) (relocation planning, advisory services, and coordination).

[330] *See* 49 C.F.R. § 24.205 (2007).

[331] *See* 42 U.S.C. § 4625(c)(1)-(6) 2007; *see also* 49 C.F.R. § 24.205(a)(1)-(5) (2007).

[332] Consumers Power Co. v. Costle, 468 F. Supp. 375, 379 (E.D. Mich. 1979), *aff'd*, 615 F.2d 1146 (6th Cir. 1980) (holding that "[i]n order to prove an entitlement to benefits, it is necessary to find that the plaintiff has a basis in law existing outside the act for its claim"), *See also* 42 U.S.C. § 4602 (2007) (stating that the provisions of section 4651 of this title "create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation. Nothing in this act shall be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of value or of damage").

[333] The term "federal agency" means "any department, agency, or instrumentality in the executive branch of the Government, any wholly owned Government corporation, the Architect of the Capitol, the Federal Reserve banks and branches thereof, and any person who has the authority to acquire property by eminent domain under Federal law." 42 U.S.C. § 4601(1) (2007).

[334] *See* 42 U.S.C. § 4605 (2007) (requiring the DOT to promulgate regulations regarding eligibility); 42 U.S.C. § 4604 (2007) (requiring the DOT to promulgate regulations regarding state agency certification); 42 U.S.C. § 4622 (2007) (noting that the DOT may issue regulations regarding moving expenses); 42 U.S.C. § 4626 (2007) (stating that the DOT shall issue regulations regarding housing replacement as a last resort); 42 U.S.C. § 4633 (2007) (requiring the DOT to develop, publish, and issue regulations to carry out the URA).

[335] *See also* Pres. Mem., "Improvement of administration of this chapter," 50 Fed. Reg. 8953 (1985) (noting that the DOT is designated to coordinate and monitor the URARA implementa-

E.2. Displaced Persons, Eligibility, and Benefits

E.2.a. Definition of a Displaced Person

A displaced person

> means…any person who moves from real property, or moves his personal property from real property…as a direct result of a written notice of intent to acquire or the acquisition of such real property in whole or in part for a program or project undertaken by a Federal agency or with Federal financial assistance….[336]

A displaced person also includes

> any person who moves from real property, or moves his personal property from real property…on which such person is a residential tenant or conducts a small business, a farm operation, or a business…as a direct result of rehabilitation, demolition, or such other displacing activity…under a program or project undertaken by a Federal agency or with Federal financial assistance

where such displacement is determined to be permanent.[337]

Certain persons under the Act do not qualify as displaced persons. For example, a displaced person does not include "a person who has been determined, according to criteria established by the head of the lead agency, to be either in unlawful occupancy of the displacement dwelling or to have occupied such dwelling for the purpose of obtaining assistance under this chapter…."[338] The regulations, moreover, provide a "nonexclusive listing" of persons who are not considered to be displaced, such as "[a] person who moves before the initiation of negotiations…unless the Agency determines that the person was displaced as a direct result of the program or project";[339] "[a] person who initially enters into occupancy of the property after the date of its acquisition for the project";[340] or "[a] person who has occupied the property for the purpose of obtaining assistance under the Uniform Act…."[341]

A holdover tenant in possession is not entitled to receive relocation assistance if the acquiring public agency does not require the tenant to move or if the tenant moves as a result of the expiration of the lease. However, if a tenant is ordered subsequently to vacate the premises for the construction of a project while in lawful possession, even if the tenant has entered into a new lease with the agency, the tenant is entitled to relocation assistance.[342] Similarly, persons who are eligible for benefits as owner-occupants when their property is acquired retain these benefits even if they enter into short-term leases with the acquiring agency until actually required to vacate.[343]

E.2.b. Eligibility

Although in 42 U.S.C. § 4622 (relating to moving and related expenses) and § 4625 (relating to relocation planning, assistance coordination, and advisory services) no period of required occupancy is stated, there is a required period of occupancy stated in § 4623 concerning replacement housing for homeowners. Accordingly, in *Tullock v. State Highway Commission of Missouri,*[344] the Eighth Circuit held with respect to §§ 4622 and 4625 that Congress intended that all persons who move from real property as a result of the acquisition of property be entitled to reimbursement of moving expenses and advisory assistance regardless of the date occupancy commenced.[345]

Thus, with respect to § 4623 one must be "displaced from a dwelling *actually owned and occupied* by such displaced person for not less than [180] days prior to the initiation of negotiations for the acquisition of the property."[346] Furthermore, in 42 U.S.C. § 4624 relating to replacement housing for tenants, the dwelling must have been "actually and lawfully occupied by such displaced person for not less than 90 days immediately prior to…the initiation of negotiations for acquisition of such dwelling…."

Actual or constructive occupancy on the date a public agency formally announces its intention to acquire the

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tion while instructing all affected executive departments and agencies to propose common regulations under it).

[336] 42 U.S.C. § 4601(6)(A)(i)(I) (2007).

[337] 42 U.S.C. § 4601(6)(A)(i), (i)(II) (2007).

[338] 42 U.S.C. § 4601(6)(B)(i) (2007).

[339] 49 C.F.R. § 24.2(a)(9)(ii)(A) (2007).

[340] 49 C.F.R. § 24.2(a)(9)(ii)(B) (2007).

[341] 49 C.F.R. § 24.2(a)(9)(ii)(C) (2007). The regulations should be consulted for the complete listing at 49 C.F.R. § 24.2(a)(9)(ii)(A)-(M) (2007).

[342] 49 C.F.R. § 24.2(a)(9)(K) (2007) (excluding from displaced persons a person who is found to be in unlawful occupancy or a person who been evicted for cause). *See* 49 C.F.R. § 24.2(a)(29) (2007) (defining an unlawful occupant as "a person who occupies without property right, title or payment of rent or a person legally evicted, with no legal rights to occupy a property under State law" but stating that "[a]n Agency, at its discretion, may consider such person to be in lawful occupancy") and 49 C.F.R. § 24.206(a) (creating a presumption of lawful occupancy when a person occupies the real property legally on the date of the initiation of negotiations with exceptions). *See also* Superior Strut & Hanger Co. v. City of Oakland, 72 Cal. App. 3d 987, 995–96, 140 Cal. Rptr. 515, 518–19 (Cal. App. 1st Dist. 1977) [*superseded by statute as stated in* Melamed v. City of Long Beach, 15 Cal. App. 4th 70, 18 Cal. Rptr. 2d 729 (Cal. App. 2d Dist. 1993)] (applying the California Relocation Assistance Act, CAL. GOV'T CODE § 7260, *et seq*., and holding that the plaintiff was entitled to relocation benefits even though the lease had expired because the Port of Oakland had informed its tenant that it would eventually demolish the building but would continue to rent the building to the plaintiff during the interim and that the plaintiff's move was the result of an acquisition and a written notice to vacate).

[343] *See, e.g.,* Albright v. State of California, 101 Cal. App. 3d at 21, 161 Cal. Rptr. at 321 (the court stating in a matter involving the state relocation assistance law that the court could not accept the argument that "individuals who are required to move because of a public entity's acquisition of their property would be ineligible for relocation benefits simply because they continued to rent from the public entity in the interim").

[344] 507 F.2d 712 (8th Cir. 1974).

[345] *Id.* at 715–17.

[346] 42 U.S.C. § 4623(a)(1) (2007) (emphasis supplied).

property for a proposed project is a prerequisite to receiving relocation benefits even if a person actually owns the property on that date.[347] The URA provides "protection…[only] for those who moved after receiving formal notice of an acquisition because of a proposed project, but not to those who moved without notice, based merely on speculation that acquisition might take place."[348] The URA's intent is to exclude from coverage persons who otherwise might attempt to obtain substantial relocation benefits by moving into property after the acquisition process had begun.[349]

Thus, for purposes of § 4623 the occupancy requirement is critical. For instance, owners of property acquired by a city who do not occupy the property are not displaced persons and therefore are not entitled to relocation benefits.[350] However, under the constructive occupancy rule that developed under the URA, as explained in *Ledesma v. Urban Renewal Agency,*[351]

> [o]rdinarily, the 180 day occupancy requirement for homeowners is intended to be the period immediately preceding initiation of negotiations. However, if a displaced homeowner has been required to temporarily leave his home for such reasons as being drafted into the Armed Forces, being detailed to another geographic location by his employer, or otherwise being employed for a limited period of time in a location which does not permit fulltime residency in his home, he may be deemed to be in 'constructive occupancy.' 'Constructive occupancy' may also be determined to exist if a person is temporarily confined to a hospital or is otherwise absent from his dwelling for reasons of health or an emergency. Determinations that a homeowner was in 'constructive occupancy' during the 180 day period prior to initiation of negotiations must be made on a case-by-case and HUD concurrence is required before a payment may be made. This concept of 'constructive occupancy' does not apply to an absentee owner.[352]

Certain displaced tenants or owner-occupants may be entitled to receive a payment of up to $5,250 for rent or down-payment assistance.[353] To be eligible, the displaced person must have "actually and lawfully occupied the displaced dwelling for at least 90 days immediately prior to the initiation of negotiations, and…rented, or purchased, and occupied a decent, safe, and sanitary replacement dwelling within one year…."[354] The formula in 49 C.F.R. § 24.402(b)-(c) specifies the amount that is to be paid to such displaced person.[355]

As stated, a person who moves in mere anticipation that the property will be acquired for a public project is not within the class of displaced persons who may obtain the benefits of the Act.[356] Also, if one enters into occupancy of a dwelling after its ownership has passed to an acquiring agency, the person is ineligible for a moving expense and dislocation allowance under the URA.[357] On the other hand, a person may be eligible to receive benefits even if the move is not from the actual parcel of property being acquired by the public agency.[358] Other situations, of course, have arisen requiring the courts to decide whether one is a displaced person who qualifies for assistance.[359]

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[347] *See* Messer v. V.I. Urban Renewal Bd., 623 F.2d 303, 306–07 (3d Cir. 1980). *See also* Carr v. City of Pittsburgh, 837 A.2d 655 (Pa. Commw. 2003), *appeal denied*, 582 Pa. 690, 870 A.2d 325 (2005) (noting that a tenant must be in legal possession at the time of acquisition under Pennsylvania's Uniform Relocation Act).

[348] S*ee* Messer v. V.I. URB, 623 F.2d at 306.

[349] *See* Alexander v. United States Dep't of Hous. and Urban Dev., 441 U.S. 39, 61, 99 S. Ct. 1572, 60 L. Ed. 2d 28 (1979).

[350] *See* Reasor v. City of Norfolk, Va., 606 F. Supp. 788, 791 (E.D. Va. 1984) (holding that "'displaced' persons include occupants, but not owners").

[351] *See* 432 F. Supp. 564 (S.D. Tex. 1977). *See also* Seeherman v. United States Dep't of Hous. and Urban Dev., 404 F. Supp. 1318, 1319, n.1 (M.D. Pa. 1975) (stating also that the constructive occupancy rule was not codified anywhere).

[352] *Id.* at 567 n.1 (stating that "[w]hile the rule is not definitively codified, it presumably stems from the Act's mandate that 'fair and equitable treatment' of those displaced as a result of federally assisted programs is required").

[353] *See* 49 C.F.R. § 24.402(c).

[354] *See* 49 C.F.R. § 24.402(a)(1)-(2).

[355] 49 C.F.R. § 24.503 provides the same assistance to displaced tenants or owner-occupants of a mobile home and/or site. *See* 49 C.F.R. § 24.503(a)-(c) (stating that the same general requirements found in 49 C.F.R. § 24.402 must be met for eligibility under this section).

[356] *See also* Messer v. V.I. Urban Renewal Bd., 623 F.2d 303, at 307 (holding that a person who moves before receiving a formal notice of intent to acquire the property is not entitled to benefits under the URA). *See also* 49 C.F.R. § 24.2(a)(9)(i)(A)-(C) (2007) (setting forth three bases for one to be deemed to be a displaced person, including a person who moves from real property as a *direct result* of written notice of intent to acquire); 49 C.F.R. § 24.2(a)(9)(i) (2007) (defining displaced person and appearing to differentiate between provisions that require occupancy and those that do not; 49 C.F.R. § 24(a)(9)(C) (2007) (excluding from the definition "a person who has occupied the property for the purpose of obtaining assistance under the Uniform Act").

[357] S*ee* Lewis v. Brinegar, 372 F. Supp. 424, 430–31 (W.D. Mo. 1974).

[358] S*ee* Beaird-Poulan Div. of Emerson Elec. Co. v. Dep't of Highways, State of La., 441 F. Supp. 866, 871–72 (W.D. La. 1977), *aff'd*, 616 F.2d 255 (5th Cir. 1980), *cert. denied*, 449 U.S. 971, 101 S. Ct. 383, 66 L. Ed. 2d 234 (1980), *reh. denied*, 449 U.S. 1104, 101 S. Ct. 903, 66 L. Ed. 2d 832 (1981).

[359] S*ee* Nagi v. United States*,* 751 F.2d 826 (6th Cir. 1985) (holding that a displaced couple's extended travel abroad did not show that the couple had separate tenancies that would preclude them from relocation benefits); Norfolk Redevelopment and Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Va.*,* 464 U.S. 30, 104 S. Ct. 304, 78 L. Ed. 2d 29 (1983) (holding that a utility company was not a displaced person within the meaning of the URA and that the Act did not deal with the separate problem posed by relocation of utility service lines); Alexander v. United States Dep't of Hous. and Urban Dev., 441 U.S. 39, 62, 99 S. Ct. 1572, 60 L. Ed. 2d 28 (1979) (holding that inasmuch as HUD had acquired the property as a result of a default under a mortgage the tenants were not displaced persons because HUD had not acquired the property in furtherance of a federal project). With respect to cases arising under

E.2.c. Relocation Benefits

Any covered person, whether owner-occupant or tenant of a dwelling, is entitled under the URA to payment for the actual expenses incurred because of relocation. As provided in 42 U.S.C. § 4622(a)(1)-(4), allowable expenses include, for example,

> (1) actual reasonable expenses in moving…; (2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation….; (3) actual reasonable expenses in searching for a replacement business or farm….; [and] (4) actual reasonable expenses necessary to reestablish a displaced farm, nonprofit organization, or small business at its new site, but not to exceed $10,000….[360]

As far as a partial taking of property is concerned, if a project would only take a portion of the real estate and leave the owner with an uneconomic remnant, the agency must make an offer to acquire the entire property.[361]

Pursuant to 42 U.S.C. § 4622(b) and 49 C.F.R. § 24.302, a covered person displaced from a dwelling who does not wish to complete the necessary documentation may receive "an expense and dislocation allowance." A displaced business also may accept a fixed payment "in lieu of the payments for actual moving and related expenses, and actual reasonable reestablishment expenses provided by §§ 24.301, 24.303 and 24.304. Such fixed payment…shall equal the average annual net earnings of the business…but not less than $1,000 nor more than $20,000."[362]

As for a displaced farm operation, the owner "may choose a fixed payment, in lieu of the payments for actual moving and related expenses and actual reasonable reestablishment expenses, in an amount equal to its average annual net earnings…but not less than $1,000 nor more than $20,000."[363] A farm operation must be conducted solely or primarily for the production of one or more agricultural products or commodities for sale or home use and be producing customarily such products or commodities in such quantity to be capable of contributing materially to the operator's support.[364]

Under 42 U.S.C. § 4623(a)(1), the "head of the displacing agency shall make an additional payment not in excess of $22,500 to any displaced person" otherwise meeting the section's 180-day ownership and occupancy requirement that is to include, for example, "[t]he amount, if any, which when added to the acquisition cost of the dwelling acquired by the displacing agency, equals the reasonable cost of a comparable replacement dwelling."[365] The regulations address what constitutes a comparable replacement dwelling.[366] As now provided in 49 C.F.R. § 24.403(4), "[t]o the extent feasible, comparable replacement dwellings shall be selected from the neighborhood in which the displacement dwelling was located or, if that is not possible, in nearby or similar neighborhoods where housing costs are generally the same or higher."[367]

For comparable housing to be acceptable, it must meet the definition of "decent, safe and sanitary" as provided in 49 C.F.R. § 24.2(a)(8), which provides in part that "decent, safe, and sanitary dwelling means a dwelling which meets local housing and occupancy codes." However, the dwelling may satisfy other standards as stated in the regulations that "are not met by the local code shall apply unless waived for good cause by the Federal Agency funding the project."[368]

If an owner is required to pay a higher rate of interest to acquire a substitute dwelling than he or she was paying on the dwelling acquired for the project, the owner is entitled to payment for additional interest.[369] A qualified relocatee may recover closing costs incidental to the purchase of a replacement dwelling.[370] Reimbursable incidental costs may include other items if the amounts involved are reasonable and if such costs are normally paid by the buyer.[371] If certain requirements are satisfied, "[a] tenant or owner-occupant displaced from a dwelling is entitled to a payment not to exceed

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the Pennsylvania and California relocation assistance laws, *see also Carr*, 837 A.2d at 661 (holding that the city's purchase of a mobile home park from the owner for purposes of building a community recreation center was not an "acquisition" and thus former residents of the park were not displaced persons entitled to reimbursement for their relocation expenses); Kong v. City of Hawaiian Gardens Redevelopment Agency, 101 Cal. App. 4th 1317, 125 Cal. Rptr. 2d 1 (Cal. App. 2d Dist. 2002) (concluding that the plaintiff did not forfeit eligibility for relocation payments by continued subleasing of the premises).

[360] *See* 49 C.F.R. § 24.301(g)(1)-(18) (2007) (regarding various expenses eligible for reimbursement). Note, however, that a business relocatee is not entitled to compensation under the URA for expenses that constitute an enhancement. *See* Supreme Oil Co. v. Metro. Transp. Auth., 157 F.3d 148, 151–52 (2d Cir. 1998), *cert. denied*, 528 U.S. 868, 120 S. Ct. 167, 145 L. Ed. 2d 142 (1999) (holding that nothing under the URA suggests a continuing obligation on the part of the federal government to pay for a business expansion or to comply with local codes after the business's initial relocation).

[361] Supreme Oil Co. v. Metro. Transp. Auth., 157 F.3d at 151–52.

[362] 49 C.F.R. § 24.304(c) (2007). *See also* 49 C.F.R. §§ 24.305(a)(1)-(6) (2007) for requirements that must be met by a business to qualify for the election.

[363] 49 C.F.R. § 24.304(c) (2007).

[364] 49 C.F.R. § 24.2(a)(12) (2007).

[365] 42 U.S.C. § 4623(a)(1)(B) (2007).

[366] 49 C.F.R. § 24.2(a)(6) (2007).

[367] *Compare* 49 C.F.R. § 24.403(4) (2007) with Mejia v. United States Dep't of Hous. and Urban Dev., 518 F. Supp. 935, 938 (N.D. Ill. 1981) (holding that a comparable dwelling does not mean a dwelling in the "immediate neighborhood.").

[368] See 49 C.F.R. § 24.2(a), (a)(8)(i)-(vii) (2007) for standards to be met that are not satisfied by the local code.

[369] *See* 42 U.S.C. § 4623(a)(1)(B) (2007); *see also* 49 C.F.R. § 24.401(d) (2007).

[370] *See* 42 U.S.C. § 4623 (a)(1)(C) (2007); *see also* 49 C.F.R. § 24.401(e) (2007).

[371] *See* 42 U.S.C. § 4623 (a)(1)(C) (2007); *see also* 49 C.F.R. § 24.401(b)(3) (2007).

$5,250 for rental assistance…or downpayment assistance…."[372]

Finally, as provided in 49 C.F.R. § 24.3, "[n]o person shall receive any payment under this part if that person receives a payment under Federal, State, local law, or insurance proceeds which is determined by the Agency to have the same purpose and effect as such payment under this part."[373] Thus, if the replacement housing payments are accepted by the homeowner under the relocation aspect of the case, the homeowner would not be entitled to additional payments in the condemnation until such payments exceed the replacement housing payment that would have been paid previously.[374]

E.3. Last Resort Housing

Under the provisions of the URA, no person may be required to move from his dwelling on account of any federal project unless the head of the agency that is displacing the person is satisfied that a comparable replacement dwelling is available to him. A state agency must provide "satisfactory assurances" to the head of the federal agency that comparable replacement dwellings will be available to displaced persons within a reasonable time prior to displacement as a condition to receiving federal financial assistance.[375] The purpose of these assurances is to protect persons displaced under federal law.[376]

Under 49 C.F.R. § 24.404 (a), "[w]henever a program or project cannot proceed on a timely basis because comparable replacement dwellings are not available within the monetary limits for owners or tenants…the Agency shall provide additional or alternative assistance under the provisions of this subpart." It has been held that a state adequately complied with § 4630 when

> [t]he state prepared an extensive relocation plan. As of the date the case was submitted to this court, the MSHC had relocated 312 persons, moved 105 homes and relocated 4 businesses from the southern segment. Almost 1,300 persons and 415 residences have been relocated from the northern segment. In preparing the study, the state defendants interviewed relocatees and tabulated their needs, conducted a spot check of 5 percent of the available housing in the area and considered the availability of financing.[377]

The broad discretion given to a displacing agency to provide last resort housing does not permit it to construct new housing if there is an adequate supply of existing housing available.[378] Similarly, the agency is not required to construct new housing if the agency is able to assure the availability of replacement housing by other means, including making a payment in excess of the statutory limits.[379] The regulations now provide that a comparable replacement dwelling should be "[i]n a location generally not less desirable than the location of the displaced person's dwelling with respect to public utilities and commercial and public facilities, and reasonably accessible to the person's place of employment."[380] The replacement housing does not have to be of the same type as long as it is comparable.[381]

E.4. Uniform Real Property Acquisition Policy

Section 4655 of subchapter III provides that "the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with, an acquiring agency…unless he receives satisfactory assurances from such acquiring agency" that the agency will be guided by the policies and provisions respectively of §§ 4651 and 4652 of the Act and that "property owners will be paid or reimbursed for necessary expenses as specified in sections [4653 and 4654]."[382] Duties imposed under the Act may be delegated from a federal agency to a requesting state agency.[383]

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[372] *See* 49 C.F.R. § 24.402(a) (2007); *see also* 42 U.S.C. § 4624(a)(2) (2007).

[373] *See* 42 U.S.C. § 4631(b) (2007).

[374] *See* 49 C.F.R. § 24.3 (2007) (prohibiting duplicate payments).

[375] 42 U.S.C. § 4630(3) (2007). *See also* 49 C.F.R. § 24.4 (2007).

[376] *See* 42 U.S.C. § 4621 (2007) (setting forth the policies of the URA to provide for fair, uniform, and equitable treatment of all displaced persons as a result of programs or projects undertaken by federal agencies or with the aid of federal funds); *see also* 49 C.F.R. §§ 24.1 (2007) (stating purpose of the URA) and 24.101 (stating applicability of acquisition requirements). *See also* La Raza Unida of S. Alameda County v. Volpe, 488 F.2d 559, 562 (9th Cir. 1973) (holding that it was "much too late for the State to avoid compliance by withdrawing State Project 238 from the Federal-aid system described in 23 U.S.C. § 103").

[377] Katsev v. Coleman, 530 F.2d 176, 180 (9th Cir. 1976). *See* 42 U.S.C. § 4630(3) (2007) (providing that the head of a federal agency shall receive satisfactory assurances that "within a reasonable period of time prior to displacement, comparable replacement dwellings will be available…"). *See also* 49 C.F.R. § 24.4 (2007) (concerning assurances, monitoring, and corrective action).

[378] *See* 49 C.F.R. § 24.404(c)(1)(iii) (2007) (concerning replacement housing of last resort). *See also* Soc'y Hill Civic Ass'n v. Harris, 632 F.2d 1045, 1056–57 (3d Cir. 1980) (holding that the Association had standing to bring claims that a consent decree contemplated housing more luxurious than permissible under applicable regulations).

[379] *See* 49 C.F.R. § 24.404(c)(1) (2007). *See also* Dukes v. Durante, 192 Conn. 207, 216, 471 A.2d 1368, 1378 (Conn. 1984) (noting that the URA requires an acquisition of property for there to be relocation benefits but the state relocation assistance law did not).

[380] *See* 49 C.F.R. § 24.2(a)(6)(v) (2007).

[381] *See* 49 C.F.R. § 24.2(a)(6) (2007) (defining comparable replacement dwelling and stating that it "need not possess every feature of the displacement dwelling").

[382] *See* 42 U.S.C. § 4655(a), (a)(1)-(2) (2007).

[383] *See* 42 U.S.C. § 4604 (2007). *See* 42 U.S.C. § 4632 (2007) (authorizing a state agency to contract with any entity or person for services in connection with relocation assistance programs while requiring that it utilize state or local housing agencies, or like agency, whenever practicable to carry out its obligations under § 4626). *See also* 49 C.F.R. §§ 24.205 (2007)

The URA sets forth a uniform policy on real property acquisition practices. Section 4651 states that

> to encourage and expedite the acquisition of real property by agreements with owners…
>
> (1) The head of a Federal agency shall make every reasonable effort to acquire expeditiously real property by negotiation.
>
> (2) Real property shall be appraised before the initiation of negotiations….
>
> (3) Before the initiation of negotiations for real property, the head of the Federal agency concerned shall establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established…. Where appropriate the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.
>
> (4) No owner shall be required to surrender possession of real property before the head of the Federal agency concerned pays the agreed purchase price, or deposits with the court….
>
> (5) [N]o person lawfully occupying real property shall be required to move from a dwelling…or to move his business or farm operation, without at least ninety days' written notice….
>
> ….
>
> (8) If any interest in real property is to be acquired by exercise of the power of eminent domain, the head of the Federal agency concerned shall institute formal condemnation proceedings….
>
> (9) If the acquisition of only a portion of a property would leave the owner with an uneconomic remnant, the head of the Federal agency concerned shall offer to acquire that remnant.[384]

A provision in 42 U.S.C. § 4651(3) requiring that a statement and summary of the appraisal be provided to the property owner does not entitle the owner to obtain a copy of the full appraisal.[385] Furthermore, a general policy of providing consistent treatment of property owners does not permit a condemnee to introduce into evidence the prices paid by the condemnor for other parcels acquired for the project.[386] The agency doing the displacing need not wait until 90 days before commencement of construction of a project to give a written notice to vacate as required by 42 U.S.C. § 4651(5).[387]

The failure of a state agency to comply with the URA's policies on the acquisition of real property may preclude the state from obtaining federal funding for a project, because "Congress may constitutionally impose conditions on voluntary programs providing states with federal funding."[388] However, an agency's noncompliance with the URA's specific policy provisions on the acquisition of real property has little, if any, effect on the validity of a condemnation action. Although "[n]o person to be displaced shall be required to move…unless at least one comparable replacement dwelling…has been made available to the person,"[389] a public agency is not required to provide relocation assistance or a hearing as a precondition to instituting an eminent domain action or obtaining the right to possession of the property.[390] In the event of litigation, if there is a judgment in favor of an owner or if the government abandons its condemnation proceedings, an owner may recover his or her reasonable litigation expenses.[391] However, an eminent domain action may be halted if state statutory provisions require the condemnor to follow specified acquisition procedures.[392]

E.5. Administrative Appeals and Judicial Review

E.5.a. Determinations of Relocation Benefits Under Subchapter II

Pursuant to 49 C.F.R. § 24.10(b), "[a]ny aggrieved person may file a written appeal with the Agency in any case in which the person believes that the Agency has failed to properly consider the person's application for assistance under this part." As for the time limit for initiating an appeal, "[t]he Agency may set a reasonable time limit for a person to file an appeal. The time limit shall not be less than 60 days after the person receives written notification of the Agency's determination on the person's claim."[393]

(relocation planning, advisory services, and coordination) and 24.601–602 (2007) (concerning certification).

[384] 42 U.S.C. § 4651 (2007). *See also* 49 C.F.R. § 24.102(c) (2007).

[385] *See* Wise v. United States*,* 369 F. Supp. 30, 32 (W.D. Ky. 1973). The court held nevertheless that the agency is "required to furnish the owner with a written statement of the basis for the amount established as a just compensation and a summary of that basis." *Id.*

[386] *See* Rapid City v. Baron, 88 S.D. 693, 699, 227 N.W.2d 617, 620 (1975).

[387] *See also* 815 Mission Corp. v. Superior Court, 22 Cal. App. 3d 604, 99 Cal. Rptr. 538 (Cal. App. 1st Dist. 1971) (involving the state relocation assistance law and rejecting petitioner's argument that the 90-day notice was given prematurely).

[388] *See* City of Columbia, S.C. v. Costle, 710 F.2d 1009, 1014 n.3 (4th Cir. 1983).

[389] *See* 49 C.F.R. § 24.204(a) (2007). *See also* City and County of Honolulu v. Toyama, 61 Haw. 156, 598 P.2d 168 (Haw. 1979) (construing Hawaii's State Assistance to Displaced Persons Act).

[390] *See* United States v. 131.68 Acres of Land, More or Less, 695 F.2d 872, 876 (5th Cir. 1983), *cert. denied*, 464 U.S. 817, 104 S. Ct. 77, 78 L. Ed. 2d 88 (1983).

[391] *See* 42 U.S.C. § 4654 (2007); *see also* 49 C.F.R. § 24.107 (2007).

[392] *See* State *ex rel*. Weatherby Adver. Co. v. Conley, 527 S.W.2d 334, 341–42 (Mo. 1975).

[393] *See* 49 C.F.R. § 24.10(c) (2007).

There was some question initially whether there was a right of review of an acquiring agency's determinations on relocation benefits. However, after a claimant has complied with the process for an administrative appeal but has not received the requested relief, the claimant is entitled to seek judicial review of the relocation benefit decision.[394] Actions taken under those sections of the Act regarding determinations on benefits are reviewable under Title 5 of the Administrative Procedure Act, §§ 551 *et seq*. and 701 *et seq*.[395] Thus, it appears to be settled that a district court has jurisdiction over a suit challenging a denial of benefits under subchapter II on relocation assistance.[396] As the court stated in *Smith v. Missouri State Highway Commission*[397] in reversing a lower court's judgment that had affirmed the highway commission's denial of relocation benefits under the URA:

> We hold that such judicial review of the action of respondent Highway Commission was authorized and appropriate….
>
> Neither do we agree with the respondent, that appellant's rights involved in this entire proceeding, are not "private rights" or that the determination thereof was not a quasi-judicial action…. The right of appellant for assistance and compensation for the necessary relocation of his business was assuredly not a public right….
>
> We hold that the order of respondent denying appellant's claim under the Federal "Highway Relocation Assistance" Act of 1968 was subject to judicial review and that, therefore, we have jurisdiction of this appeal.[398]

A failure to exhaust procedures at the administrative level usually will result in a court's dismissal of an action.[399]

E.5.b. No Private Right to Enforce Federal Real Property Acquisition Policies

Section 4602(a) provides that "the provisions of section 4651 of this title create no rights or liabilities." Thus, it has been held that issues involving acquisition policy set forth in § 4651 of subchapter III of the URA are not justiciable.[400] Although the court held in *Bethune v. United States Department of Housing and Urban Development*[401] that the requirement that a state or local agency must comply with the federal acquisition policies as a condition of receiving federal reimbursement created a right indirectly in displaced persons as third party beneficiaries to enforce compliance with such policies,[402] other federal courts specifically rejected this approach. Because "section 102(a) [42 U.S.C. § 4602(a)]…preclude[s] judicial review of federal and state agency actions under the real property acquisition practices of section 301 [§ 4651] of the Act…[f]ederal question jurisdiction is thus effectively barred."[403] The majority view appears to be that the federal policies and procedures on acquisition of real property may not be enforced based on a breach of contract theory as held in the *Bethune* case, *supra*.[404]

Finally, it has been held also that there is no subject matter jurisdiction to entertain a *private right of action* for equitable or legal relief under the URA.[405]

F. PAYMENTS TO PUBLIC UTILITIES FOR RELOCATION OF FACILITIES IN HIGHWAY RIGHTS-OF-WAY

F.1. Introduction

Although it is common for utilities to be relocated because of highway construction or improvements, there may be an issue regarding who pays for the relocation. Typically one of two situations is presented. The first situation is a matter between the utility and the condemning authority. When utilities are relocated because of highway construction or improvements, absent statutory authority to the contrary, usually the utility has to pay for the relocation.[406] As stated in *CenterPoint*

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[394] *See* United States v. 249.12 Acres of Land, More or Less, 414 F. Supp. 933, 934 (W.D. Okla. 1976) (citations omitted). *See also* 49 C.F.R. § 24.10 (2007) (concerning appeals).

[395] *Id.* at 934 (citations omitted).

[396] *See* 49 C.F.R. § 24.10(b) (2007) (noting that an eligibility determination may be grounds for an appeal). *See also* Supreme Oil Co. v. Metro. Transp. Auth., 157 F.3d at 151; Robzen's, Inc. v. United States Dep't of Hous. and Urban Dev., 515 F. Supp. 228, 231 (M.D. Pa. 1981) (involving 42 U.S.C. § 4622 but not reaching the question of whether there was a direct cause of action under the URA).

[397] 488 S.W.2d 230 (Mo. Ct. App. Kansas City Dist. 1972).

[398] *See id.* at 234–35.

[399] *See* 49 C.F.R. § 24.10 (2007).

[400] *See* United States v. 249.12 Acres of Land, More or Less, 414 F. Supp. at 934.

[401] *See* Bethune v. United States Dep't of Hous. and Urban Dev., 376 F. Supp. 1074 (W.D. Mo. 1972).

[402] *See id.* at 1074 (holding that owners of property within area proposed to be taken by the courts were third party beneficiaries of a contract between Department of Housing and Urban Development and enjoining the county from continued condemnations of property until the county complied with the URA).

[403] *See* Barnhart v. Brinegar, 362 F. Supp. at 472–73.

[404] *See* Nall Motors, Inc. v. Iowa City, Iowa, 410 F. Supp. 111, 116 (S.D. Iowa 1975), *aff'd per curiam*, 533 F.2d 381 (8th Cir. 1976). The district court in *Nall Motors, Inc.,* held that 42 U.S.C. § 4602(a) "clearly and convincingly evinces an attempt to preclude judicial review of agency action under § 4651" regarding land acquisition policies. *Id.* at 115. *See also* Bunker Props, Inc. v. Kemp, 524 F. Supp. 109, 112 (D. Kan. 1981) (holding that there was no federal jurisdiction of the plaintiffs' claim that they were third party beneficiaries to an agreement between the state transportation agency and the federal government).

[405] *See* MakCo, Inc. v. Smith, 763 F. Supp. 1003, 1005–06 (W.D. Ark. 1991) (citations omitted).

[406] *See, e.g.,* N. States Power Co. v. Fed. Transit Admin., 358 F.3d 1050, 1053 (8th Cir. 2004); Nw. Natural Gas Co. v. City of Portland, 70 Or. App. 647, 653–54, 690 P.2d 1099, 1103 (Ct. App. 1984); Hampton Roads Sanitation Dist. Comm'n v. City of Chesapeake, 218 Va. 696, 700, 240 S.E.2d 819, 822 (1978); N.Y.

Energy Houston Electric LLC v. Harris County Toll Road Authority[407]

> [t]he "long-established common law principle [requires] that a utility forced to relocate from a public right-of-way must do so at its own expense…." [B]ecause "the main purposes of roads and streets are for travel and transportation…[,] it is clear that [utilities may] be required to remove at their own expense any installations owned by them and located in public rights of way whenever such relocation is made necessary by highway improvements…." When applying this rule, "there is no material difference…between a utility company and a municipal corporation…." The common law, however, controls only where there is no conflicting or controlling statutory law.[408]

One limitation apparently on the state's power with respect to the relocation of utility facilities is that the state must be acting reasonably.[409]

The second situation, discussed *infra*, is presented when there is statutory authority for the reimbursement of utilities for relocating facilities from the highway right-of-way. Even prior to the Federal Highway Act of 1956,[410] some states had enacted statutes providing for reimbursement of utilities under some circumstances for having to relocate. Since the enactment of 23 U.S.C. § 123, the Federal Highway Administration (FHWA) reimburses states for much of their costs for utility relocation.[411] One effect of § 123 was to encourage states to enact legislation to reimburse utilities.

As used herein and as defined in 23 U.S.C. § 123(b), "[t]he term 'utility,' …include[s] publicly, privately, and cooperatively owned utilities." As provided in the regulations, the term utility means

> a privately, publicly, or cooperatively owned line, facility or system for producing, transmitting, or distributing communications, cable television, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water not connected with highway drainage, or any other similar commodity, including any fire or police signal system or street lighting system, which directly or indirectly serves the public….[412]

Under § 123 federal funds are available in a particular case only when "a utility's costs are compensable under state law"[413]—that is, there may not be reimbursement if reimbursement for relocation under § 123 would "violate[] the law of the State or violates a legal contract between the utility and the State."[414]

F.2. Compensation for Taking or Damaging of a Utility's Property Interest

F.2.a. Compensation for Relocation from Utility-Owned Property or an Easement

A utility's facilities may be located on land that was acquired by the utility in fee simple from the owner; the facilities may be situated on privately-owned land over which the utility has purchased or condemned an easement for its facilities; or they may be on private property with the landowner's permission. The highway authority's right-of-way may be adjacent to the utility under one of the foregoing conditions, or the highway authority may have acquired or condemned property to which the utility may have some prior right that has not been extinguished by purchase or condemnation.

The nature of the utility's interest therefore is important in determining whether the utility must be paid for relocating its facilities from their present position along the right-of-way.[415] The authority of a state to regulate reasonably its streets and highways is well established.[416] Included within the scope of this author-

City Tunnel Auth. v. Consol. Edison Co. of N.Y., Inc., 295 N.Y. 467, 474–75, 68 N.E.2d 445, 448 (N.Y. 1946).

[407] 436 F.3d 541 (5th Cir. 2006), *cert. denied*, 548 U.S. 907, 126 S. Ct. 2945, 165 L. Ed. 2d 956 (2006).

[408] *Id.* at 543–44 (some citations omitted) (footnotes omitted) (*citing* Norfolk Redevelopment & Hous. Auth. Potomac Tel. Co. of Va., 464 U.S. 30, 34, 104 S. Ct. 304, 78 L. Ed. 2d 29 (1983); State v. City of Austin, 160 Tex. 348, 331 S.W.2d 737, 741 (1960)). *See also* Benbrook Water & Sewer Auth. v. City of Benbrook, 653 S.W.2d 320, 323–24 (Tex. Ct. App. 1983); City of Grand Prairie v. City of Irving, 441 S.W.2d 270, 273 (Tex. Civ. App. 1969); City of Grand Prairie v. Am. Tel. and Tel. Co., 405 F.2d 1144, 1146 (5th Cir. 1969) (all holding as a general rule that utilities can be required to relocate from the public right-of-way at their own expense).

[409] *See* N. States Power Co. v. Minn. DOT, 2002 Minn. App. LEXIS 999, at *6 (finding that a deadline imposed by the Minnesota Department of Transportation was unreasonable).

[410] 23 U.S.C. § 123 (2007).

[411] *See* § 5F, *infra*.

[412] 23 C.F.R. § 645.105 (2007). *See also* 23 U.S.C. § 109(l)(2)(A) (defining "utility facility" in similar terms).

[413] Artesian Water Co. v. State of Del., Dep't of Highways and Transp., 330 A.2d 432, 437 (Super. Ct. 1974), *aff'd as modified by* 330 A.2d 441 (Del. 1974), (*citing* Potomac Elec. Power Co. v. Fugate, 211 Va. 745, 180 S.E.2d 657 (1971); S.C. State Highway Dep't v. Parker W. & S. Subdistrict, 247 S.C. 137, 146 S.E.2d 160 (1966); Dep't of Highways v. Sw. Elec. Power Co., 243 La. 564, 145 So. 2d 312, 329 (1962)).

[414] Artesian Water Co. v. Del. DOT, 330 A.2d at 436 (*quoting* 23 U.S.C. § 123).

[415] Although it is not known whether the right is a common one among the states, it is reported that in Wisconsin sanitary sewerage lines have a clear and unequivocal right to locate in highway rights-of-way in Wisconsin without a permit.

[416] *See, e.g.,* S. Bell Tel. & Tel. Co. v. State, 75 So. 2d 796, 799–800 (Fla. 1954)

> (The original location of poles in a street by…public service corporations, pursuant to permission of the authorities, creates no absolute, indefeasible right or irrevocable license to have such poles remain at the particular spot for all time; and irrespective of statutory provisions authorizing the public authorities to direct such changes, said authorities may enforce reasonable regulations requiring these companies to change the location of their poles in a street.) (citation omitted));

Duquesne Light Co. v. Pittsburgh, 251 Pa. 557, 566, 97 A. 85, 88 (1916) ("Such statutes and ordinances are simply a regulation of the exercise of the franchise or privilege granted, to the end that it shall be enjoyed in such a manner as to inconvenience and endanger the general public as little as possible.")

ity is the right to require a utility to relocate its facilities when required by highway construction or improvements.[417] However, if a utility is located entirely on its own private right-of-way or easement, the courts have held uniformly that before the highway agency may compel the relocation of the facilities, the utility's property interest must be purchased or condemned.[418] On the other hand, there may be circumstances in which a state may destroy or alter a lawfully erected structure of a public service corporation if the structure endangers public health or safety.[419]

Generally, however, if a utility is located on a fee or easement that the utility owns, there is no question that compensation must be paid when requiring the utility to relocate.[420] For example, in *Commonwealth, Department of Transportation v. Louisville Gas & Electric Co.*,[421] the grantor of property to the state's predecessor in title for a highway also had granted an easement to the utility's predecessor in interest. The court held that the state, as part of a project to widen the highway, was liable to the utility for the cost of the removal and relocation of the utility's lines.

> [W]hen the government requires the relocation of a perpetual easement for the public convenience its owner is entitled to compensation in the form of damages, which may be determined by the actual cost of relocation. L.G. & E. had a private easement which was taken by state action, therefore it is entitled to just compensation.[422]

The utility's property interest may be created or reserved expressly by deed, thereby requiring the highway authority to purchase or condemn the utility's property.[423] However, it is not always necessary that a utility have a recorded instrument to have an easement. As one court has recognized, "[a]n easement may be created by any one of four methods: 'by grant, implication, prescription, or estoppel.'"[424] Thus, it has been held that the taking of a prescriptive easement is compensable when the highway authority requires utility facilities to be relocated.[425] In *State Highway Commission v. Ruidoso Telephone Co.*,[426] the court held that a utility company's placement of its poles on private land served to create valid easements even though the company had not compensated the landowners prior to the placement of the poles, an event that occurred at about the same time that the road had been widened and reconstructed earlier.[427] "The Commission, having notice of the occupancy and rights of the Company, took its right of way easements subject to the burden of the right of the Company to maintain its lines on the lands in question."[428]

F.2.b. No Compensation for Relocation of Facilities of Utility as Holder of a Permit or Franchise

As a general rule, the courts have held that the placement of a utility's lines in a street, pursuant to a statute, ordinance, franchise, license, or permit, is not a property right but a mere privilege that is subject to reasonable regulation,[429] but the terms of the statute,

(citation omitted)); W. Union Tel. Co. v. Richmond, 224 U.S. 160, 168, 32 S. Ct. 449, 56 L. Ed. 710 (1912) (involving an admission by the appellant, a utility, that it was subject to reasonable regulation).

[417] *See, e.g.,* CenterPoint Energy Houston Elec. LLC v. Harris County Toll Road Auth*.,* 436 F.3d 541, at 542 (involving a utility's move due to the construction of a highway); N. States Power Co. v. Fed. Transit Admin., 358 F.3d at 1056 (rejecting an argument that the Minnesota Department of Transportation's power was limited to "trunk highways" and not to city streets).

[418] *See CenterPoint Energy Houston Electric LLC,* 436 F.3d at 544, n.3 (*citing City of Grand Prairie,* 405 F.2d at 1146 (holding that where the utility facilities were located in a "private easement…the general rule…has no application"); Magnolia Pipe Line Co. v. City of Tyler, 348 S.W.2d 537, 540 (Tex. Ct. Civ. App. 1961) (noting that the utility's easement was property in the "constitutional sense").

[419] *See* City of Perrysburg v. Toledo Edison Co., 2007 Ohio 1327, at *P 13 (Ohio App. 7th Dist. 2007), *discretionary appeal not allowed,* State v. Howard, 2007 Ohio 4884 (Ohio 2007).

[420] *See CenterPoint Energy Houston Electric LLC,* 436 F.3d at 543-444, 544, n.3 (noting that the common law principle requiring relocation costs at the expense of a utility generally has no application where the utility is located in a private easement). *But see Ark. La. Gas Co.*, 2007 Ohio 1237, at *P 13–14 (discussing state action in regulating a utility's property pursuant to its "police power").

[421] 526 S.W.2d 820 (Ky. 1975).

[422] *Id.* at 822.

[423] *See* 26 AM. JUR. 2D *Eminent Domain* § 860 (1966); *CenterPoint Energy Houston Elec. LLC,* 436 F.3d at 551 (holding as a matter of state statutory construction that the term "eligible utility facilities" described a utility that incurred relocation costs resulting from a county's acquisitions of highway rights-of-way and were thus eligible for reimbursement). *See also Louisville Gas & Electric Co.*, 526 S.W.2d at 822 ("The rule is now as it was then, when the government requires the relocation of a perpetual easement for the public convenience its owner is entitled to compensation in the form of damages, which may be determined by the actual cost of relocation.").

[424] Ranallo v. First Energy Corp., 2006 Ohio 6105, at *P 33 (Ohio App. 11th Dist. 2006) (citation omitted) (holding that the trial court erred in granting summary judgment on the basis that the utility company had a license coupled with an interest in a case not involving relocation payments).

[425] *See* State Highway Comm'n v. Ruidoso Tel. Co., 73 N.M. 487, 491, 500, 389 P.2d 606, 608, 615 (1963) (upholding relocation costs for easements obtained by prescription). *See also* Arizona *ex rel*. Herman v. Elec. District No. 2 of Pinal County, 106 Ariz. 242, 474 P.2d 833, 835 (1970) (stating that although there is a general rule that utilities have no vested right to maintain lines on public highway rights-of-ways, an exception exists if the line was there before the dedication of the street or the acquisition of the road by the public body making the road improvement).

[426] 73 N.M. 487, 389 P.2d 606 (1963).

[427] *Id*. at 491, 500, 398 P.2d at 608, 615.

[428] *Id.* at 498, 398 P.2d at 614 (citations omitted).

[429] *See* CenterPoint Energy Houston Elec. LLC v. Harris County Toll Road Auth*.,* 436 F.3d at 543–44, 544 n.3 (discussing the common law principle that utilities forced to relocate from a public right-of-way must do so at their own expense); N.

license, permit, or franchise must be consulted as it likely will govern whether the utility is entitled to reimbursement of its relocation costs. In general, however, utilities that are located in highways or highway rights-of-way by virtue of a license, permit, or franchise that may be authorized by statute acquire no vested right to any specific location in the right-of-way;[430] therefore, a utility ordered to relocate has no property right for which it is entitled to reimbursement for its costs in doing so.[431]

Ordinarily, a franchise

> merely gives [the utility] a general but qualified right to locate its facilities beneath the public roads in order to effectuate its purpose…. [A statutory franchise] does not, in and of itself…grant anything specific to [the utility]; it does not categorize the nature of [the utility's] right to locate its facilities in the public way, for example, in terms of a license, a franchise or an easement. Instead, the nature of the right, as well as any conditions to be placed on its exercise, are to be determined by the appropriate local unit or agency having control over the public roads and whose consent is deemed a condition precedent to the exercise of the right…. [The utility's] interest in the subject location of its facilities must instead be determined by the nature and incidents of the particular franchise…granted.[432]

Accordingly, "the prevailing view in most jurisdictions is that a franchise conferred by the State on a public utility to locate its facilities in the public way creates no compensable property interest in the subject location."[433]

The Delaware Supreme Court in deciding the appeal in *Artesian Water Co. v. State, Department of Highways and Transportation*[434] observed that the franchise agreement in that case between the State and Artesian *did* state that if it became necessary to relocate any of the company's facilities, the highway department "shall designate and approve new and suitable locations…and, upon reasonable notice…the holder of the permit shall relocate…according to such designation."[435] The court held that the agreement was still in effect even though nearly all of the company's facilities had been relocated earlier, in part, because the utility company as a franchisee had continued to make payments after the first relocation.[436]

In another case in which a utility company's permit to locate its water lines in a state right-of-way was subject to the authority of the highway director to require relocation, the company had to do so without reimbursement.[437] The court emphasized that when a utility company accepts a permit to install a line in a highway right-of-way, what the company receives is only a franchise for which no consideration is paid and pursuant to which the company does not acquire any property interest in the right-of-way.[438] Moreover, the court held that it was the company's duty "to find and obtain an alternate route of [its] own."[439] On the other hand, in that case as a matter of the construction of two statutes applicable to the dispute, the court also held that the highway director neither had the authority to specify a new location for the line nor could the director "construct a line at a new location and assess the cost" to the company.[440]

A minority view appears to be represented by the New York Court of Appeals' decision in *In re New York (Gillen Place)*.[441] Although the court recognized the common law rule that in the absence of statute a utility company pays its own relocation costs, the court held that the city's "street closing statute" expressly provided for compensation to owners of affected real property, defined in the statute to include, *inter alia*, all "subsurface" structures and every "franchise."[442] However, the court also stated that a franchise granted by the city vested in the utility companies "'a perpetual and indefeasible interest in the land constituting the streets,'"[443] a holding that appears to be a distinct minority view. Finally, the court stated that "[e]ven at common law, then, it would seem that the closing of a street would work a *pro tanto* destruction of claimants' easements and franchise rights for which compensation should be made…."[444]

F.2.c. Compensation for Relocation When the Utility Has a Contract or Lease

A contract or lease for the benefit of a utility may serve as a basis for a claim for reimbursement of the

States Power Co. v. FTA, 358 F.3d 1050, at 1053, 1056 (affirming a summary judgment requiring a utility company to relocate at its own expense due to an order by the Minnesota Department of Transportation).

[430] *See* CenterPoint Energy Houston Elec. LLC v. Harris County Toll Road Auth*.,* 436 F.3d at 543–44; N. States Power Co. v. FTA*,* 358 F.3d at 1053–54. *See also* Peoples Gas Light & Coke Co. v. City of Chicago*,* 413 Ill. 457, 460, 474, 109 N.E.2d 777, 779, 786 (Ill. 1952); Merced Falls Gas & Elec. Co. v. Turner, 2 Cal. App. 720, 722, 84 P. 239, 240 (Cal. App. 3d Dist. 1906); New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans, 197 U.S. 453, 458–59, 474, 25 S. Ct. 471, 49 L. Ed. 831 (1905).

[431] Cent. Main Power Co. v. Waterville Urban Renewal Auth., 281 A.2d 233, 240–41 (Maine 1971) (holding that the Authority acted reasonably in requiring the facility to be located underground).

[432] Artesian Water Co. v. State Dep't of Highways & Transp*.,* 330 A.2d 432, at 440 (Del. 1974) (citations omitted).

[433] *Id.* (citations omitted).

[434] 330 A.2d 441 (Del. 1974).

[435] *Id.* at 443 (citation omitted).

[436] *Id.* at 443–44.

[437] Green v. Noble, 114 Ohio App. 321, 325–27, 182 N.E.2d 569, 573–74 (Ohio App. 10th Dist. 1961).

[438] *Id.* at 327, 182 N.E.2d at 574.

[439] *Id.*

[440] *Id.* at 328, 182 N.E.2d at 575.

[441] 304 N.Y. 215, 106 N.E.2d 897 (1952).

[442] *Id.* at 221–22, 106 N.E.2d at 900.

[443] *Id.* at 223, 106 N.E.2d at 901 (citation omitted).

[444] *Id.* at 224, 106 N.E.2d at 901.

costs for having to relocate from the highway right-of-way. For example, in *City of Perrysburg v. Toledo Edison Co.,*[445] a case in which the utility company was forced to relocate poles for a highway widening project, the utility argued that it was a third party beneficiary. The court did rule that Perrysburg's relocation order was a valid exercise of the municipality's police power as a "'permissive right of use of public highways by public utilities is subordinate to the rights of the public.'"[446] However, the court held that there was an issue of fact concerning whether the utility was a third party beneficiary of an agreement between the city and the state transportation department because the "contract clearly contemplates an expense to be paid to a utility in furtherance of the project, even specifically using the word 'relocation.'"[447]

In another case a county-owned water line was leased to a water service company in a county right-of-way. The county and the company had property rights that could not be extinguished by the State to build a freeway except by purchase, gift, agreement, or condemnation.[448]

F.2.d. Compensation When the Relocation Is Not for a Governmental Purpose

In *Gillen Place, supra,* the court noted another exception to the common law rule that in the absence of a statute or agreement to the contrary, relocation must be for a governmental not a proprietary purpose. In *Gillen Place,* the city's street closing was for a public necessity but the street closing was not for a governmental purpose. Rather, the closing was to make room for the construction of a bus garage and shop, a purpose that the court deemed to be proprietary. Hence, although

> [i]t is true, of course, that street closings usually result in the ultimate appropriation of the land to private ownership, …there is a great difference where, as here found, the very purpose of the closing is to accomplish the devotion of the land to a use by the city which, although in the interest of the public, is nevertheless proprietary…. "[W]hen the change is required in behalf of other public service corporations or in behalf of municipalities exercising a proprietary instead of a governmental function," the common-law rule that utilities maintain their installations in public streets subject to the risk of relocating them at their own expense when public necessity so requires, does not apply.[449]

In a later case from Oregon, however, the Oregon Court of Appeals essentially agreed that the governmental-proprietary distinction was an "anachronism."[450] The case involved the relocation of utilities because of a highway project and the construction of a light rail transit system. The utilities argued that because they were being relocated for the purpose of the construction of a publicly-owned utility, the defendants were acting in a proprietary capacity rather than a governmental one.[451] The utilities argued moreover that they fell within a distinction

> embodied in *City of Los Angeles v. Los Angeles Gas and Electric Corp.*, 251 U.S. 32, 40 S. Ct. 76, 64 L Ed 121 (1919). In that case, the city required a private electric utility to move its fixtures in order to make way for the installation of a city-owned electrical system. The Supreme Court carved an exception to the general common law rule. The city was operating in a "proprietary" as opposed to "governmental" capacity and therefore had to compensate the utility.[452]

The Oregon court stated, however, that it did not find the governmental-proprietary distinction "to be a particularly helpful analytic tool in utility relocation law."[453] The court stated that "Oregon cases do not follow a governmental/proprietary distinction in deciding who must pay," that the "[t]he focus is on public need," and that "broad latitude is given to the legislative determination of that need."[454] Thus, the court held that "[t]he public need involved here has been established beyond question."[455] Finally, in a footnote the court observed that the New York courts, rather than rejecting the governmental-proprietary distinction outright, had stated that the cases decided on the basis of the distinction were limited to their facts.[456]

F.3. Federal Reimbursement of States for Relocation Payments Made to Utilities

F.3.a. Reimbursement as Authorized by 23 U.S.C. § 123

As seen, the general rule is that a state or highway agency is not required in the absence of statute to pay a utility the cost of relocating its facilities in the highway right-of-way when required by highway construction or improvements. In 1956, however, Congress authorized FHWA to reimburse the states for the cost of relocation

[445] 171 Ohio App. 3d 174, 2007 Ohio 1327, 870 N.E.2d 189 (Ct. App. 2007).

[446] *Id.* at 180, 2007 Ohio 1327, at *P17, 870 N.E.2d at 193 (citation omitted).

[447] *Id.* at 182, 2007 Ohio 1327, at *P41, 870 N.E.2d at 195. The court also held that a provision of the Ohio statutes that authorized payments to a relocating utility because of a program or project was permissive rather than mandatory because of use of the term "may." *Id.,* 171 Ohio App. 3d at 184, 2007 Ohio 1327, at *P48, 870 N.E.2d at 196.

[448] Green v. Noble, 114 Ohio App. at 329, 182 N.E.2d at 575–76.

[449] *In re New York (Gillen Place),* 304 N.Y. at 221, 106 N.E.2d at 899–900.

[450] Nw. Natural Gas Co. v. City of Portland*,* 70 Or. App. 647, 655, 690 P.2d 1099, 1104, n.7 (Ct. App. 1984).

[451] *Id.* at 654, 690 P.2d at 1103.

[452] *Id.*

[453] *Id.* at 656, 690 P.2d at 1104 (footnote omitted).

[454] *Id.* at 656, 690 P.2d at 1105 (citations omitted).

[455] *Id.* at 657, 690 P.2d at 1105.

[456] *Id.* at 656, n.8, 690 P.2d at 1105, n.8 (citation omitted).

of utility facilities in the same proportion that federal funds were authorized for the project.

Section 123 states:

> (a) When a State shall pay for the cost of relocation of utility facilities necessitated by the construction of a project on any Federal-aid system, Federal funds may be used to reimburse the State for such cost in the same proportion as Federal funds are expended on the project. Federal funds shall not be used to reimburse the State under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State. Such reimbursement shall be made only after evidence satisfactory to the Secretary shall have been presented to him substantiating the fact that the State has paid such cost from its own funds with respect to Federal-aid highway projects for which Federal funds are obligated subsequent to April 16, 1958, for work, including relocation of utility facilities.
>
> (b) The term "utility," for the purposes of this section, shall include publicly, privately, and cooperatively owned utilities.
>
> (c) The term "cost of relocation," for the purposes of this section, shall include the entire amount paid by such utility properly attributable to such relocation after deducting therefrom any increase in the value of the new facility and any salvage value derived from the old facility.[457]

Because of § 123, states passed statutes authorizing payment to utilities for their right-of-way relocation cost on certain highways, usually Interstate, and other federal-aid projects. During the period immediately following the enactment of state statutes, several constitutional issues were litigated; however, the courts upheld the constitutionality of state reimbursement statutes.[458] Constitutional issues included claims that the reimbursement statutes were not for a public purpose,[459] extended the state's credit for nongovernmental purposes,[460] were prohibited as being special legislation,[461] or abrogated preexisting agreements requiring utilities to pay relocation costs.[462] Although the constitutionality of the laws generally was upheld, some provisions have been struck down on the basis that there was an unfair or unreasonable classification of utilities for purposes of payment.[463]

F.3.b. States' Eligibility for Reimbursement of Utility Relocation Costs

As seen, on federal-aid primary or secondary systems or the Interstate system, the states may be reimbursed for the cost of relocating utility facilities in proportion to the amount of federal funds spent on the project. Moreover, as seen, reimbursement may be made for relocating utility facilities whether they are publicly, privately, or cooperatively owned.

The federal regulations pertaining to eligibility for reimbursement provide for three categories of federal funding.

> (a) When requested by the STD [State Transportation Department], Federal funds may participate, subject to the provisions of § 645.103(d) of this part and at the pro rata share applicable, in an amount actually paid by an TD [Transportation Department] for the costs of utility relocations. Federal funds may participate in safety corrective measures made under the provisions of § 645.107(k) of this part. Federal funds may also participate for relocations necessitated by the actual construction of highway project made under one or more of the following conditions when:
>
> (1) The STD certifies that the utility has the right of occupancy in its existing location because it holds the fee, an easement, or other real property interest, the damaging or taking of which is compensable in eminent domain,
>
> (2) The utility occupies privately or publicly owned land, including public road or street right-of-way, and the STD certifies that the payment by the TD is made pursuant to a law authorizing such payment in conformance with the provisions of 23 U.S.C. 123, and/or
>
> (3) The utility occupies publicly owned land, including public road and street right-of-way, and is owned by a public agency or political subdivision of the State, and is not required by law or agreement to move at its own expense, and the STD certifies that the TD has the legal authority or obligation to make such payments.[464]

It should be noted also that 23 C.F.R. § 645.107(g) (2007) provides:

> In lieu of the individual certifications required by § 645.107(a) and (c), the STD may file a statement with the FHWA setting forth the conditions under which the STD will make payments for the relocation of utility facilities. The FHWA may approve Federal fund participation in utility relocations proposed by the STD under the conditions of the statement when the FHWA has made an affirmative finding that such statement and conditions form a suitable basis for Federal fund participation under the provisions of 23 U.S.C. 123.

Thus, federal funds may participate if a utility comes within the purview of one or more of the three categories specified in 23 C.F.R. § 645.107(a) (2007); however, the state actually must have made payments to the utility for relocation costs. First, as appears in the regulation, there is reimbursement on a *pro rata* basis when the "utility has the right of occupancy in its existing location because it holds the fee, an easement, or other

[457] 23 U.S.C. § 123(a)-(c) (2007).

[458] *See, e.g.,* Pack v. S. Bell Tel. and Tel. Co., 215 Tenn. 503, 387 S.W.2d 789 (1965); Edge v. Brice, 253 Iowa 710, 113 N.W.2d 755 (1962); Jones v. Burns, 138 Mont. 268, 357 P.2d 22 (1960).

[459] *See, e.g.,* Minneapolis Gas Co. v. Zimmerman, 253 Minn. 164, 91 N.W.2d 642 (1958).

[460] *See, e.g.,* State v. Gainer, 149 W. Va. 740, 143 S.E.2d 351 (1965).

[461] *See, e.g.,* Nw. Bell Tel. Co. v. Wentz, 103 N.W.2d 245 (N.D. 1960).

[462] *See, e.g.,* State Road Comm'n of Utah v. Utah Power & Light Co*.,* 10 Utah 2d 333, 353 P.2d 171 (1960); N.M. *ex rel*. Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

[463] *CenterPoint Energy Houston Elec. LLC,* 436 F.3d at 545–47, 551 (finding the statutes at issue ambiguous as to the meaning of "eligible utility facilities").

[464] 23 C.F.R. § 645.107(a) (2007).

real property interest, the damaging or taking of which is compensable in eminent domain….”[465] On occasion it has been difficult for the utility to show ownership of a compensable interest in the land. For example, the utility may occupy property for many years without a recorded deed or instrument. Local law must be consulted to determine whether a utility may have acquired a property right by adverse possession or prescription.

If a utility places its facilities on private land without paying the landowners, it has been held that the highway department was liable, nevertheless, for the cost of relocation.[466] Moreover, when a utility has a leasehold interest it has a property right that is compensable.[467] On the other hand, it has been held that compensation is not required if the utility's lease is terminable on 60-days notice and the lease in fact is terminated.[468]

The second situation in which a state may be reimbursed for utility relocation costs is, as stated, when a "utility occupies privately or publicly owned land, including public road or street right-of-way, and the STD certifies that the payment by the TD is made pursuant to a law authorizing such payment in conformance with the provisions of 23 U.S.C. 123….”[469] It may be noted that there is some change here from the former regulation that appeared at 23 C.F.R. § 645.103(a). Previously, the federal regulation required that there must be an "affirmative finding" by FHWA that the state law formed a "suitable basis" for federal reimbursement. The regulation, however, now requires only that the state must certify "that the payment by the TD is made pursuant to a law authorizing such payment in conformance with the provisions" of 23 U.S.C. § 123.[470] Although federal law authorizes reimbursement of states for payments to utilities for relocation costs, a state may not be compelled to pay relocation costs to a utility merely because § 123 authorizes federal reimbursement of the state.[471]

[465] 23 C.F.R. § 645.107(a)(1) (2007). *See also* Wichita v. Kan. Gas & Elec. Co., 204 Kan. 546, 464 P.2d 196, 205–06 (1970), (*quoting* a similar provision that appeared in the Federal Bureau of Public Roads, Policy and Procedure Memorandum, ¶ 3a(1)).

[466] State Highway Comm'n v. Ruidoso Tel. Co., 73 N.M. 487, 389 P.2d 606 (1964).

[467] Green v. Noble, 114 Ohio App. 321, 325–27, 182 N.E.2d 569, 573–74 (Ct. App. 1961) (involving a county-owned water line leased to a water service company and located in county right-of-way).

[468] Richfield Oil Corp. v. United States, 178 F. Supp. 799, 800 (1959).

[469] 23 C.F.R. § 645.107(a)(2) (2007).

[470] *Id.*

[471] S.C. State Highway Comm'n v. Parker Water and Sewer Sub-District, 247 S.C. 137, 140, 146 S.E.2d 160, 162 (1966) (holding that "[t]he fact however that Federal funds may be available to aid in the reimbursement of defendant for the cost of relocating its lines has no effect upon the determination of the liability of the state for such costs").

The third category in which there is reimbursement is when the

> utility occupies publicy owned land, including public road and street right-of-way, and is owned by a public agency or political subdivision of the State, and is not required by law or agreement to move at its own expense, and the STD certifies that the TD has the legal authority or obligation to make such payments.[472]

Thus, the third subsection is concerned with reimbursement of utilities owned by an agency or political subdivision of a state when the utilities are located on publicly-owned lands or right-of-way. A state must, however, demonstrate to FHWA's satisfaction that it has some legal authority or obligation to pay relocation costs before qualifying for reimbursement.[473]

F.3.c. Utility Relocation and Reimbursable Expenses

The regulations issued pursuant to § 123 set forth in detail the technical requirements for obtaining reimbursement of the costs of relocating utility facilities.[474] Initially, there was some question whether relocation meant only a relocation involving the movement of facilities within the right-of-way or included relocation to a new site outside the right-of-way. The federal regulations provide, however, that expenses are reimbursable for relocation within and without the right-of-way. The term relocation means

> the adjustment of utility facilities required by the highway project. It includes removing and reinstalling the facility, including necessary temporary facilities, acquiring necessary right-of-way on the new location, moving, rearranging or changing the type of existing facilities and taking any necessary safety and protective measures. It shall also mean constructing a replacement facility that is both functionally equivalent to the existing facility and necessary for continuous operation of the utility service, the project economy, or sequence of highway construction.[475]

Most state statutes concerning utility relocation payments include a provision specifying relocation or removal. However, there are some statutes in which there is a reference only to relocation.[476] Where the state's law provides or has been interpreted to provide that a relocation means only those adjustments within the right-of-way, it is possible that reimbursement would not be authorized under § 123. As stated in 23 C.F.R. § 645.103(d):

[472] 23 C.F.R. § 645.107(a)(3) (2007).

[473] *Id.*

[474] *See* 23 C.F.R. § 645.103 (2007) (stating when the statute applies); *see also* § 645.107 (2007) (setting forth the eligibility requirements).

[475] 23 C.F.R. § 645.105 (2007).

[476] City of Perrysburg v. Toledo Edison Co., 171 Ohio App. 3d 174, 2007 Ohio 1327, 870 N.E.2d 189 (Ohio App. 6th Dist. 2007) (referring to both relocation and/or removal); CenterPoint Energy Houston Elec. LLC v. Harris County Toll Road Auth., 436 F.3d 541 (5th Cir. 2006) (referring only to relocation); N. States Power Co. v. Fed. Transit Admin., 358 F.3d 1050 (8th Cir. 2004).

> The FHWA's reimbursement to the STD will be governed by State law (or State regulation) or the provisions of this regulation, whichever is more restrictive. When State law or regulation differs from this regulation, a determination shall be made by the STD subject to the concurrence of the FHWA as to which standards will govern, and the record documented accordingly, for each relocation encountered.

The regulations at 23 C.F.R. § 645 (2007), Subpart A, prescribe the policies, procedures, and reimbursement provisions for the utility relocation expenses claimed by state transportation departments. States may claim reimbursement for costs incurred under a transportation department utility agreement and for costs incurred under all FHWA utility agreements.[477] If the facilities at issue are privately owned, located on the owner's land, and devoted exclusively to private use and not directly or indirectly serving the public, then FHWA's right-of-way provisions apply.[478] Otherwise, either the applicable regulation or state law governs, depending on which one is more restrictive.[479]

Federal funds may be used for the costs of utility relocations, subject to § 645.103(d), for safety corrective measures, or for relocations necessitated as a result of highway projects under certain conditions.[480] However, funds may not be used if payments were made by a political subdivision, unless the state transportation department certifies the payments, or if a utility contributes or repays the transportation department.[481]

To simplify the process of utility relocations or adjustments, the state transportation department may act in FHWA's place for reviewing and approving the requirements to authorize the utility to proceed with and complete the work.[482]

The regulations at 23 C.F.R. § 645 (2007), Subpart B, prescribe the policies and procedures for accommodating utility facilities and private lines on the right-of-way of federally-related highway projects. New utility installations within the right-of-way, existing utility facilities retained, relocated, or adjusted within the right-of-way; and private lines permitted to cross the right-of-way all may be accommodated when doing so is lawful and does not jeopardize highway or traffic safety or impair the highway or its aesthetic quality.[483] A state transportation department, however, first must obtain FHWA's approval.[484]

F.4. Attempts to Obtain Reimbursement Under Other Statutes

F.4.a. 23 U.S.C. § 106(a)

In at least one case, because of the particular circumstances involved, a state obtained reimbursement under the Tucker Act of utility relocation cost where there was neither a private easement nor specific statutory authority. As seen in *Arizona by Arizona Highway Dept. v. United States,*[485] the United States had to pay the state because of the operation of 23 U.S.C. § 106(a) rather than 23 U.S.C. § 123.

F.4.b. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970

The concept of utility companies being eligible for the cost of relocating their facilities is relatively new. As seen, under the common law rule a public utility accepts franchise rights in public streets subject to an implied obligation to relocate its facilities at its own expense when required to do so for the construction of a public project.[486] With respect to utilities, 42 U.S.C. § 4622(d) provides for reimbursement of "extraordinary" relocation expenses.[487]

As a result of a 1987 amendment to the URA, adding subsection (d) to § 4622,[488] if a program or project (not undertaken itself for the purpose of relocating a utility) causes a utility to have to relocate, if the utility is located on state or local property for which it has a "franchise or similar agreement" to use the property, and if the relocation results in the owner of the utility "incurring an extraordinary cost in connection with such relocation," the utility is to be provided "a relocation payment which may not exceed the amount of such

[477] *See* 23 C.F.R. § 645.105 (2007).

[478] 23 C.F.R. § 645.103(c) (2007) (*citing* Right-of-Way and Real Estate, 23 C.F.R. § 710.203 (2007)).

[479] 23 C.F.R. § 645.103(d) (2007).

[480] 23 C.F.R. § 645.107(a), (a)(1-3) (2007). *See* 23 C.F.R. § 645.107(i)-(j) (2007) (approving use of funds for incidental costs, including preliminary engineering and allied services, acquisition of replacement right-of-way, and physical construction work associated with utility relocations for the utility); *see also* 23 C.F.R. § 645.109 (2007) (preliminary engineering); 23 C.F.R. § 645.111 (2007) (right-of-way); 23 C.F.R. § 645.115 (2007) (construction); 23 C.F.R. § 645.117 (2007) (cost development and reimbursement).

[481] 23 C.F.R. § 645.107(b)-(d) (2007). *See* 23 C.F.R. § 645.107(h) (2007) (prohibiting use of funds solely for the benefit or convenience of a utility, its contractor, or a highway contractor). *See* 23 C.F.R. § 645.105 (2007) (defining State Transportation Department as "the transportation department of one of the 50 States, the District of Columbia, or Puerto Rico" and Transportation Department as "the department, commission, board, or official of any state or political subdivision thereof, charged by its law with the responsibility for highway administration").

[482] 23 C.F.R. § 645.119 (2007).

[483] 23 C.F.R. §§ 645.203–205 (2007).

[484] 23 C.F.R. § 645.215 (2007).

[485] 494 F.2d 1285, 1287 (1974) (holding that after Arizona entered into an agreement with a utility company to reimburse the utility for expenses it incurred in relocating its facilities, which was necessitated by construction of an Interstate highway, and an authorized federal representative signed a highway project agreement expressly including the utility adjustment as part of the project, the United States contractually was bound to pay Arizona's proportionate share of the utility relocation costs.)

[486] *See* discussion in § 5F, *infra*.

[487] *See* 49 C.F.R. § 24.306 (2007).

[488] Pub. L. No. 100–17, § 405(d) (Apr. 2, 1987).

extraordinary cost…."[489] What constitutes an "extraordinary cost" is described in § 4622(d).

Prior to 1987 there were unsuccessful attempts to have the URA construed to include relocation of utilities. In *Norfolk Redevelopment and Housing Authority v. Chesapeake & Potomac Telephone Co.,*[490] the U.S. Supreme Court held that the URA did not change the common law rule "that a utility forced to relocate from a public right-of-way must do so at its own expense,"[491] and that the URA did not grant utilities "a new, federal right to reimbursement" for relocating their facilities from the right-of-way.[492]

Also, even earlier in *Artesian Water Co. v. State, Department of Highways and Transportation,*[493] a Delaware court had held that the URA and the Delaware Relocation Assistance Act of 1970 "do not create an absolute right in a utility to be reimbursed for the cost of relocating its facilities in order to facilitate federally assisted highway improvements," and that the utility was not a displaced person within the meaning of the relocation statutes.[494]

G. CONTROL OF OUTDOOR ADVERTISING

Outdoor advertising, primarily billboards, involve competing interests. Although commercial enterprises want to advertise along highways, members of the traveling public and transportation safety specialists want unobstructed views of the highway environment. This section will discuss federal and state legislation and regulations regarding the removal of certain billboards near or visible from the Interstate system and the primary system of highways,[495] valuation and related issues, and relocation expenses for owners of certain billboards that must be removed, as well as the authority of state and local governments to enact laws restricting or even prohibiting billboards and other signs.

[489] *See* 42 U.S.C. § 4622(d)(1)(A)-(C) (2007); *see also* 49 C.F.R. § 24.306 (2007) (concerning discretionary utility relocation payments).

[490] 464 U.S. 30, 104 S. Ct. 304, 78 L. Ed. 2d 29 (1983). *See also Artesian Water Co.,* 330 A.2d at 437, 438 (holding that the URA and the Delaware Relocation Assistance Act of 1970 "do not create an absolute right in a utility to be reimbursed for the cost of relocating its facilities in order to facilitate federally assisted highway improvements" and that the utility was not a displaced person within the meaning of the relocation statutes).

[491] *Id.* at 34, 42, 104 S. Ct. at 307, 78 L. Ed. 2d at 33.

[492] *Id.* at 43, 104 S. Ct. at 311, 78 L. Ed. 2d at 38.

[493] 330 A.2d 432 (Del. Super. Ct. 1974), *aff'd as modified by* 330 A.2d 441 (Ct. 1974).

[494] *Id.* at 437, 438.

[495] "[T]he terms 'primary system' and 'federal-aid primary system' mean the federal and primary system in existence on June 1, 1991, and any highway which is not on such system but which is on the National Highway System." 23 U.S.C. § 131(t) (2007).

G.1. Highway Beautification Act

In 1965 Congress enacted what is popularly known as the Highway Beautification Act, herein the "HBA."[496] Outdoor advertisements adjacent to certain highways that are subject to regulation under the Act[497] include signs, displays, and devices in areas next to Interstate highways and the primary system of highways.[498] Title 23 of the U.S.C., § 131(c), limits signs, displays, or devices after January 1, 1968, if located within [660 feet] of the right-of-way, and on or after July 1, 1975…if located beyond [660 feet] of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way…."[499]

As explained in *Texas Department of Transportation v. Barber,*[500] a 2003 case upholding the constitutionality of the Texas Highway Beautification Act, the federal act

> requires states to effectively control the erection and maintenance of signs within 660 feet of interstate and primary highways and beyond 660 feet in non-urban areas if the signs are designed to be and are visible from such highways. The Federal Act seeks to curb the proliferation of signs along the nation's highways and to "protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." The Federal Highway Beautification Act provides that if states fail to make provisions for effectively controlling such signs, they risk losing ten percent of their federal highway funds.[501]

The HBA, thus, seeks to "protect the public investment in such highways, to promote the safety and rec-

[496] 23 U.S.C. § 131 (2007). *See* Vermont v. Brinegar*,* 379 F. Supp. 606 (D. Vt. 1974) (upholding the constitutionality of the HBA).

[497] *See* 23 U.S.C. § 131 (2007)*.* The procedures applicable to the HBA are set forth in: Highway Beautification, 23 C.F.R. § 750 (2007); Junkyard Control and Acquisition, 23 C.F.R. § 751 (2007); and Landscape and Roadside Development, 23 C.F.R. § 752 (2007).

[498] 23 U.S.C. § 131(a) (2007). *See* 23 C.F.R. § 750.102(m) (defining a "sign") and 23 C.F.R. § 750.704 (2007) (defining "sign, display and device").

[499] Displays, and devices permitted by the Act are

> limited to (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder…, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, (3) signs, displays, and devices including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22, 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, …, and (5) signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee….

23 U.S.C. § 131(c) (2007).

[500] 111 S.W.3d 86 (Tex. 2003), *cert. denied*, 540 U.S. 1177, 124 S. Ct. 1404, 158 L. Ed. 2d 77 (2004).

[501] *Id.* at 89 (footnotes omitted).

reational value of public travel, and to preserve natural beauty."[502]

The Act seeks to have signs subject to the Act removed from federal-aid primary and Interstate highways that are not on land needed for right-of-way purposes.[503] The states are not required to remove nonconforming signs unless the federal government pays 75 percent of the just compensation required for the removal of signs.[504]

The failure of a state to comply with the HBA could result in the state incurring a penalty amounting to a 10 percent reduction in its federal-aid highway funds.[505] Although states are not required to comply, the penalty is considered to be an inducement for states to implement the HBA.[506] Consequently, the states enacted legislation so as to be in compliance with the HBA and avoid losing federal funds.

The HBA appears to satisfy the requirement that a taking be for a public use. In *Kamrowski v. State,*[507] although involving a taking of a scenic easement, the court upheld the taking of a scenic easement on the basis that the taking was for a public use. The State argued successfully that public enjoyment of scenic beauty was a public use and that physical occupancy by the State of the property was not an essential element of public use.[508] The court held that "[t]he enjoyment of the scenic beauty by the public which passes along the highway seems to us to be a direct use by the public of the rights in land which have been taken in the form of a scenic easement, and not a mere incidental benefit from the owner's private use of the land."[509] The HBA also appears to satisfy the public use requirement for the reasons discussed in Section I.G, *supra*, regarding cases upholding urban renewal statutes.

G.1.a. Requirement of Just Compensation Under the HBA

When an outdoor advertisement lawfully erected under state law is required to be removed pursuant to § 131(c) of the HBA, just compensation must be paid.[510] Just compensation is required for:

> (A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and
>
> (B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon.[511]

The HBA requires compensation for the "taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device" without regard to whether the nonconforming outdoor advertisement is personal or real property or a fixture.[512]

Although the federal share of compensation due to an owner for the "acquisition, removal and incidental costs legally incurred or obligated by the state" is set at 75 percent,[513] if the federal share of funding is unavailable then the removal of a nonconforming outdoor advertisement is not required.[514] If an owner of an illegal outdoor advertisement fails to remove the sign, the owner is liable to the state for its costs to remove the sign.[515]

Federal funds may participate in the compensation paid to an owner of a sign, for example, "for his right, title and interest in a sign, and where applicable, his leasehold value in a sign site," and may participate in the compensation paid "to a site owner for his right and interest in a site, which is his right to erect and maintain the existing nonconforming sign on such site."[516] Federal funds also may participate in "[t]he cost of relocating a sign to the extent of the cost to acquire the sign, less salvage value if any…."[517] Federal funds may not participate, for example, with respect to "[p]ayments to a sign owner where the sign was erected without permission of the property owner unless the

[502] *Id., quoting* 23 U.S.C. § 131(a).

[503] *See* 23 U.S.C. § 131(e) (2007).

[504] 23 U.S.C. at § 131(g) (2007). Under certain circumstances, nonconforming outdoor advertisements in existence prior to May 5, 1976, may remain if approved by the Secretary. *See* 23 U.S.C. § 131(o) (2007).

[505] 23 U.S.C. § 131(b) (2007). The Secretary maintains discretion to suspend the imposition of penalties. *See* 23 U.S.C. § 131(b) (2007); *see also* 23 C.F.R. § 750.705 (2007) (listing mandatory requirements for states under the HBA).

[506] Pima County v. Clear Channel Outdoor, Inc., 212 Ariz. 48, 52–53, 127 P.3d 64, 68–69 (Ariz. App., 2d Div. 2006), *review dismissed*, 2006 Ariz. LEXIS 106 (Ariz. 2006). *See also* Markham Adver. Co. v. State, 73 Wash. 2d 405, 439 P.2d 248 (1968), *appeal dismissed,* 393 U.S. 316, 89 S. Ct. 553, 21 L. Ed. 2d 512 (1969), *reh. denied,* 393 U.S. 1112, 89 S. Ct. 854, 21 L. Ed. 2d 813 (1969).

[507] 31 Wis. 2d 256, 142 N.W.2d 793 (1966).

[508] *Id*. at 263, 142 N.W.2d at 796.

[509] *Id.* at 265, 142 N.W.2d at 797. *See also* Wis. Builders Ass'n v. Wis. Dep't of Transp., 285 Wis. 2d 472, 702 N.W.2d 433 (Wis. Ct. App. 2005) (discussing *Kamrowski*); Richley v. Crow, 43 Ohio Misc. 94, 334 N.E.2d 542 (Ohio Ct. Common Pleas 1975) (stating that a scenic-easement acquisition under 23 U.S.C. § 131 was for a public purpose).

[510] *See* 23 U.S.C. § 131(g) (2007) (requiring just compensation to be made). *See also* 23 C.F.R. § 750.302(a) (2007) (requiring the same).

[511] 23 U.S.C. § 131(g)(A)-(B) (2007).

[512] 23 U.S.C. § 131(g)(A) (2007).

[513] 23 C.F.R. § 750.302(b) (2007). *See also* 23 U.S.C. § 131(g) (2007); 23 U.S.C. § 131(p) (2007) (federal government pays 100 percent of the just compensation if an outdoor advertisement was removed under the HBA and lawfully relocated but subsequent amendments require its removal again).

[514] 23 U.S.C. § 131(n) (2007) (excludes federal funds apportioned to states under 23 U.S.C. § 104 "except to the extent that the State, in its discretion, expends such funds for such a payment").

[515] *See* 23 U.S.C. § 131(r)(1)-(2) (2007).

[516] 23 C.F.R. § 750.305(a)(1) (2007). The regulations should be consulted fully for all compensable items in which federal funds may participate.

[517] 23 C.F.R. § 750.305(a)(2) (2007).

sign owner can establish his legal right to erect and maintain the sign."[518] Federal guidelines and regulations for control of outdoor advertising also are set forth in 23 C.F.R. § 750.701, *et seq*.[519]

Federal policies and procedures regarding a state's written policies and operating procedures for implementing its sign removal program are found in 23 C.F.R. § 750.304. Under the federal guidelines, a standard valuation method is recommended for each state.[520] If an owner disagrees with a valuation, an appraisal must be utilized and verified by an independent party.[521] As for severance damages, the state must justify the recognition of such damages before federal participation will be allowed.[522] The federal regulations allow the states considerable leniency in devising their own policies and procedures.[523] Moreover, a state may "establish standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway systems than those established under this section."[524]

As discussed in Section 4, *supra*, a state has the authority to exercise its police power in certain circumstances and take or destroy property without having to pay just compensation. The police power has been extended in at least one case to the taking of a billboard that was declared to be hazardous to traffic.[525] If a sign is illegal for some reason or if a sign is altered after receiving a permit and the alteration renders the sign illegal, then no compensation is due to the sign owner if the owner is ordered to remove the sign. The illegality of a sign removes the sign from the realm of constitutionally-protected property and thus any right to compensation.[526] Although 23 U.S.C. § 131(g) requires that just compensation be paid for requiring the removal of a lawfully erected outdoor advertisement, 23 C.F.R. § 750.705(d) requires the expeditious removal of an illegal outdoor advertisement.[527]

G.1.b. HBA's Rejection of Amortization

Because of the cost of the removal of billboards and other signs, some states enacted statutes for amortization of signs over a period of years rather than paying just compensation.

> "Amortization" properly refers to a liquidation, but in [the] context [of nonconforming uses] the owner is not required to take any particular financial step. "Amortization period" simply designates a period of time granted to owners of nonconforming uses during which they may phase out their operations as they see fit and make other arrangements. It is, in effect, a grace period, putting owners on fair notice of the law and giving them a fair opportunity to recoup their investment.[528]

Although challenged on constitutional grounds, the courts upheld amortization laws, thus allowing the states to require the removal of signs after the amortization period had passed.[529] The perceived injustice of this practice led to an amendment in 1978 of the HBA pursuant to which states now are prohibited from using amortization in lieu of paying for signs.[530] The 1978 amendment basically terminated the practice of amortizing signs on federal-aid primary and Interstate highways in lieu of paying just compensation as states must conform their outdoor advertising laws to avoid losing up to 10 percent of their federal funding.

G.1.c. Relocation Assistance

The HBA contains a provision for relocation costs under certain circumstances. Section 131(p) states:

> In the case of any sign, display, or device required to be removed under this section prior to the date of enactment of the Federal-Aid Highway Act of 1974, which sign, display, or device was after its removal lawfully relocated and which as a result of the amendments made to this section by such Act is required to be removed, the United States shall pay 100 per centum of the just compensation for such removal (including all relocation costs).[531]

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[518] 23 C.F.R. § 750.305(b)(2) (2007).

[519] *See* 23 C.F.R. § 750.709 (2007) (regulating on-property or on-premise advertising).

[520] 23 C.F.R. § 750.304(c) (2007).

[521] 23 C.F.R. § 750.304(c)(2) (2007).

[522] 23 C.F.R. § 750.304(c)(4) (2007). *See also* 23 C.F.R. § 750.304(c)(4)(i)-(iii) (2007) (outlining the required data to assist the FHWA in its evaluation of the submission).

[523] *See generally* 23 C.F.R. § 750.304 (2007).

[524] 23 U.S.C. § 131(k) (2007). *See also* 23 C.F.R. § 750.110 (2007) (authorizing the state to prohibit otherwise permissible signs without forfeiting its rights to any benefits provided for in the Act).

[525] Rochester Poster Adver., Inc. v. Town of Brighton, 374 N.Y.S.2d 510, 49 A.D. 2d 273 (N.Y. App. 4th Dep't 1975).

[526] Miss. State Highway Comm'n v. Roberts, 304 So. 2d 637 (1974).

[527] *See* Pima County v. Clear Channel Outdoor, Inc*.,* 212 Ariz. at 52, 127 P.3d at 68.

[528] Adams Outdoor Adver., LP v. Zoning Hearing Bd. of Smithfield, 909 A.2d 469, 475 (Pa. Commw. Ct. 2006) (*quoting* Village of Valatie v. Smith, 83 N.Y.2d 396, 632 N.E.2d 1264, 1266 (N.Y. 1994) (citations omitted)). *See* City of Oakbrook Terrace v. Suburban Bank & Trust Co., 364 Ill. App. 3d 506, 518, 845 N.E.2d 1000, 1011 (Ill. App. 2d Dist. 2006) (involving a city's valid 2-year amortization ordinance).

[529] Iowa Dep't of Transp. v. Neb.-Iowa Supply Co., 272 N.W.2d 6 (Iowa 1978), *overruled on other grounds,* Estate of Grossman v. McCreary*,* 373 N.W.2d 113, 114 (Iowa 1985); Modjeska Sign Studios, Inc. v. Berle, 43 N.Y.2d 408, 373 N.E.2d 255 (N.Y. 1977), *appeal dismissed*, 439 U.S. 809, 99 S. Ct. 66, 58 L. Ed. 2d 101 (1978); Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741 (N.D. 1978); People *ex rel.* Dep't of Transp. v. Desert Outdoor Adver., Inc., 68 Cal. App. 3d 440, 137 Cal. Rptr. 221 (Cal. App. 4th Dist. 1977).

[530] 23 U.S.C. § 131(g) (2007) ("Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section….")

[531] 23 U.S.C. § 131(p).

However, the expense of relocating outdoor advertisements implicates another federal statute, the URA, discussed in subsection 5.E, *infra*.[532] The URA provides a "uniform policy for the fair and equitable treatment of persons displaced as a direct result of programs or projects undertaken by a federal agency or with federal financial assistance."[533]

Although the term "sign" or "billboard" does not appear in the URA, § 4601(6)(A)(i) defines "displaced person" as "any person who moves from real property, or moves his personal property from real property." Section 4652(a) requires any federal agency that acquires any interest in real property to

> acquire at least an equal interest in all buildings, structures, or other improvements located upon the real property so acquired and [the head of a federal agency] requires to be removed from such real property or which [the head of a federal agency] determines will be adversely affected by the use to which such real property will be put.[534]

Section 24.301(f) of the regulations promulgated pursuant to the URA specifically addresses outdoor advertisements:

> The amount of a payment for direct loss of an advertising sign, which is personal property shall be the lesser of:
>
> (1) The depreciated reproduction cost of the sign, as determined by the Agency, less the proceeds from its sale; or
>
> (2) The estimated cost of moving the sign, but with no allowance for storage.

Similar to the HBA, the URA requires that states seeking federal funds must comply with the Act.[535]

In a 2006 case, *Commissioner of Transportation v. Rocky Mountain, LLC,*[536] a court considered whether the URA applied to outdoor advertisements. Connecticut had responded to the enactment of the URA by enacting a statute providing for relocation expenses of outdoor advertising.[537] In deciding whether the URA applied to billboards, the court recognized that

> [a]t least one federal District Court has concluded that billboards are encompassed by this provision. *Whitman v. State Highway Commission*, 400 F. Supp. 1050, 1070 (W.D. Mo. 1975); see also *United States v. 40.00 Acres of Land, More or Less*, 427 F. Supp. 434, 440, 441 (W.D. Mo. 1976) (adopting analysis of Whitman); 8A P. Nichols, Eminent Domain (3d Ed. Rev. 2005, P. Rohan & M. Reskin, eds.) § 23.03, pp. 23-32 through 23-33. State courts that have considered whether billboards are structures for purposes of this section are divided on the question. *See* 8A P. Nichols, supra, p. 23-33. If, however, the uniform relocation act does require a condemnor to acquire billboards as "structures or other improvements," the commissioner would be authorized to comply with that obligation through the state relocation assistance statutes, which provide that the commissioner may conform to the requirements of the uniform relocation act by providing relocation payments and by doing "such other acts…as may be necessary to comply with…the [uniform relocation act]…."[538]

The court concluded that URA (or the state law) did not mandate the acquisition of billboards by way of eminent domain; instead, the property owner may reject a relocation payment under URA for just compensation.[539]

G.2. Removal, Restriction, or Prohibition of Other Billboards and Signs

G.2.a. Off-Site Signs

State or local governments may want to restrict or even prohibit prospectively billboards or signs of various types, particularly off-premise billboards or signs having nothing to do with the property on which they are located. The First Amendment is not a guarantee that billboards and other signs are not susceptible to regulation. It does not appear that the First Amendment has been a critical issue from the standpoint of state transportation agencies trying to enforce the HBA.

Nevertheless, in a case involving an off-site sign unrelated to the property on which the sign was located, the Supreme Court of Texas in *Texas Department of Transportation v. Barber*[540] upheld the Texas Highway Beautification Act. Barber, an attorney, installed a billboard measuring 8 x 16 ft on nonresidential property adjacent to Interstate 20. The billboard stated "Just Say NO to Searches" and displayed a telephone number. The Texas Supreme Court observed that outdoor advertising is prohibited

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[532] 42 U.S.C. § 4601, *et seq* (2007). Title III of the Uniform Relocation Act applies to compensation except "where complete conformity would defeat the purposes set forth in 42 U.S.C. 4651, would impede the expeditious implementation of the sign removal program or would increase administrative costs out of proportion to the cost of the interests being acquired or extinguished." *See* 23 C.F.R. § 750.302(c) (2007).

[533] 42 U.S.C. § 4621(b) (2007). *See also* 42 U.S.C. §§ 4622 (Moving and Related Expenses) and 4651 (Uniform Policy on Real Property Acquisition Practices) (2007).

[534] *See also* 49 C.F.R. § 24.105(a) (2007) (requiring the agency to offer to acquire any improvements located upon the real property).

[535] 49 U.S.C. §§ 4604 and 4655 (2007).

[536] 277 Conn. 696, 894 A.2d 259 (2006).

[537] *Id.* at 717–18, 894 A.2d at 274–75; *see also* CONN. GEN. STAT. §§ 8-267(5), 8-268(a); CONN. AGENCIES REGS. §§ 8-273-13, 8-273-14.

[538] 277 Conn. at 720, 894 A.2d at 276 (*quoting* CONN. GEN. STAT. § 8-263a) (*citing* CONN. GEN. STAT. § 8-267a).

[539] *Id.* at 721, 894 A.2d at 276 (*citing* 42 U.S.C. § 4652(b)(2)). In Pima County v. Clear Channel Outdoor, Inc., 212 Ariz. at 53, 127 P.3d at 69, Pima County claimed that the HBA, the Uniform Relocation Act, the related federal acts and regulations, and state implementing statutes for those acts required relocating billboards on property that complied with local law. The court did not, however, address the issue of relocation.

[540] 111 S.W.3d 86 (Tex. 2003), *cert. denied*, 540 U.S. 1177, 124 S. Ct. 1404, 158 L. Ed. 2d 77 (2004).

> in a limited area: (1) within 660 feet of a right-of-way, if the advertisement is visible from the interstate or primary highway system, or (2) if outside an urban area, more than 660 feet from the right-of-way, but visible from the highway and erected for the purpose of having its message seen from the highway.[541]

The court held that the Texas Highway Beautification Act is content neutral[542] and distinguished Barber's case from the ordinance at issue in *Metromedia*[543] (discussed *infra*) that

> only allowed onsite commercial signs, but prohibited other (offsite) commercial advertising and prohibited all noncommercial communications everywhere unless permitted by one of twelve exemptions. As discussed, the Texas Act is different. The Texas Act permits commercial and noncommercial speech everywhere that relates to an activity on the property. In addition, it permits both types of speech in all commercial and industrial areas, even if the speech does not relate to an activity on the property. Therefore, the Texas Act does not run afoul of the concerns the plurality or concurrence expressed in *Metromedia.*[544]

In *Mississippi State Highway Commission v. Roberts Enterprises, Inc.,*[545] the owner erected billboards after June 16, 1966, the effective date of Mississippi's Outdoor Advertising Act, which provided that with some exceptions "[n]o outdoor advertising shall be erected or maintained within [660] feet of the nearest edge of the right-of-way and visible from the main-traveled way of the interstate or primary highways in this state."[546] The owner erected two billboards that were situated within 660 feet of the right-of-way of a highway in violation of Section 49-23-5. The statute allowed for compensation to be paid for signs erected before but not after the enactment of the Act. The court held that the Act was constitutional.

> The first issue is whether the act violates section 17 of the Mississippi Constitution, which requires that landowners be compensated for property "taken or damaged for public use."
>
> We hold that the act is not concerned with a physical taking or damaging of property. Rather, it involves a use restriction, and is in essence a zoning of property adjacent to highways. Restrictions imposed upon the use of property through the lawful exercise of the police power of the state do not require compensation. The distinction between a use restriction and a taking of property was discussed in Jackson Municipal Airport Authority v. Evans, 191 So. 2d 126 (Miss. 1966), wherein we said: "…where the owner of property is merely restricted in the use and enjoyment of his property, he is not entitled to compensation." 191 So. 2d at 133. The question arises whether the state, through the exercise of police powers, may regulate billboards adjacent to its highways.[547]

The First Amendment has arisen with more frequency in the context of city ordinances[548] and regulations by other state agencies.[549] Beside the issue of commercial versus noncommercial free speech is the issue of on-site versus off-site advertising. In 1964 the U.S. Supreme Court held that the First Amendment protected advertising,[550] but in a later case has held that commercial speech had less protection than traditional speech.[551] In *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York,*[552] the Court devised a four-part test for determining the constitutionality of the regulation of commercial speech.[553]

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[541] *Id.* at 90 (footnote omitted).

[542] *Id.* at 98. The court stated:

> The Act defines "outdoor advertising" broadly. It includes both commercial and noncommercial speech, encompassing "advertising or information." Further, the Act permits both types of speech in noncommercial and non-industrial areas as long as that speech relates to activities on the property. It also permits both types of speech in commercial and industrial areas, regardless of whether that speech relates to activities on the property.

Id. at 99 (footnote omitted).

[543] Metromedia Inc. v. San Diego, 453 U.S. 490 (1981).

[544] 111 S.W.3d at 99 (footnote omitted).

[545] 304 So. 2d 637 (Miss. 1974) (holding the Act to be constitutional).

[546] *Id.* at 638.

[547] *Id.* at 639. *See* Markham Adver. Co. v. State, 73 Wash. 2d 405, 439 P.2d 248 (1968); *Opinion of the Justices*, 103 N.H. 268, 169 A.2d 762 (1961); N.Y. State Thruway Auth. v. Ashley Motor Court, Inc., 10 N.Y.2d 151, 176 N.E.2d 566 (N.Y. 1961); Gen. Outdoor Adver. Co. v. Dep't of Pub. Works, 289 Mass. 149, 193 N.E. 799 (1935); Ghaster Props, Inc. v. Preston, 176 Ohio St. 425, 200 N.E.2d 328 (Ohio 1964).

[548] Action Outdoor Adver. JV, LLC, v. Town of Shalmar, Florida, 377 F. Supp. 2d 1178 (N.D. Fla. 2005) (finding that the third factor in the *Central Hudson Test*, as supported by *Metromedia*, was satisfied because the ordinance improved traffic safety and increased the town's esthetic beauty); Lamar Whiteco Outdoor Corp. v. City of West Chicago, 355 Ill. App. 3d 352, 823 N.E.2d 610 (Ill. App. 2d Dist. 2005) (First Amendment challenge to a city's ordinance seeking to ban all billboards).

[549] Action Outdoor Adver. JV, LLC, v. Town of Shalimar, Florida, 377 F. Supp. 2d 1178 (N.D. Fla. 2005); Adams Outdoor Adver., LP, v. Zoning Hearing Bd. of Smithfield*,* 909 A.2d 469 (Pa. Commw. Ct. 2006) (noting that *Cent. Hudson Gas & Elec. Corp., Pub. Service Comm'n*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) and its progeny addressed ordinances in which there was either a complete ban on commercial speech or a content-based restriction).

[550] N.Y. Times v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

[551] Ohralik v. Ohio Bar Ass'n, 436 U.S. 447, 456, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978).

[552] 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980).

[553] *See* Cent. Hudson Gas & Elec. Corp*.,* 447 U.S. at 566, 100 S. Ct. at 2351, 65 L. Ed. 2d at 351 (describing the four-part analysis as follows:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest).

In an attempt to reconcile competing interests, the regulating authorities sometimes carve out exceptions in their regulations to permit certain outdoor advertising structures to remain. One such example is found in *Metromedia, Inc. v. San Diego,*[554] in which the city ordinance provided that off-site commercial sites, that is billboard advertising of products, services, or goods not sold on the premises, could be banned but that on-site commercial sites, that is billboard advertising of products, services, or goods sold on the premises, could be permitted without violating the First Amendment.[555]

As noted recently by a federal court in Florida,[556] the Court's decision in *Metromedia, Inc.,* is the leading decision in the field of billboard regulations.[557] Before the *Metromedia* case, the regulation of outdoor advertising was primarily a land-use or zoning issue. In *Metromedia*, the plurality opinion set forth "the standard for determining the constitutionality of governmental restrictions on commercial speech."[558]

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.[559]

As for whether government may impose a total ban on billboards, "the *Metromedia* plurality found the ordinance at issue to be unconstitutional due to an impermissible preference of commercial speech over noncommercial speech, [but] *seven justices agreed that a total prohibition of offsite commercial signs is constitutional*."[560]

In *Action Outdoor Advertising v. Town of Shalimar*, *supra*, the plaintiff argued in part that an "ordinance prohibiting offsite commercial signs, while permitting onsite commercial signs [did] not further the Town's stated interests in a direct and material manner."[561] However, the court held that regardless of "'whether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the stated objectives of safety and esthetics.'"[562]

Thus, the court in *Action Outdoor Advertising* upheld the town's ordinance prohibiting off-site billboards, because the ordinance did not restrict commercial speech unconstitutionally.[563] Furthermore, the court held that the ordinance did not discriminate unconstitutionally against noncommercial speech. Relying on Eleventh Circuit authority, the court agreed "that 'the definition of a billboard as an offsite advertising sign does not include noncommercial speech as such speech is always onsite.'"[564]

The court explained:

> As noted above, the Town's Sign Ordinance in the instant case defines "billboard or billboard sign" as meaning "any sign which provides information of any kind concerning any activity that takes place on property other than that where the sign is located." Section 82-316. The Court agrees that the phrase "information of any kind concerning any activity" tends to suggest that the Ordinance encompasses both commercial and noncommercial speech. But, especially given the Eleventh Circuit's clear instruction that *all noncommercial speech is inherently onsite*, the phrase further defining a billboard as providing information concerning any activity "that takes place on property other than that where the sign is located" eliminates noncommercial speech from the scope of the definition's reach—and thus the ban on billboards set forth in Section 82-352(4). *Thus, while the prohibition against billboards unquestionably encompasses commercial speech it does not implicate noncommercial speech. Plaintiff's argument that the Town's ban on billboards in effect is an impermissible proscription against all noncommercial speech therefore fails.*[565]

If a billboard company, however, has satisfied all the legal requirements for permission to erect a billboard, and thereafter there is an alteration in the legal requirements before a permit is issued, it has been held that the company's application under those circumstances may not be denied. As one court held, it is necessary to "view the permitting process and the government action on [the] applications under the rules that were in effect on the date of those applications."[566]

As for whether billboards may be prohibited, although *Adams Outdoor Advertising v. Zoning Hearing*

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[554] 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981) (plurality opinion) (overturning a complex billboard ordinance that had been crafted over a period of 10 years).

[555] *Id.* at 512, 101 S. Ct. at 2885, 69 L. Ed. 2d at 806.

[556] Action Outdoor Adver. JV, L.L.C. v. Town of Shalimar, 377 F. Supp. 2d 1178 (N.D. Fla. 2005).

[557] *Id.* at 1186.

[558] *Id.* at 1189.

[559] Metromedia Inc. v. San Diego, 453 U.S. at 507, 101 S. Ct. at 2892, 69 L. Ed. 2d at 815 (*citing* Cent. Hudson Gas & Elec. Corp., 447 U.S. at 563–66, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980)).

[560] Action Outdoor Adver. v. Town of Shalimar, 377 F. Supp. 2d at 1189 (emphasis supplied). *See also* Harnish v. Manatee County, Fla., 783 F.2d 1535, 1540, n.7 (11th Cir. 1986) and Dills v. City of Marietta, Georgia, 674 F.2d 1377 (11th Cir. 1982).

[561] 377 F. Supp. 2d at 1190.

[562] *Id.* at 1191 (citation omitted) (emphasis supplied). In *Action Outdoor Advertising*, the plaintiff conceded the first and second criteria of the four-part *Central Hudson* test cited in *Metromedia*, *supra*. *See id.* at 1189.

[563] *Id.* at 1192.

[564] *Id.* at 1193 (*quoting* Southlake Prop. Ass'n v. City of Morrow, 112 F.3d 1114, 1119 (11th Cir. 1997)).

[565] *Id.* at 1193 (emphasis supplied) (footnote omitted).

[566] Lamar Adver. Co. v. Township of Elmira, 328 F. Supp. 2d 725, 732 (E.D. Mich. 2004) (holding that the township, in exercising discretion that the township did not have, "deprived Lamar of its First Amendment rights by denying Lamar a permit based on improper interpretation of the zoning ordinance").

Board of Smithfield Township[567] involved a dispute over a Zoning Hearing Board's decision requiring that two off-site premises' advertising billboards be removed, the court stated:

> Billboards are regarded as a legitimate business use of property in Pennsylvania and may be regulated but not excluded by a local zoning ordinance…. A municipality has the power to regulate signs, billboards or other advertising media provided such regulation is not unreasonable, arbitrary, or discriminatory, and there is a reasonable relationship to the safety, morals, health, or general welfare of the community.[568]

The court held that there was "a valid basis for the Township's distinction between off-premises advertising signs and other uses."[569] The ordinance itself stated that the purpose "was to reduce signs or advertising distractions and obstructions that may" undermine traffic safety.[570] Furthermore, the court stated: "[T]here is nothing novel or constitutionally infirm about the use of the on-site/off-site distinction."[571] The ordinance, moreover, was not "an impermissible regulation of protected commercial speech."[572] Finally, because the statute "require[d] removal of off-premises signs 'on a property proposing land development or alterations or enlargement of an existing use,'"[573] there was no *de facto* taking, because the "right to use the billboards ceased when the landowner actively pursued land development on the Subject Property."[574]

With respect to signs relating to a religious message or a church, owners may argue that the prohibition of signs violates the right of freedom of religion as well as of speech under the First Amendment. However, in *Corinth Baptist Church v. State Department of Transportation,*[575] involving an off-site sign, an individual permitted a church to erect a display on her property adjacent to a highway. An Alabama state court held that the sign did not conform to the HBA and that the controlling rule and regulations did not violate the church's freedom of speech and religion. Relying on the Supreme Court's decision in *Ladue v. Gilleo,* discussed below, the court held that the highway department's rule "merely regulates the manner in which churches may display signs that are not on the property on which the churches are located" and "does not attempt to regulate the views of the various churches."[576]

On the other hand, in prohibiting off-site signs a statute may be unconstitutional under the First Amendment if the statute is so under-inclusive that the law fails to meet the substantial governmental interest test. In *Eller Media Co. v. Montgomery County, Maryland,*[577] the court dealt with a challenge to a county ordinance that did not distinguish between commercial and noncommercial signs.[578] The court observed that "because Montgomery County's ordinance only bars signs that identify a site other than where the signs are located, much (perhaps most) off-site commercial and non-commercial advertising is allowed…."[579] However, on the record, the court had "no idea how many signs will be allowed and how many prohibited—and thus the factual situation here presented is a far cry from that presented in *Metromedia*…. [I]t is impossible to say whether the ordinance is so under-inclusive that the restrictions do not advance "a substantial governmental interest" to a "material degree."[580]

In sum, there is authority that government may lawfully regulate billboards and other signs even to the extent of prohibiting off-site signs, or even require their removal pursuant to legal requirements in effect at the time the signs were erected.

G.2.b. On-Site Signs

As stated, it has been held that "non-commercial speech is inherently onsite."[581] In *Ladue v. Gilleo,*[582] a city ordinance prohibited all signs except those that fell within 1 of 10 exemptions and that complied with stated limitations on size. The sign in question was on the homeowner's lawn and stated "For Peace in the Gulf." The U.S. Supreme Court affirmed an Eighth Circuit decision holding that the ordinance was a content-based regulation of speech and that the city's interest, although substantial, in enacting the new ordinance was not sufficiently compelling to support a content-based restriction. "[R]esidential signs have long been an important and distinct medium of expression."[583] The Court held that

> even regulations that do not foreclose an entire medium of expression, but merely shift the time, place, or manner of its use, must "leave open ample alternative channels for communication." In this case, we are not persuaded that adequate substitutes exist for the important medium of speech that Ladue has closed off.[584]

Without further clarification the Court stated that its "decision that Ladue's ban on almost all residential signs violates the First Amendment by no means leaves

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[567] 909 A.2d 469 (2006), *app. denied*, 2007 Pa. LEXIS 1055 (Pa. 2007).

[568] *Id.* at 477.

[569] *Id.* at 478.

[570] *Id.* (*quoting* WIS. STAT. § 504 of the Ordinance).

[571] *Id.* at 479.

[572] *Id.*

[573] *Id.* at 476 (*quoting* WIS. STAT. § 504 of the Ordinance).

[574] *Id.* at 480.

[575] 656 So. 2d 868 (Ala. Ct. Civ. App. 1995).

[576] *Id.* at 870.

[577] 143 Md. App. 562, 795 A.2d 728 (Md. Ct. Spec. App. 2002), *cert. denied*, 369 Md. 573, 801 A.2d 1033 (2002).

[578] *Id.* at 566, 795 A.2d at 731.

[579] *Id.* at 597, 795 A.2d at 749.

[580] *Id.* at 598, 795 A.2d at 749.

[581] Action Outdoor Adver. v. Zoning Hearing Bd*.,* 377 F. Supp. 2d at 1193.

[582] 512 U.S. 43, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994).

[583] *Id.* at 54, 114 S. Ct. at 2045, 129 L. Ed. 2d at 47.

[584] *Id*. at 56, 114 S. Ct. at 2045, 129 L. Ed. 2d at 48 (*quoting* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984)).

the City powerless to address the ills that may be associated with residential signs."[585]

In the *Barber* case, *supra*, the court held that the Texas Act's "exemptions for signs relating to onsite activities likewise does not render the Act content based."[586] Because the Act was content neutral, the court, applying the test of "whether the Act is narrowly tailored to serve a substantial state interest,"[587] held that the law went "no further than to serve the significant state interests in "'preserving scenic beauty and promoting public safety along interstate and federally-funded state highways.'"[588]

G.2.c. Signs in Existence Prior to the Enactment of Legislation

Preexisting signs are another matter, as illustrated by *Eller Media, supra,* which involved 34 billboards affixed to 14 structures located in the county. Montgomery County wanted them removed without having to pay compensation. Various ordinances had been enacted and repealed, two of which had allowed lawfully erected nonconforming signs to stay in place for a period of time before having to be removed. A 1997 ordinance allowed signs "lawfully constructed, structurally altered or relocated after July 1986" to remain for 5 years from July 1992.

The court held:

> In the face of the legislative history surrounding article 25, section 122E, the language of the statute, and the straightforward statement by the *Revere* Court that Montgomery County "has no authority to ban pre-existing lawfully erected billboards without paying the fair market value of the billboards," we hold that the trial court erred when it held that the amortization provisions of the 1997 ordinance "trumped" the provisions of article 25, section 122E. *Fair compensation, as defined in article 25, section 122E(a), must be paid even if a reasonable amortization period was provided for in the ordinance.*[589]

G.3. Just Compensation

G.3.a. Compensable Interests

The vast majority of billboards are located pursuant to a lease on land owned by someone other than the billboard owner. When a sign and the land are commonly owned, the problem of value is less difficult than when there is separate ownership of a sign and the land. Regardless of which valuation approach is used, if there is common ownership there is no conflict between a lessee and a lessor; the sole question becomes one of the difference between the before and after value of the property taken. The interest of the sign-owner, when the sign-owner does not own the land on which the sign is located, is really two-fold: 1) a so-called "leasehold" interest in the land, and 2) a full ownership in the sign itself.

A preliminary issue, however, is whether there is a lease. Whenever the advertising lease is for a definite term and indicates the intent of the parties that it should not be revocable at the will of the landowner, the lease should be deemed to create an easement rather than a license.[590] In *Commissioner of Transportation v. Rocky Mountain, LLC*, *supra*, the court discussed a leasehold interest asserted by a billboard owner and noted that the definition "refer[s] to an interest in real property created by the existence of a lease."[591] In *Santa Fe Trail Neighborhood Redevelopment Corporation v. W.F. Coen & Company,*[592] the court distinguished between a lease and a license, emphasizing that a leaseholder possesses an interest in property that requires compensation in condemnation whereas a licensee does not.[593]

If there is a lease, the condemnor is entitled to make use of the terms of the lease even though the condemnor is not a party to the lease. For example, in an eminent domain proceeding the proprietor (Guttha) of a business had a leasehold interest in the condemned property.[594] Guttha's lease provided that Guttha could not participate independently in any condemnation proceedings affecting the property. Although the Pennsylvania Department of Transportation (PennDOT) was not a party to the lease, the court held that

> PennDOT cannot be liable to a person who has contractually abrogated its rights to condemnation damages by the terms of the written agreement that created the leasehold interest.
>
> In sum, we hold that PennDOT appropriately used the Lease to determine how the condemnation award for the taking of Parcel No. 65 is to be divided.[595]

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[585] *Id.* at 58, 114 S. Ct. at 2045, 129 L. Ed. 2d at 49.

[586] Texas DOT v. Barber, 111 S.W.3d at 100–01.

[587] *Id.* at 103–04.

[588] *Id.* at 104 (footnote omitted).

[589] Eller Media Co. v. Montgomery County, 143 Md. App. at 580, 795 A.2d at 739.

[590] *See* Comm'n of Transp. v. Rocky Mountain, LLC, 277 Conn. at 700, n.4, 894 A.2d at 265 n.4 (2006) (stating that the party's description of his interest in billboards as a leasehold interest "denote[s] a real property interest generated by personal property located on an easement may be inconsistent with our prior usage"). The court also noted that it "placed quotation marks around the phrase to indicate that we do not adopt Viacom's usage as our own." *Id.*

[591] *Id.* (*citing* Celentano v. Oaks Condo. Ass'n, 265 Conn. 579, 830 A.2d 164 (Conn. 2003); Canterbury Realty Co. v. Ives, 153 Conn. 377, 216 A.2d 426 (1966)); *see also* Adams Outdoor Adver., LP v. Zoning Hearing Bd. of Smithfield, 909 A.2d 469 (Pa. Commw. Ct. 2006).

[592] 154 S.W.3d 432 (Mo. App. W. Dist. 2005).

[593] Santa Fe Trail Neighborhood Redevelopment Corp. v. W.F. Coen & Co., 154 S.W.3d at 439 (*citing* St. Louis Sw. Ry. Co. v. State Tax Comm'n, 319 S.W.2d 559, 564 (Mo. 1959), (*quoting* 51 C.J.S. *Landlord & Tenant,* § 202e(2)); State *ex rel.* State Highway Comm'n v. Johnson, 592 S.W.2d 854, 857 (Mo. App., E. Dist. 1979))).

[594] *In Re: Condemnation by the Dep't of Transportation*, 871 A.2d 896 (Commw. Ct. Pa. 2005).

[595] *Id.* at 901–02 (footnote omitted).

Assuming there is a valid lease, there are two principal interests for which compensation may be required—the interest in the lease to the land on which the billboard is erected and the interest in the billboard itself. "[A] lease is a valuable interest in land…."[596] The "[d]etermination of the value of a leasehold…[is] the difference between the reasonable rental value…and the actual rental required…."[597] Furthermore,

> "[i]n sharing the condemnation award, a lessee of such property is entitled to the market value of the right to use the property for the unexpired term over and above the amount of rent he is obligated to pay under the provisions of his lease….
>
> 'In evaluating the leasehold interest, it is proper to consider the rental the lessee is required to pay, the reasonable value of the use of the realty for the unexpired term of the lease, any premium paid by the lessee for the lease in addition to the subsequent rental, and any increase or decrease in the market value of the realty during the term of the lease.'"[598]

Thus, in *Zimmerman*, in calculating the billboard advertising company's share, the court allowed the value of the leasehold interest plus the loss of income for the remainder of the term.[599] However, the court also held that under the lease the billboards were personal property that had to be removed by the advertising company.[600]

If the evidence shows that it was the intent of the parties that the billboard is personal property and not a fixture, then the billboard must be removed. However, whether a billboard is personal property or a fixture is a question of fact.[601] As the court stated in *Commissioner of Transportation v. Rocky Mountain, LLC, supra*, a "condemnee is not entitled to compensation for personal property on condemned land unless the trial court finds that it constitutes a fixture."[602] In *Commissioner of Transportation v. Burkhart,*[603] the court determined that based on the evidence the billboard was personal property for which the lessee was not entitled to compensation; post-condemnation the lessee had no right to be on the property and, thus, was ordered to remove the billboard.[604]

If the billboard is determined to be a fixture, then the billboard and the leasehold interest are valued as one. "[A] lessee is entitled to be compensated for the market value of the leasehold and the building or fixture as a unit;"[605] that is, "'what a buyer would be willing to pay for them as a unit and not the sum of the values of each considered separately.'"[606] Furthermore,

> "[t]he value of the leasehold should be determined from the testimony of qualified expert witnesses as that value which a buyer under no compulsion to purchase the tenancy would pay to a seller under no compulsion to sell, taking into consideration the period of the lease yet to run, including the unexercised right of renewal, the favorable and unfavorable factors of the leasehold estate, the location, type and construction of the building, the business of the tenant, comparable properties in similar neighborhoods, present market conditions and future market trends, and all other material factors that would enter into the determination of the reasonable market value of the property. The bonus value, sometimes referred to as the leasehold savings or profit, is the difference between the economic rental and the contract rental. The economic rental is the actual market value of the use and occupancy."[607]

In the *Eller Media* case, noted previously, Eller Media also contended that the trial court, which had calculated the fair market value of the billboards at $470,000, "erred in failing to award damages for the fair market value of its leasehold interest in the sites where the billboards are located."[608] The court agreed and held that Eller Media was entitled to the fair market value of its leasehold interest.[609]

It may be noted that Guttha had "contractually preserved his right to claim damages for his loss of goodwill…generally understood to signify the value of an on-going business that was operated on the condemned property." The court held that

> Article VI-A of the Eminent Domain Code establishes a right to special damages where a condemnation leads to displacement of a business. 26 P.S. §§ 1-601A–1-606A. A displaced person is defined as any condemnee or other person who moves from real property or moves his personal property from real property due to a condemnation. 26 P.S. § 1-201(8). A tenant who is not entitled to general damages may be entitled to special damages for displacement.

Id. at 903. The court remanded for further proceedings. *Id.*

[596] City of Cleveland v. Zimmerman, 22 Ohio Misc. 19, 22, 253 N.E.2d 327, 330 (Ohio Ct. Common Pleas 1969) (involving the apportionment of part of a landowner's appropriation award to a lessee with respect to two billboards belonging to the billboard company on the property).

[597] *Id.* at 23, 253 N.E.2d at 330.

[598] *Id.* (*quoting* syllabus in In re Appropriation for Highway Purposes A. K. A. Frownfelter v. Graham, 169 Ohio St. 309, 159 N.E.2d 456 (1959)).

[599] 22 Ohio Misc. at 26, 253 N.E.2d at 332.

[600] *Id.*

[601] *See* Comm'r of Transp. v. Burkhart, 2003 Conn. Super. LEXIS 3166, at **7–8 (denying compensation because it was the parties' intent that the billboard was personal property, not a fixture).

[602] *Rocky Mountain, LLC,* 277 Conn. 696, 730, 894 A.2d at 282.

[603] 2003 Conn. Super. LEXIS 3166, at *1 (Conn. Super. Ct. 2003) (Unrept).

[604] *Id.* at *15.

[605] State *ex. rel.* Mo. Highway & Transp. Comm'n v. Quiko, 923 S.W.2d 489, 493 (Mo. App. S. Dist. 1996).

[606] *Id.* at 493 (citation omitted).

[607] *Id.* at 494 (*quoting* Land Clearance for Redevelopment Corp. v. Doernhoefer, 389 S.W.2d 780, 784 (Mo. 1965)).

[608] Eller Media Co. v. Montgomery County, Md*.,* 143 Md. App. 2d at 583, 795 A.2d at 741.

[609] *Id.* A DOT document entitled, "Reproduction Cost Index for Outdoor Advertising Signs," explained that

> The value of the site is to be accounted for in the appraisal of the land except when doing the valuation for the Highway Beautification Program. Under this program, some signs are considered legal non-conforming use signs and the lease value of the remaining economic life of these signs will determine the site value.

When the sign is located on land not owned by the advertising company, it must be determined how much of the damages go to the advertising company and how much to the landowner.[610] In a situation in which an outdoor advertising structure is located on property subject to a lease, the majority rule appears to be that the land and the structure are to be valued as a unit, not separately. [611] The owner of the outdoor advertising structure is entitled to be compensated for the structure and bonus value of its lease, if any, and the owner of the land is entitled to all remaining damages.

In *United States v. Petty Motor Corporation,*[612] in which the Supreme Court dealt with compensation for tenants in condemnation proceedings, the Court held that the value of a leasehold interest may be determined by calculating the difference between what the premises would rent for in the market and the rent actually paid pursuant to the lease based on the remaining term of the lease. The difference, if any, is the bonus value and measures the benefit of the bargain to the tenant. Using this rule of thumb as to the value of the lease, it is only necessary to determine the value of the structures.[613]

G.3.b. Valuation

In determining the value of the interests taken, there are four approaches to valuation proposed by parties depending on their particular point of view. Although these methods are discussed in more detail in Section 7 of the report, they are discussed briefly in this subsection in relation to control of outdoor advertising. The first three approaches are the traditional valuation techniques of the 1) market data or sales comparison approach; 2) income approach; and 3) cost-less-depreciation approach.[614] The fourth and most controversial method is the gross income multiplier approach.[615]

The market data or comparable sales method is complicated as billboards generally are not sold individually; such an approach usually has been rejected by the courts.[616] Although the income approach is difficult to apply, the method has been used in billboard cases.[617] Most courts will accept such testimony if properly prepared, but there is difficulty in doing so. The information necessary to prepare maintenance and management costs is controlled by the billboard companies, which generally object for reasons of privacy to providing such information. If the income approach is used, it is not necessary to establish the value of the leasehold separately as it is included in the income approach. The cost approach is accepted by many courts as a proper one but not necessarily as the only method.[618]

In *Burkhart, supra,* the lessee's expert's opinion on the market value of a sign relied on the "recognized appraisal approaches: the income approach, the sales comparison approach, and the cost approach."[619]

Id.

[610] *See* Santa Fe Trail Neighborhood Redevelopment Corp. v. W.F. Coen & Co., 154 S.W.3d at 440 (finding a landlord-tenant relationship rather than a revocable license and apportioning condemnation damages between the landlord and tenant); Guttha v. Commw. of Pa., Dep't of Transp., 871 A.2d 896 (Pa. Commw. Ct. 2005) (involving a similar factual situation and result).

[611] *See* Comm'r of Transp. v. Rocky Mountain, LLC, 277 Conn. at 734, 894 A.2d at 284 (discussing the method of valuation and factors to consider); Comm'r of Transp. v. Patrick & Helen Corp., 2004 Conn. Super. LEXIS 1650 (Conn. Super. Ct. 2004) (Unrept.) (considering the market value of a partial taking of property).

[612] 327 U.S. 372, 66 S. Ct. 596, 90 L. Ed. 2d 729 (1946).

[613] *See* City of Oakbrook Terrace v. Suburban Bank & Trust Co., 364 Ill. App. 3d 506, at 518, 845 N.E.2d 1000, at 1010–11 (rejecting the Department of Transportation's assertion that the defendant was entitled to only the bonus value as just compensation in lieu of the fair market value of the property at its highest and best use on the date the property is condemned) (*citing* Dep't of Transp. v. Drury Displays, Inc., 327 Ill. App. 3d 881, 764 N.E.2d 166 (Ill App. 5th Dist. 2002)). *See Santa Fe Trail Neighborhood Redevelopment Corp.,* 154 S.W.3d at 444 (holding that the "proper measure of damages for condemnation of lessee's interest in real property is the bonus value of the unexpired term of the lease as measured by the difference between the market rental and the contract rental for the use and occupancy of the affected leasehold") (*citing* Land Clearance for Redevelopment Corp. v. Dornhoefer, 389 S.W.2d 780, 784 (Mo. 1965)); *Guttha,* 871 A.2d at 900 (Pa. Commw. Ct. 2005).

[614] Norman v. United States, 63 Fed. Cl. 231, 271 (2004), *aff'd,* 2005 U.S. App. LEXIS 24826 (Fed. Cir. 2005); *Burkhart*, 2003 Conn. Super. LEXIS 3166, at *6-7; *Rocky Mountain, LLC,* 277 Conn. at 727, n.26, 894 A.2d at 280, n.26 (recognizing that the three common methodologies for valuing real property interests are income capitalization, the replacement cost, and the comparable sales approach) (*citing* Ne. Conn. Econ. Alliance, Inc. v. ATC P'ship, 272 Conn. at 14, 22, n.10, 861 A.2d at 473, 480, n.10 (2004)); United Techs Corp. v. East Windsor, 262 Conn. 11, 18–20, 807 A.2d 955 (2002)); Comm'r of Transp. v. Patrick & Helen Corp., 2004 Conn. Super. LEXIS 1650 (Conn. Super. Ct. 2004) (Unrept.) (applying the comparable sales method to determine the fair market value of taken property).

[615] *See* State *ex rel*. Mo. Highway and Transp. Comm'n v. Quiko, 923 S.W.2d 489 (Mo. Ct. App. 1996).

[616] *See id. But see Norman*, 63 Fed. Cl. at 270–71 (stating that the comparable sales method is "generally accepted metric for determining economic impact").

[617] *See* Comm'r of Transp. v. Rocky Mountain, LLC, 277 Conn. at 735, 894 A.2d at 284 (upholding the use of the capitalization of income approach to valuation of billboards); Comm'r of Transp. v. Burkhart, 2003 Conn. Super. LEXIS 3166, at **6–7. S*ee also* City of Cleveland v. Zimmerman, 22 Ohio Misc. 19, 253 N.E.2d 327, 330 (Ohio Ct. Common Pleas 1969) (court treating the claim as one for the leasehold and awarding anticipated income from the rental, minus expenses for ground rent, maintenance, and management for the leasehold period).

[618] *See* Comm'r of Transp. v. Burkhart, 2003 Conn. Super. LEXIS 3166, at **6–7; Comm'r of Transp. v. Rocky Mountain, LLC, 277 Conn. at 735, 894 A.2d at 284 (upholding the use of the capitalization of income approach to value billboards).

[619] *Burkhart,* 2003 Conn. Super. LEXIS 3166, at *6.

> [T]he income approach…considers the leasing history of the billboard in comparison to comparable properties to estimate its net operating income as standardized occupancy. The sales comparison approach analyzes the sales of comparable properties with adjustments made for differences. This analysis is based upon the Principle of Substitution which holds that a prudent purchaser will pay no more for a property than the cost of producing a substitute property with the same utility as the subject. The cost approach regards the construction quality of the sign structure, its physical condition, and its depreciation from all causes. The cost approach is also based upon the Principle of Substitution.[620]

The gross income multiplier approach is a controversial method and has apparently been rejected by many courts, at least in condemnation of billboards. *Missouri, ex rel. Missouri Highway and Transportation Commission v. Quiko*[621] involved condemnation actions and the apportionment of awards between landowners and a lessee that maintained advertising billboards on the properties. The billboard company complained that the trial court used the depreciated replacement cost of the structure to determine the lessee's compensation.[622] The lessees argued for an approach using comparable sales data, i.e., sales of other advertising structures "from which the [lessee's] witness…derived percentages expressed as multiples of gross advertising revenues" that the lessee sought "to apply…in arriving at the market value of the structures."[623]

In *Quiko*, the lessee's expert used comparable sales and then

> arrived at a "gross income multiplier" by referring to the number of structures sold, the gross revenue from the structures involved in each case, and the sale price. [The expert] concluded that those sales were for amounts ranging from 3½ to 4½ times the gross revenue of the structures sold."[624]

Included among the expert's assumptions, however, was the assumption that the leases would be renewed. Although the leases were automatically renewable for 5-year terms, the leases could be terminated by a lessor on 30-days' notice prior to the end of the term. In ruling against the lessee, the court cited authorities from other states that had rejected the gross income multiplier approach in deciding the amount of just compensation for billboards.[625]

Another problem in the *Quiko* case was that "using a multiple of gross income in arriving at a value for the structures effectively incorporates a factor for lost business income. Missouri has generally not permitted consideration of lost business profits in valuing property taken by condemnation."[626] The court did note that exceptions to the rule had been recognized when "there was a total taking of the land and the business was inextricably related and connected with the land so that an appropriation of the land constituted an appropriation of the business."[627] The court held, however, that the structures were not "inextricably connected with this land" and that there was no showing that other land was not available for the structures; hence, even assuming that there was a total taking, it was not appropriate to consider business revenues via the gross income multiplier approach.[628]

G.3.c. Amortization

Amortization or abatement is a method of removing billboards that do not conform to a statute, ordinance, or regulation without the governing authority having to compensate the owner. The method is to take the in-place value of the sign and then based on that value allow the structure to remain in place for a period of time, so that it depreciates to a zero value at which time the sign must be removed.[629] The practice of amortization may be prohibited, however, by statute.[630] Of course, as seen, under the HBA amortization may not be substituted for just compensation.

The question of whether an amortization schedule is legal depends on the consideration of at least three issues: does the state require that just compensation be paid; if not, is the period of amortization fair; and does the law comply with the four-prong test of *Central Hudson*?[631]

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[620] *Id.*

[621] 923 S.W.2d 489 (Mo. Ct. App. 1996).

[622] *Id.* at 493.

[623] *Id.*

[624] *Id.* at 494–95.

[625] *Id.* at 495 (*citing* Whiteco Indus., Inc. v. City of Tucson, 168 Ariz. 257, 812 P.2d 1075, 1079 (1990) (stating that evidence of the value of billboards established by proving "four times gross income without any regard for the existence, length or terms of the leases, was incompetent and legally insufficient…."); State Dep't of Transp. & Dev. v. Chachere, 574 So. 2d 1306, 1311 (La. App. 3d Cir. 1991) (rejecting the use of a gross income multiplier in valuing billboards even though it may be an accepted approach within the advertising industry)).

[626] *Id.* (*citing* City of St. Louis v. Union Quarry & Constr. Co., 394 S.W.2d 300, 306 (Mo. 1965); State *ex rel.* Highway & Transp. Comm'n v. Musterman, 856 S.W.2d 121, 123 (Mo. App. E.D. 1993); Land Clearance for Redevelopment Auth. v. W.F. Coen and Co., 773 S.W.2d at 467–68.

[627] *Id.* at 495–96.

[628] *Id.* at 496.

[629] An example of such an amortization or abatement schedule was included in the city ordinance that was the basis for the *Metromedia* case.

[630] *See* S.D. CODIFIED LAWS § 31-29-75 (1977), which provides that

> No outdoor advertising sign, display, or device may be removed by an amortization schedule, nor may its value be so determined, and the owners thereof and the owners of the real property on which the same are situated shall be guaranteed just compensation, including through condemnation procedures, as provided in §§ 31-29-61 to 31-29-83, inclusive.

[631] *See* Village of Skokie v. Walton on Dempster, Inc., 119 Ill. App. 3d 299, 456 N.E.2d 293, 305 (Ill. App. Ct. 1st Dist. 1983) (upholding a 7-year amortization period as reasonable), *but see* Eller Media Co. v. Montgomery County, Md., 143 Md. App. 2d 562, 795 A.2d 728 (Md. 2002) (requiring just compensation to

In a 2006 case, an Illinois appellate court held that a 2-year amortization period was not just compensation. The city sought to enforce an ordinance regulating off-premises, freestanding, outdoor advertising signs against various defendants that owned or leased either legal, nonconforming signs, or the property on which signs were located. Thereafter, the city enacted a new ordinance that permitted such signs and included a 2-year amortization period for conforming signs. The city "argue[d] that its use of amortization as just compensation has no impact on judicial procedures and that its ordinance places no undue burden on the courts."[632]

However, the court held

> "Amortization" has nothing to do with fair market value of the property at its highest and best use on the date the property is deemed condemned. The City's claim, that amortization *is* just compensation, fails.
>
> To the extent, then, that the City is arguing that its amortization schedule in its ordinance is the only remedy available to defendants, the ordinance burdens the state judiciary, because it prevents the state judiciary from awarding "just compensation" pursuant to the Act….
>
> As a result, the City's attempt to replace "just compensation" with amortization as the only remedy available to a sign owner required to remove or alter its sign to comply with the City's ordinance infringes on the state judiciary and is an impermissible exercise of its home rule authority.[633]

In *Eller Media Co. v. Montgomery County, Maryland, supra*, the county attempted to amortize signs made nonconforming by its ordinance in spite of a state statute very similar to 23 U.S.C. § 131(g) requiring just compensation be paid to the owners. The court in interpreting the statute held that "Montgomery County has no authority to ban pre-existing lawfully erected billboards without paying the fair market value of the billboards."[634]

An issue has arisen regarding whether a taking occurred at the time of the enactment of an ordinance providing for amortization or at the time of the expiration of the amortization period. In *Lamar Whiteco Outdoor Corporation v. City of West Chicago,*[635] the court held that the date of the taking occurred after the expiration of the amortization period. A municipal ordinance had provided for a 7-year amortization period for removing existing nonconforming structures without providing for compensation of one losing the right to display a sign. The plaintiffs did not challenge the ordinance until the 7-year amortization period expired and the city began issuing citations. The principal issue in the case was whether the statute of limitations had expired, but the court held that the plaintiffs' § 1983 and eminent domain claims accrued when the city issued the citations, not when the ordinance was enacted. Thus, the action was timely filed.[636] The court further held that under Section 701 of the state's Eminent Domain Act, the plaintiffs were entitled to just compensation[637] and the issuance of the citations, not the enactment of the ordinance, was the date of the taking.[638]

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be paid even if a reasonable amortization period was provided pursuant to Maryland statute).

[632] City of Oakbrook Terrace v. Surburban Bank & Trust Co., 364 Ill. App. 3d at 515, 845 N.E.2d at 1008.

[633] *Id.* at 518, 845 N.E.2d at 1011.

[634] Eller Media Co. v. Montgomery County, Md. 143 Md. App. 2d at 579, 795 A. 2d at 739.

[635] 355 Ill. App. 3d 352, 823 N.E.2d 610 (Ill. Ct. App. 2d Dist. 2005).

[636] *Id.* at 354–55, 823 N.E.2d at 613.

[637] *Id.* at 368, 823 N.E.2d at 623. Section 7-101 states that:

> the right to just compensation as provided in this Article applies to the owner or owners of any lawfully erected off-premises outdoor advertising sign that is compelled to be altered or removed under this Article or any other statute, or under any ordinance or regulation of any municipality or other unit of local government, and also applies to the owner or owners of the property on which that sign is erected.

735 ILL. COMP. STAT. 5/7-101 (West 2002).

[638] *Id.* at 369, 823 N.E.2d at 624.

SECTION 6

VALUATION PROBLEMS IN TRANSPORTATION-RELATED TAKINGS IN EMINENT DOMAIN

No matter what valuation method is selected for a particular parcel of real property, the Supreme Court has cautioned that the "assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety."[1]

[1] Cane Tenn., Inc. v. United States, 71 Fed. Cl. 432, 439 (2005) (citing United States v. Miller, 317 U.S. 369).

A. JUST COMPENSATION AND VALUATION

As stated in a case, just compensation requires that "the full and perfect equivalent in money" be paid by the condemnor for the property taken.[2] Just compensation, moreover, "is what the owner has lost, not what the condemnor has gained."[3] If "there is ascertainable market value,"[4] the condemnee is to be "made whole."[5] However, "'[o]vercompensation is as unjust to the public as undercompensation is to the property owner, and the landowner bears the burden of proving the value of the land.'"[6]

> The "just compensation" to which such owner is entitled has been held to be the value of the property at the time it is acquired pursuant to an exercise of the sovereign power. It has been held to be equivalent to the full value of the property. All elements of value which are inherent in the property merit consideration in the valuation process. Every element which affects the value and which would influence a prudent purchaser should be considered.[7]

The term value "includes every element of usefulness and advantage in the property…. It matters not that the owner uses the property for the least valuable of all the ends to which it is adapted, or that he puts it to no profitable use at all."[8] The highest and best use of the property must be taken into consideration. Of course, just compensation is based on "the value of the property at the time it is acquired."[9]

Value, however, is not an exact term.[10] As Justice Frankfurter stated in *Kimball Laundry Co. v. United States,*[11]

> "[v]alue is a word of many meanings." …For purposes of the compensation due under the Fifth Amendment…only that "value" need be considered which is attached to "property," but that [statement] only approaches by one step the problem of definition. The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker.[12]

"[W]here the character of the property is such as not to be susceptible to the application of market value, the courts have based their awards on a so-called actual or intrinsic value."[13] The value of a property that is "peculiar to the owner" or the owner's special use or the property's value to the condemnor generally is not the measure of value.[14] Moreover, the property's "productive value" or its value to the owner based on income that may be derived from the land is not to be used to determine value except insofar as the income is some indication of market value of the land.[15]

A condemnor may take an interest in real property such as an easement rather than a fee interest in whole or in part. As for valuation of an easement, "[i]n some cases the measure of damages for the taking of an easement by condemnation proceedings is the difference in the market value of the land free of the easement and its market value burdened with the easement."[16]

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[2] United States v. Miller, 317 U.S. 369, 373, 63 S. Ct. 276, 279, 87 L. Ed. 336 (1943). *See also* Conti v. R.I. Econ. Dev. Corp., 900 A.2d 1221, 1232 (R.I. 2006) (stating that "our conventional working rules bow, as they must, to the 'ultimate objective' that one who challenges the adequacy of a condemnation award should not receive a measure of compensation that in any way exceeds, or falls short of, 'just compensation'") (citation omitted). *See* State of Oklahoma v. Chelsea Butane Co., 2004 Ok. Civ. App. 48, at *16, 91 P.3d 656, 661 (Ok. Ct. App. 2004) ("The financial consequences are present to prevent abuse of the power of eminent domain and to insure that the condemnee is made whole when the eminent domain power is exercised."); City of New London v. Foss & Bourkie, Inc., 2002 Conn. Super. LEXIS 3624, at *17 (Super. Ct. 2002) (Unrept.) ("The question of what is just compensation is an equitable one rather than a strictly legal or technical one. The paramount law intends that the condemnee shall be put in as good condition pecuniarily by just compensation as he would have been in had the property not been taken."), *aff'd,* 85 Conn. App. 275, 857 A.2d 370 (2004), *appeal granted in part*, 271 Conn. 946, 861 A.2d 1177 (2004), *appeal dismissed*, 276 Conn. 522, 886 A.2d 1217 (2005). *See also* 4 NICHOLS ON EMINENT DOMAIN § 12.01.

[3] 4 NICHOLS ON EMINENT DOMAIN § 12.03, at 12-90. See State v. Ware, 86 S.W.3d 817 (Tex. App. 3d Dist. 2002).

[4] 4 NICHOLS ON EMINENT DOMAIN § 12.04[2], at 12-96.

[5] United States v. 6.45 Acres of Land, 409 F.3d 139, 145 n.11 (3d Cir. 2005) ("The guiding principle of just compensation…is that the owner of the condemned property must be made whole but is not entitled to more.") (internal quotation marks omitted) (citation omitted)).

[6] *Id.* at 145 (*quoting* United States v. L.E. Cooke Co., Inc., 991 F.2d 336, 341 (6th Cir. 1993).

[7] 4 NICHOLS ON EMINENT DOMAIN § 12.01, at 12-2–12-4.

[8] Alloway v. Nashville, 88 Tenn. 510, 514, 13 S.W. 123, 123 (1890) (affirming the trial court's decision refusing to permit the landowners to show the land's value for a specific purpose). *See also* Memphis Hous. Auth. v. Mid-South Title Co., 59 Tenn. App. 654, 666–67, 443 S.W.2d 492, 498 (1968) (quoting *Alloway* but holding that the landowners had no immediate plans to erect a high rise motel and that damages had to be based on the fair market value of the land in light of all purposes to which it was naturally adapted).

[9] 4 NICHOLS ON EMINENT DOMAIN § 12.01, at 12-2 (2007).

[10] *See id.* § 12 01.

[11] Kimball Laundry Co. v. United States, 338 U.S. 1, 8, 69 S. Ct. 1434, 1439, 93 L. Ed. 1765, 1773 (1948) (holding that proper measure of compensation was the rental that could have been obtained on the property during the temporary taking and for whatever transferable value their temporary use of the laundry's "trade routes" may have had).

[12] *Id.* at 4, 69 S. Ct. at 1437, 93 L. Ed. at 1771 (citation omitted) (footnote omitted).

[13] 4 NICHOLS ON EMINENT DOMAIN § 12.01, at 12-22.

[14] *Id.* at 12-26.

[15] *Id.* § 12.02[2], at 12-82.

[16] State v. Ware, 86 S.W.3d 817, at 820 (Tex. App. 2002) (the court remanding a case in which the state had acquired an easement for highway purposes but there was no evidence that the condemnation award was less than the property's full fair

However, some easements may deprive the owner of any beneficial use of the land, in which case "the landowner may recover as damages the market value of the land."[17]

In a case in which

> the condemnor already owns all interest in the land except that of the condemnee, the market value of the condemnee's interest is the sole issue[;]…[t]hus…the proper measure of damages in a case involving the taking of property burdened by an existing easement is to value the interest actually taken.[18]

A.1. Market Value as Just Compensation

Although value is a relative term, it is generally held to mean market value[19] that is based on a consideration of four factors: sales, income, cost, and use.[20] As explained in *Nichols on Eminent Domain*, "'fair market value' means the amount of money which a purchaser willing, but not obliged, to buy the property would pay to an owner willing, but not obliged, to sell it, taking into consideration all uses for which the land was suited and might be applied."[21] Thus, in the usual case, market value has been accepted as the measure of compensation.[22]

"The most advantageous use to which the property may be adapted, where such use has an effect upon the market value, may be considered."[23] "A property's highest and best use is commonly accepted by real estate appraisers as the starting point for the analysis of its true and actual value…."[24] The "highest and best use" of property is "the reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value."[25]

> "Under the general rule of property valuation, fair [market] value, of necessity, regardless of the method of valuation, takes into account the highest and best value of the land…." A property's highest and best use is commonly defined as "the *use that will most likely produce the highest market value, greatest financial return, or the most profit from the use of a particular piece of real estate."* …The highest and best use determination is inextricably intertwined with the marketplace because "fair market value" is defined as "'the price that a willing buyer would pay a willing seller based on the highest and best possible use of the land assuming, of course, that a market exists for such optimum use.'"[26]

As stated in *United Technologies Corporation v. Town of East Windsor,*[27] "[t]he highest and best use conclusion necessarily affects the rest of the valuation process because, as the major factor in determining the scope of the market for the property, it dictates which methods of valuation are applicable."[28] In *United Technologies,* a case involving an assessment for tax purposes but using the same methods of valuation as in condemnation, the issue was whether the trial court's ruling regarding the property's highest and best use was too restrictive.[29] The plaintiff leased property used in part as an aftermarket support facility for the manufacturing, repairing, and reconditioning of jet engine fuel injectors and propellers for aircraft piston engines. The property was "not the normal run-of-the-mill plant" but one with ceiling heights as high as 26 ft and with "environmentally controlled clean rooms."[30]

The trial court concluded that the market data approach did not apply because there were no comparable sales.[31] On appeal the plaintiff argued that the trial court's decision was too restrictive "because it failed to consider that the property could be put to other industrial uses, forcing the court to ignore relevant market data…."[32] However, the appeals court affirmed the trial court's decision, holding that that in this case, "the plaintiff's continued profitable use of its East Windsor property supports the trial court's highest and best use conclusion."[33]

Expert testimony is required to prove valuation.[34] Indeed, "[t]he heart of most property valuation cases is

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market value, and the landowner thereafter sought a declaratory judgment that the unused portion of the easement had terminated).

[17] *Id.*

[18] *Id.* at 825 (citations omitted).

[19] 4 NICHOLS ON EMINENT DOMAIN § 12.01, at 12-8–12-9.

[20] *Id.* at 12-49.

[21] 4 NICHOLS ON EMINENT DOMAIN § 12.02[1], at 12-60–12-67.

[22] Marseilles Hydro Power, LLC v. Marseilles Land and Water Corp., 2004 U.S. Dist. LEXIS 25276, at *14–15 (N.D. Ill. 2004), *aff'd*, 2008 U.S. App. LEXIS 4286 (7th Cir. Ill. 2008); United States v. Miller, 317 U.S. 369, 374, 63 S. Ct. 276, 280, 87 L. Ed. 336, 342–43 (1943) ("In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value.").

[23] 4 NICHOLS ON EMINENT DOMAIN § 12.02[3], at 12-88.

[24] United Technologies Corp. v. Town of East Windsor, 262 Conn. 11, 25, 807 A.2d 955, 965 (2002) (citation omitted).

[25] *Id.,* n.20 (citations omitted).

[26] *Id.* at 25, 807 A.2d at 965 (emphasis in original) (citations omitted) (footnotes omitted).

[27] 262 Conn. 11, 807 A.2d 955 (2002).

[28] *Id.* at 25–26, 807 A.2d at 965.

[29] *Id.* at 12, 807 A.2d at 957.

[30] *Id.* at 14, 807 A.2d at 958–59 (internal quotation marks omitted).

[31] *Id.* at 20, 807 A.2d at 962 (holding that the income capitalization approach was the more credible method of valuation in the case).

[32] *Id.* at 22, 807 A.2d at 962.

[33] *Id.* at 28, 807 A.2d at 966.

[34] *See* Spencer Diesel Injection & Turbo, Inc. v. Sioux City, 2007 Iowa App. LEXIS 535, at *15 (Iowa App. 2007) (Unrept.), *aff'd*, 735 N.W.2d 202 (Iowa Ct. App. 2007), *cert. denied*, 128 S. Ct. 654, 169 L. Ed. 2d 510 (U.S. 2007); Aaron v. United States, 340 F.2d 655 (Ct. Cl. 1964); Bd. of Park Comm'rs of Wichita v. Fitch, 184 Kan. 508, 512, 337 P.2d 1034, 1039 (1959) (stating also, however, that "[o]pinion evidence is also usually admitted from persons who are not strictly experts, but who from residing and doing business in the vicinity have familiarized themselves with land values. The competency of such witnesses is

the evidence of experts regarding their professional judgments as to the fair market value of the subject property."[35] An expert usually will testify concerning the facts and reasoning that are the basis of the expert's opinion. However, it is also possible that the basis of an expert's opinion may not be elicited until cross-examination. In a condemnation trial the property must be valued first by the witnesses and then by the trier of the facts based on the evidence.[36] Whether the property has market value is generally a question of fact.[37] Although a California court has stated that "[t]he right to a jury trial…goes *only* to the *amount* of compensation" and that "[a]ll other questions of fact**,** or mixed fact and law, are to be tried…without reference to a jury,"[38] the court, nevertheless, held that the trial court improperly excluded an expert witness's testimony concerning the valuation of goodwill. According to the court, the trial court had erroneously believed that "in valuing goodwill, evidence of a lease renewal is inadmissible as a matter of law."[39] The court held that the evidence was sufficient for the jury "to determine whether there was a reasonable probability of a lease renewal given the Agency's conflicting evidence the highest and best use of the property is redevelopment in the near future."[40]

Evidence in a condemnation case may be inadmissible if the evidence is not sufficiently probative of the value of the property to be considered by the trier of fact. In an eminent domain trial a limitation on the admissibility or use of evidence of value may occur at two stages. The proffered evidence may be excluded from consideration by the trier of fact either before trial by a motion *in limine* or an equivalent motion or during the trial. Second, although certain evidence may be admitted for the jury's *consideration*, an instruction may restrict the jury in how it may consider the evidence. On the other hand, because once the jury hears the evidence a limiting instruction may not serve its intended function, such a limiting instruction may not work necessarily to the condemnor's advantage.

Limitations on the admissibility of evidence of value, or limiting instructions on how the evidence may be considered, usually work to the advantage of the condemnor because the more that an owner's evidence is restricted, the more likely it is that a condemnor will pay less. Nevertheless, although the "[r]ules relating to the fixing of damages afford convenient measures of value which are ordinarily satisfactory and conclusive," the rules are "nothing more than a means to an end and that end is complete indemnity."[41]

A.2. Methodologies to Indicate Market Value

A.2.a. The Market Data or Comparable Sales Approach

As stated recently by an Illinois court, there are three generally accepted means of estimating the fair market value of property taken by eminent domain: the income approach, the cost approach, and the market approach, the latter also known as the sales comparison approach.[42] In condemnation cases the measure of compensation generally is the market value of the property.[43] Market value is not an end in itself but a means to an end, a satisfaction of the constitutional requirement that an owner receive just compensation.[44] In most jurisdictions, prices paid for voluntary sales of similar land are admissible, with some jurisdictions holding that, if there is sufficient evidence of comparable sales on which to base an estimate of just compensa-

primarily for the court, and the weight to be given such testimony is for the jury.")

[35] Spencer Diesel Injection & Turbo, Inc. v. Sioux City*,* 2007 Iowa App. LEXIS 535, at *15 (citations omitted).

[36] *See* State v. Ware, 86 S.W.3d at 824 (noting that the only valuation testimony admitted was by one expert whose conclusions were accepted by the jury).

[37] *See also* Dep't of Transp. v. H P/Meachum Land Ltd. P'ship, 245 Ill. App. 3d 252, 256, 614 N.E.2d 485, 488 (Ill. App. 2d Dist. 1993) (*citing* Chicago v. Farwell, 286 Ill. 415, 121 N.E. 795 (1919) (affirming the trial court's determination of compensation and holding that whenever property has market value, evidence of profits derived from the property is neither admissible nor a basis for determining compensation and rejecting the owner's argument that just compensation included the "efficiency" value of the property resulting from its capacity for earning profits as a soap manufacturing plant)).

[38] Redevelopment Agency of San Diego v. Attisha, 128 Cal. App. 4th 357, 367, 27 Cal. Rptr. 3d 126, 134 (Cal. App. 4th Dist. 2005), *modified*, 2005 Cal. App. LEXIS 726 (Cal. App. 4th Dist. 2005), *review denied*, 2005 Cal. LEXIS 8379 (Cal. 2005) (emphasis in original).

[39] *Id.* at 370, 27 Cal. Rptr. 3d at 136.

[40] *Id.* at 373, 27 Cal. Rptr. 3d at 139.

[41] Matter of Board of Water Supply, 209 A.D. 231, 232, 205 N.Y.S. 237 (N.Y. App. 3d Dep't 1924); 4 NICHOLS ON EMINENT DOMAIN § 12.1[4].

[42] Marseilles Hydro Power, LLC v. Marseilles Land and Water Corp., 2004 U.S. Dist. LEXIS 25276, at *15.

[43] Pa. Dep't of Gen. Servs. v. U.S. Mineral Prods. Co.*,* 587 Pa. 236, 898 A.2d 590, 596 (2006); Oxford v. Oxford Water Co., 391 Mass. 581, 589, 463 N.E.2d 330, 336 (1984) (holding also that "[w]hen the property taken by eminent domain is 'special purpose property,' …the accepted way to determine fair market value is reproduction cost less depreciation") (*citing* Commonwealth v. Mass. Turnpike Auth., 352 Mass. 143, 224 N.E.2d 186 (1966)). *See also* 4 NICHOLS ON EMINENT DOMAIN § 12.02.

[44] *See generally* Aladdin, Inc. v. Black Hawk County*,* 562 N.W.2d 608, 611 (Iowa 1997) ("It is difficult, if not impossible, to lay down a rule of universal application as to what may be considered as elements of damage, as the equities of the parties must more or less depend upon the particular facts and circumstances of each case.") (citation omitted); United States v. Certain Properties, etc., 306 F.2d 439, 453 (2d Cir. 1962) (stating that "[e]stimates of reproduction cost less depreciation are admissible but not conclusive" but that "each owner, landlord or tenant, is entitled to the value of what the Government took from him"); United States v. Penn-Dixie Cement Corp., 178 F.2d 195, 199 (6th Cir. 1949) ("It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose."); 4 NICHOLS ON EMINENT DOMAIN § 12.02.

tion, the comparable sales method is the preferred way to compute market value.[45] "Under the market data approach the particular property is compared with other similar properties which have been sold or are listed for sale."[46] Thus, valuation of conventional types of property usually is based on the market data or sales comparison approach.[47]

The market data or sales comparison approach arrives at an indication of the value of property by comparing the property being appraised to similar properties that have been sold recently; by applying appropriate units of comparison; and by making adjustments to the sale prices of the comparables based on the elements of comparison. Unless the purchase price of the property were to be nearly contemporaneous with the date of the taking of the property by the condemnor, "[t]he original cost of property is not a proper measure of market value;"[48] nor does the investment value of the property define its market value.[49] The market data or sales comparison approach may be used to appraise the value of improved properties, of vacant land, or of land that is being appraised as if it were vacant land. It is understood that the value of comparable sales data varies directly with the similarity of the comparable properties to the property claimed to have been taken.[50] However,

> [s]pecial opportunities for proof of value have long been afforded in cases where it is felt that there is no market value, in the sense in which, in most communities, market value is at all times reflected by a steady volume of sales of ordinary commercial and residential properties. The occasion for this difference in type of proof (permitting the use of valuation data other than those factors ordinarily bearing on market price) has been expressed in terms of absence of market value…or of market…. The courts in these cases, however, may be doing no more than recognizing that *more complex and resourceful methods of ascertaining value must be used where the property is unusual or specialized in character and where ordinary methods will produce a miscarriage of justice*. In such cases, it is proper to determine market value from the intrinsic value of the property and from its value for the special purposes for which it is adapted and used.[51]

The market data or sales comparison approach is the most common and preferred method of land valuation when comparable sales data is available.[52]

A.2.b. The Income Approach

Market value also may be determined using an income capitalization approach.[53] Appraisers develop an indication of market value by applying a rate or factor to the anticipated net income from a property based on

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[45] 4 NICHOLS ON EMINENT DOMAIN § 12B.04[3], at 12B-19–12B-22.

[46] Marseilles Hydro Power, LLC v. Marseilles Land and Water Corp., 2004 U.S. Dist. LEXIS, at *15.

[47] Spencer Diesel Injection & Turbo, Inc. v. Sioux City, 2007 Iowa App. LEXIS 535, at *9-10.

[48] Cane Tennessee, Inc. v. United States, 71 Fed. Cl. at 438 (2005) (*citing* Brooks-Scanlon Corp. v. United States, 265 U.S. 106, 123, 44 S. Ct. 471, 474, 68 L. Ed. 934, 941 (1924); United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396, 403, 70 S. Ct. 217, 221, 94 L. Ed. 195, 201 (1949) ("Original cost is well termed the 'false standard of the past' where, as here, present value in no way reflects that cost.") (footnote omitted); TVA v. Powelson, 319 U.S. 266, 284–285, 63 S. Ct. 1047, 1057, 87 L. Ed. 1390, 1403 (1943) ("The constitutional obligation of the United States…[under] the Fifth Amendment allows the owner only the fair market value of his property; it does not guarantee him a return of his investment." (citation omitted))).

[49] Olson v. United States, 292 U.S. 246, 255, 54 S. Ct. 704, 708, 78 L. Ed. 1236, 1244 (1934) (stating that the compensation owed for a taking is the "market value of the property at the time of the taking contemporaneously paid in money," that such value "may be more or less than the owner's investment," and observing that the owner "may have acquired the property for less than its worth or he may have paid a speculative and exorbitant price," and that the property's "value may have changed substantially while held" by the owner.)

[50] San Nicolas v. United States, 617 F.2d 246, 251 (Ct. Cl. 1980) ("Reliability of the market data approach to valuation is dependent upon the selection of transactions with comparable data, on the accuracy of adjustments for differences in time, size, and other variables, and upon verification of the sales data.")

[51] Newton Girl Scout Council, Inc. v. Mass. Turnpike Auth., 335 Mass. 189, 195, 138 N.E.2d 769, 774 (1956) (emphasis supplied).

[52] *See also* Norman v. United States, 63 Fed. Cl. 231, 270–71 (2004), *aff'd*, 429 F.3d 1081 (Fed. Cir. 2005), *cert. denied*, 547 U.S. 1147, 126 S. Ct. 2288, 164 L. Ed. 2d 813 (2006) (recognizing the "'comparable sales method' is the generally accepted metric for determining the economic impact [of a regulatory taking]"); Good v. United States, 39 Fed. Cl. 81, 106 (1997) ("The most reliable method of arriving at the fair market value of property, particularly unimproved property, is through the 'sales comparison approach.'"); Cane Tenn., Inc. v. United States, 71 Fed. Cl. at 438 (*citing* Fla. Rock Indust., Inc. v. United States, 18 F.3d 1560, 1563 (Fed. Cir. 1994) (discussing the use of a "standard comparable sales valuation method" in a proceeding to determine the fair market value of the property alleged to have been taken and thereby assess the economic impact of the regulatory action).

[53] Cane Tenn., Inc. v. United States, 71 Fed. Cl. at 438 (*citing* Snowbank Enters., Inc. v. United States, 6 Cl. Ct. 476, 485 (1984); Foster v. United States, 2 Cl. Ct. 426, 447 (1983) (recognizing as a method of determining market value "the capitalization of income approach (sometimes referred to as 'discounted cash flow' or the 'present worth of future income'), which relates earnings that reasonably could be expected to be derived from the property, discounted for risks and other variables, to arrive at a present value"); Whitney Benefits, Inc. v. United States, 18 Cl. Ct. 394, 408–09 (1989), *aff'd*, 926 F.2d 1169 (Fed. Cir. 1991) (approving use of an income capitalization method of property valuation in the absence of adequate comparable sales); *but see* Bassett, N.M. LLC v. United States, 55 Fed. Cl. 63, 76 (2002) (rejecting in an inverse condemnation action the plaintiff's calculation of "the fair market value of aggregate mining on [its] property prior to the taking by determining the present value of the future income stream of aggregates that Plaintiff could have mined on the property absent the taking over a twenty year period")).

a consideration of the property's actual rental income, as well as on rental income for comparable properties in the vicinity, property expenses, and allowances for vacancy and collection losses.[54]

As a Connecticut court described it in a 2006 case, there are seven steps to the income capitalization approach. The appraiser must

> (1) estimate gross income; (2) estimate vacancy and collection loss; (3) calculate effective gross income (i.e., deduct vacancy and collection loss from estimated gross income); (4) estimate fixed and operating expenses and reserves for replacement of short-lived items; (5) estimate net income (i.e., deduct expenses from effective gross income); (6) select an applicable capitalization rate; and (7) apply the capitalization rate to net income to arrive at an indication of the market value of the property being appraised…. The process is based on the principle that the amount of net income a property can produce is related to its market value. …This approach only has utility where the property under appraisal is income producing in nature….[55]

In sum, "[t]he income approach involves [an] analysis of the property in terms of its ability to generate a net annual income in dollars, which is then capitalized."[56] As noted in another Connecticut case, "[t]he rate of capitalization should be a reflection of the market rate."[57]

A.2.c. The Cost Approach

The cost approach alternatively is referred to as the replacement cost or reproduction cost.[58] The cost approach arrives at an indication of value of the fee simple interest in property by estimating the current cost to construct a reproduction of (or replacement for) the existing structure, including an entrepreneurial profit, deducting depreciation from the total cost, and adding the estimated land value. Adjustments may then be made to the indicated fee simple value of the subject property to reflect the value of the interest in the property being appraised.[59] "[T]he rationale justifying assignment of an enhanced role to building costs in special-use cases hinges on the recognition that, in the absence of comparable properties in the marketplace or income generated by the property in question, construction costs may be the only reasonably available indicator of value."[60] Thus, "[u]nder the cost approach the estimated depreciated replacement cost of improvements is added to an estimate of the land's value."[61]

In *United Technologies, supra*, involving a unique factory, the court upheld an appraisal of the property using the cost approach.[62] However, in *Pennsylvania Department of General Services v. U.S. Mineral Products, Co., supra*, although the court "recognize[d] the difficulty of quantifying depreciation in a situation in which there is little or no market for a property,"[63] it was held to be improper for the lower court to award "damages for property loss based solely upon raw replacement costs…."[64] The court held that "[o]nce the abstract figure of replacement or reproduction costs is presented as an indicator of value, …it [is] preferable to require consideration of an analogously abstract depreciation figure…."[65]

B. VALUATION OF SPECIAL PURPOSE PROPERTIES

B.1. Definition of Special Purpose Properties

As discussed, special use properties do not change hands, at least not on a regular basis, and therefore the establishment of market value may be difficult, if not impossible.[66] For appraisal purposes

> [a] limited-market property is a property that has relatively few potential buyers at a particular time, sometimes because of unique design features or changing market conditions. Large manufacturing plants, railroad sidings, and research and development properties are ex-

[54] United Technologies Corp. v. Town of East Windsor, 807 A.2d at 960 n.9 (*citing* J. EATON, REAL ESTATE VALUATION IN LITIGATION 194 (2d ed. 1995) (hereinafter cited as "Eaton." *See also* Spencer Diesel Injection & Turbo, Inc. v. Sioux City, 2007 Iowa App. LEXIS 535, at *11 (holding that Spencer Diesel's valuation of the property was too uncertain and speculative because of the lack of any income history) and United States v. 6.45 Acres of Land, 409 F.3d at 143 n.6 (reversing the trial court's judgment and agreeing with the United States that the court below impermissibly failed to apply the "unit rule" of valuation and thus erroneously valued separate interests rather than the aggregate interests in a single unit).

[55] Sun Valley Camping Coop., Inc. v. Town of Stafford, 94 Conn. App. 696, 703, 894 A.2d 349, 356 (Conn. Ct. App. 2006) (citations omitted) (the parties agreeing however that the income approach was "inappropriate").

[56] Marseilles Hydro Power, LLC v. Marseilles Land and Water Corp., 2004 U.S. Dist. LEXIS, at *15.

[57] Comm'r of Transp. v. Candlewood Valley Country Club, Inc., 2005 Conn. Super. LEXIS 3308 (Super. Ct. 2005) (Unrept.).

[58] Cane Tenn., Inc., v. United States, 71 Fed. Cl. at 438.

[59] United States v. 6.45 Acres of Land, 409 F.3d at 143, n.7 ("The cost approach (also known as the reproduction approach)…values a tract of land by estimating the value of the land as vacant, adding the cost of the improvements, and then deducting any depreciation in the improvements"); United Technologies Corp. v. Town of East Windsor, 807 A.2d at 960 n.8 (*citing* Eaton, *supra* note 55, at 157) ("Under the cost approach to valuation, the appraiser estimates the current cost of replacing the subject property, with adjustments for depreciation, the value of the underlying land, and entrepreneurial profit.").

[60] Pa. Dep't of Gen. Servs. v. U.S. Mineral Prods. Co., 587 Pa. at 250, 898 A.2d at 599.

[61] Marseilles Hydro Power, LLC v. Marseilles Land and Water Corp., LLC, 2004 U.S. Dist. LEXIS, at *15.

[62] United Technologies Corp. v. Town of East Windsor, 262 Conn. at 20, 807 A.2d at 962.

[63] 587 Pa. 236 at 252, 898 A.2d 590 at 599.

[64] *Id.* at 252, 898 A.2d at 600.

[65] *Id.* at 252, 898 A.2d at 599.

[66] Sun Valley Camping Coop. v. Town of Stafford, 94 Conn. App. at 696, at 700 and n.6, 894 A.2d 349, at 354 and n.6.

amples of limited-market properties that typically appeal to relatively few potential purchasers.[67]

Many limited-market properties include structures with unique designs, special construction materials, or layouts that restrict their utility to the use for which they were originally built. These properties usually have limited conversion potential and, consequently, are often called special-purpose or special-design properties. Examples of such properties include houses of worship, museums, schools, public buildings, and clubhouses.[68]

The term "special purpose properties" is a generic term to identify all properties that because of their unique uses and characteristics and the lack of sales of similar properties are not susceptible readily to valuation according to the rules of evidence usually applicable in condemnation cases. One court has stated that "'[a] special-purpose property is one with a physical design peculiar to a specific use, no apparent market other than sale to an owner-user, and no financially feasible alternative use. The lack of comparable sales data is generally the key in distinguishing a special-purpose property.'"[69]

A special use property is one that "is so limited by its improvements that it cannot be converted to another use without prohibitively high cost and cannot readily be valued on the open market."[70] The term used to describe a special purpose property is not uniform.[71] In general, the evidence at trial must establish that a property has a "special purpose,"[72] a "special use,"[73] or is a "specialty"[74] property before a court will relax the methodology for measuring compensation or relax the rules for the admission of evidence to establish the value of a property.[75] For example, one court defines a special purpose property or special use property as land that is "not available for use for general and ordinary purposes."[76]

A New York court recently stated that eminent domain cases have developed a four-part criteria for such specialty properties.

A specialty property is defined as 1) a unique property specially built for the specific purpose for which it is designed, 2) with no market for the type of property and no sales of property with such a use, 3) used for the special purpose for which it was designed, and 4) constituting an appropriate improvement with a use that is economically feasible and reasonably expected to be replaced….[77]

The classification of a property as a specialty or similarly described property is quite important with respect to the admissibility of the methodology used to appraise the property's value. A special use property, however, is "[n]ot to be confused with 'special purpose' buildings. The latter are designed for a particular special use, whereas 'special use' buildings are not so designed originally but at the time in question are being put to a special use."[78]

Courts may define a special purpose property as one that is "unique"[79] or "unusual."[80] It has been held that a

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[67] THE APPRAISAL OF REAL ESTATE 25 (12th ed. 2001).

[68] *Id.* at 26.

[69] United Technologies Corp. v. Town of East Windsor, 262 Conn. at 26, 807 A.2d at 965 (*quoting* Eaton, *supra* note 55, at 242).

[70] State v. KQRS, Inc., 2004 Minn. App. LEXIS 84, at *13 (Minn. App. 2004), *review denied*, 2004 Minn. LEXIS 211 (Minn. 2004).

[71] *See* Sun Valley Camping Coop., Inc. v. Town of Stafford, 94 Conn. App. at 714 n.20, 894 A.2d at 362 n.20 (noting that the various legal nomenclature used for "special use properties" does not make a precise distinction between the terms).

[72] *Id.*

(It is likely that on retrial, a court would find that the plaintiff's property is a special purpose property because of the limited likelihood of any sale, the fact that the sites have individual hookups for water, sewage and utilities, and the paucity or lack of any comparable sales of an entire recreational cooperative campground. No single method of valuation is controlling for the finding of fair market value for a special purpose property, at least in eminent domain cases.)

Creason v. the Unified Gov't of Wyandotte County, Kansas, 272 Kan. 482, 487, 33 P.3d 850, 853 (2001) ("Where the usual means of ascertaining market value are lacking, or other means must from necessity of the case be resorted to, it is proper to determine the market value by considering the intrinsic value of the property, and its value to the owners for their special purposes.").

[73] State v. KQRS, Inc., 2004 Minn. App. LEXIS 84, at *13.

[74] *In re city of New York (Lincoln Square Slum Clearance Project, etc.)*, 15 A.D. 2d 153, 171–72, 222 N.Y.S.2d 786, 802–803 (N.Y. App. 1st Dep't 1961) (stating, however, that the "proceeding included properties of practically every kind and classification to be found within urban limits") (*id.*, 15 A.D. 2d at 160, 222 N.Y.S.2d at 792) (citations omitted).

[75] In the Matter of Consol. Edison Co. of N.Y., Inc. v. City of N.Y., 33 A.D. 3d 915, 916, 823 N.Y.S.2d 451, 452 (N.Y. App. 2d Dep't 2006) (In a tax assessment case the parties agreed that power generation units and transmission facilities were "specialty properties that must be valued using the reproduction-cost-new-less-depreciation method…because the preferred methods for determining value, comparable sales and income capitalization, fail to yield a meaningful result with respect to such property….") (citations omitted).

[76] County of Cook v. City of Chicago, 84 Ill. App. 2d 301, 305, 228 N.E.2d 183, 185 (1967).

[77] In the Matter of Consol. Edison Co. of N.Y., Inc. v. City of N.Y., 33 A.D. 3d at 919, 823 N.Y.S.2d at 454 (electric generating plant) (Goldstein, J., dissenting) (citations omitted).

[78] Chicago v. George F. Harding Collection, 70 Ill. App. 2d 254, 257, 217 N.E.2d 381, 383 (1965) (reversing for a new trial on the issue of just compensation for museum buildings).

[79] In the Matter of Consol. Edison Co. of N.Y., Inc. v. City of N.Y., 33 A.D. 3d at 919, 823 N.Y.S.2d at 455.

[80] Comm'r of Transp. v. Towpath Assocs., 255 Conn. 529, 544, 767 A.2d 1169, 1179 (2001)

([I]n order for the value of the plaintiff's premises to be increased by the unusual [adaptability], there must have been a showing not only that the premises were physically or specially adaptable for the particular use upon which the plaintiff solely relied…but also that there was a reasonable probability that they would be so used within a reasonable time; otherwise the special use would be too remote and speculative to have any legitimate effect upon the valuation….)

(internal quotation marks omitted) (*quoting* Connecticut Printers, Inc. v. Redevelopment Agency, 159 Conn. 407, 412, 270

property so described must have a unique value to the particular owner involved and not to others,[81] or, as another court has stated, before a property may be considered unique it must have "a value particular to the owner incapable of being passed to a third party…."[82]

Cases usually are concerned with whether the improvements to the property as distinguished from the land constitute a special purpose. However, although a market value nearly always may be found for land if it is considered as vacant land, it is also possible that land may be unique and have special value for a particular owner because of the property's physical features or unusual historical features.[83] The claimed special capability must be in the property itself "and not because of any value peculiar to the owner…."[84]

> The adaptability of the land, sought to be taken in eminent domain, for a special purpose or use may be considered as an element of value. If the land possesses a special value to the owner which can be measured in money, he has the right to have that value considered in the estimate of compensation and damages.[85]

> [T]he determination of value in condemnation proceedings is not a matter of formula or artificial rules but of sound judgment and discretion based upon a consideration of all relevant facts in a particular case.[86]

Various properties have been held to be special purpose ones not susceptible to valuation by the market data or comparable sales approach, such as schools, churches, cemeteries, parks, and utilities,[87] as well as railroads and turnpikes.[88] As for factories, a California court agreed with a condemnee manufacturer of adhesive "that due to the character of its use and its extensive fixturization with machinery and equipment which had a substantial value in excess of salvage value only to a major manufacturer of adhesives, the whole parcel constituted a special purpose property."[89] As a later California case stated, "when the government takes property…which has a preexisting special use, it may be required to compensate the owner for taking or damaging the owner's use."[90]

Because the issue is one of local law, in some jurisdictions the burden is on the owner to prove the elements necessary to constitute a special purpose property or other elements affecting value,[91] whereas in other jurisdictions the condemnor may have the burden.[92] In a case involving a special purpose property, an expert's opinion is particularly important because of the

A.2d 549, 552 (1970). *See* Bowers v. Fulton County, 221 Ga. 731, 146 S.E.2d 884 (1966) (allowing compensation to the owner for loss of a bookkeeping and tax service); Hous. Auth. of the City of Atlanta v. Troncalli, 111 Ga. App. 515, 142 S.E.2d 93 (1965) (finding that a tune-up and brake shop was unique because of its location and applying the measure of pecuniary loss to the owner); State Roads Dep't v. Bramlett, 179 S.E.2d 137 (Fla. 1965) (applying a particular statute)*;* Hous. Auth. v. Savannah Iron Works, Inc., Ga. App. 881, 87 S.E.2d 671 (1955) (allowing moving costs to a lessee).

[81] *See* United Airlines, Inc. v. Pappas, 348 Ill. App. 3d 563, 572, 809 N.E.2d 735, 743 (Ill. App. 1st Dist. 2004), *appeal denied*, 209 Ill. 2d 602, 813 N.E.2d 229 (Ill. 2004) (stating that although "rental of an airport terminal may be considered property of special use," the court was "not persuaded that the lease of such property is 'so unique as to not be salable'" and that the sales comparison method should have been used). *See also* 4 NICHOLS ON EMINENT DOMAIN § 12C.01.

[82] Carroll County Water Auth. v. L.J.S. Grease & Tallow, Inc., 274 Ga. App. 353, 355, 356, 617 S.E.2d 612, 616 (Ga. Ct. App. 2005) (holding that damages for business loss were proper because the loss was not speculative and because the plant was unique in that it was one not generally bought and sold on the open market).

[83] Scott v. State, 230 Ark. 766, 772, 326 S.W.2d 812, 815 (1959) (the court stating in a case involving property on which there was a historic Civil War tavern that "land may have value based on peculiar qualities, conditions or circumstances" and that "[t]he owner has a right to obtain the market value of the land based upon its availability for the most valuable purpose for which it can be used.").

[84] Chicago v. Harrison-Halsted Corp., 11 Ill. 2d 431, 440, 143 N.E.2d 40, 46 (1957) (authority questioned by some courts).

[85] *In re Grand Haven Highway*, 357 Mich. 20, 27, 97 N.W.2d 748, 751 (Mich. 1959).

[86] *Id.* at 28, 29, 97 N.W.2d at 752.

[87] *See* 4 NICHOLS ON EMINENT DOMAIN § 12C.01[4][a] (valuation of cemeteries); § 12 C.01[4][b] (valuation of churches); § 12 C.01[4][c] (valuation of parks); § 12 C.01[4][d] (valuation of schools); § 12 C.01[4][e] (valuation of miscellaneous special use properties).

[88] *See* Marseilles Hydro Power, LLC v. Marseilles Land and Water Corp, LLC, 2004 U.S. Dist. LEXIS 25276, at *16–17.

[89] City of Commerce v. Nat'l Starch & Chemical Corp., 118 Cal. App. 3d 1, 6, 173 Cal. Rptr. 176, 178 (Cal. App. 2d Dist. 1981). *See also United Technologies Corp.,* 262 Conn. at 14, 807 A.2d at 958 (lease of specialty property for reconditioning aircraft engine parts).

[90] County of San Diego v. Rancho Vista Del Mar, 16 Cal. App. 4th 1046, 1058, 20 Cal. Rptr. 2d 675, 683 (Cal. App. 4th Dist. 1993) (holding that a detention facility was a governmental function with no private sector equivalent and that the property was not a "special purpose" property), *review denied*, 1993 Cal. LEXIS 4953 (Cal. 1993); City of Pleasant Hill v. First Baptist Church, 1 Cal. App. 3d 384, 82 Cal. Rptr. 1 (Cal. App. 1st Dist. 1969) (holding that severance damages were proper based on loss for future growth of preexisting church)).

[91] Newton Girl Scout Council v. MTA, 138 N.E.2d 769 at 775. *See also* United States v. Brooklyn Union Gas Co., 168 F.2d 391, 398 (2d Cir. 1948); Davenport v. Franklin County, 277 Mass. 89, 93, 177 N.E. 858, 860 (1931); Lebanon and Nashville Turnpike Co. v. Creveling, 159 Tenn. 147, 154, 155, 17 S.W.2d 22, 24 (1929).

[92] Chicago v. George F. Harding Collection, 70 Ill. App. 2d 254 at 258, 217 N.E.2d 381 at 383 (stating that "the condemnor's burden must be construed to require, as a minimum, that there be competent evidence of value as to all the property to be taken").

absence of market data on which any expert would be able to rely.[93]

To summarize, for a property to be valued on the basis of being a special purpose property, there must be an absence of market data, the property and its improvements must be unique, and because of its unusual character the property's utility must be peculiar to the owner. Occasionally, it is held that it must be shown that the property would have to be replaced.[94]

B.2. Absence of Market Data

With respect to the legal principles and appraisal methods that apply to the valuation of special purpose properties, the issue is whether an owner has been indemnified for what the owner has lost. If adequate sales data are available, the evidence will be confined to the market data approach. An owner must show the absence of such data as well as of other elements that render the property unusual before the use of the income or cost approach is allowed.[95] On the other hand, with respect to special use properties, "market value will not generally be the measure of compensation."[96] If market data is not available, then it is appropriate "to deduce market value from the intrinsic value of the property, and its value to the owners for their special purposes."[97]

Although generally there must be an absence of market data before a court will permit use of an alternate method of valuation, the Supreme Court of Pennsylvania recently noted that it had "not categorically and immutably confined special-purpose valuation and/or the relevance of replacement or reproduction costs to instances in which market valuation is impossible."[98] Nevertheless, it is with respect to special purpose properties that because of the absence of a market for the properties or of comparable sales some courts allow the use of the income or replacement cost approach for an indication of value of the properties.[99] Accordingly, "[r]esort to other methods of valuation may also be had where there are no comparables, no market, and no general buying and selling of the kind of property in question."[100]

When the cost approach or income approach is applicable rather than the market value approach, "the term 'value to the owner' is used."[101] On the other hand, as noted in another recent case, "[t]he market value concept excludes any special value to the owner for his particular purpose or any special value to the condemnor for its special use."[102] With respect to special purpose properties, the rationale is that they are not "amenable to conventional market-valuation assessment." Thus, an alternate methodology is appropriate to determine due compensation for associated loss or destruction of an owner's property,[103] because "an injured plaintiff should not be deprived of fair recompense merely because there is some degree of uncertainty associated with the calculation of damages."[104]

Special purpose properties usually have unusual improvements that are of value only to the owner or to a few owners and are properties that are rarely bought and sold. Consequently, the usual evidence of market data that would be admissible to establish the value of the property may be lacking, if not completely nonexistent. As a matter of necessity, legal rules concerning allowable methods of valuation and proof thereof have to be relaxed.[105]

Of course, a business may be conducted on a special purpose property. If so, and if the condemnor is taking a fee interest, then "evidence of business profits is generally inadmissible as an independent element of damage or as [being] relevant in determining the value of the land because it is too uncertain and depends upon too many contingencies."[106] The rationale also is that the

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[93] Woburn v. Adams, 187 F. 781, 784 (1st Cir. 1911) (stating that "ascertainments of reasonable value are made upon the best evidence of which the case is susceptible").

[94] *In re City of N.Y. Lincoln Square Slum Clearance Project,* 15 A.D. 2d at 171, 222 N.Y.S.2d at 802 (court stating that "[r]eproduction cost as a measure of value, except to establish the maximum value that can be placed on a building for purposes of taxation…is limited to specialties" but that "[i]t must be shown that the [lighthouse] would reasonably be expected to be replaced") (citation omitted).

[95] Atlantic Refining Co. v. Dir. of Pub. Works, 102 R.I. 696, 703–04, 233 A.2d 423, 427–28 (1967) (holding that the trial court did not err in holding that there was no evidence of a comparable sale); *see also* United States v. Benning Hous. Corp., 276 F.2d 248, 251 (5th Cir. 1960) ("Isolated comparable sales, though themselves admissible as tending to show fair market value, are not sufficient to render reproduction cost evidence inadmissible in a case where admission is otherwise appropriate.")

[96] 4 NICHOLS ON EMINENT DOMAIN § 12C.01[1], at 12C-2.

[97] *Id.* at 12C-6.

[98] Pa. Dep't of Gen. Servs. v. U.S. Mineral Prods. Co., 587 Pa. at 250, 898 A.2d at 598.

[99] *See* Marseilles Hydro Power, LLC v. Marseilles Land and Water Corp., LLC, 2004 U.S. Dist. LEXIS 25276, at *16–17.

[100] Spencer Diesel Injection & Turbo, Inc. v. Sioux City, 2007 Iowa App. LEXIS 535, at *8–9 (Unrept.) (citations omitted).

[101] 4 NICHOLS ON EMINENT DOMAIN § 12C.01[2], at 12C-19.

[102] Chicago & I. M. Ry. v. Crystal Lake Indus. Park, 225 Ill. App. 3d 653, 588 N.E.2d 337, 343 (Ill. App. 3d Dist. 1992), *appeal denied,* 146 Ill. 2d 624, 602 N.E.2d 448 (1992) (reversing and remanding for a new trial because expert's valuation testimony regarding methodology that was used differed from expert's pre-trial deposition). *See* Dep't of Transp. v. Keller, 149 Ill. App. 3d 829, 830, 500 N.E.2d 982, 983 (Ill. App. 5th Dist. 1986) (affirming judgment based on income approach because there were no comparable sales and landowners were not advancing a theory of "special use" but contending that the subject property had a special value based on its ability to produce a specialty crop), *appeal denied*, 505 N.E.2d 352 (Ill. 1987).

[103] Pa. Dep't of Gen. Servs. v. U.S. Mineral Prods. Co., 587 Pa. at 248, 898 A.2d at 597.

[104] *Id.*

[105] THE APPRAISAL OF REAL ESTATE 63, 64 (12th Ed. 2001).

[106] Spencer Diesel Injection & Turbo, Inc. v. Sioux City, 2007 Iowa App. LEXIS 535, at *8–9 (citations omitted) (emphasis supplied).

condemnor is not acquiring the business, which indeed may be relocated elsewhere by the owner.[107] "If the property must be duplicated for the business to survive, and if there is no substantially comparable property within the area, then the loss of the forced seller is such that market value does not represent just and adequate compensation to him."[108] One court noted that a property owner may not "recover loss of profits because of damages caused by business interruption" but could recover expenses "occasioned by business interruption."[109] The court, furthermore, held that "the evidence introduced in [the] condemnation proceeding showing expenses occasioned by business interruption was properly introduced for consideration as to value and weight by the commissioners making the award" but that the proof "must not be speculative and must possess a reasonable degree of certainty."[110] A later case similarly stated that "damages may not be recovered…for 'loss of profits' due to interruption of business and that in the case of 'interruption of business,' the recovery will be limited to the amount of the 'expenses' attributable to the interruption."[111] Damages, however, are not precluded in a case in which the "'loss of a particular location may destroy business altogether, for want of access to any other that is suitable for it.'"[112] Finally, the income capitalization approach also may be permitted "when the property taken is a leasehold or land used for agricultural purposes…."[113]

B.3. Rules of Evidence Regarding Special Purpose Properties

The courts have tried to resolve the problems of special use properties in one of two ways. One approach is to apply the conventional market data or comparable sales approach but relax the rules of evidence to accommodate the special situation. [114] As one court stated,

> [g]enerally, existing sales data concerning similarly situated and comparable properties serve to exclude the use of other methods for deducing fair market value. …We have allowed for the departure from this preferred method, however, at the discretion of the trial justice, when the fair market value established through comparable sales did not adequately reflect "just compensation" because the condemned property was "unique or suited for a special purpose…." Either way, "[t]he availability of such comparable sale is a question addressed to the discretion of the trial justice whose determination will be reversed only if 'palpably or grossly wrong.'"[115]

In cases involving special purpose property cases the courts have made broad statements about the evidence that will be permitted to establish value.

> To assist the trier of the fact of value to reach a just result when such a property is taken by eminent domain, it frequently will be necessary to allow much greater flexibility in the presentation of evidence than would be necessary in the case of properties having more conventional uses. In such cases, for example, detailed knowledge by expert witnesses of local prices of land for ordinary resi-

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[107] *See In the Matter of the City of N.Y., Relative to Acquiring Title to Real Property for Clinton Urban Renewal Project, etc*., 59 N.Y.2d 57, 64, 449 N.E.2d 1246, 1249 (1983) (Fuchsberg, J. (dissenting)

> ([I]t is the realty and not the business which is condemned, the incidental damages to good will wrought by removal of a business conducted on premises taken for a public purpose is to be seen as one of the burdens, if that it be, that is balanced by the benefits of government….)

(*citing* Banner Milling Co. v. State, 240 N.Y. 533, 148 N.E. 668, 670 (1925)

> (While it may be as in this case that removal from one place to another may cause some loss, yet the elements making up that loss are so highly speculative that the courts have not considered it an appropriation or damage for which the State should pay as commanded by the Constitution.)

cert. denied, 269 U.S. 582, 46 S. Ct. 107, 70 L. Ed. 423 (1925)). *See also* 4 NICHOLS ON EMINENT DOMAIN § 13.3.

[108] Carroll County Water Auth. v. L.J.S. Grease and Tallow Inc., 274 Ga. App. 353, at 355, 617 S.E.2d at 616 (holding that business loss damages were proper because the loss was not speculative and because the plant was unique as it was one not generally bought and sold on the open market) (citation omitted) (footnote omitted).

[109] *In re Grand Haven Highway,* 357 Mich. at 30–31, 97 N.W.2d at 753 (stating also that "[t]here may be cases when the loss of a particular location may destroy business altogether, for want of access to any other that is suitable for it. Whatever damage is suffered, must be compensated.").

[110] *Id.* at 31, 97 N.W.2d at 754.

[111] Mich. State Highway Com. v. L & L Concession Co., 31 Mich. App. 222 at 236, n.17, 187 N.W.2d 465, 472, n.17 (Mich. Ct. App. 1971) (*quoting In re Grand Haven Highway*, 357 Mich. at 30, 97 N.W.2d at 753). The court also observed that "[w]here the condemnee's business has been destroyed, recovery of the value of the business has been awarded" (*L & L Concession Co*., 31 Mich. App. at 230, 187 N.W.2d at 469); that "[i]n a large number of cases owners and lessees have recovered going-concern value where the condemned property could not be realistically valued apart from the business there conducted, or, as it is sometimes said, the business for which the property is best 'adapted'" (*id*., 31 Mich. App. at 232, 187 N.W.2d at 470); and that "where the value of the leasehold as an estate in land and the value of the business there conducted cannot readily be separated, the valuation ascribed to the leasehold may reflect the value of the business there operated…." (*id*., 31 Mich. App. at 234, 187 N.W.2d at 471).

[112] *Id.* at 236, 187 N.W.2d at 472 (footnote omitted).

[113] Spencer Diesel Injection & Turbo, Inc. v. Sioux City, 2007 Iowa App. LEXIS 535, *8 (citations omitted).

[114] 4 NICHOLS ON EMINENT DOMAIN § 12 C.01 [2] at 12C-14.

[115] Conti v. R.I. Econ. Dev. Corp., 900 A.2d 1221, at 1237 (some citations omitted) (*citing J.W.A. Realty, Inc.*, 121 R.I. at 381, 384, 399 A.2d at 483, 484 (apartment project with "no comparable sales that reflected [its] special characteristics"). *See also*, *e.g.*, Warwick Musical Theatre, Inc. v. State, 525 A.2d 905, 910 (R.I. 1987) (structure used as a musical theater); Trustees of Grace and Hope Mission of Baltimore City, Inc. v. Providence Redevelopment Agency, 100 R.I. 537, 538, 543, 217 A.2d 476, 477, 479 (1966) (structure used as a religious and benevolent mission); Assembly of God Church of Pawtucket, R.I. v. Vallone, 89 R.I. 1, 10–11, 150 A.2d 11, 15–16 (1959) (building used as a parsonage); Hall v. City of Providence, 45 R.I. 167, 168–69, 121 A. 66, 66–67 (1923) (highly improved country estate that was one of the first in the area)).

> dential or commercial use may be far less helpful than knowledge of conditions (relevant to this particular type of property) over a wide geographical area and of the demand for and use of comparable specialized properties by a particular industry or class of users or customers. The property may be of a character where, within fairly wide limits, geographical location has less effect on its value than its adaptability for a particular use. The properties may be of a type, not frequently bought or sold, but usually acquired by their owners and developed from the ground up, so that the cost of land plus the reproduction cost (less depreciation where appropriate) of improvements may be more relevant than in the ordinary case….[116]

The second approach is to reject the market data or comparable sales approach in favor of the income or replacement cost approach.[117] The cases stating that market value is not the measure of compensation often contain statements to the effect that liberality will be permitted regarding the proof needed to establish the value of the subject property.[118] If the market data or comparable sales approach is not applicable, one court has stated that "[w]hat we use is largely a matter of judgment and circumstance."[119] If an owner has applied a property to the owner's use that is of particular value to the owner, then the value to the owner is to be ascertained and allowed as just compensation.[120] Moreover, the court may state that the objective is to put the owner in as good a financial condition as the owner was before the taking.[121] Compensation may take the form also of providing the owner with substitute property.

B.4. Partial Takings of Special Purpose Properties

When dealing with a partial taking, except when the doctrine of substitution is applied, "the valuation is the difference between the fair market value of the entire property before the taking and the fair market value of the remainder after the taking."[122] The valuation will reflect damages to the remaining property as well as to the value of the part taken.[123] Depending on the jurisdiction, some courts may value the property that is taken and then apply the before and after evaluation to the remainder.[124] Some argue that the cost to cure is competent evidence because it is relevant to the diminution of the value of the remainder caused by the taking.[125] In California, severance damages are either 1)

[116] Newton Girl Scout Council, Inc. v. Mass. Turnpike Auth., 138 N.E.2d 769, at 773.

[117] *See* Marseilles Hydro Power, LLC v. Marseilles Land and Water Corp., 2004 U.S. Dist. LEXIS 25276, at *15–17; *but see* United Airlines, Inc. v. Pappas, 348 Ill. App. 3d 563, at 572, 809 N.E.2d at 743 (holding that as airport terminal being rented was not "so unique as to not be salable," the sales comparison method should have been used).

[118] Orleans Parish Sch. v. Montegut, Inc., 255 So. 2d 613, 615 (La. App. 4th Cir. 1971) ("Market value is not the constitutional objective and requirement; just compensation is."); United States v. Two Acres of Land, etc., 144 F.2d 207, 209 (7th Cir. 1944)

> (In the case of nonprofit, religious or service properties, cost of replacement is regarded as cogent evidence of value although not in itself the only standard of compensation. But people do not go about buying and selling country churches. Such buildings have no established market values. Consideration must be given to the elements actually involved and resort had to any evidence available, to prove value, such as the use made of the property and the right to enjoy it.).

[119] Onondaga County Water Auth. v. N.Y.W.S. Corp., 285 A.D. 655, 662, 139 N.Y.S.2d 755, 763 (N.Y. App. 4th Dep't 1955). *See also* Marseilles Hydro Power, LLC., 2004 U.S. Dist. LEXIS 25276, at *15–17 (noting that in cases where property does not have a reasonable market value, the law permits resort to any evidence available to prove value.)

[120] *In the Matter of the Superintendent of Highways of the Town of Frankfort*, 193 Misc. 617, 619, 84 N.Y.S.2d 78, 80, 81 (N.Y. Cnty. Ct. 1948) (holding that determination of value of the property of transit corporation had to consider any special intrinsic quality of the property taken).

[121] *See* State *ex rel.* DOT v. Chelsea Butane Co., 2004 Ok. Civ. App. 48, at *16, 91 P.3d 656, at 661 ("The financial consequences are present to prevent abuse of the power of eminent domain and to insure that the condemnee is made whole when the eminent domain power is exercised."); *Foss & Bourkie, Inc.*, 2002 Conn. Super. LEXIS 3624, at *17 ("The question of what is just compensation is an equitable one rather than a strictly legal or technical one. The paramount law intends that the condemnee shall be put in as good condition pecuniarily by just compensation as he would have been in had the property not been taken.").

[122] Ala. Dep't of Transp. v. Land Energy, LTD., 886 So. 2d 787, 794 (Ala. 2004).

[123] Cemeterio Buxeda v. People of Puerto Rico, 196 F.2d 177, 180 (1st Cir. 1952) (stating that "given a single tract under the test of unitary use and a taking of part of it, there may or there may not be severance damages depending upon whether the taking of the part operates to reduce the market value of what remains"); Laureldale Cemetery Co. v. Reading, 303 Pa. 315, 324, 154 A. 372, 374 (1931) (holding that there was "nothing in this case which justifies the application of an exceptional measure of damages to the land appropriated"). *See* DeBoer v. Entergy Ark., 82 Ark. App. 400, 404, 109 S.W.3d 142, 144 (Ark. App. 1st Div. 2003)

> (When the sovereign exercises its right to take a portion of a tract of land, the proper measure of compensation is the difference in fair market value of the entire tract immediately before and after the taking. …When another entity such as a railroad, telephone company or, in this case, an electric company, exercises the right of eminent domain, just compensation is measured by the value of the portion of the land taken plus any damage to the remaining property.)

(citation omitted).

[124] 4A NICHOLS ON EMINENT DOMAIN § 14 A.03.

[125] Dep't of Transp. v. 2.953 Acres of Land, 219 Ga. App. 45, 47, 463 S.E.2d 912, 915 (Ga. Ct. App. 1995)

> ("The proper measure of consequential damages to the remainder is the diminution, if any, in the market value of the remainder in its circumstance just prior to the time of the taking compared with its market value in its new circumstance just after the time of the taking. …In a partial taking case, evidence as to the cost to cure may be admissible as a factor to be considered in determining the amount of recoverable consequential damages to the remainder."

(citations omitted)); State *ex rel.* Dep't of Highways v. Neyrey, 260 So. 2d 739, 744–45 (La. App. 4th Cir. 1972) (stating that

the diminution in fair market value of the remainder after the taking, or 2) the cost to cure, whichever is less.[126]

Because of the taking, the use to which the remainder is adaptable may be changed from a special purpose to a general purpose. If so, the value to the owner or other relaxed rule of evidence may be used to determine the value before the taking for the property as a special purpose property, and the market approach may be used to determine the value of the remainder after the taking. An example is a situation in which a school or church has lost all its capability for its special use (and hence its value for such use) because of the property's proximity to a railroad or highway.[127] In such a case, the property's improvements may lose their special value as a result of the taking, with the improvements having only scrap or salvage value.

For a recognized change in the use of the property after the taking, the evidence must establish the impossibility, for example, of conducting a school on the property and the owner's efforts to overcome the effect of the taking.

> To authorize a finding that the property is wholly destroyed for school purposes, the evidence must make it appear that it is impractical to continue the school by reason of the construction and operation of the railroad. By this is not meant that it must be shown to be utterly impossible to conduct a school, but what is meant is that it must appear that, after reasonable effort and diligence upon the part of the board of education and the teachers to avoid the physical dangers and to overcome the interference from the operation of the trains, it is no longer practical to conduct the school. So long as these things may be overcome by reasonable effort, the efficiency and safety of the school is only impaired, and not wholly destroyed. Until that destruction is shown, appellant cannot legally be required to pay for the full value of the property, but can be required only to make good the damages caused by its interference of the conduct of the school.[128]

The court also indicated in the foregoing case that in determining whether there was a full loss in value of the school building, the school board's abandonment of the use could not be considered.[129]

As stated, an owner may claim proximity damages to the property because of the highway improvement's interference with the owner's use and enjoyment caused by the taking.[130] Proximity damages for noise, dust, fumes and the like are evaluated on a case-by-case basis. Such damages may not be speculative in nature and must be based on a "reliable methodology."[131] If a reduction in area damages the remaining property, a remedy may be to apply the principle of substitution or to a more limited extent the cost to cure.[132] The cost of curing defects caused by a taking may affect the value of the property after the taking. For example, the costs of reconstructing entryways and replacing shrubs have been allowed in a partial taking of a cemetery.[133] Another example is that just compensation may mean the

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> under certain exceptional circumstances the "before and after test" will not adequately compensate the owner for his damage and the courts will resort to the 'cost to cure' method of computation, not for the purpose of restoration, but to gauge the diminution in market value as would be reflected in a lower purchase price that a well-informed buyer would be willing to pay).

[126] People *ex rel.* Dep't of Public Works v. Hayward Bldg. Materials Co., 213 Cal. App. 2d 457, 465, 28 Cal. Rptr. 782, 787 (Cal. App. 1st Dist. 1963) (stating that

> "[e]vidence of damage falls into two classes: (1) Evidence of the decrease in market value of the owner's land as it stands on account of the construction of the public work; (2) Evidence of the cost of restoring the injured property to the same relative position to the public work in which it stood before its construction")

(citation omitted) (internal quotation marks omitted)).

[127] Bd. of Educ. v. Kanawha and M.R. Co., 44 W.Va. 71, 72, 29 S.E. 503, 504 (1897).

[128] San Pedro, L. A. & S. L. R. Co. v. Bd. of Educ. of Salt Lake City*,* 32 Utah 305, 312, 90 P. 565, 567 (1907).

[129] *Id.* at 315, 90 P. at 568.

[130] State Highway Dep't v. Hollywood Baptist Church, 112 Ga. App. 857, 146 S.E.2d 570 (Ga. Ct. App. 1965) (indicating that such factors must be continuous and permanent incidents of the improvement) (*questioned by* State Highway Dep't v. Thomas, 115 Ga. App. 372, 377, 154 S.E.2d 812 (1967)). *See also* State Highway Dep't v. Augusta Dist. of N. Ga. Conference of Methodist Churches, 115 Ga. App. 162, 164, 154 S.E.2d 29, 30 (Ga. Ct. App. 1967) (holding in a case involving noise and other elements that "[i]f…the condemnee has designed and built an improvement on the property for a special purpose and has been deprived of its use, just and adequate compensation may include the cost or its value to condemnee for the particular purpose for which it was constructed") (citation omitted).

[131] N.C. Dep't of Transp. v. Haywood County, 360 N.C. 349, 352, 626 S.E.2d 645, 647 (2006) (agreeing with the trial court and rejecting a claim for proximity damages in a condemnation action by the transportation department against the county). *See also* County of Cook, 84 Ill. App. 2d 301, 228 N.E.2d 183 (holding that as a matter of law a condemned school property was not to be valued on a market value basis but by the cost of supplying necessary substitute facilities to restore the same facilities for school purposes); Idaho-Western Ry. Co. v. Columbia Conference of Evangelical Lutheran Augustana Synod, 20 Idaho 568, 579, 119 P. 60, 63 (1911)

> (The constitution and the law require that the owner of property shall receive such compensation that he will be as well off after the taking as he was before. To do that it is necessary to determine what the property is worth to the owner, and unless he receives what it is worth to him he does not receive just compensation.).

[132] First Nat'l Stores, Inc. v. Town Plan and Zoning Comm'n, 26 Conn. Supp. 302, 222 A.2d 228 (Conn. Super. Ct. 1966). *See* PA. STAT. ANN. 26, § 1-705(2) (v) (allowing consideration of "[t]he cost of adjustments and alterations to any remaining property made necessary or reasonably required by the condemnation.").

[133] State *ex rel.* State Highway Comm'n v. Barbeau, 397 S.W.2d 561 (Mo. 1965); Mount Hope Cemetery Ass'n v. State, 11 A.D. 2d 303, 203 N.Y.S.2d 415 (N.Y. App. 3d Dep't 1960), *aff'd*, 10 N.Y.2d 752, 177 N.E.2d 49 (1961); *see also* State v. Assembly of God*,* 230 Or. 67, 368 P.2d 937 (1962); State v. Lincoln Memory Gardens, Inc., 242 Ind. 2d 206, 177 N.E.2d 655 (1961).

cost of remodeling an owner's facility when a taking has resulted in total or partial loss of use of the property.[134]

> Where severance damages have occurred, it may sometimes prove possible for the property owner to perform certain actions upon the property to rectify the injuries in whole or in part, thus decreasing the amount of severance damages and correspondingly increasing the parcel's market value. These actions constitute a "curing" of the defects, and the financial expenditures necessary to do so constitute the condemnee's cost to cure.[135]

However, an owner may recover cost-to-cure damages only to the extent that the damages do not exceed the diminution in the value of the remainder parcel, and "the total damages awarded may not exceed the fair market value of the whole parcel before the taking."[136] Not all damages that may result in inconvenience to the owner are compensable. The damages must be real and affect the value of the property;[137] subjective damages have been denied.[138]

B.5. The Measure of Compensation for Special Use Properties

As can be seen from the foregoing discussion of special use properties, there is no absolute rule on how they are to be valued. A good understanding of the problems and their solutions can be gained, however, by studying takings of different types of special use properties. As a general rule, however, only the market data approach or the cost approach will apply.

B.5.a. Churches

The market data approach has been accepted in some takings as a proper method of valuing churches or of church property such as parking lots. In a given case there may not have been any sales of churches or church property in the area, or the highest and best use of the property is no longer as a church. The absence of data does not mean that the market data approach may not be used but rather that an appraiser may value the property at its current highest and best use. In a case in which the condemned property was located in a business zone and had been improved with a structure that had been used as a Masonic Hall, as recreational type property, and as a church, the court held that the property was a "specialty property,"[139] however, the court also held that the highest and best use of the property was as a single-story commercial development. Thus, valuation based on comparable sales was the most appropriate method of valuation.[140]

Although churches may not be bought and sold frequently, the comparable sales approach should not be disregarded. As one court has noted,

> sales of church property are scarce. For that very reason, when there *is* one that is reasonably susceptible of comparison, it has high evidentiary value. It is our opinion that the factual and opinion evidence tendered by the highway department's witnesses indicated a sufficient similarity between the properties here in question to warrant consideration by the jury, and that the exclusion of it was a prejudicial error.[141]

If there are no comparable sales that may be used, then the method of valuation most often used is the cost-less depreciation approach.[142] However, the approach is difficult to apply to church properties because of concerns with measuring functional depreciation, as well as physical depreciation.[143] As stated in *Common-*

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[134] City of Elkhart v. NO-BI Corp., 428 N.E.2d 43 (Ind. App. 3d Dist. 1981) (loss of use of loading dock). *See also* Div. of Admin., State Dep't of Transp. v. Frenchman, Inc., 476 So. 2d 224, 227 (Fla. App. 4th Dist. 1985 (holding that cost to cure may be used to mitigate the amount of the award when it exceeds the difference in market value), *review dismissed*, 495 So. 2d 750 (Fla. 1986); B&B Food Corp. v. New York, 96 A.D. 2d 893, 893, 466 N.Y.S.2d 60, 60 (App. Div. 2d Dep't 1983) (holding that the cost to cure approach may not be used when the cure must be accomplished by going outside the tract in controversy)).

[135] Dep't of Transp. v. Sherburn, 196 Mich. App. 301, 305, 492 N.W.2d 517, 520 (Mich. Ct. App. 1992).

[136] *Id.* at 306, 492 N.W.2d at 520.

[137] *See* 4A NICHOLS ON EMINENT DOMAIN § 14.1, *et seq*.

[138] State v. Wilson, 103 Ariz. 194, 197, 438 P.2d 760, 763 (1968) (holding that testimony regarding loss of business went to the issue of the reduction in highest and best use of the property and that the "trial court correctly instructed the jury that it was not to consider any claim of loss or impairment of business 'inasmuch as the law permits damages to be awarded for injury to property but not injury to business conducted thereon'") (no citation for internal quotation); State v. Wemrock Orchards, Inc., 95 N.J. Sup. 25, 29, 229 A.2d 804, 806 (N.J. Super. Ct. 1967 (reversing judgment below as the excessive verdict must have been based on the land's uniqueness for historical reasons for which there was no evidence), *cert. denied*, 50 N.J. 92, 232 A.2d 153 (1967); Syracuse Univ. v. State, 7 Misc. 2d 349, 353, 166 N.Y.S.2d 402, 405 (1957) (holding that esthetic, sentimental, and historical aspects were not compensable)).

[139] Town of Bloomfield v. The Masonic Hall Ass'n, 2006 Conn. Super. LEXIS 904, at *6 (Conn. Super. 2006) (Unrept.).

[140] *Id.*; *see* State Highway Dep't v. Hollywood Baptist Church, 112 Ga. App. at 859, 146 S.E.2d at 572 (reversing a judgment for the landowner and holding that the property was no different from any other property zoned for residential or commercial use and that the determination of market value for this purpose was just compensation).

[141] Commonwealth, Dep't of Highways v. Oakland United Baptist Church, 372 S.W.2d 412, 413–14 (Ky. 1963) (emphasis in original) (citation omitted) (holding that the comparable sale was not too distant to exclude its consideration).

[142] Commonwealth, Dep't of Highways v. Congregation Anshei S'Fard, 390 S.W.2d 454 (Ky. Ct. App. 1965) (holding that cost less depreciation of improvements could be used as the condemnees were entitled to be able to replace their facility and holding that testimony regarding the undepreciated cost of constructing a replica of the building was not prejudicial when considered with other evidence of depreciation). *See Marseilles Hydro Power, LLC*, 2004 U.S. Dist. LEXIS 25276, at *15–17 (noting alternative measures of damages but not rejecting the market value measure).

[143] Trustees of Grace and Hope Mission v. Providence Redevelopment Agency, 100 R.I. 537, 544, 217 A.2d 476, 480 (1966)

wealth, Dep't of Highways v. Congregation Anshei S'Fard,[144]

> there may be circumstances in which evidence as to the cost (less depreciation) of improvements may be received. For example, if it is shown that a particular improvement is well adapted to the location and tends to adapt the property to the use to which it could most advantageously be put, and there is nothing to show that the cost of the improvement was not paid in good faith and under normal conditions, the cost of the improvement, less depreciation, may be considered as proper evidence of the amount by which the improvement enhances the market value of the property.[145]

In a case in which half of a church's parking lot was taken, the court similarly observed that "[w]hen the property is such that evidence of fair market value is not obtainable, necessarily some other formula for fixing the fair value of the property must be devised."[146]

Thus, in the valuation of churches "[m]arket value as a measure of compensation has been accepted and rejected in cases involving churches…. In some cases, the cost approach has been used…."[147]

B.5.b. Cemeteries

The courts generally have adopted the market value approach as the appropriate measure of compensation for the taking of cemetery land in eminent domain proceedings.[148] However, vacant cemetery property presents a unique problem in valuation and is a situation in which the income approach or some variation thereof may be used.[149] Because cemeteries are not bought and sold commonly on the open market, some states have adopted an income approach similar to a "cost of development" method to determine the value of the land taken.[150] As in the traditional income approach, the problem is ascertaining the appropriate discount or capitalization rate to be applied. Finally, the cost of replacement approach has been used as well in the valuation of cemeteries.[151]

B.5.c. Parks

When a public park or a portion thereof is taken, it may be difficult to determine its value. However, "the usual method of compensation is market value," especially for public parks.[152] In some cases, however, the courts have allowed damages based on the cost of re-

(holding that the trial court did not err in "excluding evidence of functional depreciation on a theory of obsolescence").

[144] 390 S.W.2d 454 (Ky. Ct. App. 1965).

[145] *Id.* at 455–56.

[146] First Baptist Church of Maxwell v. Neb. Dep't of Roads, 178 Neb. 831, 836, 135 N.W.2d 756, 759 (1965) (holding however that the witnesses were not shown to be qualified to give an opinion as to value and were "not examined in the area of the total cost of the property, its reproduction or replacement cost with allowances for depreciation"). *See also* State Highway Dep't v. Augusta District of No. Ga. Conference of Methodist Churches, 115 Ga. App. at 164, 154 S.E.2d at 30 (holding that "in some instances market value is not the fairest or most accurate method of measuring" a property's value and that in this case because "the condemnee has designed and built an improvement on the property for a special purpose and has been deprived of its use, just and adequate compensation may include the cost or its value to condemnee for the particular purpose for which it was constructed.")

[147] 4 NICHOLS ON EMINENT DOMAIN § 12C.01[4][b], at 12C-43–44.

[148] Annotation, *Damages for Condemnation of Cemetery Lands*, 42 A.L.R. 3d 1314, 1317 (2007 Supp.). *See, e.g.*, Bd. of Comm'rs v. Trustees of St. Patrick's Cathedral, 78 A.D. 2d 644, 432 N.Y.S.2d 246, 247 (N.Y. App. 2d Dep't 1980) (holding that the record did not justify a conclusion that the value of each grave site should be diminished by 10 percent for purported sales and administrative expenses as these expenses were already included in the valuation of each site); Green Acres Mem'l Park, Inc. v. Miss. State Highway Comm'n, 246 Miss. 855, 864, 153 So. 2d 286, 290 (1963) (holding that the jury was properly instructed on the before and after rule and that the trial court correctly excluded opinion evidence of the sale price of similar, comparable cemetery property as a "going concern"); Laureldale Cemetery Co. v. Reading Co., 303 Pa. 315, 329, 154 A. 372, 376 (1931) (holding that the jury must not determine how the land "could best be divided into building lots, nor conjecture how fast they could be sold, nor at what price per lot" and that "[t]he land must be valued as land like any other land in its vicinity, and not as sepulture lots to be turned into cash in the future").

[149] Dep't of Transp. v. Bouy, 69 Ill. App. 3d 29, 38, 386 N.E.2d 1163, 1169 (1979) (holding that in a partial taking of cemetery for a highway the value of the property taken and value of a temporary easement were properly determined by the income approach).

[150] State *ex rel.* State Highway Comm'n v. Mt. Moriah Cemetery Ass'n, 434 S.W.2d 470, 473 (Mo. 1968)

> (Since it is common knowledge that cemeteries are not sold on the market and evidence of the usual fair market value of land is not available, some other measure must be used. The capitalization method is evidence to show such values, but it is not a rigid formula for mathematical determination of the damages.).

[151] County of Erie v. St. Matthew's United Church of Christ, 116 A.D. 2d 973, 498 N.Y.S.2d 710 (N.Y. App. 4th Dep't 1986) (holding that the trial court erred in using the income method, as damages under the replacement cost method were almost three times larger than under the income method); St. James Roman Catholic Church Soc'y of Jamestown v. State, 50 A.D. 2d 193, 376 N.Y.S.2d 347 (N.Y. App. 4th Dep't 1975) (holding that the cost of replacement was the proper method of valuation for a cemetery with a large inventory of gravesites and a slow rate of sales).

[152] 4 NICHOLS ON EMINENT DOMAIN § 12C.04[4][c], at 12C-46. *See* People, *ex rel.* Dep't of Pub. Works v. City of L.A., 220 Cal. App. 345, 350–51, 33 Cal. Rptr. 797, 799–800 (Cal. App. 2d Dist. 1963) (holding that with respect to the park land in question, "damages must be measured by the market value of the land at the time it is taken" and "*that the test is not the value for a special purpose, but the fair market value of the land in view of all the purposes to which it is naturally adapted*") (emphasis in original) (internal quotation marks omitted) (citation omitted)).

placing the land taken or on the "rule of substitution."[153] For example,

> [w]here property already devoted to public use by one agency of government is condemned by another such agency for some unrelated public purpose, just compensation consists in paying the cost of providing equivalent substitutes or necessary replacements for the property taken. …
>
> The rule requiring the payment of the cost of substitute facilities is an application of the principles controlling the determination of just compensation and is not an exception to those principles. …
>
> "The 'substitute facilities' doctrine is not an exception carved out of the market value test; it is an alternative method available in public condemnation proceedings. …"[154]

The court held that the

> [a]pplication of the foregoing principles justifies the cost of the substitute or replacement land to be obtained by the Board for use for park purposes in the place of the 7.72 acres of park land taken by the road commission as just compensation to which the board was entitled for the land taken.[155]

The court in *United States v. Certain Land in Borough of Brooklyn*[156] applied the doctrine of substitution to vacant playground land:

> We see no reason a priori for treating a public street as more deserving of compensation for its replacement than a public playground might be, and the cases relied upon below do not suggest any. … Both may serve vital public functions and the absence of either might cause serious strain on other public facilities. In this case, the City authorities had decided that an adequate playground was more important for the area than was an untruncated Cook St. Under this view, if a playground is found to be "necessary," the City may well be entitled to the amount needed to acquire and prepare the additional land, less the value of the land still held, if any, that was not a necessary part of the playground.[157]

The *Brooklyn* case involved a taking of land with buildings when the property was purchased by the owner; however, the buildings had been removed prior to the condemnation. Nevertheless, the court held that the original cost including improvements was material to the market value of the property if the substitution doctrine was not applicable.[158] In remanding the case, the court stated that the trial court would decide

> whether a new playground is in fact necessary, how much land would be needed if it is, the expense involved in such a project, whether the 15,000 [square feet] not taken could be part of the substitute, and what is its value. Even if a new playground is not "necessary," there must be a new trial to determine just compensation to the City for the value of the property taken, giving consideration to the evidence we find improperly disregarded.[159]

As Justice White stated in *United States v. 564.54 Acres of Land*,[160] "[t]he substitute-facilities doctrine is unrelated to fair market value and does not depend on whether fair market value is readily ascertainable; rather, it unabashedly demands additional compensation over and above market value in order to allow the replacement of the condemned facility."[161]

With respect to takings of parkland, an appraiser should be aware also of 23 C.F.R. § 771-35 (2007), promulgated pursuant to 49 U.S.C. § 303 (2007). Section 303(a) provides that "[i]t is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites." Section 303(d)(3) states that with respect to parks, recreation areas, and wildlife or waterfowl refuges, the Secretary of Transportation

> may make a finding of de minimis impact only if—
>
> (A) the Secretary has determined, after public notice and opportunity for public review and comment, that the transportation program or project will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge eligible for protection under this section; and
>
> (B) the finding of the Secretary has received concurrence from the officials with jurisdiction over the park, recreation area, or wildlife or waterfowl refuge.

The regulations set forth guidelines on when publicly owned parks and historic sites may be acquired.[162] Although there is no language governing valuation in § 303 or the regulations, an appraiser should be aware of federal policy that could affect the valuation of any remainder.

With respect to private parks, as well as special purpose properties in general, a leading case is *Newton Girl Scout Council v. Massachusetts Turnpike Authority,*[163] involving a taking of a strip of land through a Girl Scout camp for use as part of a freeway project. The trial court excluded testimony of damages based on use of the land for camp purposes and refused to instruct on

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[153] State Road Comm'n of W. Va. v. Bd. of Park Comm'rs of the City of Huntington, 154 W. Va. 159, 167–68, 173 S.E.2d 919, 925 (1970) (citations omitted) ("'Where the highest and best use of the property is for municipal or governmental purposes, as to which no market value properly exists, some other method of arriving at just compensation must be adopted, and the cost of providing property in substitution for the property taken may reasonably be the basis of the award.'" (*id.*, 154 W. Va. at 169, 173 S.E.2d at 926) (citations omitted)).

[154] *Id.* (*quoting* United States v. Certain Property Located in the Borough of Manhattan, 403 F.2d 800, 801 (2d Cir. 1968) (some citations omitted).

[155] 154 W. Va. at 170, 173 S.E.2d at 926–27.

[156] 346 F.2d 690 (2d Cir. 1965).

[157] *Id.* at 695 (citations omitted).

[158] *Id.* at 693.

[159] *Id.* at 695–96 (footnote omitted).

[160] 441 U.S. 506, 99 S. Ct. 1854, 60 L. Ed. 2d 435 (1979).

[161] *Id.* at 517, 99 S. Ct. at 1860, 60 L. Ed. 2d at 445 (White, J., concurring).

[162] *See* 23 C.F.R. § 771-35 (2007).

[163] 335 Mass. 189, 138 N.E.2d 769 (1956).

assessing damages based on such purposes.[164] The taking included land that shielded the camp from the existing highway, with a resulting loss of privacy.[165] The Supreme Judicial Court of Massachusetts held that damages could be proved by a method other than the comparable sales method and that although market value remained the test, the property was to be valued based on the use that would result in the most money. "In such cases, it is proper to determine market value from the intrinsic value of the property and from its value for the special purposes for which it is adapted and used."[166] The court held that it was permissible to allow for more flexibility with respect to the evidence.[167] However, the owner had the burden of showing that it was impossible to prove the value of the property without using an alternative method of valuation.[168]

Other than for takings of private parks, owners have been compensated for the value of a variety of recreational uses of their land[169] based on the property's "peculiar qualities, conditions, or circumstance"s;[170] its "intrinsic value arising out of its uniqueness"s;[171] or its use for only one specific purpose.[172] For example, one court approved a valuation based on "actual or intrinsic value" in terms of reproduction cost less depreciation.[173]

B.5.d. Golf Courses

With respect to golf courses the cost approach has been applied, including the cost of substitute facilities and the cost to cure.[174] In *Sun Valley Camping Cooperative, Inc. v. Town of Stafford,*[175] although involving a taxpayer's appeal of the valuation of a cooperative campground for a property tax assessment, the court observed that "[a] special purpose property is defined as real estate appropriate for only one use or a limited number of uses, whose highest and best use is probably a continuation of its present use."[176] Such a property has a "limited demonstrable market" and "is usually defined in terms of buildings with a special purpose, but also includes theme parks and golf courses,"[177] for which the reproduction cost approach is often used to indicate a value.[178] However, the court further stated that "[a] valuation must sometimes involve more than one single theory or methodology of assessment because of the particular facts"[179] and that "[n]o single method of valuation is controlling for the finding of fair market value for a special purpose property, at least in eminent domain cases."[180]

In *State Highway Department v. Thomas,*[181] the court held in a partial taking of property leased for a golf course

> that the jury was authorized to find from the other evidence adduced on the trial that the leasehold interest in the property had a special value to the lessee which could not be adequately compensated by an award of damages based on the mere fair market value of the land itself.[182]

Testimony properly was disallowed that would have suggested that the lessee could have minimized its damages by reconstructing some of the course on other property not already leased to the lessee.[183] The court

[164] 335 Mass. at 193, 138 N.E.2d at 772.

[165] *Id.* at 192, 138 N.E.2d 772.

[166] *Id.* at 195, 138 N.E.2d 774.

[167] *Id.* at 194, 138 N.E.2d 773.

[168] *Id.* at 197, 138 N.E.2d at 775.

[169] Sun Valley Camping Coop. v. Town of Stafford*,* 94 Conn. App. at 696, 707, 894 A.2d at 359 (holding in an appeal of a property tax assessment of a recreational cooperative campground that the court improperly adopted a comparable sales method of valuation, which used the average individual unit value multiplied by the number of units of which the cooperative was comprised, rather than valuing the property as a whole).

[170] Scott v. State*,* 230 Ark. at 772, 326 S.W.2d at 815 (historical tavern, museum, and park); *cf. Wemrock Orchards, Inc*., 95 N.J. Sup. at 29, 229 A.2d at 806 (1967) (holding that there was no evidence of uniqueness and that an excessive jury verdict was based apparently on the jury's knowledge of property's "historical significance").

[171] State *ex rel.* Herman v. Wilson, 103 Ariz. 194, at 197, 438 P.2d 760, at 763 (unusual rock formations).

[172] Cent. Ill. Light Co. v. Porter, 96 Ill. App. 2d 338, 339, 239 N.E.2d 298, 299, 300 (1968) (noting that the only use of the property was for duck hunting purposes).

[173] Keator v. State, 23 N.Y.2d 337, 340, 244 N.E.2d 248, 249 (1968) (holding in a case involving the Isaac Walton League clubhouse that the trial court's verdict would be reinstated because the evidence showed that the property was a specialty and that an award based on the actual or intrinsic value was more appropriate because the property was not susceptible to valuation based on fair market value), *modified*, 26 A.D. 2d 961, 274 N.Y.S.2d 671 (N.Y. App. 3d Dep't 1966).

[174] Comm'r of Transp. v. Candlewood Valley Country Club, Inc., 2005 Conn. Super. LEXIS 3308, at *16, *29, *31 (condemnation action to acquire a fee simple interest in and to a strip of land from the club, permanent easements, and a temporary construction easement during the completion of the work, in which appraisers used a combination of the market sales data, income and cost approaches, as well as cost to cure). *See* Albany Country Club v. State, 19 A.D. 2d 199, 201, 241 N.Y.S.2d 604, 606 (N.Y. App. 3d Dep't 1963) (holding that a country club was specialty property and that the valuation of the property should have been based on replacement value but also holding that acreage labeled as "club purpose land" should have received a higher valuation because of "an exceptional number of trees" that enhanced the course). *See also* 4 NICHOLS ON EMINENT DOMAIN § 12C.01[4][c], at 12C-48–49.

[175] 94 Conn. App. 696, 894 A.2d 349 (Conn. Ct. 2006).

[176] *Id.* at 713, 894 A.2d 362 (citation omitted).

[177] *Id.*

[178] *Id.*

[179] 894 Conn. App. at 714, 94 A.2d 362–63.

[180] *Id.* (*citing* Brothers, Inc. v. Ansonia Redevelopment Agency, 158 Conn. 37, 255 A.2d 836 (1969). *See* Rustici v. Stonington, 174 Conn. 10, 12, 14, 381 A.2d 532, 534, 535 (1977) (holding that town assessor correctly used a combination of comparable sales and cost of improvement methods to value property operated and developed as a golf course).

[181] 115 Ga. App. 372, 154 S.E.2d 812 (1967).

[182] *Id.* at 378, 154 S.E.2d 817.

[183] *Id.* at 380, 154 S.E.2d 818.

held that "[t]he condemnor could not compel [the lessor] to lease other portions of her land to [the lessee] against her will merely for the purpose of minimizing the condemnees' damages resulting from the condemnation."[184]

It should be noted that the existence of trees and other improvements may result in an unusual application of the cost approach. Although the separate valuation of trees has been the subject of some literature on valuation,[185] trees generally are valued as part of the land. One source suggests valuation based on trunk area, kind, and condition.[186] The application of such a formula may result in more than adequate compensation, but there is nothing in the formula to indicate any correlation to actual or market value. Finally, in takings involving golf courses damages may be permitted for loss of screening and the cost to cure damaged fairways and greens.[187]

B.5.e. Schools

With respect to takings of schools, the courts have applied the market value approach to takings of private school property and the substitute property approach to takings of public school property.[188] For example, in a recent case involving a taking of 41 percent of the land used for a private school and its athletic facilities, but leaving the building intact, the court found that the existing use of the school, which had a special exception to operate in a residential area, was "more analogous to a commercial use than a residential use," as the private school competed against other private schools to attract students.[189] The court accepted the plaintiff's expert's pre-taking valuation of the property based on values of similarly sized commercial lots in proximity to the property,[190] but did not accept the same expert's post-taking valuation of the property based on residential home sites on the theory that the property was no longer suitable for use as a school.[191]

Notwithstanding the substantial taking of the school's property, the court agreed with the state that the highest and best use of the property was its continued use as a school. The court held that the plaintiff failed to prove that after the taking the remaining parcel was unsuitable for use as a school and that its highest and best use was as a single family residence.[192] In particular, the owner failed to support its allegations that the property was no longer suitable for use as a school because of increased noise and pollution, decreased safety, insufficient ground, and a decline in the student population. With respect to severance damages, as noted, the owner argued that the highest and best use of the property was not as a school but provided no evidence regarding the diminished value of the remaining parcel. The court stated that "one…alternative theory is the introduction of evidence of 'restoration or replacement costs' to restore the property owner to the position he would have occupied had the taking not occurred."[193] Although the state offered no evidence of severance damages, it was the owner's burden to prove "any diminished value to the remaining school parcel," a burden the owner failed to satisfy.[194] Thus, for an institution to be destroyed for school purposes, there must be a showing that it is impractical and unreasonable to continue the school after reasonable efforts and diligence to overcome the destructive effects caused by the taking.[195]

In another case, the petitioners sought compensation for a decrease in fair market value of property because of an appropriation of a portion of their property for highway purposes.[196] The court held that specific adverse effects to the property "are not separate items of damage, recoverable as such, but are relevant only as circumstances tending to show a diminution in the over-all fair market value of the property."[197] It should be noted that the court stated that it did not rule out the fair market approach to valuing the property which was used as a Bible college.[198] On the other hand, the courts have recognized the necessity of liberalizing the proof permitted to establish just compensation for a taking of school property.[199] An Illinois court has held

[184] *Id.* at 380, 154 S.E.2d at 817.

[185] Long Island Lighting Co. v. State, 28 A.D. 2d 1014, 1015, 283 N.Y.S.2d 806, 808 (N.Y. App. 3d Dep't 1967) (considering replacement cost of trees).

[186] *Shade Tree Valuation*, National Shade Tree Conference (1957).

[187] Knollwood Real Estate Co. v. State, 33 Misc. 2d 428, 430, 227 N.Y.S.2d 112, 114 (N.Y. Ct. Cl. 1961) (allowing cost of restoration, including cost to restore "screen planting").

[188] 4 NICHOLS ON EMINENT DOMAIN § 12C.01[4][d], at 12C-49.

[189] West Bay Christian Sch. Ass'n, Inc. v. R.I. Dep't of Transp., 2007 R.I. Super. LEXIS 24, at *12 (R.I. Super. Ct. 2007).

[190] *Id.*

[191] *Id.* at *16–17 and n.8.

[192] *Id.* at *18.

[193] *Id.* at *27 n.12.

[194] *Id.* at *28.

[195] San Pedro, L.A. and S.L.R. R. Co. v. Bd. of Educ., 32 Utah 305, at 312, 90 P. 565, at 567 (1907).

[196] Gallimore v. State Highway and Pub. Works Comm'n, 241 N.C. 350, 353, 85 S.E.2d 392, 395 (1955). *See* County of Cook v. Chicago, 84 Ill. App. 2d at 306, 228 N.E.2d at 186 (holding that "market value is not the basis for valuation when special use property is involved," that the trial court was correct "that the defendant was entitled to acquire substitute facilities, and that the cost of adjacent land to replace the property taken was properly admitted into evidence") (citation omitted)); Idaho-W. Ry. Co. v. Columbia Conference, etc., 20 Idaho 568, 583, 119 P. 60, 65 (1911) ("Whenever the property is of such character and nature that it has no market value, its value for the uses and purposes to which it is being devoted and to which it is peculiarly adaptable may be shown, and the authorities above cited fully sustain and justify this position.").

[197] 241 N.C. at 355, 85 S.E.2d 396.

[198] *Id.* at 355, 85 S.E.2d 397.

[199] West Bay Christian Sch. Ass'n, Inc. v. R.I. Dep't of Transp., 2007 R.I. Super. LEXIS 24, at *12 ("In takings cases involving special use property, a trial court has the discretion

that as a matter of law, condemned school property "is not to be valued on a market value basis, but by the cost of supplying the necessary substitute facilities for those taken to restore the same facilities…."[200]

As summarized in *Nichols on Eminent Domain*, if "a portion of the property was taken and the remainder so damaged that it could not be used for school purposes, the before valuation was made in terms of value for school purposes and the after valuation in terms of market value."[201] However, in other instances, "the cost approach has been used in lieu of the substitution approach so that depreciation may be taken into account."[202] Factors affecting the use of the property for institutional purposes should be recognized.[203] Also, "damages to improvements on the remaining property have been recognized, usually in the form of cost to cure."[204] If a taking is extensive then the valuation of public school property usually involves the application of the substitute property doctrine.[205]

B.5.f. Functional Replacement

Notwithstanding the difficulties of establishing the value of schools and other publicly-owned facilities such as a fire station or other government buildings, an alternative method of satisfying just compensation may be available under 23 C.F.R. § 710.509 (2007).

Section 710.509(a) states that

> [w]hen publicly owned real property, including land and/or facilities, is to be acquired for a Federal-aid highway project, in lieu of paying the fair market value for the real property, the State may provide compensation by functionally replacing the publicly owned real property with another facility which will provide equivalent utility.[206]

In cases where the doctrine of substitution is overly expensive, such as massive restoration costs, functional replacement may be an alternative preferable to both parties.

C. VALUATION AS AFFECTED BY RECOGNITION OF BENEFITS TO THE REMAINDER

C.1. Distinguishing Between General and Special Benefits

There are two classifications of benefits—general and special. In most states only special benefits may be considered as a proper offset against compensation for the value of the land taken or against damages to the

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to depart from traditional valuation methods to properly compensate the party whose property has been taken.")

[200] County of Cook v. Chicago, 84 Ill. App. 2d at 308, 228 N.E.2d at 187. *See also* State v. Waco Indep. Sch. Dist., 364 S.W.2d 263, 268 (Tex. Civ. App. 1963) (affirming the trial court's verdict that held "that the property remaining after [the] taking has value to the school district only to the extent that it is a starting point from which to rebuild a high school campus that is absolutely necessary to the Waco School District" and "that, therefore, *the before* and *after value* to the premises to the school would be solely dependent upon the cost of acquiring or constructing reasonable substitute facilities…." *Id*. at 266) (emphasis in original).

[201] 4 NICHOLS ON EMINENT DOMAIN § 12C.01[4][d], at 12C-49–50.

[202] *Id.*

[203] Harvey School v. State, 14 Misc. 2d 924, 926, 180 N.Y.S.2d 724, 727 (N.Y. Ct. Cl. 1958)

> (Assuming one wanted to purchase the entire property to continue using it as a boarding school…he would consider the construction of the buildings, whether brick or frame; he would consider the exterior aspects of the buildings and their state of repair; he would closely examine the interior of the buildings, especially the condition of ceilings, walls, floors, electrical equipment, type and condition of heating equipment, the number of rooms and adequacy thereof for the purposes intended; the possibility of continuing unimpaired the services presently provided, all with reference, in his mind, to the contemplated capital investment and, more so, to the function thereof as well as to the maintenance expenses.)

Gallimore, 241 N.C. at 356, 85 S.E.2d at 397

> ([T]he application of our concept of fair market value does not depend upon the actual availability of one or more prospective purchasers, but assumes the existence of a buyer who is ready, able and willing to buy but under no necessity to do so…. "Of course, the market value of a church could not be determined by saying just what somebody would give for that piece of property, because the ordinary citizen does not want to own a church, but what would a congregation that desired a church give for the church. In like manner, a college campus must have its value determined by what somebody who wanted a college would give for the property with that campus.")

(citation omitted)).

[204] 4 NICHOLS ON EMINENT DOMAIN § 12C.01[4][d], at 12C-50.

[205] People *ex rel.* Dir. of Finance v. YWCA, 74 Ill. 2d 561, 572, 387 N.E.2d 305, 311 (Ill. 1979) (holding that a women's facility that included kitchens, a swimming pool, a gymnasium, locker rooms, and a meeting room held not to be a special use property requiring application of the "substitute-facilities measure of compensation"), *overruled on other grounds*, People v. Ortiz, 196 Ill. 2d 236, 752 N.E.2d 410 (Ill. 2001); County of Cook v. City of Chicago, 84 Ill. App. 2d at 307, 228 N.E.2d at 186 (holding that the city had had to replace the school property by acquiring another site for the same special use); City of Wichita v. Unified Sch. Dist. No. 259, 201 Kan. 110, 439 P.2d 162 (1968); *Waco Indep. Sch. Dist.,* 364 S.W.2d at 265, 266.

[206] 23 C.F.R. § 710.509 (b) (2007) states:

> *Federal participation*. Federal-aid funds may participate in functional replacement costs only if:
>
> (1) Functional replacement is permitted under State law and the STD elects to provide it.
>
> (2) The property in question is in public ownership and use.
>
> (3) The replacement facility will be in public ownership and will continue the public use function of the acquired facility.
>
> (4) The State has informed the agency owning the property of its right to an estimate of just compensation based on an appraisal of fair market value and of the option to choose either just compensation or functional replacement.
>
> (5) The FHWA concurs in the STD determination that functional replacement is in the public interest.
>
> (6) The real property is not owned by a utility or railroad.

remainder, or both. Courts use different terminology in an effort to distinguish between general and special benefits and often become hopelessly entangled in a theoretical explanation of the difference between the two kinds of benefits. One could argue that the courts lose sight of the principal objective, i.e., determining whether the remainder in fact has been benefited, in seeking to find language distinguishing the two categories of benefits.[207] Although the court observed in *Missouri ex rel. State Highway Commission v. Gatson*[208] that "[t]he distinction between general and special benefits has been carefully delineated," the court also stated that "[t]he distinction in practical application however is shadowy…. [T]rained legal minds have difficulty in distinguishing between the two types of benefits and as a consequence it is necessary to make submissions to the jury with 'all possible clarity.'"[209] It may be noted that California no longer distinguishes between general and special benefits.[210]

General benefits are those that increase values of land throughout the community[211] and are enjoyed by the public at large.[212]

> "General benefits," those accruing to the owners of property in a neighborhood or vicinity generally, are not deductible from the damages; to make such a deduction would be to require the landowner whose property is taken in part to liquidate his damages by contributing his share of the benefits which inure to the public as a whole.[213]

Unlike general benefits, special benefits attach because of a property's relationship to the highway improvement.[214] "'Special benefits'…accrue directly and proximately to the particular land remaining by reason of the construction of the public work on the part taken. Such benefits must, of course, be reflected in an increase in the market value of the land."[215]

Consequently, the benefit that accrues to the property is unlike or is different in kind from a benefit or benefits that accrue to properties in the area.[216] Benefits must, therefore, be special[217] or peculiar[218] to the owner.

[207] *See* Bassett v. United States, 55 Fed. Cl. 63, at 77 (rejecting the federal government's claim in an inverse condemnation case arising out of the government's deposit of large quantities of hazardous waste on the owner's property that the government's actions allegedly conferred a special benefit).

[208] 617 S.W.2d 80, 83 (Mo. App. E. Dist. 1981) (holding that a landowner with access to a county gravel road before the taking had access after the taking via a greatly improved paved road that enhanced the owner's property).

[209] *Id.* at 82.

[210] L.A. County Metro. Transp. Auth. v. Continental Dev. Corp., 16 Cal. 4th 694, 941 P.2d 809 (Calif. 1997) (abolishing the distinction).

[211] Podesta v. Linden Irrigation Dist., 141 Cal. App. 2d 38, 55, 296 P.2d 401, 412 (Cal. App. 3d Dist. 1956) (finding no special benefit); L.A. County v. Marblehead Land Co., 95 Cal. App. 602, 615, 273 P. 131, 137 (Cal. App. 2d Dist. 1928) (holding that "special benefits must be such as are reasonably certain to result from the construction of the work" and stating that the evidence showed a benefit resulting from the access and transportation facilities that would increase the value of the land fronting thereon, including the affected ranch).

[212] N.C. Bd. of Transp. v. Rand, 299 N.C. 476, 481, 263 S.E.2d 565, 569 (1980) (holding that the "State *has* produced evidence of benefit to defendants' land" and that "[s]uch evidence should be credited with a jury instruction") (emphasis in original); Phoenix Title and Trust Co. v. State, 5 Ariz. App. 246, 253, 425 P.2d 434, 441 (Ariz. Ct. App. 1967) (holding that it was "error to permit testimony to the effect that the property experienced general benefits which could be used to offset the severance damages" because "'[t]o charge a tract of land with the value of general benefits is to require its owner to pay for a benefit common to others who are themselves exempt from such payments'" (citation omitted); Kirkman v. State Highway Comm'n, 257 N.C. 428, 433, 126 S.E.2d 107, 111 (1962) (stating that it is

> "generally agreed that only those benefits can be taken into consideration which arise from the particular improvement for the purpose of which the owner's land [that] is taken or damaged and not those which have no causal connection with such improvements but are derived from other previous or subsequent improvements….")

(citation omitted)).

[213] State *ex rel.* Mo. Highway & Transp. Comm'n v. Delmar Gardens, 872 S.W.2d 178, 180 (Mo. App. E. Dist. 1994).

[214] The Central Puget Sound Reg'l Transit Auth. v. The Heirs and Devisees of Jack K. Eastey, 135 Wash. App. 446, 459, 144 P.3d 322, 328 (Wash. Ct. App. 2006) (holding that the trial court properly excluded "project influence" damages); E-470 Pub. Highway Auth. v. Revenig, 91 P.3d 1038, 1039, 1042 (Colo. 2004) (holding that special benefits may reduce an award of compensation for damages to a landowner's remaining property and that just compensation does not require only payment in cash). *See also* Daniels v. State Road Dep't of Fla., 170 So. 2d 846 (1964) (holding that the setoff would not have been allowed because the enhancements did not benefit the property directly but that the landowners had failed to preserve the issue by not objecting to the testimony); Kirkman v. State Highway Comm., 257 N.C. at 433, 126 S.E.2d at 111 (stating that "'[a] benefit once allowed cannot be reasserted in a further proceeding to condemn'") (citation omitted)).

[215] State *ex rel*. Mo. Highway & Transp. Comm'n v. Delmar Gardens, 872 S.W.2d at 180.

[216] State v. Pope, 228 Mo. App. 888, 74 S.W.2d 265, 269 (Mo. Ct. App. 1934) (stating that "'[t]he benefit to a particular parcel by its being left in a desirable size or shape or in fronting upon a desirable street is the peculiar benefit'" to the property owner); State v. Jones, 321 Mo. 1154, 1159, 15 S.W.2d 338, 340 (1929) (explaining that "[s]pecial benefits…accrue directly and proximately to the particular land remaining by reason of the construction of the public work on the part taken" but that "[s]uch benefits must of course be reflected in an increase in the market value of the land"); Jones v. City of Clarksburg, 84 W. Va. 257, 266, 99 S.E. 484, 488 (1919) (holding that if "the grading and paving of a public street have especially benefitted an abutting property…the jury…should consider and include therein the value of such special benefits, thereby deducting them from the damages inflicted).

[217] Stanley v. City of Salem, 247 Or. 60, 65, 427 P.2d 406, 408 (1967) (stating that

> "[w]hen a local improvement produces a special benefit…the mere fact that [the improvement] also results in [a] benefit to the general public…does not deprive it of its character as a local improvement nor prevent the imposition of at least a portion of its cost as a special assessment against such land")

> All the land in the community may not—almost certainly will not—receive the same general benefits in a monetary sense; and the general benefits derived by the particular tract in litigation might be greater than those enjoyed by any other land, and would be reflected in its increased value. But only that part of the increase resulting from special benefits—those, if any, arising from the land's position directly on the highway improvement, such as availability for new or better uses, facilities for ingress and egress, improved drainage, sanitation, flood protection, and the like—would be chargeable.[219]

As with general benefits, special benefits must occur because of the construction of a public improvement for which the land is taken.[220] A special benefit "connotes an enhancement more localized than a general improvement in community welfare, but not necessarily unique to a given piece of property. A special benefit is one going beyond the general benefit supposed to diffuse itself from the improvement through the municipality."[221]

No single case provides a definitive explanation of what is or is not a special benefit. However, "[c]ases involving the condemnation of a right of way for highway construction often cite changes in available uses or in the facilities for direct access that enhance the value of the residual land as paradigm examples of special benefits."[222]

The benefit to be special or specific need not be shared only by one property. If other properties have a close relationship to the improvement and are benefited specially and peculiarly, then such properties similarly situated are specifically benefited. Thus, special benefits is an improvement that enhances the value of remaining land such that its value may be determined and offset against the damages for the part taken.[223]

It is only when special benefits may be offset that most problems will arise. No presumption of special benefits arises merely because of a taking for the improvement of a street or highway.[224] The condemnor has the burden of distinguishing general from special benefits and of proving the value of the claimed special benefits to the remainder.[225] For example, street improvements may decrease the value of residential property.[226] Although each situation is different, the courts have

(citation omitted)). Smith v. State Highway Dep't, 105 Ga. App. 245, 246, 124 S.E.2d 305, 306 (1962) (holding that there was insufficient evidence to submit a charge on "consequential benefits" to the property); People v. Loop, 127 Cal. App. 2d 786, 804, 274 P.2d 885, 898 (Cal. App. 2d Dist. 1954) (holding that the instruction on special benefits must address the benefit that is "reasonably certain to result from the construction of the work").

[218] City of Springdale v. Keicher, 243 Ark. 161, 166, 419 S.W.2d 800, 803 (1967) (finding that there was not evidence that a sewer line was a benefit and not a detriment to the subject property); Richardson v. Big Indian Creek Watershed Conservancy Dist., 181 Neb. 776, 780–81, 151 N.W.2d 283, 287 (1967) (holding that there was no error in refusing to give a jury instruction on special benefits and stating that "[i]f a special benefit exists, it must be material and capable of measurement by computation, and should be reflected in the value of the remaining land immediately after the taking"); *Podesta*, 141 Cal. App. 2d at 54, 296 P.2d at 411 (holding that action of irrigation district in sending water across the owner's property constituted a taking and there was no special benefit to the owner in connection with the taking).

[219] State *ex rel.* State Highway Comm'n v. Tate, 592 S.W.2d 777, 779 (Mo. 1980) (citation omitted) (internal quotation marks omitted) (holding that the exclusion at trial of evidence of special benefits constituted prejudicial error as "changes in direct access onto a landowner's property and changes in the highest and best use of the property are elements of special benefits which may be set off against the amount of damages in determining the amount of compensation due the landowner." (*id*. at 780)).

[220] N.C. Bd. of Transp. v. Rand*,* 299 N. C. at 482, 263 S.E.2d at 569 (holding that "evidence of benefit here was clearly not hypothetical and speculative"); Town of Sumner v. Fryar, 146 Wash. 607, 610, 264 P. 411, 413 (1928) (holding that benefits were derived from the improvement for which the land was condemned and were properly considered in assessing damages).

[221] Haynes v. City of Abilene, 659 S.W.2d 638, 641–42 (Tex. 1983) (failure to prove that benefits conferred were special) (citation omitted).

[222] State *ex rel.* State Highway Com. v. Tate, 592 S.W.2d 777, 779 (Mo. 1980) (citations omitted).

[223] State Dep't of Highways v. Miller, 182 So. 2d 155, 157 (La. App. 3d Cir. 1966) (holding that possibilities noted in the case were "too speculative to sustain a finding of special benefits"); Hootman v. Indiana, 237 Ind. 72, 143 N.E.2d 666 (1957); State v. McCann, 248 S.W.2d 17 (Mo. App. 1952) (reversing and remanding for a new trial because jury instruction that stated that compensation could be paid in the form of benefits failed to distinguish between general, specific, and speculative benefits). *See* Juliet E. Cox*, Assessing the Benefits of California's New Valuation Rule for Partial Condemnations*, 88 CAL. L. REV. 565 (2000).

[224] City of Grand Prairie v. Sisters of the Holy Family of Nazareth, 868 S.W.2d 835, 839, 840 (Tex. App. 5th Dist. 1993) (holding in a case arising out of the city's assessment of a property owner for street improvements based on a study of the value of benefits to abutting property owners that the city's special assessment ordinance was not supported by substantial evidence of special benefit.)

[225] N.C. State Highway Comm'n v. Thomas, 2 N.C. App. 679, 682, 163 S.E.2d 649, 651 (N.C. Ct. App. 1968) (condemnation of defendants' entire parking lot for use as a ramp leading to Interstate 40); Richardson v. Big Indian Creek Watershed Conservancy Dist., 181 Neb. 776, 151 N.W.2d 283 (1967); McMahan v. Carroll County, 238 Ark. 812, 814, 384 S.W.2d 488, 489 (1964)

> (We have repeatedly held that where the public use for which a portion of a man's land is taken so enhances the value of the remainder as to make it of greater value than the whole was before the taking, the owner in such case has received just compensation in benefits….) (citations omitted);

Thomson v. Kansas City, 379 S.W.2d 194, 198 (Mo. App. Kansas City Dist. 1964) (noting that there is "authority holding that certain improvements give rise to a presumption of benefit" but that "the burden of proving the existence and amount of special and peculiar benefits is on the party seeking to condemn the land" (citation omitted)).

[226] City of Grand Prairie v. Sisters of the Holy Family of Nazareth, 868 S.W.2d at 840.

attempted to identify criteria for determining when a property has been specifically injured or benefited. For example, the Supreme Court of Texas has stated:

> [An] analysis of whether an injury or benefit was common to the community involved consideration of the location of the landowner's property, the condemnor's project, and the effects of the latter. However, the concept of community injury and benefit is not primarily geographical. It is always true that the injury or benefit from a public project increases with proximity. While injury to several landowners on the same street is not community injury simply because they all suffer alike, it is also not special injury simply because others farther away do not suffer at all. Whether an injury is community cannot be decided simply by setting the size of the relevant area. "Community" in this context means not only where, but, more importantly, what kind. It is the nature of the injury rather than its location that is critical in determining whether it is community.[227]

The Supreme Court of Nebraska has stated

> [t]he right to setoff is usually allowed if it is found that special benefits result to the property owner after the construction, but the same does not follow if the benefits are merely general to the entire area…. A determination must be made by the trier of fact whether site prominence, increased traffic and possible change in use of the property after the taking, all or singularly, have increased the value of the land after the taking. The trier of fact must then determine whether the benefits, if any, are general or special. If special, they must be setoff against the damages occasioned by the taking.[228]

As for the constitutionality of state statutes requiring the deduction of the value of special benefits, the Supreme Court of Colorado has held that Colorado Revised Code Section 38-1-114(2)(d) —requiring that a trial court reduce a landowner's compensation for property taken by the amount of special benefits to the remaining property—did not conflict with the just compensation guarantee of Article II, Section 15 of the Colorado Constitution.[229] The court noted that

> [t]he General Assembly's new method requires a trial court to apply special benefits not only to reduce the amount of damages to the landowner's remaining property, which has long been approved as a form of just compensation under article II, section 15, but also to reduce the amount of compensation for property taken, which we have never before tested against our constitutional guarantee of just compensation.[230]

The court noted that the petitioners had argued that the majority of states do not "permit an award of compensation for property taken to be reduced by the amount of special benefits to the remaining property."[231] The court, however, observed that "most of the states that do not permit an award of compensation for property taken to be reduced by the amount of special benefits to the remaining property have statutes to that effect, which supports the principle that it is the General Assembly's prerogative to provide the method for calculating just compensation."[232] The court stated that its decision was based on Colorado's just compensation clause and that "both federal law and a substantial minority of states allow compensation for property taken to be reduced by the amount of special benefits to the remaining property."[233]

C.2. Rules Applicable to Deduction of Benefits

It appears that the states follow one of five rules with respect to general and special benefits.

1. In some states, benefits, whether special or general, may not be considered.
2. In other states, special benefits may be offset only against damages to the residue but not against the value of the land taken.
3. In some states, both special benefits and general benefits may be offset against damages to the remainder but not against the value of the land taken.
4. On the other hand, in some states special benefits may be offset against both the damages to the remainder and the value of the land taken.
5. Finally, some states recognize a rule that special and general benefits may be offset against both damages to the remainder and the value of the land taken.[234]

A recent decision from Missouri held that it was error for the trial court to exclude at trial the Commission's evidence that the "landowners' property was suitable

[227] State v. Schmidt, 867 S.W.2d 769, 781 (Tex. 1993) (holding that no damages could be awarded for diversion of traffic, construction disruption, and decreased visibility that affected the community).

[228] State *ex rel.* Dep't of Highways v. Haapanen, 84 Nev. 722, 724, 448 P.2d 703, 705 (1968) (citations omitted).

[229] E-470 Pub. Highway Auth. v. Revenig, 91 P.3d 1038, 1041 (Colo. 2004).

[230] *Id.* at 1043.

[231] *Id.* at 1044 (*citing* State v. Enter. Co., 728 S.W.2d 812 (Tex. Ct. App. 1986) (disallowing a reduction in compensation for property taken by the amount of special benefits to the remaining property under the "adequate compensation" guarantee of the Texas Constitution); Kane v. City of Chicago, 392 Ill. 172, 175, 64 N.E.2d 506, 508 (Ill. 1946) (reasoning that "the rule has been long settled" in Illinois that compensation for property taken may not be reduced by the amount of special benefits to the remaining property).

[232] *Id.* at 1044 n.7.

[233] *Id.* at 1044 (*citing* Bauman v. Ross, 167 U.S. 548, 574, 574–75, 17 S. Ct. 966, 976, 42 L. Ed. 270, 283 (1897) (holding that the compensation for property taken may be reduced by the amount of special benefits under the Fifth Amendment's guarantee of just compensation because a landowner "is entitled to receive the value of what he has been deprived of, and no more"); State *ex rel.* Chicago B. & Q. R. Co. v. City of Kansas, 89 Mo. 34, 39, 14 S.W. 515-16 (Mo. 1886) (holding that an award of compensation for property taken may be reduced by the amount of special benefits to the remaining property).

[234] State *ex rel.* State Highway Comm'n v. Pelletier, 76 N.M. 555, 560, 417 P.2d 46, 49 (1966), (*citing* Bd. of Comm'rs of Dona Ana County v. Gardner, 57 N.M. 478, 482, 260 P.2d 682, 684 (1953) (holding that "benefits, both general and special, should be set off against damages to the remainder and against the part taken").

for residential development before the highway improvement and then commercial development after the improvement."[235] The court explained that "special benefits to the residue of a landowner's property may be set off against the award of compensation for a taking in a condemnation suit, but general benefits may not be set off."[236]

On the other hand, a different rule is stated in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corporation,*[237] in which the court held that the value of benefits may be offset against severance damages without reference to whether the benefits are general or special.[238] The court stated:

> [W]e overrule *Beveridge* [*v. Lewis,*, 137 Cal. 619, 70 P. 1083 (1902)], to the extent it holds that only "special" benefits may be offset against severance damages. We hold that in determining a landowner's entitlement to severance damages, *the fact finder henceforth shall consider competent evidence relevant to any conditions caused by the project that affect the remainder property's fair market value*, insofar as such evidence is neither conjectural nor speculative.[239]

In doing so the court acknowledged that the rule it had adopted was not the "majority view in the United States," but that the court was joining "a quite respectable minority" of jurisdictions that follow the rule now adopted by California.[240]

Of the five rules, two rules have been adopted by a majority of states, with one group of states having adopted Rule 2 and another group having adopted Rule 4. A small minority of states have adopted one of the other three rules. If one of the above rules has been adopted, then the other rules do not apply. An extensive annotation discusses which rule the states follow.[241]

A condemnor may be confronted with the question of which issues to ask that the court determine and which issues to leave for the jury's consideration. The cases do not always indicate clearly when it is for the court or the jury to determine whether a benefit is a specific or general one. Although there is authority holding that it is a question of law for the court to determine, it appears that the majority rule is that it is for the jury to decide the extent and amount of the benefit.[242] If, however, testimony is admitted and the court rules later that the item is not a special benefit, then the evidence should be stricken.

C.3. Methods of Valuation of Special Benefits

Although the courts have had difficulty distinguishing general from special benefits, the courts have formulated rules regarding the admissibility of evidence to prove value. Once again, the three approaches to the determination of value most commonly accepted are the market data or comparable sales approach, the cost approach, and the income approach.[243] The rules governing the use of these approaches may vary from one ju-

[235] State *ex rel.* Mo. Highway and Transp. Comm'n v. Delmar Gardens, 872 S.W.2d at 181.

[236] *Id.* at 180 (citations omitted).

[237] 16 Cal. 4th 694, 941 P.2d 809 (1997).

[238] In a condemnation action the transit agency sought to prove that the landowner's remaining property would increase in value as a result of proximity to the station.

[239] 16 Cal. 4th at 718, 941 P.2d at 824 (footnote omitted) (emphasis supplied).

[240] *Id.* (*citing* Ill. State Toll Highway Auth. v. Amer. Nat'l Bank & Trust Co. of Chicago*,* 162 Ill. 2d 181, 642 N.E.2d 1249 (1994); Mich. State Highway Comm'n v. Frederick, 32 Mich. App. 236, 188 N.W.2d 193 (1971); Brand v. State, 21 A.D. 2d 727, 250 N.Y.S.2d 158 (N.Y. App., 3d Dep't 1964). *See also* N.C. GEN. STAT. § 136-112 (stating that when the North Carolina State Board of Transportation exercises power of eminent domain to condemn private property for public use, both general and special benefits may be deducted from owner's condemnation award).

[241] 145 A.L.R. 1 (2007 Supp.).

[242] State v. Fullerton, 177 Or. App. 254, 266, 34 P.3d 1180, 1186 (Ore. Ct. App. 2001) (holding that there must be some evidence, other than the fact of the improvement itself, that demonstrates special benefits to reduce damage to the property not taken and that in this case the evidence did not provide a basis for a jury instruction on special benefits) (citing Selbee v. Multnomah County, 247 Or. 390, 430 P.2d 561, 563 (1967)); Big Pool Holstein Farms, Inc. v. State Roads Comm'n, 245 Md. 108, 117, 225 A.2d 283, 288 (1967) (stating that "general rule in condemnation proceedings [is] that the jury should *not consider either increases or diminution in value because of the public project* for which the condemned property is acquired" (emphasis supplied)); Martin v. Newton County, 239 Ark. 769, 770, 394 S.W.2d 133, 135 (1965) (stating that question of whether enhancement "special and peculiar to the particular [to the] property remaining…after the taking is a question of fact"); Thomson v. Kansas City, 379 S.W.2d 194, 197 (Mo. Ct. App. Kansas Cty. Dist. 1964) (explaining that jury must "consider the quantity and value of the land taken by the [condemnor] for a right of way and the damages to the whole tract by reason of the road running through it…and deduct from these amounts the benefits, if any, peculiar to the said tract of land, arising from the running of the road through the same"); State v. Ellis, 382 S.W.2d 225, 235 (Mo. Ct. App.,Springfield Dist. 1964) (holding that condemnor failed to prove special benefits); State v. Vorhof-Duenke Co., 366 S.W.2d 329, 337–38 (Mo. 1963) (holding that "a highway constructed where none had been before presumptively conferred a special benefit on the adjoining land, but whether it actually did was a question for the jury to determine"); Hawaii v. Mendonca, 46 Haw. 83, 85, 375 P.2d 6, 8 (1962) (noting that in Hawaii, "except in projects involving the widening or realignment of existing ways, the [condemnor] has the statutory right to offset special benefits to the remaining land in partial taking cases against the total damages to the property owner, including the value of the land taken"); Backer v. City of Sidney, 165 Neb. 816, 821, 87 N.W.2d 610, 616 (1958) (holding that there was prejudicial error in submitting issue of special benefits to the jury because evidence failed to show "any special benefits accrued to the plaintiffs' property by virtue of the construction of the [underpass]….").

[243] Nat'l Auto Truckstops, Inc. v. State of Wis., Dep't of Transp., 263 Wis. 2d 649, 667, 665 N.W.2d 198, 207 (2003) (the court noting that Wisconsin law holds that income evidence is never admissible if there is evidence of comparable sales).

risdiction to another, but the proper use of one or more of these approaches is the key to proving benefits or disproving damages.

C.3.a. Comparable Sales Approach

The key is to use comparable sales to establish both the value of the whole and the value of the remainder.[244] Sales reflecting enhanced values resulting from the improvement can be used to rebut a claim of damages, as well as to show possible benefits. The usual rules of comparability apply in both valuations. Characteristics of the comparison property, such as size, shape, terrain, distance from the subject remainder, and time of the sale, must be examined to determine comparability. In a particular jurisdiction, it may be largely discretionary with the court concerning whether a sale has the necessary elements of comparability. An appraiser's opinion that the remainder will sell for more or less because of the improvement's construction or proposed construction carries far less weight if the opinion is not supported by market data.

C.3.b. Cost Approach

The most likely use for the cost approach would be with respect to the cost of building a road that was necessary for the development of a property. For example, if a remainder were commercial in nature but could not be developed until a road was constructed providing access to the property, then the condemnor may be permitted to show the cost of building a road on the property taken if it in fact provided such access. Even if the appraiser is not permitted to testify regarding the cost of the road, the appraiser should be permitted to testify concerning the increased value of the remaining land if new access were provided.[245]

C.3.c. Income Approach

The income approach will be of limited application in establishing benefits as there will be little or no data on the income of the property remaining after the improvement.[246]

One court has stated that

> unquantified lost business profits are a fact that can be *generally* considered in determining whether there has been a diminution in value in the land that remains after a partial taking…. [A]lthough the jury may consider adverse effects resulting from condemnation that decrease the value of the remaining property, these effects "are not separate items of damage, recoverable as such, but are relevant only as circumstances tending to show a diminution in the over-all fair market value of the property…." "[D]iminished value of [condemned] land…constitutes a proper item for inclusion in the award, but a business *per se* is not 'property'…requiring compensation for its taking under the power of eminent domain…." Allowing the jury to consider that the land may be less valuable due to the condemnation's effect on the landowner's business does not require quantified evidence of lost profits also be admitted.[247]

As discussed previously, the income approach converts net income attributable to the real estate into an indication of value by the use of a capitalization rate. For example, a property used for a service station that has experienced an increase in gasoline sales because of a highway improvement presumably would experience a corresponding increase in land value. However, the income approach is very sensitive and seemingly minor adjustments to income and expenses may result in major changes in the indication of value. If the income approach to determine the value of benefits is applied, one must be careful to separate the influences on income that are caused by the improvement from other influences.

In sum, the distinction between general and special benefits is difficult to articulate. The attorney and witnesses should concentrate on the value of the remaining land and the reasons for it so that the court and the jury will be able to comprehend and find a value for whatever benefits have accrued.

D. EXCLUSION OF INFLUENCE CAUSED BY THE PUBLIC IMPROVEMENT ON VALUATION

D.1. General Rules

Usually public improvements are planned and announced several years in advance of actual construction. Public knowledge of a projected improvement may affect the value of land needed for an improvement, as well as the land in proximity to it. The influence may be positive and increase property values or negative and decrease property values. If enhancement in value because of the project is allowed, the condemning authority presumably will pay more for property that must be acquired.

In some states enhancement in value caused by the public improvement is a proper element of just compen-

[244] *Id.* at 666, 665 N.W.2d at 207 (holding in a partial taking that resulted in access via only a frontage road that it was error to exclude appraisals that considered change in access but it was proper for the trial court to exclude that evidence of income, which is never admissible if there is evidence of comparable sales).

[245] Comm'r of Transp. v. Candlewood Valley Country Club, Inc., 2005 Conn. Super. LEXIS 3308, at *21, 28 (utilizing cost approach in part); Comm'r of Transp. v. Jarvis Realty Co., 2002 Conn. Super LEXIS 4022, at *21 (Dec. 13, 2002) (Unrept.) (Although the cost method was used in part the defendant's traffic engineer conceded that its patrons were safer in that they had "easier access because of the traffic signal [and he agreed that the department of transportation had] accomplished its mission by making Route 83 safer for bowling alley customers coming in and out of that bowling alley.") (internal quotation marks omitted).

[246] Dep't of Transp. v. M. M. Flower, Inc., 361 N.C. 1, 13, 637 S.E.2d 885, 894 (2006) ("While the comparable sales method is the preferred approach, the next best method is capitalization of income when no comparable sales data are available.")

[247] Dep't of Transp. v. M. M. Fowler, Inc., 361 N.C. at 14, 637 S.E.2d 895 (citations omitted) (emphasis in original).

sation and may not be denied to the landowner. The rationale is that it is inequitable for the owners of land taken for the improvement to be denied the increased value that inures to the benefit of the neighboring owners whose land is not taken. In other states it is held that the public should not be required to pay a property owner for enhancement caused by an improvement that has increased the land's value. It may be argued that an increase in value of the land taken is not because of benefits accruing to the land but rather because of speculation concerning what the government eventually may pay for the land.

The general rule when there is an enhancement because of project influence is that such enhancement in value is not admissible.[248] As stated in *City of San Diego v. Barratt American Inc.,*[249]

> [a]lthough a property owner is entitled to receive the fair market value of the property condemned, the owner is not entitled to more…. Accordingly, when assessing fair market value (including its highest and best use and the reasonable probability of a zoning change), any increase or decrease in the property's value *caused by the project for which the property is condemned* may not be considered…. [S]uch project-caused increases or decreases must be excluded from the just compensation calculus…. The probability of rezoning or even an actual change in zoning which results from the fact that the project which is the basis for the taking was impending cannot be taken into account in valuing the property in a condemnation proceeding…. Therefore, changes in land use, to the extent that they were influenced by the proposed improvement, [are] properly excluded from consideration in evaluating the property taken.'"[250]

However, as discussed below, "under limited circumstances, a property owner *may* properly be compensated for the increase in value the property experienced in anticipation of the benefits of a proposed improvement, so long as it was not *reasonably probable* the property being evaluated was anticipated to be taken for the improvement."[251] Thus, in the majority of cases a determination of whether enhancement will be allowed or denied depends on what some courts refer to as the "probability of inclusion" test or rule.[252]

First, as held by the U.S. Supreme Court in the early case of *Shoemaker v. United States*,[253] if in the case of a condemnation of land for a single unenlarged project the probability exists at the outset of the project that the land will be included, all enhancement in value caused by the improvement will be denied.[254] The recent Michigan case of *Department of Transportation v. Rooks Family Trust*[255] involved Section 20(1) of the Uniform Condemnation Procedures Act, Michigan Compiled Laws 213.70(1) [256] and a dispute over whether the defendants "were entitled to compensation for the increased land value from speculation surrounding the M-6 [highway] project over the two decades that the project was under development." [257] The court rejected the defendants' argument that "these provisions precluded compensation for any increase in land value after general knowledge of the *imminence of the M-6 project*." [258] The "[d]efendants argued that the plain language of the statute only precludes the increase in value after general knowledge of the *imminence of the condemnation of their property in particular*.'"[259]

However, the court held that "our courts have long recognized that '[w]here condemnation proceedings tend to increase the value of property, the property

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[248] *See* City of San Diego v. Barratt Am. Inc., 128 Cal. App. 4th 917, 943, 27 Cal. Rptr. 3d 527, 544 (Cal. App. 4th Dist. 2005) (stating that "enhancement value should not be includable in 'just compensation' whenever the condemned lands 'were probably within the scope of the project from the time the Government was committed to it'") (citation omitted), *review denied*, 2005 Cal. LEXIS 8751 (Cal. 2005). *See also* Dep't of Transp. v. Family Trust, 2006 Mich. App. LEXIS 2943, at *9 (Oct. 5, 2006) (Unrept.), *appeal denied*, 2007 Mich. LEXIS 387 (Mich. 2007).

[249] 128 Cal. App. 4th 917, 27 Cal. Rptr. 3d 527 (Cal. App. 4th Dist. 2005).

[250] *Id.* at 934, 27 Cal. Rptr. 3d at 537 (citations omitted) (emphasis in original).

[251] *Id.* at 934, 27 Cal. Rptr. 3d at 537–38 (emphasis supplied).

[252] *Id.* at 944, 27 Cal. Rptr. 3d at 545.

[253] 147 U.S. 282, 13 S. Ct. 361, 37 L. Ed. 170 (1893).

[254] 147 U.S. at 303–04, 13 S. Ct. at 392–93, 37 L. Ed. at 186–87; City of San Diego v. Rancho Penasquitos P'ship, 105 Cal. App. 4th 1013, 1039, 130 Cal. Rptr. 2d 108, 127 (Cal. App. 4th Dist. 2003), *review denied*, 2003 Cal. LEXIS 3061 (Cal. 2003); Valdez v. 18.99 Acres, 686 P.2d 682, 689 (Alaska. 1984) ("'If the condemned land was probably within the scope of the governmental project for which it is being condemned at the time the Government became committed to that project, then the owner is not entitled to any increment in value occasioned by the Government's undertaking the project.'") (citation omitted). *See also* City and County of Denver v. Smith, 152 Colo. 227, 381 P.2d 269 (1963); Williams v. City and County of Denver, 147 Colo. 195, 363 P.2d 171 (1961); Cole v. Boston Edison Company, 338 Mass. 661, 157 N.E.2d 209 (1959); Olson v. United States, 292 U.S. 246, 54 S. Ct. 704, 78 L. Ed. 1236 (1934); R.I. Hosp. Trust Co. v. Providence County Court House Comm'n, 52 R.I. 186, 189, 159 A. 642, 643 (1932) ("The rule is that the owner of land taken by right of eminent domain is not entitled to recover any increase in the value of this land, due to the fact that the land was known to be within the area designated for condemnation and was certain to be taken.").

[255] 2006 Mich. App. LEXIS 2943 (Mich. Ct. App. 2006) (Unrept.), *appeal denied*, 477 Mich. 1032, 727 N.W.2d 611 (2007).

[256] The section provides:

> A change in the fair market value before the date of the filing of the complaint which the agency or the owner establishes was substantially due to the general knowledge of the imminence of the acquiring by the agency, other than that due to physical deterioration of the property within the reasonable control of the owner, shall be disregarded in determining fair market value. Except as provided in section 23, [MCL 213.73] the property shall be valued in all cases as though the acquisition had not been contemplated.

[257] 2006 Mich. App. LEXIS 2943, at *2.

[258] *Id.* at *3 (emphasis in original).

[259] *Id.* (emphasis in original).

owner is not entitled to the increased value'"[260] and that the statutory provision "prohibits consideration of any changes in market conditions that are 'substantially due' to the 'general knowledge' of the 'imminent' condemnation of the property…. 'Instead, with the exception of enhancement in value of the remainder of a partially taken parcel, [MCL 213.73,] the property shall be valued in all cases as though the acquisition had not been contemplated.'"[261]

The second situation arises when the subject property is not included within the scope of the original project but the scope is enlarged subsequently to include the condemned land. Whether enhancement in value is allowed depends on the probability at the outset that the project would be enlarged subsequently to include the subject land. Some courts have held that if at the outset of the public improvement it was probable that the initial project would be enlarged and that land adjacent thereto would be taken for the enlarged project, then no increase in value may be allowed to owners of land subsequently taken because of the project's enlargement.

> If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.[262]

Similarly, as held more recently in *Valdez v. 18.99 Acres*,[263]

> whenever it becomes likely that the property will be condemned—whether or not the property was originally within the project's scope—project-enhanced value ceases to be compensable…. The rule thus prevents property owners from receiving many unjustified windfalls, as when, for example, formal condemnation of property which everyone knows will be taken is delayed…. We believe that this rule properly separates general government-caused value enhancement from the specific situations in which a government may well have to pay twice for its preliminary project work—once directly, and again as compensation for the value the preliminary work adds to condemned property.[264]

On the other hand, if an enlargement of a project is determined to be an independent project that was not conceived as part of the original improvement, then the owners of land taken later are entitled to enhancement in value caused by the original improvement.[265] As held by the U.S. Supreme Court,

> [t]he question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities.[266]

Thus, the issue of whether enhanced value is allowable depends on whether at the time of the project's announcement land that is later taken probably would be taken as part of the original project.

The third situation is presented when the general location of the improvement is known from the outset but the probability that the subject land will be included does not appear until a later stage in the planning and development of the improvement. There is some authority holding that enhancement in this instance will be allowed until the date that it became evident that the subject land would probably be taken for the project; thus, enhancement in value is denied for the period after the date that it is known that the subject land will be taken for the project.

In this connection, in *Merced Irrigation Dist. v. Woolstenhulme,*[267] involving condemnation to improve a lake to prevent seasonal fluctuation in its water level, the trial court permitted the jury to consider enhancement in value resulting from public knowledge of the project prior to January 1, 1965, but instructed the jury that it was not to consider any enhancement in value caused by public awareness of the project that occurred afterward.

In upholding the action of the trial court, the Supreme Court of California stated:

> If, on the other hand, when plans for the proposed project first became public and when the consequent enhancement of land values began, the probability was that the land in question would not be taken for the public improvement, the landowner would be entitled to compensation for some "project enhancement." During that period when it was not likely that his land would be condemned,

[260] *Id.* at *8 (citation omitted).

[261] *Id.* at *11 (some internal quotation marks omitted).

[262] United States v. Miller, 317 U.S. 369, at 376–77, 63 S. Ct. 276, at 281, 87 L. Ed. 336, at 344. *See also* United States v. 2353.28 Acres of Land, 414 F.2d 965, 969, 971 (5th Cir. 1969) (allowing enhancement in value).

[263] 686 P.2d 682 (Alaska. 1984).

[264] *Id.* at 689 (citations omitted).

[265] *See* City of San Diego v. Barratt Am. Inc., 128 Cal. App. 4th at 934, 27 Cal. Rptr. 3d at 537. *See also* United States v. Goodloe, 204 Ala. 484, 86 So. 546 (1920); Nichols v. City of Cleveland, 104 Ohio St. 19, 135 N.E. 291 (1922); Virginia & T.R.R. v. Lovejoy, 8 Nev. 100 (1872).

[266] United States v. Miller, 317 U.S. at 377, 63 S. Ct. at 281, 87 L. Ed. at 345. *See also 2353.28 Acres of Land*, 414 F.2d at 969, 971.

[267] 4 Cal. 3d 478, 483 P.2d 1 (1971).

> the fair market value of the property may have appreciated because of anticipation that the land would partake in the advantages of the proposed project. The owner would be entitled to such increase in value. On the other hand, once it becomes reasonably foreseeable that the land is likely to be condemned for the improvement, "project enhancement," for all practical purposes, ceases. *Thus, in computing "just compensation" in such a case, a jury should only consider the increase in value attributable to the project up until the time when it became probable that the land would be needed for the improvement.*[268]

The court in the *Woolstenhulme* case refined the rule that a property owner is never entitled to compensation resulting from enhancement in value caused by the project "by distinguishing three different types of project-enhanced value."[269]

> (1) the worth of *property known to be within the project* may rise when the land is valued *as part of* the proposed improvement rather than as a separate tract of land; (2) the value of *property expected to be condemned* may rise because of the anticipation that the condemner will be required to pay an inflated price for the land at the time of condemnation; and (3) the value of *property expected to be outside of the proposed improvement* may rise because it is anticipated that the land will reap the benefits resulting from *proximity* to the coming project.[270]

As a California appellate court later held, "a property owner is entitled to be compensated for appreciating property value under the third scenario."[271] Several courts follow the *Woolstenhulme* exception or at least cite it with apparent approval.[272]

In *City of San Diego v. Barratt American Incorporated, supra,* in a partial taking case, the trial court "ruled in favor of the property owners as to the method of valuation, disregarding the impact of the project on value…."[273] The property taken was in the North City Future Urbanizing Area (NCFUA), a mostly undeveloped area established to avoid premature urbanization. Two interesting methodologies were advanced. The owners' approach or "hypothetical construct for disregarding the impact of the Project on the value of the taken property was founded on the fiction that the Project had never been conceived or planned (the no Project construct)."[274] The owners argued "that development pressures and the need to implement a long list of City's land use priorities would have caused City to remove the NCFUA and subarea III from its agricultural *holding* status to permit higher density development even without the Project…."[275] The city, on the other hand, presented a different "hypothetical construct for factoring out the impact of the Project on the value of the taken property, the abandoned Project construct, [which] was founded on the fiction that the Project was abruptly abandoned on the November 16, 2001 valuation date."[276]

The owners relied on the *Woolstenhulme* exception, discussed above, with respect to valuation and project enhancement. In *Barratt American, Inc*., the appellate court held that the

> trial court did not abuse its discretion by excluding the City's abandoned Project construct because that construct did *not* disregard the impact of the Project on the value of the taken property. To the contrary, this construct posited that the Project's *existence*—e.g., its presence up to November 16, 2001, and the consequences caused by its abandonment (the five-to-seven year moratorium)—negatively impacted the probable upzoning of Owners' land because the Project's existence preempted the development of the alternative transportation plans essential to making it reasonably probable the taken property

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[268] *Id.* at 497, 483 P.2d at 13–14 (footnote and citations omitted) (emphasis supplied).

[269] City of San Diego v. Barratt Am. Inc., 128 Cal. App. 4th at 935, 27 Cal. Rptr. 3d at 538, quoting from 4 Cal. 3d at 490.

[270] *Id* (citation omitted) (internal quotation marks omitted) (emphasis in original).

[271] *Id.*

[272] *Valdez v. 18.99 Acres,* 686 P.2d at 690 n.15 ("'To guard against interminable wrangles over the instant at which a particular property is 'selected,' and to recognize that property may be likely to be condemned long before formal 'selection' takes place, we adopt Woolstenhulme's "probability" test.") (citation omitted)); City of Phoenix v. Clauss, 177 Ariz. 566, 569, 869 P.2d 1219, 1222 (Ariz. Ct. App. 1994)

> (The "project influence doctrine" (also referred to as "project enhancement") holds that property may not be charged with a lesser or greater value at the time of taking, when the change in value is caused by the taking itself or by anticipation of appreciation or depreciation arising from the planned project…. The doctrine applies only to properties that were "probably within the scope of the project from the time the government was committed to it.")

City of Kenai v. Burnett, 860 P.2d 1233 (Alaska 1993); State *ex rel.* State Highway Dep't v. Shaw, 90 N.M. 485, 486, 565 P.2d 655, 656–57 (N.M. 1977) ("'If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating a probable increase in value due to the Government's activities.'") (*quoting Miller*, 317 U.S. at 377, 63 S. Ct. at 281, 87 L. Ed. at 344 and *citing* United States v. 2,353.28 Acres of Land*,* 414 F.2d 965 (5th Cir. 1969)). *See also* State, Dep't of Highways v. Colby, 321 So. 2d. 878 (La. App. 1st Cir. 1975), application denied, 325 So. 2d 278 (La. 1976); Merced Irrigation Dist., 4 Cal. 3d 478, 93 Cal. Rptr. 833, 483 P.2d 1; United States v. 172.80 Acres of Land, etc., 350 F.2d 957 (3d Cir. 1965).

In Texas, for example, the rule is somewhat different.

> The date upon which the market no longer allows project enhancement is delineated by variant tests. In some jurisdictions the landowner is entitled to recover project enhancement only until his property is probably within the scope of the project…More is required under Texas law: enhancement is allowed up to the time that the condemnor manifests a *definite purpose* to take the particular land.

Ft. Worth v. Corbin, 504 S.W.2d 828, 831 (Tex. 1974) (citations omitted) (emphasis supplied). *See also* Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623, 627 (Tex. 2002) (*citing Corbin*).

[273] City of San Diego v. Barratt Am. Inc., 128 Cal. App. 4th at 917, 27 Cal. Rptr. 3d at 527, 529 (Syllabus).

[274] *Id.* at 928, 27 Cal. Rptr. 3d at 532.

[275] *Id.*

[276] *Id.*

would have been upzoned by (or shortly after) the November 16, 2001 valuation date.[277]

In sum,

> when assessing fair market value (including its highest and best use and the reasonable probability of a zoning change), any increase or decrease in the property's value *caused by the project for which the property is condemned* may not be considered. Thus, to the extent the fair market value of the property condemned increases or decreases because of the project for which it is condemned, or the eminent domain proceeding in which the property is taken, or any preliminary actions of the condemnor relating to the taking of the property, such project-caused increases or decreases must be excluded from the just compensation calculus.[278]

Thus, the third situation presented is when the general location of the improvement is known from the outset but the probability that the subject land will be included does not appear until a later date in the planning of the project. Enhancement in value may be allowed until that date in the project's planning that it becomes evident that specific land probably will be taken for the project; appreciation in value of such land after the said date should be denied.[279] Consequently, in California an "owner *may* properly be compensated for the increase in value the property experienced in anticipation of the benefits of a proposed improvement, so long as it was not reasonably probable the property being evaluated was anticipated to be taken for the improvement."[280]

D.2. Effect of 42 U.S.C. § 4651(3)

Congress addressed the problem of project influence in the URA. Section 4651(3) (2007) provides:

> Before the initiation of negotiations for real property, the head of the Federal agency concerned shall establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property. The head of the Federal agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount he established as just compensation. Where appropriate the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

The foregoing section is mandatory in nature but is qualified by 42 U.S.C. § 4655(a)(1) (2007):

> a) Notwithstanding any other law, the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with, an acquiring agency under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property on and after January 2, 1971, unless he receives satisfactory assurances from such acquiring agency that—
>
> (1) in acquiring real property it will be guided, to the greatest extent practicable under State law, by the land acquisition policies in section 4651 of this title and the provisions of section 4652 of this title….

It appears that 42 U.S.C. § 4655(a)(1) would allow a federal agency to approve an amount that is in conflict with § 4651(3) if the law of the affected state permitted it to do so.[281] As of 2007, there still have been no cases interpreting the interaction of these two sections and the meaning of the words "greatest extent possible under state law." Apparently the interaction of the two sections does not appear to have presented an issue.

E. EFFECT OF ZONING AND PROPERTY RESTRICTIONS ON PROPERTY VALUES

In *Michigan Department of Transportation v. Haggerty Corridor Partnership,*[282] a partial taking case, the issue was whether the trial court properly allowed defendants to present evidence that their property had been rezoned from residential to commercial after the taking.[283] The court held that the evidence was "irrelevant to the issue of the condemned property's fair market value at the time of the taking."[284] The defendants at trial had sought to establish that they and other knowledgeable persons in the real estate market knew at the time of the taking that the property "was likely to be rezoned to allow for its planned use as an office park."[285]

The court held that

> because information concerning events occurring after the condemnation could not possibly have influenced the conduct of a willing buyer on the date of the taking, it can never be logically, and thus legally, relevant in determining the price that the theoretical willing buyer and seller would have agreed upon on the date of the taking.[286]

Furthermore, "[a]lthough it is true that some courts have, indeed, permitted the introduction of posttaking

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[277] *Id.* at 937, 27 Cal. Rptr. 3d at 540.

[278] 128 Cal. App. 4th at 934, 27 Cal. Rptr. 3d at 537.

[279] *Id.* (stating that "to the extent the fair market value of the property condemned increases or decreases because of the project for which it is condemned, or the eminent domain proceeding in which the property is taken, or any preliminary actions of the condemnor relating to the taking of the property, such project-caused increases or decreases must be excluded from the just compensation calculus").

[280] 128 Cal. App. 4th at 934, 27 Cal. Rptr. 3d at 537–38 (emphasis in original).

[281] *See also* 23 C.F.R. pt. 710 (2007).

[282] 473 Mich. 124, 700 N.W.2d 380 (Mich. 2005).

[283] *Id.* at 126, 700 N.W.2d at 381.

[284] *Id.* at 126, 700 N.W.2d at 382–83.

[285] *Id.* at 128, 700 N.W.2d at 382–83.

[286] *Id.* at 142, 700 N.W.2d 390.

rezoning evidence, for the reasons we have expressed, we reject the reasoning employed by these courts."[287]

In *City of San Diego v. Rancho Penasquitos Partnership,*[288] also a partial taking case, the city maintained at trial

> that because it had a zoning restriction in place prohibiting higher density development of properties such as [the Rancho Penasquitos Partnership's] that were in the potential path of SR-56 until the SR-56 project was approved, a zoning change was not possible absent the SR-56 project, and therefore the property must be valued at its current zoning for agricultural use."[289]

The court disagreed:

> Here, we have a zoning restriction imposed by the City, the express purpose of which was to prevent development in areas that might later be condemned for the SR-56 project. Thus, this zoning restriction falls squarely under the rule set forth in *Southern Pacific* that evidence of a zoning restriction is inadmissible to show a lower value to the condemned property where (1) the restriction is imposed to freeze or depress the value of land that a governmental agency seeks to condemn, and (2) the same entity is both the condemner and the authority responsible for that restriction.[290]

The court held that the city could not "enact restrictions on property it seeks to condemn for the express purpose of preventing development and thereby freeze or depress property values" and thereafter argue that the zoning restriction prevents a higher and best use of the property.[291]

F. VALUATION OF CONTAMINATED PROPERTY

F.1. Evaluating Possible Contamination Prior to Acquisition

Because state transportation agencies increasingly are encountering hazardous waste when acquiring property for highway construction, they should consider the appropriate method for determining the value of such property.[292] Although it may be possible to align a highway project to avoid contaminated property, a transportation agency may have no option other than to acquire contaminated property for the project. If so, an evaluation of whether property may be contaminated should be made as soon as possible in the planning process.

Some states have standards for evaluating the environmental condition of property prior to its acquisition.[293] The U.S. Environmental Protection Agency (EPA) maintains a database of potentially contaminated sites pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act[294] (CERCLA), known as the CERCLA Information System

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[287] *Id.* at 144, 700 N.W.2d 391 (*citing* State by State Highway Comm'r v. Gorga, 26 N.J. 113, 118, 138 A.2d 833 (1958)).

[288] 105 Cal. App. 4th 1013, 130 Cal. Rptr. 2d 108 (Cal. App. 4th Dist. 2003).

[289] *Id.* at 1017, 30 Cal. Rptr. 2d at 111.

[290] *Id.* at 1032, 130 Cal. Rptr. 2d at 122–23.

[291] *Id.* at 1033, 1035–37, 130 Cal. Rptr. 2d at 123, 124–6, (*citing* United States v. Certain Lands in Truro, 476 F. Supp. 1031 (D. Mass. 1979); Dep't of Pub. Works & B. v. Exchange Nat'l Bank*,* 31 Ill. App. 3d 88, 334 N.E.2d 810, 818 (Ill. Ct. App. 1975); Bus. Ventures, Inc. v. Iowa City, 234 N.W.2d 376 (Iowa 1975); Bd. of Comm'rs v. Tallahassee Bank and Trust Co., 108 So. 2d 74 (Fla. App., 1st Dist. 1959)). *See* Annotation, *Zoning as a Factor in Determination of Damages in Eminent Domain*, 9 A.L.R. 3d 291 (2007 Supp.).

[292] With respect to access to contaminated properties, see James S. Teel, Problems of Access to Contaminated Properties for Evaluation, Transportation Research Board, 74th Annual Meeting (Jan. 1995).

[293] *See* The Real Properties Group, *USEPA Creates New Standard for Pre-Acquisition Due Diligence to Replace ASTM Phase I ESA's*, *available at* http://www.gibbonslaw.com/news_publications/articles.php?action=display_publication&publication_id=1588 (last accessed on Aug. 30, 2007). *See also*, U.S. Environmental Protection Agency, *All Appropriate Inquiries Criteria Analysis / Comparison to State, Federal, and Commercial Assessment Approaches*, *available at* http://www.epa.gov/swerosps/bf/aai/assessappr.htm (last accessed on Aug. 30, 2007). *See* Standards and Practices for All Appropriate Inquiries, 70 Fed. Reg. 210 (Nov. 1, 2005); U.S. Environmental Protection Agency, Standards and Practices for All Appropriate Inquiries, 40 C.F.R. § 312 (2007).

[294] As noted in City of Mishawaka v. Uniroyal Holding Inc., 2006 U.S. Dist. LEXIS 4372, at * 11 (N.D. Ind. 2006),

> CERCLA creates two distinct causes of action for cost incurred in cleaning up hazardous waste: § 107(a), 42 U.S.C. § 9607(a), establishes liability and permits a cause of action for direct cost recovery by a party that incurs cost in cleaning up a contaminated site; § 113(f) governs the apportionment of liability and permits a cause of action for contribution among the parties responsible for the contamination.

(Citation omitted).

Although beyond the scope of this chapter on valuation, it may be noted that CERCLA imposes liability for costs on four categories of "persons" in regard to cleaning up hazardous wastes:

> (1) current owners or operators of a facility; (2) owners or operators at the time of disposal; (3) persons who arranged for disposal or treatment, or for transportation for disposal or treatment; and (4) transporters. 42 U.S.C. § 9607(a). …Because CERCLA is a remedial, rather than a fault-based statute, a person, including the government, may be held fully liable for clean-up costs based solely on their status as a potentially responsible party, even if the person neither caused nor contributed to the release of hazardous substances at the site.

Moden v. United States, 60 Fed. Cl. 275, 277 n.1 (Ct. Cl. 2004) (dismissal of inverse condemnation claim based on a trichloroethylene (TCE) contamination plume from Ellsworth Air Force Base because the landowners could not demonstrate that the contamination of their property was the foreseeably direct, natural, or probable consequence of the Air Force's use of TCE at the base) (some citations omitted). *See* Jill D. Neiman, *Easement Holder Liability Under CERCLA: The Right Way to Deal with Rights-of-Way,* 89 MICH. L. REV. 1233, 1240 (1991) (noting that as of the time of the article no cases had been located regarding whether easement holders may be held liable as owners under CERLCA).

or CERCLIS.[295] State environmental agencies may also maintain a list of sites, as well as a list of sites being investigated for possible inclusion on a state priority list. State and local health departments may have information regarding incidents in which hazardous substances were released at a particular site.[296]

F.2. Admissibility of Evidence of Contamination and Cost to Remediate Property

F.2.a. The Majority Rule

Although "[a] majority of courts…admit evidence of [environmental] contamination in the eminent domain trial,"[297] as discussed below, some courts have taken a different approach.[298] As summarized in one article,

> [m]ost courts do admit evidence of environmental contamination, reasoning that it is relevant to the condemned property's fair market value. Some, however, exclude it entirely, reasoning that the condemnor could recover its remediation costs in an environmental law action, which is the appropriate forum for determining such liability. More recently, still other courts have taken a compromise position, limiting contamination evidence to that which is probative of the property's value in a remediated state, and then allowing some of the condemnation award to be escrowed until environmental liability has been determined.[299]

The majority rule is that evidence of contamination and the cost to remediate the subject property is admissible because contamination is relevant to determining a property's value.[300] It may be argued that "[e]xcluding contamination evidence, as a matter of law, is likely to result in a fictional property value—a result that is inconsistent with the principles by which just compensation is calculated."[301]

Thus, in the early case of *Redevelopment Agency of the City of Pomona v. Thrifty Oil Company,*[302] the city had acquired possession of a former gas station and had spent funds to clean up petroleum contamination. At trial the city's appraiser testified that the cleanup costs had exceeded the value of the property and that the property had only minimal value.[303] The property owner's appraiser, claiming that the city's costs were excessive, deducted only a nominal amount for cleanup. Based on the opinions of other experts who claimed that the cleanup could have been done for a lower price, a court-appointed appraiser deducted a sum less than that actually spent by the city.[304]

On review the appellate court stated in a footnote that

> [a]fter examining the record and digesting the expert's discussions as to the different methods of remediation and the respective costs of each, we cannot agree with Thrifty's suggestion that [the] City engaged in "wasteful

[295] U.S. Environmental Protection Agency, *Environmental Data Registry*, available at http://www.epa.gov/edr/ (last accessed on Aug. 30, 2007).

[296] There are other considerations that may be noted. For example, if a transportation agency makes the cost solely a cost-recovery issue, the agency may risk having the court find that recovery of cost from the current property owner or the offset of the cost against the fair market value of the property in the condemnation action is barred either by the agency failing to follow applicable regulations or by the owner showing that he or she is an innocent landowner. In such a case, the agency would be left having to pay the owner the value of the property as if uncontaminated and having to incur the cost of cleanup before or during construction. Of course, if the owner is found to be an innocent landowner, the agency may still have the opportunity to pursue prior owners for the cleanup cost. On the other hand, if the cost can be dealt with as an appraisal problem the owner does not have the argument that the owner is not liable for the cleanup costs. As a practical matter, if an owner were to sell the property, a willing buyer would take into account the cost attributable to the contamination. If the owner is not responsible for the contamination, the owner's recourse is to incur the cleanup costs himself or herself and then pursue the former owner or owners and any other responsible parties for what the owner has lost.

[297] 7A NICHOLS ON EMINENT DOMAIN § 13.B.03. *See* New York v. Mobil Oil Corp., 2 A.D. 3d 77, 783 N.Y.S.2d 75 (N.Y. App. 2d Dep't 2004) (granting a motion in limine to exclude evidence of diminished value because of cleanup and remediation but ordering that the condemnation award be held in escrow pending the outcome of the companion action in which the city sought to recover costs and damages for the remediation).

[298] *See* Michael L. Stokes, *Valuing Contaminated Property in Eminent Domain: A Critical Look at Some Recent Developments,* 19 TUL. ENVTL. L. J. 221 (2006).

[299] Stokes, *supra* note 298, at 224–25.

[300] Stokes, *supra* note 298, at 225 (*citing* State *ex rel.* Dep't of Transp. v. Hughes, 162 Or. App. 414, 986 P.2d 700 (Or. Ct. App. 1999) (petroleum-related contamination); Finkelstein v. Dep't of Transp., 656 So. 2d 921 (Fla. 1995) (holding that if the owner is entitled to reimbursement of remediation costs, the condemned property should be valued as if the contamination cleanup had been completed but testimony about contamination stigma and its effect on value is allowed); State *ex rel.* Dep't of Transp. v. Brandon, 898 S.W.2d 224 (Tenn. Ct. App. 1994) (evidence of contamination and cost of reasonable steps to remedy the contamination is admissible and relevant to the issue of fair market value); City of Olathe v. Stott, 253 Kan. 687, 861 P.2d 1287 (1993) (holding that the Kansas Storage Tank Act does not preempt general statutes regarding eminent domain, meaning that evidence of contamination is admissible in determining the fair market value of the property that was taken by eminent domain); Redevelopment Agency of Pomona v. Thrifty Oil Co., 4 Cal. App. 4th 469, 5 Cal. Rptr. 2d 687 (Cal. App. 2d Dist. 1992) (condemnation of a gas station)). *See also* In re City of Syracuse Indus. Dev. Agency, 20 A.D. 3d 168, 796 N.Y.S.2d 503, 506 (N.Y. App. 4th Dep't 2005); Nat'l Compressed Steel Corp. v. Unified Gov't of Wyandotte County/Kansas City, Kan., 272 Kan. 1239, 1255, 38 P.3d 723, 735 (2001) (stating that environmental contamination is relevant to appraising the value of property sought to be condemned).

[301] Stokes, *supra* note 298, at 224.

[302] 4 Cal. App. 4th 469, 5 Cal. Rptr. 2d 687 (Cal. App. 2d Dist. 1992), *review denied*, 1992 Cal. LEXIS 2812 (Cal. 1992).

[303] 4 Cal. App. 4th at 473, 5 Cal. Rptr. 2d at 689.

[304] 4 Cal. App. 4th at 474 n.8, 5 Cal. Rptr. 2d at 689 n.8.

> cleanup." Nor are we persuaded by the contention that the remediation issue was not properly before the jury. The contamination of the property was used by all experts in determining the fair market value of the property. Extensive cross-examination was conducted as to the proper remediation procedure and the costs of different types of remediation. Inherent in this discussion was the reasonableness of the procedures taken by [the] City. As a characteristic of the property which would affect its value, *the remediation issue was properly before the trier of fact*.[305]

In *Finkelstein v. Florida Department of Transportation,*[306] the court held that "evidence of contamination is relevant and admissible on the issue of market value in a valuation trial if there is a sufficient factual predicate upon which to conclude that the contamination does affect the market value of the property taken." Similarly, in 2004 in *Northeast Connecticut Economic Alliance, Inc. v. ATC Partnership,*[307] the Supreme Court of Connecticut affirmed a trial court's decision that had calculated the "clean value of the property…and then deducted the substantial expenses that would be incurred to clean and stabilize the property to arrive at" the property's fair market value.[308]

The court noted that the trial court had made certain assumptions and findings of fact that included one that "[a] potential buyer would seek all sources of funds to reimburse or defray the environmental costs, including investigation or remediation."[309] The sources included $3 million from funds approved for the project by the state bond commission and from a former owner (American Thread) that had assumed liability to the extent required for the environmental cleanup. The trial court was held to have correctly assumed "that 80 percent of the environmental remediation costs could be recouped from the $3 million grant and 'from other potential sources, including American Thread.'"[310]

In holding that it was proper to consider the foregoing sources, the court stated:

> We cannot exclude consideration of recovery of remediation costs pursuant to environmental laws as irrelevant as a matter of law, or conclude that the trial court abused its discretion by considering them. Put differently, we cannot conclude that a prospective purchaser absolutely would not consider the reasonable possibility of such recovery.[311]

In a more recent case, citing *ATC Partnership, supra*, in a dispute over the relocation of an electric power substation that had been situated on contaminated property that was part of an urban redevelopment project, another court determined that "compensation for claims under the 'Substation Relocation Agreement' would more properly be determined through the condemnation procedures…."[312]

Although the method used most often by transportation agencies is to value the property as though it were not contaminated (i.e., to value the property as if it were clean) and subtract the cost of remediation, a transportation department may understate the cost of eventual remediation. On the other hand, "valuing property as if remediated assures just compensation insofar as it relates to the notion of highest and best use."[313] That is, "[i]f property is valued as is, its contaminated state will necessarily circumscribe its uses, concomitantly diminishing its fair market value despite the reality that it will likely be subject to cleanup."[314]

It may be more appropriate to value contaminated property as clean and deduct the cost of remediation when the cost may be quantified with some certainty, for example, when the contamination is limited and well defined. It also may be more appropriate to utilize the above method after the cleanup has been completed. However, it must be recognized that the submission of evidence of the cost of remediation in a condemnation trial does pose some risk of excessive valuation of the owner's property.

F.2.b. Criticism of the Majority Rule

The majority rule has been criticized, however, for being unfair to the condemnee. The reason is that

> landowners first receive discounted compensation in the condemnation proceeding and then are subject to the full cleanup costs, thus suffering what is colloquially denominated as a "double-take." …Under that scheme, the condemnor receives a windfall by ultimately obtaining the property in a remediated state at the condemnee's cost, yet paying a discounted price due to the contamination…. We think that is fundamentally unfair.[315]

Thus, some jurisdictions have adopted a minority rule, which is that evidence of contamination must be excluded because an eminent domain proceeding is not the proper place for determining liability for environmental contamination.[316] In recent years, the states of

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[305] 4 Cal. App. 4th at 474 n.9, 5 Cal. Rptr. 2d at 689 n.9 (emphasis supplied).

[306] 656 So. 2d 921, 922 (Fla. 1995).

[307] 272 Conn. 14, 861 A.2d 473 (Conn. 2004), *aff'd*, 284 Conn. 537, 935 A.2d 115, 2007 Conn. LEXIS 491 (2007).

[308] *Id.* at 22, 861 A.2d at 480 (internal quotation marks omitted).

[309] *Id.* at 23, 861 A.2d at 480 (quoting trial court decision).

[310] *Id.* at 23, 861 A.2d at 481 (quoting trial court decision).

[311] *Id.* at 42, 861 A.2d at 491 (citation omitted).

[312] United Illuminating Co. v. City of Bridgeport, 2006 Conn. Super. LEXIS 1466, at *17 (Conn. Super. Ct. 2006) (Unrept.).

[313] Hous. Auth. of the City of New Brunswick v. Suydam Investors, L.L.C., 177 N.J. 2, 23, 826 A.2d 673, 686 (2003) (internal quotation marks omitted). *See also* Matter of City of Syracuse Indus. Dev. Agency, 20 A.D. 3d 168, 171, 796 N.Y.S.2d 503, 506 (N.Y. App. 4th Dep't 2005) (agreeing that the best way to avoid a "double taking" was to value the property as if remediated but remitting the case to the trial court to hold any condemnation award in escrow pending the outcome of "[any] Navigation Law proceeding").

[314] 177 N.J. at 23, 826 A.2d at 686.

[315] *Id.* (citations omitted).

[316] Stokes, *supra* note 298, at 231 (*citing* Dep't of Transp. v. Parr, 259 Ill. App. 3d 602, 633 N.E.2d 19 (Ill. App. Ct. 1994) (holding that admission of evidence of remediation cost in the eminent domain proceeding deprives property owners of their

Connecticut, Michigan, and New York have adopted the minority approach or a variation of the minority rule as discussed in the next subsection.[317] One reason for the minority view is based on due process considerations.

> The first, a procedural due process argument, centers on the eminent domain trial itself, and the perceived risk of imposing liability for an environmental condition without the procedural safeguards that the landowner would have in an environmental cost-recovery proceeding. The second, a substantive due process argument, focuses on the perceived risk of an unfair outcome of the trial: that the condemnor might acquire not only the property (at a discount, because of the contamination) but also the right, as the property's new owner, to sue the condemnee for the cost of cleaning up the contamination.[318]

There are practical reasons as well for removing the issues of contamination and cost recovery from a condemnation trial. The New Jersey Supreme Court noted that one reason for the court's approach is that "[v]aluation is a relatively straightforward notion with which condemnation commissioners are familiar and experienced."[319] Another reason is that "[o]mitting the complications of contamination from the valuation process…advances the speed and efficiency" of the condemnation trial.[320] Furthermore, "dealing with environmental issues in [a] cost-recovery proceeding makes sense," as the separate proceeding "allows for third-party claims against insurers, title companies, and prior owners, none of whom have a place at the condemnation table."[321]

F.2.c. A Third Approach

There is a variation of the minority view—a third approach: it is to value the condemned property as if it had been remediated and *escrow the condemnation award* as security for cleanup costs.[322] For example, in *New Jersey Transit Corp. v. Cat in the Hat, L.L.C.*[323] the New Jersey Supreme Court noted that in a companion case decided the same day, *Housing Authority of the City of New Brunswick v. Suydam Investors, L.L.C.*, *supra*, the court had

> approved a methodology for valuing contaminated property that effectively removes the contamination issue from the condemnation proceeding and reserves it for the cost-recovery action…. Under that methodology, the condemnor appraises the property as if remediated, deposits that amount into a trust-escrow account in court and reserves the right to initiate a separate action to recover remediation costs…. That scheme fully addresses the condemnees' concerns over double liability. If the value of a condemnee's property is not reduced for contamination, then the condemnee's payment for remediating the property in a subsequent cost-recovery action cannot constitute double liability.[324]

In *Cat in the Hat*, *supra*, the court also approved the trial court's condemnation judgment that had included for the condemnor's protection, "a reservation of rights provision identical to the provision in [New Jersey Transit's] proposed orders, including the preclusion of *res judicata*, collateral estoppel and the entire controversy defenses."[325]

F.3. Appraisal Methodologies and Issues

F.3.a. Use of Contaminated Comparable Sales

The use of actual or estimated cleanup cost may cover the diminution in value of the property caused by the cleanup work required to make the property developable. However, the actual or estimated cost does not account for the reduction in value due to the stigma that is usually associated with contaminated sites.[326] Property may be stigmatized by residual contamination that is below regulatory cleanup levels, by uncertainty regarding whether the standards for cleanup may be higher in the future, or by the possibility of the discov-

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rights and defenses under the Illinois Protection Act) [*superseded by statute as stated in* Hous. Auth. of the City of New Brunswick v. Suydam Investors, L.L.C., 355 N. J. Super. 530, 810 A.2d 1137 (2002)]; Aladdin, Inc. v. Black Hawk County, 562 N.W.2d 608, 616 (Iowa 1997) ("We are mindful that other jurisdictions have allowed evidence of contamination and the cost of cleanup to be admitted in an eminent domain proceeding.")).

[317] *See* discussion in Stokes, *supra* note 298, at 233–39 (*citing* Ne. Conn. Econ. Alliance, Inc., 256 Conn. 813, 776 A.2d at 1076 and Silver Creek Drain Dist. v. Extrusions Div., Inc., 468 Mich. 367, 663 N.W.2d 436, 441–44 (Mich. 2003), *cert. denied*, 540 U.S. 1107, 124 S. Ct. 1062, 157 L. Ed. 2d 893 (2004)). *See also* In re City of New York v. Mobil Oil Corp., 12 A.D. 3d 77, 783 N.Y.S.2d 75 (N.Y. App. 2d Dep't 2004).

[318] Stokes, *supra* note 298, at 241. *See* Aladdin Inc. v. Black Hawk County, 562 N.W.2d at 615

> (We agree the Commission's deduction of estimated cleanup cost deprives Aladdin of 'just compensation….' If such cleanup costs are admissible and considered by a compensation commission without the procedural safeguards in chapter 455B, the procedural due process rights of the property owner are violated. A property owner has a right to have its liability established in a legal proceeding in which the owner has the opportunity to show that the owner did not cause the water pollution or hazardous condition.).

[319] Hous. Auth. v. Suydam Investors, L.L.C., 177 N.J. at 23, 826 A.2d 686.

[320] *Id.*

[321] *Id.* at 24, 826 A.2d 687.

[322] Stokes, *supra* note 298, at 239 (*citing Suydam Investors, LLC*, 177 N.J. 2, 826 A.2d 685; *City of New York*, 12 A.D. 3d 77, 783 N.Y.S.2d at 80)).

[323] 177 N.J. 29, 826 A.2d 690 (2003).

[324] 177 N.J. at 40, 826 A.2d 697 (citations omitted).

[325] *Id.* at 37, 826 A.2d at 696.

[326] *See* discussion in City of Bristol v. Tilcon Minerals, Inc., 284 Conn. 55, 78, 931 A.2d 237, 253 (Conn. 2007) (affirming the trial court's decision in part and holding that the property owner had demonstrated that because of contaminated water from the city's landfill, the contamination would have "a chilling effect" on Tilcon's ability to develop part of the subject property for residential use for 31 years, i.e., for the duration of the city's easements "to pollute and to maintain effective control of the land thirty-one years").

ery of more contamination.[327] Both actual and potential cleanup cost and the effect of stigma may be taken into account if evidence of comparable contaminated properties is used to establish the fair market value of the property. Potential liability under CERCLA or otherwise may be a factor.[328] "'[S]tigma' amounts to considerably more than a mental attitude on the part of buyers. It is based upon a very real possibility that any commercial activity on the property might lead to regulatory prohibition or real physical danger."[329]

It may be less difficult to find contaminated comparable sales in some areas than in others. As one article states, "when a condemned property is environmentally contaminated, there are few, if any, market sales or leases to rely upon, because there are fewer such properties and they sell less readily."[330] In some cases, it may be necessary to look at sales over a wider geographic area. Sales of property in large industrial areas may have taken contamination problems into account in arriving at a sale price. The agency's appraiser may inquire into the presence or significance of any contamination when confirming a sale price. Environmental agencies' lists of potentially contaminated sites may be checked to see whether a sale property that has been sold is listed.

Contaminated comparable sales may be used in two ways. First, the sale may be used in the same manner as comparable sales would be used as evidence of the value of clean property, with adjustments for differences between the comparable property and the subject property. The comparable sales approach may be used where there are sales of property that are similar to the subject property in size, location, and highest and best use. Second, sales of the contaminated comparable properties may be used to establish a discount factor to be applied to the value of the subject property as if it were not contaminated. The approach may be appropriate when there are sales of contaminated property available but none are sufficiently comparable to the subject property in size, location, highest and best use, or other factors determining comparability.

Although a discount factor may be a range of percentages, the range likely will be narrower and more reliable if properties are used that are more comparable to the subject property. If a transportation agency finds that because there is a limited number of sales of contaminated property, not only may comparisons be difficult but larger adjustments may be necessary that in turn cause the comparisons to be less reliable.

F.3.b. Income Approach with Amortization of Cost

The income approach is obviously limited to income-producing property. When using the income approach on contaminated property, it may be necessary to modify the capitalization approach to take into account the possible effect of stigma.

In *lnmar Associates Inc. v. Borough of Carlstadt v. Borough of South Borend Brook,*[331] the Supreme Court of New Jersey addressed the question of how to value polluted property for purposes of a tax assessment. Of interest to attorneys involved with eminent domain is the standard that the tax assessor had to apply under New Jersey law—"true value."[332] In holding that the assessor must take into account the effect of pollution on the property's value, the court stated that

> if the effect of these federal and state regulatory programs is to produce the market consequence of driving down the value of commercial property potentially subject to cleanup costs, the effect of those market forces cannot be ignored in the assessment process simply because it would be counter to the environmental policy. Rather, the question that remains to be tested is whether a strong environmental cleanup policy will drive real estate values up or down.[333]

The court concluded that "it may be helpful for appraisers to view these properties as they do special purpose properties using a measure of flexibility that will aid in the determination of the 'true value' of contaminated properties."[334]

F.4. Valuation of Access Rights

Occasionally, a transportation agency may need to acquire access rights without needing to acquire an entire parcel of land, such as for a limited access facility

[327] As one court agrees,

> [i]t is generally acknowledged that "the existence of contamination may stigmatize [a] property, making it less attractive, even after full remediation." 7A P. Nichols, Eminent Domain (3d Ed. Rev. 2007) § G13B.04 [1], p. G13B-75. This court, in particular, long has recognized the effect of stigma in significantly reducing the value of property taken by eminent domain….

Tilcon Minerals, Inc., 284 Conn. at 79, 931 A.2d at 253 (*citing* Ne. Gas Transmission Co. v. Tersana Acres, Inc., 144 Conn. 509, 514–15, 134 A.2d 253, 256 (1957) (general public belief in danger from proximity of gas transmission line properly considered by court in fixing market value of land after taking by temporary and permanent easements); Bristol v. Milano, 45 Conn. Super. 605, 622, 732 A.2d 835, 844 (Conn. Super. Ct. 1998) (prospective nature and extent of possible contamination of property and waters from adjacent landfill will create reasonable and well-founded public belief in health hazard and danger for duration of limited easements that must be taken into consideration in fixing market value of property)).

[328] Bassett v. United States, 55 Fed. Cl. 63, at 74–75.

[329] *Id.* at 74.

> [T]he Court finds that stigma associated with general contamination dramatically affected the entire Property's value. …The Court…accepts Plaintiff's argument that the Quarry's taking negatively impacted the entire Property's value on the basis of the United States' evidence. In analyzing this impact below, we accept the United States' computations regarding the Property's diminution in value as a result of the stigma associated with hazardous waste. At the same time, we leave open the possibility of additional damages resulting from the potential CERCLA liability.

Id. at 75 (citations omitted) (footnote omitted).

[330] Stokes, *supra* note 298, at 223.

[331] 112 N.J. 593, 549 A.2d 38 (N.J. 1988).

[332] *Id.* at 606, 549 A.2d at 44.

[333] *Id.* (footnote omitted).

[334] *Id.* (citations omitted).

or an area near an interchange. If a parcel is contaminated but the agency is acquiring only access rights, then the question is whether the contamination affects the value of the access. If a parcel is so severely contaminated that its value is zero or even has a negative value, then the value of the parcel's access to the highway may be questionable. However, if access is treated as one factor that affects a property's value and if contamination is treated as another factor affecting value, the problem may be less difficult to resolve. The property's access to the highway gives the property the same additional value regardless of the presence of contamination. As a practical matter, contamination simply may give some parcels a lower value than they would have had if only the access rights had been purchased.

In sum, it may be argued that if an agency is acquiring only the right of access to a contaminated parcel, then no deduction should be made for the presence of contamination; the value of the access and the effect on value of the contamination are two completely independent factors.

G. VALUATION OF AIR SPACE AND AIR RIGHTS

G.1. Air Space and Air Rights as Property

Many states have enacted statutes recognizing air space as real estate.[335] In *State ex rel. Washington State Convention & Trade Center v. Evans,*[336] the Supreme Court of Washington observed that

> [s]ince air space can be transferred, it can be taken in eminent domain. Model Act at 365, 366; *cf.* Stoebuck, *Theory of Eminent Domain, supra,* at 606 ("The conclusion is that 'property' in eminent domain means every species of interest in land and things of a kind that an owner might transfer to another private person."). *See also* Model Act at 365; 2 NICHOLS § 5.04[5][a], *supra,* at 5-298, and 3 NICHOLS § 11.02[2], *supra,* at 11-30. Some eminent domain statutes expressly reference taking air space as well. Moreover an air space estate is even fair game for an action in inverse condemnation.[337]

The condemnation of air rights or an easement with the intention of reselling or leasing the airspace to a private developer may raise a question of whether the taking of an owner's air rights is for a public use. As discussed, however, in Section 1, *supra*, the public use requirement is a constitutional limitation on the condemnation power but many courts have interpreted the limitation quite broadly. The courts, moreover, may defer to the legislature's finding of what constitutes a public use.

As a matter of state law on property rights, the owner of property adjacent to the highway may have a right to light, air, and view that the transportation agency may not infringe through joint development without the payment of just compensation. Thus, whenever a property right exists as a matter of state law, the right may not be extinguished without paying just compensation.[338]

The Model Airspace Act, Section 12, sets out a proposed method for disposition of airspace rights. If a highway is part of the federal-aid highway system, certain requirements must be satisfied to receive federal funds.[339]

G.2. Approaches to Valuation

Airspace has not been a recognizable property right long enough for there to be a method of valuation that differs from the three traditional approaches to the valuation of real estate. Some refer to the value of air rights as a percentage of the value of the fee, an approach that led to a misconception that a certain ratio may be used as a rule of thumb to value the air rights based on the value of the fee. No cases have been located in which such an approach has been accepted.

Although no specific methodology appears to have developed for the valuation of air space or air rights, there are a number of factors that may be considered. First, as with any appraisal, when appraising airspace the nature of the ownership interest being acquired will affect the outcome of the final value. For example, compensation for a flight easement would differ from compensation for a clearance easement.[340] Second, one means of determining the value of airspace is based on the right to receive income from a lease of the air rights or space.[341] Third, although compliance with zoning laws may be required, such a requirement should be no more

[335] 4 NICHOLS ON EMINENT DOMAIN § 13.17[1].

[336] 136 Wash. 2d 811, 966 P.2d 1252 (1998).

[337] *Id.* at 840, 966 P.2d at 1267 (citation omitted) (footnote omitted). The Model Air Space Act is an attempt to codify the law with regard to airspace. It appears that Oklahoma is the only state to have substantially adopted it.

[338] If a structure planned above a highway will in any way interfere with the motorist's ordinary use of the highway, conveyance of the air rights may be an unlawful diversion of public property. The outlines of this legal prohibition are exceedingly vague, as is its legal basis. It may be a common law doctrine, a matter of statutory construction, or a limitation derived from the state constitution.

[339] *See* 23 U.S.C. § 111 (2007).

[340] *See* United States v. 64.88 Acres of Land, 244 F.2d 534, 535–36 (3d Cir. 1957)

> (On this record it must be accepted that the claimed right of clearance is merely a provision for assuring that space shall be unoccupied and vision unobstructed above a designated altitude. Unquestionably, this is in aid of avigation. But no flight easement is mentioned or to be inferred, much less claimed, in the present pleadings and, therefore, no servitude can be imposed except for the asserted and precisely limited rights of clearance.).

[341] *See* Macht and Macht v. Dep't of Assessments of Baltimore City, 266 Md. 602, 610, 296 A.2d 162, 167 (Md. Ct. App. 1972) (stating that the owners conceded

> that the revenue derived from the lease of the airspace could properly be considered, like any other rent, in reaching a valuation of the property as a whole. Under the teaching of *Susquehanna Power*, we see no reason why land, improvements and airspace could not be separately valued for assessment purposes, so long as the sum of the elements did not exceed the value of the whole. See Note, Conveyancing and Taxation of Air Rights, 64 Colum. L. Rev. 338, 350-354 (1964)).

serious than it is with any parcel of land. Fourth, how an agency uses or permits the use of the air rights may limit the value of the property to a value consistent with the permitted use. Fourth, to the extent that federal funding is available to defray a lessee's costs in a joint development project, the value of the leasehold to a lessee is increased, as is the amount of rent the lessee should pay. To the extent that federal funding is available to reimburse the cost that a state may incur in preparing for a joint development, a factor that would influence the terms of a lease, a development becomes financially more feasible for the state.

An important valuation factor is the liability of a private party carrying out joint development for the applicable property taxes, in contrast to a transportation department that is exempt from such taxes.[342] The relevance of a tax exemption to valuation is that the value of air space to a developer will be higher than if the space, i.e., property, were subject to taxation.[343]

H. VALUATION OF BILLBOARDS

H.1. Billboards and Billboard Leases as Property Rights

One must distinguish between billboards and their support structures and the billboard companies' leasehold interests or easements, referred to herein as leasehold interests, for the erection of billboards on property belonging to another. As stated in *City of Norton Shores v. Whiteco Metrocom*, "[a]lthough these cases all involve billboards, it would be incorrect to say that the property taken was billboards."[344] In *Whiteco Metrocom*, the city "did not expressly condemn *any* billboards. Rather, it condemned leaseholds that gave defendants…the right to locate on certain land several billboards they owned."[345] In contrast, in *Whiteco Metrocom* the Department of Transportation "did expressly condemn three billboards…but also condemned the easement [one defendant] owned that entitled it to place…three billboards on the top of a building at that precise location."[346]

If a transportation department actually condemns billboards, the department is obligated to pay the owner the full value of the billboards.[347] On the other hand, if a transportation department does not condemn the billboards, the department usually has the obligation to pay the costs "associated with moving [defendants'] billboards to another location," along with the value of the leaseholds unless they were terminable at will.[348] Furthermore, "a condemnee is not entitled to compensation for personal property on condemned land unless the trial court finds that it constitutes a fixture," a matter of state law and the applicable lease, as well as a question of fact.[349]

Whenever a billboard lease is for a definite term, i.e., not revocable at the landowner's will, the lease should be deemed to create an easement rather than a revocable license.[350] "[T]he term 'leasehold interest' refers to an interest in real property created by the existence of a lease."[351] "Regardless of whether a billboard is classified as personal property or a fixture, the leaseholds and air rights…are real property."[352] In general, with respect to the taking of any leasehold interest on which there is a structure belonging to the lessee billboard company, the lessee is entitled to the market value of the leasehold and the structure as a single unit.[353] Although

> evidence of the value of the unexpired portion of the lease and the [structure] separately is admissible as bearing upon the value of the two as a unit, the market value is what a buyer would be willing to pay for them as a unit and not the sum of the values of each considered separately,[354]

a rule that has been applied in billboard cases. As stated by a Missouri court, "[i]f property taken by condemnation includes a leasehold interest and buildings or fixtures which, between the owner and lessee belong to the lessee, the lessee is entitled to be compensated

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[342] In some jurisdictions the state and its agencies and departments are exempt by statute and in other jurisdictions exempt by virtue of a constitutional provision. Absent such express exemptions, sovereign immunity may render the state and its agencies and departments exempt from local taxation.

[343] *See* United States & Borg-Warner v. City of Detroit, 355 U.S. 466, 472, 78 S. Ct. 474, 477–78, 2 L. Ed. 2d 424, 428–29 (1958). As the Maryland Court of Appeals pointed out in *Macht and Macht, supra*,

> [s]o long as the Machts made no use of the airspace over their property, it was not, nor could it be made the subject of an assessment. Once they denied themselves the use of it for a price, it took on value for the purposes of assessment, a value which could be derived by an appraisal based on income, the option price, or both, Bornstein v. State Tax Comm., 227 Md. 331, 337, 176 A. 2d 859 (1962). Concurrently, the Blaustein Building, as holder of the estate to which new rights became appurtenant, has the benefit of an easement, which could be reflected in its assessable basis, because the utility of its site was enhanced.

Macht and Macht, 266 Md. at 613, 296 A.2d at 168–69.

[344] City of Norton Shores v. Whiteco Metrocom, 205 Mich. App. 659, 661, 517 N.W.2d 872, 873 (Mich. Ct. App. 1994), *appeal denied*, 448 Mich. 862, 528 N.W.2d 733 (1995).

[345] *Id.* (emphasis supplied).

[346] *Id.* (footnote omitted).

[347] *Id.* at n.1 (holding that value could be "determined by estimating the cost of the billboards as 'new less depreciation'").

[348] *Id.* at 662, 517 N.W.2d 873.

[349] *See* Comm'r of Transp. v. Rocky Mountain, LLC*,* 277 Conn. 696, 730, 894 A.2d 259, 282 (2006) (citation omitted).

[350] Some cases describe the interest created by an advertising lease as a license; however, a license usually is revocable at the will of the landowner.

[351] Comm'r of Transp. v. Rocky Mountain*,* LLC*,* 277 Conn. at 734, 894 A.2d 284.

[352] City of Norton Shores v. Whiteco Metrocom, 205 Mich. App. at 662, 517 N.W.2d 873.

[353] *See* Minneapolis-St. Paul M.A.C. v. Hedberg-Freidheim Co.*,* 226 Minn. 282, 286, 32 N.W.2d 569, 572 (Minn. 1948) (condemnation of a leasehold and hangar) (citation omitted).

[354] *Id.*

for the market value of the leasehold and the building or fixture as a unit."[355]

Recently, a lessee sought to obtain compensation for the value of the lessee's *easement* and for what the lessee claimed was a separate *leasehold interest*. In *Commissioner of Transportation v. Rocky Mountain, LLC, supra,* the appraiser for Viacom Outdoor, Inc. ("Viacom"), a business selling outdoor advertising, first valued what the appraiser referred to as Viacom's "easement" based on a portion of the income generated by the billboards erected on the easement.[356] (Viacom's agreement with the property owner was called an "easement lease" with a term of 99 years that the court described as an "easement in gross" rather than an "easement appurtenant."[357]) Second, the appraiser assumed that Viacom, in addition to the easement, possessed a separate real property interest in the billboards and easement that the appraiser called a "leasehold interest."[358] However, the court did not agree with Viacom's separate or additional concept of a leasehold interest as "a real property interest generated by personal property located on an easement…."[359] The court agreed with the condemnor that the billboards and their income "are components of Viacom's outdoor advertising business, and do not constitute a separate compensable interest in real estate."[360] The court held that the trial court did not have "jurisdiction to make a separate award of damages for the billboards" and that the billboards were personal property, not compensable in eminent domain.[361] The court pointed out that the state's relocation law provided that "businesses are eligible to receive compensation for relocation expenses and losses when they are forced to remove personal property as a result of the state's acquisition of real property."[362]

In *Rocky Mountain LLC, supra,* the court held that it was proper for the trial court to consider "the presence of the billboards in determining the value of Viacom's real property interest in the easement" (as described in the case),[363] but it was error for the trial court to amend the judgment later "to include a separate award of damages for the billboards themselves…."[364] It should be noted that the condemnation notice filed by the Commissioner did not include an assessment of damages for the billboards.[365] Consequently, because there was no showing that the Commissioner intended to take the billboards (which the Commissioner later maintained were personal property), the court held that the Commissioner was not required to acquire the billboards under the state's billboard condemnation law[366] or under federal law.[367]

As discussed in the next subsection, the three basic approaches to appraising billboards and/or the leasehold interests are the comparable sales or market data approach, the income approach, and the cost-less-depreciation approach. A fourth and more controversial approach is the gross income multiplier approach.[368] However, there is a dearth of cases in recent years concerning the valuation of billboards and related leasehold interests.

H.2. Valuation Approaches for Billboards

H.2.a. Market Data or Sales Comparison Approach

As seen, a condemnor may condemn the leasehold for a billboard or may condemn both a billboard and the leasehold interest.[369] However, because billboard companies apparently do not sell billboards very often, the courts normally do not use the market data or sales comparison approach in determining the value of such leasehold interests.[370]

H.2.b. The Income Approach

In determining the value of a leasehold interest the courts tend to follow the U.S. Supreme Court's decision in *United States v. Petty Motor Corp*.[371] In *Petty Motor Corp*., the Court held that the value of a leasehold interest for its remaining term is determined by calculating the difference between what the premises would rent for in the market and the rent the lessee pays under the lease. The difference is the so-called bonus value that measures the benefit of the bargain to the tenant.[372] For instance, if a sign company is paying $100

[355] State of Mo. *ex rel*. Mo. Highway and Transp. Comm'n v. Quiko, 923 S.W.2d 489, 493 (Mo. App. S. Dist. 1996).

[356] Comm'r of Transp. v. Rocky Mountain, LLC, 277 Conn. at 699, 894 A.2d at 264.

[357] *Id.* at 726 n.36, 894 A.2d 280 n.36.

[358] *Id.* at 700, 894 A.2d 265.

[359] *Id.* at 700 n.4, 894 A.2d 265 n.1.

[360] *Id.* at 701, 894 A.2d at 265.

[361] *Id.* at 708, 894 A.2d at 269.

[362] *Id.* at 709, 894 A.2d at 270 (citation omitted).

[363] *Id.* at 712–13, 894 A.2d at 271.

[364] *Id.* at 713, 894 A.2d at 272.

[365] *Id.,* 894 A.2d at 272.

[366] *Id.* at 713, 894 A.2d at 272.

[367] *Id.* at 716–18, 894 A.2d at 274–76.

[368] Norman v. United States*,* 63 Fed. Cl. 231, at 271 (discussing various valuation methods for real property, including comparable sales, subdivision development, and subdivision development methods); Comm'r of Transp. v. Burkhart, 2003 Conn. Super. LEXIS 3166, at *6-7 (Conn. Super. Ct. 2003) (Unrept.) (discussing methods of valuation for a billboard, including the income approach, sales comparison approach, and cost approach—the latter being a combination of the income and sales comparison approaches).

[369] *See* State *ex rel.* Mo. Highway and Transp. Comm'n v. Quiko, 923 S.W.2d at 493 (involving both billboards and/or leaseholds); Minneapolis-St. Paul M.A.C. v. Hedberg-Freidheim Co., 226 Minn. at 286, 32 N.W.2d at 572 (involving a leasehold and hangar).

[370] *Id.* at 494.

[371] 37 U.S. 372, 66 S. Ct. 596, 90 L. Ed. 729 (1946).

[372] *See In re Urban Redevelopment Auth.*, 440 Pa. 321, 325, 272 A.2d 163, 165 (Pa. 1970) (holding there was no evidence that two leases for billboards had a "'bonus' value").

per month under the lease and the rental in the market would be $300 per month, then the sign company is entitled to the difference, i.e., a $200 per month bonus value, for a comparable site the sign owner would have to lease.[373] If a billboard is condemned, the court must determine the value of the structure.[374]

In *Whiteco Industries, Inc. v. City of Tucson, supra,* the court explained that

> the only market value to a lessee…in the event of condemnation is the economic value of the rental over and above the actual rental paid reduced to present value…. This has been termed "bonus value." In determining this value, the length of time that the lease has to run, the rent to be paid, and the various obligations of the parties under the lease are relevant to the price that a willing, informed buyer and a willing, informed seller of the lessee's interest would pay for the leasehold interest. This price is fair market value or just compensation….[375]

In *City of Cleveland v. Zimmerman,*[376] in which the court accepted the income approach, the court considered the claim to be one for the leasehold and awarded anticipated income from the rental, less expenses for ground rent, maintenance, and management for the leasehold period.[377]

It will be recalled that in *Rocky Mountain LLC, supra,* Viacom, the lessee, sought damages for its easement for billboards and for a leasehold interest as Viacom attempted to define the concept. However, the Supreme Court of Connecticut held that "the trial court properly considered the income generated by the billboards as a factor influencing the value of the *easement*, but properly refused to compensate Viacom directly for the income generated by the billboards because business income is not directly compensable under Connecticut eminent domain law."[378] Thus, the court accepted the income capitalization method for valuing the 99-year "easement lease," as Viacom's agreement was called.[379] However, on Viacom's claim for damages based on a separate leasehold interest, the court rejected the gross income multiplier method that is discussed in the next subsection.[380] The court did not reject the gross income multiplier method *per se* but rejected Viacom's interpretation of what constituted a leasehold interest.[381] The court held that although the billboards were noncompensable personal property, the trial court properly considered "income from the billboards in its determination of the fair market value of Viacom's easement interest."[382]

In sum, the capitalization of the rentals under the lease is a proper way to value the billboard-leasehold interest: "income capitalization is a proper method of estimating the value of income-producing real property."[383]

H.2.c. The Cost Approach

In *Quiko*, *supra,* the court stated that "evidence of comparable sales is not the only method of establishing fair market value. *Cost of replacement minus depreciation* is also an accepted method of determining fair market value of condemned property."[384] In *Whiteco Metrocom*, *supra*, the court held that the condemnor has the obligation to pay the billboard owner "the full value of the billboards," which "can be determined by estimating the cost of the billboards as new less depreciation."[385]

In *Quiko*, the lessee maintaining billboards on the subject property argued that the trial court erroneously used "depreciated replacement cost of the structures to determine its interest" in the condemnation awards rather than comparable sales data.[386] However, for reasons explained in the next subsection, the court agreed with the trial court and held that the sales relied on by Quiko's expert, who utilized the gross income multiplier approach to calculate the value of the company's properties, were not comparable.[387]

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[373] Whiteco Indus., Inc. v. Tucson*,* 168 Ariz. 257, 260, 812 P.2d 1075, 1078 (Ariz. App. 1990) ("Under our law, the only market value to a lessee such as Eller in the event of condemnation is the economic value of the rental over and above the actual rental paid reduced to present value.").

[374] *See* City of Oakbrook Terrace v. Suburban Bank & Trust Co., 364 Ill. App. 3d 506, 518, 845 N.E.2d 1000, 1010–11 (Ill. Ct. App., 2d Dist. 2006) (rejecting the transportation department's assertion that the defendant was entitled to only the bonus value as just compensation in lieu of the fair market value of the property at its highest and best use on the date the property is condemned), *appeal denied*, 221 Ill. 2d 643, 857 N.E.2d 674 (2006). *See* Santa Fe Trail Neighborhood Redevelopment Corp. v. W.F. Coen & Co., 154 S.W.3d 432, 444 (Mo. App., W. Dist. 2005) (holding that the "proper measure of damages for condemnation of a lessee's interest in real property is the bonus value of the unexpired term of the lease as measured by the difference between the market rental and the contract rental for the use and occupancy of the affected leasehold"), (*citing* Land Clearance for Redevelopment Corp. v. Dornhoefer, 389 S.W.2d 780, 784 (Mo. 1965)).

[375] Whiteco Indust., Inc. v. Tuscon, 168 Ariz. at 260, 812 P.2d 1075, 1078 (citations omitted).

[376] 22 Ohio Misc. 19, 253 N.E.2d 327 (Ohio Ct. Cm. Pl. 1969).

[377] *Id.* at 22, 253 N.E.2d at 330. *See Rocky Mountain, LLC,* 277 Conn. at 734, 894 A.2d at 284 (upholding the use of the capitalization of income approach to value billboards).

[378] Comm'r of Transp. v. Rocky Mountain, LLC, 277 Conn. at 726, 894 A.2d 279 (emphasis supplied).

[379] *Id.*

[380] *Id.* at 734 n.31, 894 A.2d 284 n.31.

[381] *Id.* at 733, 894 A.2d 283.

[382] *Id.* at 735, 894 A.2d 284.

[383] State *ex rel.* Mo. Highway and Transp. Comm'n v. City of Norton Shores v. Whiteco Metrocom, 205 Mich. App. at 662, 517 N.W.2d 873.

[384] State *ex rel.* Mo. Highway and Transp. Comm'n v. Quiko, 923 S.W.2d 497 (emphasis supplied).

[385] 205 Mich. App. at 661 n.1, 517 N.W.2d at 873 n.1 (internal quotation marks omitted).

[386] 923 S.W.2d at 493.

[387] *Id.* at 495.

H.2.d. The Gross Income Multiplier Approach

Although the gross income multiplier approach may be used by outdoor advertising companies when selling their signs to other companies, the courts have not been inclined to accept the gross income multiplier approach. A billboard company, of course, earns its income from those individuals or companies that pay for advertising displayed on the billboard company's signs. Unless a new site is found where a billboard may be relocated, the loss of a billboard and associated leasehold may reduce a billboard company's income. Loss of business income in most jurisdictions, however, is not recoverable as part of just compensation for a taking of property.[388] As stated, income may be a relevant factor in valuing a real property interest, but the structure and the leasehold are to be valued as a unit.[389]

Billboard companies have argued that the gross income multiplier approach is an appropriate means of valuation. Under the gross income multiplier approach, the value of a sign is determined by the number of the structures sold, the gross revenue from the structures involved in each sale, and a multiplier. In the example below, the multiplier is assumed to be 3.5.

[388] In Comm'r of Transp. v. Rocky Mountain, LLC, 277 Conn. at 733, 894 A.2d at 283–84, the Supreme Court of Connecticut, in agreeing with the trial court's analysis, stated:

> The trial court concluded that the income from the billboards is the product of Viacom's outdoor advertising business, rather than the product of its real property interest. The court reasoned that "advertising space generates income whether it is on a structure in a fixed location, on the side of a bus, or on a website" and the fact that the value of a business depends somewhat upon its location does not render the business itself real estate. Thus, the trial court declined to make a separate award for damages for the loss of the billboards and the income generated by them. In so doing, the trial court correctly interpreted our existing case law. Billboards can be removed from the condemned property and placed on another site, and the income they generate from the advertising placed on them also can be replicated on another site. Thus, *the trial court correctly determined that Viacom's attempt to obtain direct compensation for the billboards and the income they generate, in the form of a "leasehold interest," actually was an attempt to obtain direct compensation for loss of personal property and business income, neither of which is directly compensable in a condemnation action*.

(footnotes omitted) (emphasis supplied).

[389] As stated by the Supreme Court of Connecticut, "although elements of takings such as lost profits or personal property are not independently compensable because they do not constitute real property, the value of such elements nevertheless may be considered in determining the fair market value of the land…." *Id.* at 711–12, 894 A.2d at 271 (*citing* Alemany v. Comm'r of Transp., 215 Conn. 437, 446–47, 576 A.2d 503, 508 (1990) (cost of moving sign should have been considered in determining loss in value of property not taken); Seferi v. Ives, 155 Conn. 580, 583–84, 236 A.2d 83, 84–85 (1967) (loss of business not separate element of damage, but may be considered in determining value of land), *appeal dismissed*, 391 U.S. 359, 88 S. Ct. 1665, 20 L. Ed. 2d 640 (1968); Edwin Moss & Sons, Inc. v. Argraves, 148 Conn. 734, 736, 173 A.2d 505, 506 (1961) (sand and gravel on property not separately compensable but properly considered for effect on market value of land); Harvey Textile Co. v. Hill, 135 Conn. 686, 690–91, 67 A.2d 851, 853 (1949) (cost of removing property is not separate element of damage, but should be considered as evidence of fair market value of land)).

Structures	Gross Income	Multiplier	Sale Price
100	$360,000	3.5	$1,260,000

The gross income multiplier approach presents a number of issues. First, each sign is subject to a lease for a term of years, not a fee simple title; the term is variable as it depends on when the sign company acquired the lease.

Second, there is no guarantee that a landowner will renew a lease. If the remaining term of a lease is of short duration, there is no reasonable expectation of long-term income, especially if the owner of the fee is aware of an impending condemnation. For example, in *Quiko*[390] an appraiser for an outdoor advertising company testified to a value based on the assumption that the subject lease would be renewed, simply because most leases are renewed. The landowner, however, testified that it was doubtful that the lease would be renewed. The conflict in the evidence regarding the continuation of the lease was one of the reasons the court disallowed the gross income multiplier approach.

Third, the gross income multiplier formula includes a value for lost business income.[391] However, most states do not allow recovery of lost business income in determining just compensation.[392]

Fourth, in arriving at a damage figure based on the rental value, an appraiser also may include any aforementioned bonus value.

In *Quiko* the lessee that maintained billboards on the condemned parcels argued on appeal that the appropriate method of valuing the structures was the comparable sales method.[393] Although the lessee's expert relied on five comparable sales (sales involving from 1 to 82 structures), the expert had arrived at her value of the sales by using the gross income multiplier method. Although using the gross income multiplier approach, the expert referred to her "method of evaluation as the sales-comparison approach."[394]

For a variety of reasons the court rejected the approach. For example, there "was no testimony that any of the structures or locations involved in the 'comparable sales' were in fact comparable to those involved in the instant case"; it was doubtful that the leases would be renewed when they expired; and the expert's formula impermissibly "incorporate[d] a factor for lost business income."[395] Notably, the court did not reject the gross income multiplier approach as a matter of principle or as a matter of law, but the court did observe that other courts had not applied the method:

> In *Whiteco Indus., Inc. v. City of Tucson*, 168 Ariz. 257, 812 P.2d 1075, 1079 (Ariz. Ct. App. 1990), the court said that evidence of the value of billboards established by proving "four times gross income without any regard for the existence, length or terms of the leases, was incompetent and legally insufficient…." In *State Dep't of Transportation & Dev. v. Chachere*, 574 So. 2d 1306, 1311 (La. Ct. App. 1991), the court rejected the use of a gross income multiplier in valuing billboards even though, as suggested by Appellant in the instant case, it may be an accepted approach which is acted upon within the advertising industry.[396]

The gross income multiplier approach arguably is a dubious method of determining the before- and after-value of property for the purpose of just compensation. At a minimum, it appears that before the courts would be willing to accept the approach, outdoor advertising companies would have to demonstrate that a subject lease will be renewed and that there are no suitable sites for relocation of the subject billboard.

I. VALUATION OF MINERALS

I.1. Whether the Unit Times Price or Multiplication Method Is Allowable

When minerals are present they may be a necessary element of the value of the land.[397] The fact that the

[390] State *ex. rel* Mo. Highway & Transp. Comm'n v. Quiko, 923 S.W.2d 489, at 495.

[391] *Id.* (stating that the billboard owner and lessee's "evidence also indicated that using a multiple of gross income in arriving at a value for the structures effectively incorporates a factor for lost business income. Missouri has generally not permitted consideration of lost business profits in valuing property taken by condemnation") *Id*. (citations omitted).

[392] *Id.*; *see Rocky Mountain, LLC,* 277 Conn. at 732–33, 894 A.2d at 283–84.

[393] State *ex rel.* Mo. Highway and Transp. Comm'n v. Quiko, 923 S.W.2d at 494.

[394] *Id.* at 495.

[395] *Id.*

[396] *Id.*

[397] W. Va. Dep't of Transp. v. Robertson, 217 W. Va. 497, 618 S.E.2d 506 (2005) (holding that when it was determined by motion that there was more acreage being condemned, the trial court's order exposed the DOT to an additional claim for coal minerals associated with the additional acreage); Dep't of Transp. v. Bacon Farms, L.P., 270 Ga. App. 862, 865–66, 608 S.E.2d 305, 308–09 (Ga. Ct. App. 2004) (reversing the trial court because of its use of the price times unit method but not reversing on the ground that deposits of kaolin had never been sold or mined prior to the taking); Ala. Dep't of Transp. v. Land Energy, Ltd., 886 So. 2d 787, 790 (Ala. 2004) (stating that "in Alabama, a mineral interest is considered to be real property"); East Tenn. Natural Gas Co. v. Riner, 239 Va. 94, 98, 387 S.E.2d 476, 478 (Va. 1990) (holding that frustration of the owner's plans for development or future use of the property is not in itself a compensable item of damages and finding that the landowner had no present or future rights to the coal or to

mineral deposits have not been developed may not necessarily preclude their valuation.[398] However, even if there are minerals in place, a "landowner is not entitled to have all factors affecting the value of his property added together and to have the total of the additions taken as the reasonable market value of his land."[399] Because minerals are not visible, are not easily measured in terms of amount or quality, and may be undeveloped leading to possible speculation as to their value, expert testimony will be required to establish the highest and best use of the property, the minerals' value, the effect on the land if the minerals are acquired, and whether there is a market for the minerals.

The general rule is that minerals in place may not be multiplied by a per ton or per unit value to arrive at a market value, the so-called "unit times price" method or the "multiplication method."[400] The courts have given several reasons for rejecting the unit times price method, [401] including the reason that it constitutes a separate valuation of the land and minerals.[402] As one court has explained the rule,

> [a]ll we are saying is that a tract of land containing 500 tons of sand and gravel is much more valuable than a tract of land with five tons and the jury has the right to know more than that there is a sand and gravel deposit of unknown quantity below the surface.[403]

Consequently, although the value of the minerals in place may be considered, the land and the minerals are to be valued as one.

In an early case, *United States ex rel. TVA v. Indian Creek Marble Co.*,[404] a federal court stated that the unit times price method does not take into consideration the possibility of fluctuation in market, taxes, costs, or the possibilities of business disasters. Thus, the court held that "[f]ixing just compensation for land taken by multiplying the number of cubic feet or yards or tons by a given price per unit has met with almost uniform disapproval of the courts."[405] The court emphasized that the unit times price approach

> involves all of the unknown and uncertain elements which enter into the operation of the business of producing and marketing the product. It assumes not only the existence, but the continued existence of a stable demand at a stable price. It assumes a stable production cost and eliminates the risks all business men know attend the steps essential to the conduct of a manufacturing enterprise.[406]

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any royalties or other benefits the coal might ever produce); United States v. 100.80 Acres of Land, 657 F. Supp. 269, 274 (M.D. N.C. 1987) ("Existence of mineral deposits in the subject property is an element in determining fair market value.").

[398] Bassett v. United States, 55 Fed. Cl. at 74 (holding that the plaintiff had "sufficient access before the taking to exploit fully the Property's highest and best use" that included aggregate mining as well as residential development and water rights); *see also* 4 NICHOLS ON EMINENT DOMAIN § 14F.02(1).

[399] United States v. 91.90 Acres of Land, 586 F.2d 79, 87 (8th Cir. 1978), *cert. denied*, 441 U.S. 944, 99 S. Ct. 2162, 60 L. Ed. 2d 1045 (1979) (reversing a trial court's award to a landowner that was nearly eight times what the government had been willing to pay).

[400] DOT v. Bacon Farms, L.P., 270 Ga. App. 862, at 865, 608 S.E.2d 305, at 308 (approving, however, the concept that the "the unit price and quantity of the minerals are factors upon which an opinion of fair market value may be based"). *See also* United States v. 179.26 Acres of Land in Douglas County, 644 F.2d 367, 372 (10th Cir. 1981); State Highway Comm'n v. Mann, 624 S.W.2d 4, 8 (Mo. 1981); *91.90 Acres of Land*, 586 F.2d at 87; State *ex rel.* Dep't of Highways v. Nevada Aggregates & Asphalt Co., 92 Nev. 370, 374, 551 P.2d 1095, 1097 (1976); Gradison v. State, 260 Ind. 688, 694, 300 N.E.2d 67, 73 (1973); State v. Hobart*,* 5 Wash. App. 469, 471, 487 P.2d 635, 637 (Wash. Ct. App. 1971); Smith v. State Roads Comm'n, 257 Md. 153, 160, 262 A.2d 533, 536 (1970); Ark. State Highway Comm'n v. Hampton, 244 Ark. 49, 52, 423 S.W.2d 567, 570 (1968); State *ex rel.* State Highway Comm'n v. Nunes, 233 Or. 547, 563, 379 P.2d 579, 587 (1963); United States v. Land in Dry Bed of Rosamond Lake, 143 F. Supp. 314, 315 (S.D. Cal. 1956).

[401] State of Alabama v. Bearid, 981 So. 2d 386 (2007) (affirming a substantial verdict for the owners, who used the unit method when the State failed to offer evidence of the mineral value of the remainder property), *rehearing denied*, 2007 Ala. LEXIS 296 (Ala. 2007); Bd. of County Supervisors of Henrico County v. Wilkerson, 226 Va. 84, 89, 307 S.E.2d 450, 452 (1983) (rejecting unit times royalty method of valuation because result is based upon speculation as to continuing existence of theoretical future market); State Road Comm'n v. Noble, 6 Utah 2d 40, 48, 305 P.2d 495, 501 (Utah 1957)

> ("[T]he amount of the mineral deposits cannot be estimated and then be multiplied by a fixed price per unit. The reason for this rule is said to be that the estimate as to the quantity and quality of the minerals in the land constitutes mere speculation and that, furthermore, even if such amount could be exactly ascertained, the costs of mining and the profits made therefrom would still be uncertain, since the contingencies of the business could not be estimated with any fair degree of certainty.")

(*quoting* 156 A.L.R. at 1423); Ga. Kaolin Co. v. United States, 214 F.2d 284, 286 (5th Cir. 1954) (rejecting the approach because of its "speculativeness" in that "whether or not the deposits would be mined and the royalties paid would depend upon the condition of the market, the uncertainty of the future, the demand for the product, 'and many other elements, on and on, in the future'") (citation omitted).

[402] Gradison v. State, 260 Ind. at 692, 300 N.E.2d at 72 (stating that "'[t]he land taken must be valued as land, with the factor of mineral deposits given due consideration. Thus, the value as stone land suitable for quarrying—but not the value of the stone separate from the land — is a proper subject for consideration, both by the witnesses and the jury in fixing the amount of just compensation to be awarded'"); Werner v. Commonwealth, 432 Pa. 280, 286, 247 A.2d 444, 448 (1968) (explaining that "the minerals may not be valued separately apart from the remainder of the tract…. [I]t is impossible to determine how much a ton of sand and gravel will be worth until it has been removed from the earth and processed for market").

[403] Werner v. Commonwealth, 432 Pa. 280 at 286, 247 A.2d 444, at 448 (1968).

[404] 40 F. Supp. 811 (E.D. Tenn. 1941).

[405] *Id.* at 822.

[406] *Id.*

The court elaborated on its reasons for rejecting the method, stating that the unit times price approach

> eliminates the possible competition of better materials of the same general description and of the possible substitution of other and more desirable materials produced or possible of production by man's ingenuity, even to the extent of rendering the involved material unmarketable. It involves the assumption that human intelligence and business capacity are negligible elements in the successful conduct of business. It would require the enumeration of every cause of business disaster to point out the fallacy of using this method of arriving at just compensation. No man of business experience would buy property on that theory of value. True it is that quality and quantity have a place in the mind of the buyer and the seller, but the product of these multiplied by a price per unit should be rejected as indicating market value when the willing seller meets the willing buyer, assuming both to be intelligent. Values fixed by witnesses on such a basis are practically worthless, and should not be accepted.[407]

Accordingly, the court concluded that "[t]o the extent the valuation fixed by any witness contains this speculative element…its value as evidence [is] reduced."[408] Thus, a majority of courts have held that the unit times price or multiplication method is simply too dependent on future conditions and too speculative.[409]

In similarly rejecting the multiplication method, the Supreme Court of Oregon, in *State Highway Commission v. Arnold,*[410] stated that

> [t]he evil of the method is not simply the danger of leading the appraiser to an inaccurate appraisal but more important, because it has the illusion of scientific certainty and validity, it is too likely to be grasped upon by the jury as the sole criterion of value even though the expert witnesses in making their estimates purport to eliminate from their computation the element of speculation.[411]

Notwithstanding the firm rejection of the unit times price method by a majority of courts, other courts have suggested that the result of the method may be considered as one factor in the overall valuation of property. For example, although the Supreme Court of Nevada agreed that "a fair estimation of value cannot be reached simply by multiplying the unit market price of a given mineral by the estimated quantity thereof contained in the condemned land,"[412] the court held that if "the product of the price-unit formula is considered *only as one of such factors*, no prejudicial error results."[413]

More recently, in *Department of Transportation v. Bacon Farms, L.P., supra,* the court agreed that

> [t]he value of land containing mineral deposits cannot be determined simply by multiplying the estimated number of units of the mineral by a fixed, projected royalty per unit. This is because, in the words of the Supreme Court of Pennsylvania, "First, the minerals may not be valued separately apart from the remainder of the tract. Second, it is impossible to determine how much [the minerals] will be worth until [they have] been removed from the earth and processed for market."[414]

However, the court held that

> evidence of the quantity and value of minerals on the land is admissible—along with all other relevant evidence—to determine the value of the land as a whole. *In other words, while "price times unit" is not itself the proper measure of damages, the unit price and quantity of the minerals are factors upon which an opinion of fair market value may be based.*[415]

Although some courts reject the unit times price approach, properly presented the approach to valuation may be acceptable in some courts. That is, it may be important how the expert testimony is presented. For example, in *United States v. 83.32 Acres of Land,*[416] the subject parcel was an estimated 44 acres "underlain by four million recoverable tons of phyllite," a "figure…amply supported by the record…."[417] According to the appeals court, "[t]he trial court…multiplied four million tons by nine cents a ton, to arrive at an award of $360,000."[418] Nevertheless, the appeals court affirmed the trial court's verdict, stating that "[t]he nine cent figure was not a royalty to be paid in connection with a lease of the minerals." According to the court, the approach

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[407] *Id.*

[408] *Id.*

[409] State v. J.H. Wilkerson & Son, Inc., 280 A.2d 700, 701–02 (Del. 1971)

> (It is wrong, therefore, to view that land as though it were simply a pile of excavated gravel. Certainly, the value of the gravel in the ground may be considered; but, in doing so, it is improper to consider the value of the mineral content as if it were extracted from the ground and ready for a waiting market, at current or anticipated prices, in order to reach the fair market value of the property. The law does not permit the finders of fact to speculate as to the availability of a market, the status of prices, or the net margin of profit.)

United States v. 620 Acres of Land, 101 F. Supp. 686, 691 (W.D. Ark. 1952) ("'The separate valuation of timber or rock attached to land, or valuations arrived at by a process of multiplying the number of cubic feet or yards by a given price per unit, are not approved bases for evaluation.'") (citation omitted); Ga. Kaolin Co. v. United States, 214 F.2d at 286 (also stating that the "rule has been applied to limestone deposits, gold ore, fire clay, coal, stone, and sand and gravel").

[410] 218 Or. 43, 341 P.2d 1089 (Or. 1959). Note that the evidence is not being admitted as a *method of valuation*; rather, it is being admitted as one factor in ascertaining the value of the property. *See also* DOT v. Bacon Farms, L.P., 270 Ga. App. at 865, 608 S.E.2d at 308.

[411] State by State Highway Comm'n v. Arnold*,* 218 Or. 43, 75, 341 P.2d 1089, 1104 (1959).

[412] Nevada v. Nev. Aggregates & Asphalt Co., 92 Nev. 370, 375, 551 P.2d 1095, 1097 (1976).

[413] *Id.* (emphasis supplied).

[414] DOT v. Bacon Farms, L.P.*,* 270 Ga. App. at 865, 608 S.E.2d at 308 (footnote omitted).

[415] *Id.* (footnote omitted) (emphasis supplied).

[416] 480 F.2d 1143 (5th Cir. 1973).

[417] *Id.* at 1144.

[418] *Id.*

represented the accepted method of calculating the value of a fee simple interest in the land itself, as opposed to the value of the minerals, and was derived by taking one-half of a reasonable royalty per ton (twenty-five cents per ton) and making further deductions for the cost of mining and transportation. This method of computing the value of the land itself had been employed in several comparable sales in the area.[419]

In *Bacon Farms*, *supra*, the court agreed with the Fifth Circuit's statement in *United States v. 83.32 Acres of Land*, *supra*, that "[t]he value of land containing mineral deposits cannot be determined…by a fixed, projected royalty per unit."[420] The court explained in *Bacon Farms* that the owners' experts' problems were that they "apparently made no deductions or other allowances for the cost of mining and transportation of the kaolin, nor did they account for future market uncertainties. Rather, they simply averaged the royalty fees from existing lease agreements, with no reductions."[421]

Based on the foregoing cases, it appears that some courts will permit the unit times price approach if it is properly adjusted. Some courts appear to go even further and allow the use of the unit times price method.[422] In *In re Lee,*[423] the court did not reject the method but still found the evidence to be too speculative.

> *The trial court did not err in admitting this "unit times price" valuation evidence*, as the rule on expert testimony allows testimony based upon data learned from reliable scientific technique and absolute certainty is not required…. The testimony substantiated that the test hole data used by petitioner's experts was relied upon in the field of sand and gravel mining. We do hold, however, that standing alone this evidence was insufficient to support any award for petitioner. The evidence was too speculative and petitioner's case lacked several critical elements necessary to allow a jury to make a reasoned decision as to the value of petitioner's interest in the condemned land. There was no evidence presented on the cost of extraction of the minerals. No evidence was offered tending to show the costs of processing or transporting the minerals.[424]

The court in *In Re Lee* did recognize that the "'unit times price' method of valuing minerals in place has been soundly rejected" by courts in other jurisdictions, in particular when "mining operations have not even begun…."[425] The court, moreover, stated that "[t]he rationale underlying this rule is that such evidence is simply too speculative, as it is based upon unknown and uncertain elements which enter into the operation of mining, processing and marketing the minerals."[426] As said, however, although the unit times price method may not be acceptable in most jurisdictions, the method, if properly adjusted, may be allowed in some jurisdictions.

Thus, it appears that a majority of courts, except in special situations, reject the use of the unit times price or multiplication method, in essence to prohibit what could amount to a separate valuation of minerals vis-à-vis the property.[427] As one article states,

> [t]he traditional statement of the unit rule is that "condemned land containing minerals is to be valued as including the minerals, the value of which cannot be shown separately." This rule has been harshly criticized since a willing buyer would at least want to be informed of the mineral content of the land, whereas this rule holds such evidence inadmissible.[428]

Consistent with the foregoing discussion, the article suggests that there is a "more liberal, modified unit rule" that "allows the parties to admit evidence of the separate value of minerals in the subject property *provided certain criteria are fulfilled*…."[429]

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[419] *Id.*

[420] DOT v. Bacon Farms, L.P., 270 Ga. App. 862, at 865, 608 S.E.2d 305, at 308.

[421] *Id.* at 865, 608 S.E.2d at 309.

[422] *See* United States v. 103.38 Acres of Land, 660 F.2d 208, 21–14 (6th Cir. 1981) (holding that the unit times price formula is competent evidence if and only if market value exists for the mineral in place and the valuation witness possesses the requisite industry expertise); City of St. Louis v. Union Quarry & Constr. Co., 394 S.W.2d 300, 307 (Mo. 1965) (holding that the unit times price approach is permissible as a last resort when the only use of property is for the exploitation of minerals); Ark. State Highway Comm'n v. Cochran, 230 Ark. 881, 883, 327 S.W.2d 733, 734 (1959) (holding that the unit times price approach is a permissible method of valuation when the land taken is leased at a royalty rate for mining).

[423] 85 N.C. App. 302, 354 S.E.2d 759 (N.C. Ct. App. 1987).

[424] *Id.* at 308, 354 S.E.2d at 763–64 (citation omitted) (emphasis supplied).

[425] *Id.* at 307, 354 S.E.2d at 763 (*citing* United States v. 339.77 Acres of Land, 420 F.2d 324 (8th Cir. 1970); H.E. Fletcher Co. v. Commonwealth, 350 Mass. 316, 214 N.E.2d 721 (1966)).

[426] 85 N.C. App. 307, 354 S.E.2d at 763.

[427] DOT v. Bacon Farms, L.P., 270 Ga. App. at 865, 608 S.E.2d at 308 (rejecting the unit times price method of valuation but holding also that unit price and quantity of minerals are factors to consider in the overall valuation of property).

[428] Robert A. Dunkelman, *Student Symposium on Oil & Gas: Consideration of Mineral Rights in Eminent Domain Proceedings*, 46 LA. L. REV. 827, 835 (1986) (footnotes omitted).

[429] Dunkelman, *supra* note 428, at 835 (emphasis supplied). The author states that "Louisiana courts have followed the more liberal unit rule which allows evidence of the value of minerals underlying the surface, provided adequate jury instructions are given to prevent jurors from simply adding the mineral value rather than considering mineral value as merely an element of the land's value." *Id.* at 836 (footnote omitted). The criteria are

> (1) The existence and quantity of the minerals can be accurately determined (technological advances have gone far in the elimination of guesswork in this area);
>
> (2) The expenses of production and marketing are taken into consideration in valuing the minerals;
>
> (3) This element of value is clearly significant;
>
> (4) The exploitation of the minerals is not inconsistent with the highest and best use of the land; and most importantly;

In sum, although it seems that a majority of courts prohibit admission of evidence based on the unit times price method, there is some judicial authority either permitting the use of the method or permitting the use of the method to arrive at a value of the minerals in place as one factor to be considered in determining the value of the subject property.[430] It is suggested also that the unit times price method may be acceptable if "certain criteria are fulfilled," including taking into consideration "[t]he expenses of production and marketing…."[431]

I.2. Use of Comparable Sales or Income Approach

The determination of the value of land having mineral deposits necessarily involves an approximation.[432] The courts have attempted to reduce the speculative nature of the valuation of minerals in place by limiting such evidence to comparable sales of similar property with mineral deposits to establish market value.[433] The courts tend to prefer evidence of comparable sales because such evidence is less speculative and more closely approximates the marketplace.[434]

In the absence of comparable sales a court must resort to other means of determining fair market value, such as the income approach.[435]

> [W]hen lacking evidence of comparable sales, other evidence in support of other methods of valuation may be sufficient for determination of value. In *United States v. Corbin*, 423 F.2d 821 (10th Cir. 1970), this Court specifically recognized that where no comparable sales were available, the capitalization of net income approach to determine fair market value of a fish farm was appropriate. *Sowards* and *Corbin* are consistent with *Sill Corporation v. United States*, 343 F.2d 411 (10th Cir. 1965), *cert. denied*, 382 U.S. 840, 86 S. Ct. 88, 15 L. Ed. 2d 81 (1965), where we said:
>
> …the law is not wedded to any particular formula or method for determining the fair market value as the measure of just compensation…. It may be based upon comparable sales, reproduction costs, capitalization of net income, or an interaction of these determinants.[436]

If evidence of comparable sales is not available, the approved method is the capitalization of income approach, which relates the value of the land to the present value of the income the land produces.[437] As held in *State Highway Commission v. Jones,*[438] if "income is produced from the sale of minerals or other soil materials, then the 'income approach' for valuing land with its incumbent use of the capitalization method is proper where such is the best method for ascertaining the fair market value."[439]

Likewise, in a case in which there were no comparable sales, it was held that "the fair market value of a coal deposit is determinable by multiplying the recoverable tonnage of mineral by a given royalty per ton, and by discounting the sum thus obtained to present value."[440] The court stated that the royalty capitalization method is an appropriate means of valuing mineral deposits

> if, and only if, the offering party can establish: 1) that an active market exists for the mineral in place; 2) that transactions between willing buyers and sellers in that market commonly take the form of royalty payments; and 3) that the figures on which an award might be based represent the conclusions of an industry expert.[441]

> (5) The jury should be instructed that the evidence of separate value is only a factor to be considered in determining the total value of the land itself.

Id. at 835–36 (footnote omitted).

[430] DOT v. Bacon Farms, L.P., 270 Ga. App. at 865, 608 S.E.2d at 308 ("First, the minerals may not be valued separately apart from the remainder of the tract.") (citation omitted) (internal quotations omitted).

[431] Dunkelman, *supra* note 428, at 835 (footnote omitted).

[432] *See generally* Jeremy Eyre, *The San Rafael Swell and the Difficulties in State-Federal Land Exchanges*, 23 J. LAND RESOURCES & ENVTL. L. 269 (2003).

[433] DOT v. Bacon Farms, L.P., 270 Ga. App. at 862, 608 S.E.2d at 306 (noting that the DOT's appraiser used comparable sales of other property in the county containing kaolin but also concluded that the kaolin deposits were cost-prohibitive to mine). *See also* United States v. Bassett, 55 Fed. Cl. at 78 (finding comparable sales method was more "persuasive"); Dawson v. Papio Natural Res. Dist., 206 Neb. 255, 292 N.W.2d 42 (1980); State v. Hobart, 5 Wash. App. 469, 487 P.2d 635 (Wash. Ct. App. 1971); Ark. State Highway Comm'n v. Hampton, 244 Ark. 49, 423 S.W.2d 567 (1968); *H.E. Fletcher Co.*, 350 Mass. 316, 214 N.E.2d 721 (1966); Hoy v. Kan. Turnpike Auth., 184 Kan. 70, 334 P.2d 315 (1959); Tenn. Gas Transmission Co. v. Mattevi, 144 N.E.2d 123 (Ohio 1956) (price paid earlier for same property inadmissible when property and market conditions have changed).

[434] United States v. 103.38 Acres of Land, 660 F.2d 208, 212 (6th Cir. 1981).

[435] *Id.* at 211.

[436] United States v. 179.26 Acres of Land in Douglas County, 644 F.2d 367 at 372.

[437] Whitney Benefits, Inc. v. United States, 18 Cl. Ct. 394, 408 (1989), *aff'd,* 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 952, 112 S. Ct. 406, 116 L. Ed. 2d 354 (1991) (affirming the use of future income stream analysis only on the basis of a finding by the lower court that reliable comparable sales data was lacking at trial); *but see Bassett*, 55 Fed. Cl. at 79 (The court rejected the plaintiff's income approach, stating that "[c]omparable sales data derived from comparison of land analogous to the Property was available based upon the evidence presented in the United States' appraisals. Thus, the Uniform Appraisal Standards would not support the use of future income stream analysis in the present case.").

[438] 173 Ind. App. 243, 363 N.E.2d 1018 (Ind. Ct. App. 1977).

[439] *Id.* at 245, 363 N.E.2d at 1025.

[440] United States v. 103.38 Acres of Land*,* 660 F.2d at 212.

[441] *Id.* at 213. *See* State v. Bearid, 981 So. 2d 386, at 391; *Bacon Farms, L.P.*, 270 Ga. App. at 865, 608 S.E.2d at 308 (rejecting the royalty capitalization method but holding that price and quantity of mineral deposits were factors to consider when determining the value of property); *Bassett*, 55 Fed. Cl. at 76-79 (rejecting a "production royalty" capitalization method in favor of the comparable sales method).

Another court has stated that if evidence of comparable sales is unavailable and "if the proof is not deficient, a present value for mineral interests taken in eminent domain proceedings may be determined by estimating the anticipated income that might be derived from the sale of the minerals over a period of time, and capitalizing that income in terms of its present worth."[442] The court distinguished the income method from the impermissible and simplistic unit times price method on the basis that "[m]any other factors were developed in the evidence and used in the landowners' demonstration of the contributory value of the limestone in place."[443]

Notwithstanding the foregoing authorities, the Supreme Court of Missouri has considered the income approach to be too speculative and an attempt to aggregate the value of land and minerals. The court rejected the use of the income method even when valuing leased land that was currently being mined.[444]

In sum, although the case law in a particular jurisdiction must be consulted, the use of the income approach appears more likely to be allowed when the condemned property is currently used for mineral production or if there is an existing lease or royalty agreement providing a similar basis for an expert's calculations.

I.3. Valuation Issues When Only Taking the Surface or Easement

If only the surface estate or easement is condemned, the measure of just compensation is the value of the land taken plus the damages to the remainder because of the taking. A condemnee must establish the real and actual damages accruing to the remainder due to a partial taking.[445] If an owner does not claim severance damages or if the court fails to find severance damages, the before-and after-value rule does not apply; the owner's damages are limited to the market value of the land taken.[446]

The damages usually represent the difference between the fair market value of the entire property immediately before the taking and the fair market value of the remainder after the taking.[447] In establishing the before and after fair market value in partial takings, the courts consider the highest and best use of the property, the value of minerals that enhance the property's value, and the property's value as a whole as if the entire property were being condemned.[448] If property has minerals, the owner has the right to use the surface estate as may be reasonably necessary to extract the minerals.[449] Thus, a landowner may be entitled to damages based on the impossibility of extracting minerals from an entire tract if a condemnation severs the land so as to make mining commercially unfeasible.[450] A condemnee's loss is measured by the diminution in the value of the mineral estate caused by the taking.[451]

If mineral deposits are the subject of a condemnation, then there is an exception to the rule that the land and the mineral deposits may not be valued separately. In such cases, the owner of the mineral rights is entitled to the separate value of the minerals, as they are treated as merchandise rather than as being a part of the land.[452] Also, the land and minerals may be valued

[442] United States v. 179.26 Acres of Land in Douglas County, 644 F.2d at 373 (*citing Corbin*, 423 F.2d 821 (10th Cir. 1970); United States v. 158.76 Acres of Land, 298 F.2d 559 (2d Cir. 1962); United States v. 1,629.6 Acres, 360 F. Supp. 147 (D. Del. 1973), *aff'd in part, rev'd in part on other grounds*, 503 F.2d 764 (3d Cir. 1974); United States v. Whitehurst, 337 F.2d 765 (4th Cir. 1964)).

[443] *179.26 Acres of Land in Douglas County*, 644 F.2d at 373.

[444] State *ex rel.* State Highway Comm'n v. Mann, 624 S.W.2d at 7–9 ("A mineral deposit is a factor to be considered in determining the fair market value of land.… A mineral deposit or other factors affecting the market value of land, however, may not be valued separately and added together to determine the fair market value of the land.") (numerous citations omitted).

[445] State Highway Comm'n v. Antonioli, 145 Mont. 411, 418–19, 401 P.2d 563, 567 (1965).

[446] Ark. State Highway Comm'n v. DeLaughter, 250 Ark. 990, 999, 468 S.W.2d 242, 247 (1971); Ruth v. Dep't of Highways, 145 Colo. 546, 549–50, 359 P.2d 1033, 1035 (1961).

[447] Highway Comm'n v. Ullman, 88 S.D. 492, 499–500, 221 N.W.2d 478, 482 (1974); *DeLaughter*, 250 Ark. at 999, 468 S.W.2d at 247; *H.E. Fletcher Co.*, 350 Mass. at 320–21, 214 N.E.2d at 724; *Argraves*, 149 Conn. at 204, 177 A.2d at 678.

[448] State v. Bearid, 981 So. 2d 386, at 389; Hultberg v. Hjelle, 286 N.W.2d 448, 455 (N.D. 1979) (value of minerals not to be determined separately from and added to value of land); *91.90 Acres of Land*, 586 F.2d at 86–87 (holding that one may not estimate tonnage of clay in ground and then multiply times fixed unit price, but one may establish that presence of clay enhances the value of property); State Highway Comm'n v. Ullman, 88 S.D. at 501–02, 221 N.W.2d at 482–83 (value of gravel deposits relevant to value of land only if deposits affect land's market value); H.E. Fletcher Co. v. Commonwealth, 350 Mass. at 324, 214 N.E.2d at 725–26 (holding that it is within the discretion of the trial court to exclude capitalization of income evidence as overly speculative when determining before and after value of the condemned property); Commonwealth, Dep't of Highways v. Gearhart, 383 S.W.2d 922, 923, 925–26 (Ky. App. 1964) (proof of valuable mineral deposit relevant but insufficient to support verdict); *Argraves*, 149 Conn. at 205, 177 A.2d at 678 (evidence of net profits from gravel business inadmissible even when the nature of the property condemned is such that profits derived therefrom are the chief source of its value); *but see Mann*, 624 S.W.2d at 10, in which the Missouri Supreme Court distinguished a partial taking from a complete taking. The court held that computing the present value by capitalization of an income stream is more speculative in cases involving a partial taking, because the starting date of the income stream from the area taken is unknown.

[449] 981 So. 2d at 390-91; Lomax v. Henderson, 559 S.W.2d 466, 467 (Tex. Civ. App. 1977).

[450] *See* Tenn. Gas Transmission Co. v. Mattevi, 75 Ohio Abs. 396, 144 N.E.2d 124, 126 (Ohio App. 7th Cir. 1956).

[451] Lomax v. Henderson*,* 559 S.W.2d at 467. *But see* Gulf Interstate Gas Co. v. Garvin, 368 S.W.2d 309, 313 (Ky. Ct. App. 1963) (damages based on diminution in fair market value of land as a whole).

[452] State Highway Comm'r v. Fegin, 2 Mich. App. 698, 704, 141 N.W.2d 312, 315 (1966)

separately when a lessee is entitled to remove minerals pursuant to a lease.[453]

If the ownership of land and mineral deposits is severed, the fair market value of the land may be determined and the damages apportioned between the owner of the land and the owner of the mineral rights.[454] In *Lomax v. Henderson, supra,* the court valued all interests in the condemned property; however, the court refused to divide the award between the owners of the separate estates because the owners of the mineral estate failed to prove that the minerals had any market value.[455] On the other hand, in *Valls v. Arnold Industries, Inc.*,[456] even though the owners presented no evidence of the actual presence of minerals or to prove that the value of the land would be enhanced by the presence of minerals, the court awarded compensation to the owners of the mineral estate.[457] Because a mineral estate has market value and often commands a substantial price in the market, the court held that the owners could not be deprived of their estate without just compensation, even though an award of compensation for them diminished the sum awarded the owner of the surface estate.[458]

It should be noted, however, that in *The Village of Tequesta v. Jupiter Inlet Corporation,*[459] the Supreme Court of Florida clarified that "the right of the owner to *ground water* underlying his land is to the usufruct of the water and not to the water itself. The ownership of the land does not carry with it any ownership of vested rights to underlying ground water not actually diverted and applied to beneficial use."[460] The court overruled the *Valls* case, *supra*, to the extent that the court in *Valls* declared that water beneath property is a property right to the same extent as oil, minerals, and other substances that may not be "divested under any circumstances without…just compensation."[461] The court in *Village of Tequesta* held rather that "[t]he right to use water does not carry with it ownership of the water lying under the land" and that "[t]he right of [a] user is not considered 'private property' requiring condemnation proceedings unless the property has been rendered useless for certain purposes."[462]

In summary, the valuation of mineral rights is a difficult issue. However, the proper considerations in the valuation of mineral rights appear to include, for example, the nature of the estate or interest being acquired, whether comparable sales data is available, whether the minerals are subject to an existing lease, whether the minerals are being mined as of the date of taking, and whether there actually exists a market for the minerals.[463]

J. VALUATION OF TREES OR SHRUBS

J.1. Valuation as Part of the Land

Section 103(10) of the Uniform Eminent Domain Code defines "any form of vegetation such as…fruits, vegetables, trees, …[and] nursery stock…intended to be used for commercial purposes." As with the valuation of mineral deposits, the majority view is that trees or shrubs are not to be valued separately from the land and the value thereof then added to the value of the land.[464] In *Deboer v. Entergy Arkansas, Inc.*,[465] in which

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> ("The second exception to the general rule is applied where the mineral deposit itself is the subject of the condemnation. In such case the deposit is treated as so much merchandise rather than as land. The rule applicable to personal property is invoked and the condemnor is liable for the market value of the mineral deposit as separately evaluated.'")

(*citing* 4 NICHOLS ON EMINENT DOMAIN (3d ed), § 13.22 (1), at 422); State *ex rel.* State Highway Comm'n v. Foeller, 396 S.W.2d 714, 719 (Mo. 1965) (*per curiam*) (stating that "[w]here there is a mineral deed, the subsurface rights conveyed create a separate, distinct interest apart from the surface rights") (citations omitted); Bd. of County Comm'rs of Roosevelt County v. Good, 44 N.M. 495, 499, 105 P.2d 470, 472 (1940) (holding that the owner "had the right to have the jury hear the evidence and determine the actual market value of the caliche rock taken from his land, without reference to the value of the land itself").

[453] Smithrock Quarry, Inc. v. State, 60 Wash. 2d 387, 390, 374 P.2d 168, 171 (1962) (holding that

> where the only valuable incident is the right to remove materials from the land, and the amount and value of the materials can be definitely ascertained…the trial court properly permitted the jury to find that the plaintiff's damages were equal to the value of the rock materials which had been severed and could be sold at the date of the taking and removed before the expiration of the lease).

[454] Commonwealth v. Haydu*,* 1 Pa. Commw. 561, 570, 276 A.2d 346, 350 (Pa. Commw. Ct. 1971).

[455] Lomax v. Henderson*,* 559 S.W.2d at 467.

[456] 328 So. 2d 471, 474 (Fla. App. 2d Dist. 1976).

[457] *Id.* at 474.

[458] *Id.* (stating that "[i]t makes no difference that without evidence of the likelihood of minerals in the property, the jury would not have been entitled to consider the speculative possibility that the property might be more valuable because of the existence of minerals").

[459] 371 So. 2d 663 (Fla. 1979), *cert. denied,* 444 U.S. 965, 100 S. Ct. 453, 62 L. Ed. 2d 377 (1979).

[460] *Id.* at 667 (emphasis supplied).

[461] *Id.* at 667–68.

[462] *Id.* at 668 (holding that the village "was only subjected to…consequential damages incurred when it was required to draw water" from one aquifer rather than another).

[463] State Highway Comm'r v. Fegin, 2 Mich. App. at 704, 141 N.W.2d at 315 (stating, however, that the court did "not believe it is necessary to establish that a market exists warranting commercial exploitation of the materials" as it was "sufficient…if [there were] occasional demand from the contractors, and county road commission [that] has established a general price in the area….")

[464] City of Gunnisson v. McCabe Hereford Ranch, Inc., 702 P.2d 768, 770 (Colo. Ct. App. 1985); People v. Gianni, 29 Cal. App. 3d 151, 156, 105 Cal. Rptr. 248, 251 (Cal. App. 1st Dist. 1972).

[465] 82 Ark. App. 400, 109 S.W.3d 142 (Ark. Ct. App. 2003).

a utility company mistakenly cut trees on the owners' land, the court held that the owners were not entitled to the claimed replacement cost of the trees but to the difference in the before and after value of the property, the measure of damages in inverse condemnation being the same as in direct condemnation.[466] "Even though the improvements may have possessed a certain amount of aesthetic value to the landowners, [the owners] are entitled to recover only what is required to place them in as good position pecuniarily as they would have been if the property had not been taken."[467]

Likewise, in *Ventres v. Goodspeed Airport, LLC*, *supra*, the Supreme Court of Connecticut, although identifying three possible ways to measure the damages for the loss of a tree, held that

> "[r]eplacement value is not a proper measure of damages in tree cutting cases because such a measure of damages…would lead to unreasonable recoveries in excess of the market value of the land …[,] would raise impossible issues in resolving the replacement values of healthy or partially damaged trees…[and] cannot be practically applied."[468]

The accepted approach to valuation seems to be based on the diminution in property value as a result of the cutting of trees "determined by the cost of repairing the damage, provided…that that cost does not exceed the former value of the property and provided also that the repairs do not enhance the value of the property over what it was before it was damaged."[469]

J.2. Valuation in Unique Situations

J.2.a. Income Producing Trees

In exceptional or unique situations it appears that trees and shrubs may be valued separately from the land.[470] Trees that bear fruit or nuts may have such value that they also enhance the value of the property.[471] In *Ventres v. Goodspeed Airport, LLC,*[472] the court noted that

> [a]lthough the court in *Maldonado* concluded that the cost of replacing the trees was not a proper measure of damages, it stated that "it is…well established that [the diminution in property value as a result of cutting the trees] may be determined by the cost of repairing the damage, provided, of course, that that cost does not exceed the former value of the property and provided also that the repairs do not enhance the value of the property over what it was before it was damaged."[473]

J.2.b. Veneer Logs and Timber

The term "veneer logs" means a special type of tree suitable for making veneered furniture. The term "timber" denotes trees suitable for conversion into lumber.[474] If property being acquired has timber of such quality and quantity that it enhances the property's value, then the owner should be allowed to present evidence of the value of the enhancement.[475] Three commonly used scales for the valuation of logs are the Doyle Scale, the Scribner Scale, and the Herring-Devant Log Scale.[476]

J.2.c. Decorative Trees and Shrubs

As a general rule, "trees and shrubbery are not to be appraised independently of the land. It is only when they have some unique value that such items are valued in addition to the fair market value of the property…."[477] In a case in which an owner who was a landscape architect had planted shrubs not merely for decoration but as samples clients could see, the court allowed evidence of enhancement in value to the property because of the shrubs.[478]

In sum, for an owner to obtain enhancement in value because of trees, shrubs, or other vegetation, it appears that the owner will have to prove some unique circumstances or some special need for or use of the claimed enhancement to the subject property. Although state law may vary, even in a case of the wrongful cutting or misappropriation of trees the accepted method of valuation does not appear to be the replacement value of the trees.

[466] *Id.* at 405, 109 S.W.3d at 145.

[467] State v. Miltenberger, 344 So. 2d 705, 710 (La. App. 1st Cir. 1977) (citations omitted).

[468] Ventres v. Goodspeed Airport, LLC, 275 Conn. 105, 159, 881 A.2d 937, 971 (2005), *cert. denied,* 547 U.S. 1111, 126 S. Ct. 1913, 164 L. Ed. 2d 664 (2006) (citations omitted).

[469] 275 Conn. at 159, 881 A.2d at 972 (citations omitted).

[470] State v. Miltenberger, 344 So. 2d at 710 ("It is only when they have some unique value that such items are valued in addition to the fair market value of the property….") (citation omitted).

[471] Uniform Eminent Domain Code § 1010(a).

[472] 275 Conn. 105, 881 A.2d 937 (2005), *cert. denied,* 547 U.S. 1111, 126 S. Ct. 1913, 164 L. Ed. 2d 664 (2006).

[473] *Id.* at 160–61, 881 A.2d at 971–72.

[474] M & I Timber Co. v. Hope Silver-Lead Mines, 91 Idaho 638, 642–43, 428 P.2d 955, 959 (1967).

[475] Bishop v. Miss. Transp. Comm'n, 734 So. 2d 218, 222 (Miss. Ct. App. 1999).

[476] United States v. 2,175.86 Acres of Land, 687 F. Supp. 1079, 1085 (E.D. Tex 1988) ("The most generally accepted log scale utilized in the East Texas timber market upon which timber is bought and sold is the Doyle Scale. Scribner Scale is also common. The Herring-Devant Log Scale is unique to Kirby.").

[477] State *ex rel*. Dep't of Highways v. Miltenberger, 344 So. 2d at 710 (citation omitted); *see also* Ventres v. Goodspeed Airport, 275 Conn. at 160, 881 A.2d at 971–72 (noting that damages may be awarded for replacing cut trees but the full value may not exceed the former value of the property and may not enhance the value of the property over what it was before it was damaged).

[478] State v. Blair, 285 So. 2d 212, 213, 215 (La. 1973).

SECTION 7

TRIAL STRATEGY AND TECHNIQUES IN EMINENT DOMAIN CASES

Partial takings of improved properties tend to be the most formidable to present, simply because they are usually the most complicated and deal with the most esoteric appraisal concepts, which often defy intelligible explanation.[1]

[1] 7A NICHOLS ON EMINENT DOMAIN § G13.07[5], at G13-64 (Julius L. Sackman, 3d ed. 2006), hereinafter cited as "NICHOLS ON EMINENT DOMAIN."

A. INTRODUCTION

A condemnation trial differs from other civil trials in that there usually is only one issue: the amount of compensation the landowner is entitled to receive as a consequence of a taking. A condemnation trial also differs from other civil suits in other ways. For example, a number of states use a two-stage condemnation procedure that involves an initial hearing or trial before condemnation commissioners, viewers, or appraisers and thereafter on a party's request a trial *de novo* before a jury. Moreover, discovery normally commences not with the filing of a petition but with the filing of exceptions or an appeal to an award of the condemnation commissioners or viewers.

This section will discuss some discrete areas that are especially important in an eminent domain case.[2]

B. EXPERTS AND OTHER WITNESSES

B.1. Use of Expert Testimony

B.1.a. Qualifications of an Expert

Trial preparation is critical; thus, one must identify the issues, for example concerning drainage or access, presented by a particular case and locate witnesses and relevant exhibits needed for trial. However, the principal issue in most condemnation trials is proof of the value of the property taken.[3] Thus, no witness is likely to be more important than the attorney's expert witness on valuation. For example, in a case involving a partial taking, evidence will be required concerning damages, if any, to the remainder. The proof of such value ordinarily may be accomplished only through opinion testimony of persons who have the expertise, knowledge, and experience to render an opinion, i.e. experts.

An expert is "[a] person who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder."[4] "Any…witness with superior knowledge, information, or skill concerning the valuation of the property may be qualified as an expert and testify to his [or her] opinion of value."[5] An expert, however, "should be perceived as an independent and objective witness, not as an advocate for either side…."[6]

Not only must an expert witness be an expert in the valuation of property, but also the witness must be knowledgeable concerning the specific property at issue.[7] As stated in *Ramey v. D'Agostini,*[8] first, "[a]s a general rule, 'a real estate dealer or appraiser may testify as to the value of property…if he possesses sufficient experience and knowledge of values of other similar real estate in the particular locality.'"[9] Second, "[a] general knowledge of real estate values…is not sufficient proof of competency to permit one to testify as to all real estate valuations.'[10] That is, "[a] real estate appraiser must have knowledge or experience regarding the particular locality involved" and "must have knowledge of the particular matter affecting the property's value."[11] As the court explained in the *Ramey* case, "[e]ven if an expert has the requisite knowledge and experience, conclusory statements as to changes in the value of land without explanation are not admissible."[12]

An issue that may arise is whether persons such as real estate salesmen or condemnation commissioners or viewers have the requisite training and experience to qualify them as experts.[13] In general, persons who sell

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[2] As one practitioner recommends, one way to prepare for the trial of an eminent domain case is by consulting the pattern jury instructions for eminent domain cases in the attorney's jurisdiction, selecting the ones that appear to be at issue in the case, and proving the case in such a way that the evidence fits the instructions. Of course, before the jury is instructed, counsel will want to be prepared to justify any modifications that he or she feels are warranted and that enhance counsel's expert's determination of value.

[3] Mandee Broussard Baumer, *Eminent Domain: Should an Expert's Appraisal Report be Subject to Pretrial Discovery?,* 67 MISS. L. J. 801, 802 (1998), hereinafter cited as "Baumer" (noting that "what constitutes due compensation is often the sole issue in an eminent domain proceeding").

[4] BLACK'S LAW DICTIONARY (8th ed. 2004).

[5] State *ex rel.* Mo. Highway and Transp. Dep't v. Kuhlmann, 830 S.W.2d 569, 570 (Mo. App. E. Dist. 1992) (citation omitted).

[6] 7A NICHOLS ON EMINENT DOMAIN, § G13.05, at G13-27.

[7] *See* Lustine v. State Roads Comm'n, 221 Md. 322, 328–29, 157 A.2d 456, 459–60 (1960).

[8] 20 MASS. L. REP. 406, at *1 (Mass. Super. Ct. 2005).

[9] *Id.* (citation omitted).

[10] *Id.* at *1–2 (citation omitted).

[11] *Id.* at *2 (citation omitted). *See, e.g.*, Hot Spring County v. Prickett, 229 Ark. 941, 942, 319 S.W.2d 213, 214 (1959) (reversal in a case in which the owner had no experience in the real estate business and a real estate witness who testified he had made only one sale and had been in the area for 6 months); Twenty Club v. Nebraska*,* 167 Neb. 37, 41, 91 N.W.2d 64, 67 (1958) (holding that an appraiser was not "incompetent" to testify because "he was one of the appraisers in the original condemnation proceeding in the county court").

[12] 20 MASS. L. REP. 406, at *2 (citations omitted).

[13] *Id.* at *2 (*citing* Sprint Spectrum L.P. v. Bd. of Zoning Appeals of the Town of Brookhaven, 244 F. Supp. 2d 108, 116 (E.D.N.Y. 2003) (excluding real estate appraiser's opinion that construction of monopole would decrease the value of homes by 10 to 15 percent because the appraiser provided no support for her opinion) (*citing* Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490, 496 (2d Cir. 1999); Iowa Wireless Servs. L.P. v. City of Moline, Ill., 29 F. Supp. 2d 915, 922 (C.D. Ill. 1998))). *See also* Maritimes & Ne. Pipeline, L.L.C. v. 0.714 Acres of Land, 2007 U.S. Dist. LEXIS 62930, *27–28 (D. Mass. 2007) (stating that the only credible evidence was provided by a real

real estate or appraise real estate may be qualified to be an expert. For example, in 2007, a Nevada court found that a real estate appraiser "used properties that were comparable…and…adequately explained his reasons for considering each property as comparable based on the degree of comparability, physically, economically, and functionally."[14] Although an owner may testify, as discussed below, regarding the value of his or her property, only a witness qualified as an expert may express an opinion regarding the value of the subject property.[15]

Of course, a condemnor or owner may challenge the other's expert. For example, in one case, bias was alleged because two appraisers testifying for the county had previously done a substantial amount of work for the county.[16] Nevertheless, the court held that the admission of their testimony was proper.[17] In another case, even though it was a state employee who testified regarding the value of the subject property, the court held that the verdict was supported by credible and competent evidence.[18]

Although the majority view is that if a witness is not an owner or is not qualified as an expert in appraising the value of real estate, the witness will not be permitted to testify,[19] there may be an exception in some states. For example, in Arizona, there is authority indicating that a witness need not be qualified as a technical expert to give opinion testimony.[20] Thus, in a few jurisdictions, opinion evidence can be given by persons who are not experts but who reside or conduct business in the vicinity of the property, may have sufficient familiarity with land values in the area, and be "more able to form an opinion on the subject at issue than citizens generally."[21] There is some authority that as long as they are not identified as commissioners, commissioners may be allowed to testify regarding the value of the subject property.[22]

Jurors are the judge of a witness's credibility and determine the weight to be given to an expert's testimony.[23] Thus, "[w]hether the witness has the necessary knowledge about his [or her] property to enable him to express an opinion about its market value is a preliminary question of fact for the judge."[24] Furthermore, "[o]n appeal, questions regarding the admissibility, qualifications, relevancy and competency of expert testimony are generally left to the discretion of the trial court" and a "trial court's ruling in this regard may only be overturned if the discretion is arbitrarily exercised or abused."[25]

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estate appraiser and rejecting an engineer's plan showing a hypothetical development of the subject property).

[14] *Maritimes & Ne. Pipeline, L.L.C.,* 2007 U.S. Dist. LEXIS 62930, at *14.

[15] Boylan v. Bd. of County Comm'rs of Cass County, 105 N.W.2d 329, 331 (N.D. 1960) (upholding the trial court's decision to admit expert testimony where the proponent of the witness laid the "foundation…that the witness had passed the examination given to candidates for a degree in engineering, that he was a member of the North Dakota Society of Professional Engineers and that in his employment he had computed the cost of similar roads"); Lustine v. State Roads Comm'n, 221 Md. 332, at 328, 157 A.2d at 459 (holding that an objection was properly sustained to the testimony of an expert appraiser on valuation who had not been qualified as an expert on sand and gravel deposits and who had "made no borings, etc., to determine the amount of the sand or gravel"); Shelby County v. Baker, 269 Ala. 111, 124, 110 So. 2d 896, 908 (1959) ("The general rule applicable here is that the test of qualification has been prima facie met when it is proved that the witness testifies he knows the property and the market value of the same."); Turner v. State Roads Comm'n, 213 Md. 428, 432–33, 132 A.2d 455, 457 (1957) (agreeing that "[t]he question of whether a witness is qualified to give an opinion must be left in a large measure to the sound discretion of the trial court" but that "[i]f the witness has some qualifications, he should be permitted to testify") (citation omitted) (internal quotation marks omitted); State Roads Comm'n v. Novasel, 203 Md. 619, 626, 102 A.2d 563, 566 (1954) (holding that it was proper for a real estate expert "discussing the comparability of sales of land in the immediate neighborhood…to give an opinion as to the cost of excavating earth and how much should be allowed for excavation necessary to make the land remaining after taking available for use").

[16] Smuda v. Milwaukee County, 3 Wis. 2d 473, 475–76, 89 N.W.2d 186, 187 (1958).

[17] *Id.* at 476, 89 N.W.2d at 187.

[18] Buch v. State Highway Comm'n, 15 Wis. 2d 140, 142, 112 N.W.2d 129, 130–31 (1961).

[19] Farrell v. Farell, 69 Va. Cir. 243, 244 (Va. Cir. Ct. 2005).

[20] Parker v. State*,* 89 Ariz. 124, at 127–28, 359 P.2d 63, at 65–66 (court holding that the landowners' witness was not qualified to testify because he "did not reside or do business" in the area or "deal in the buying or selling of property"); State v. McDonald, 88 Ariz. 1, 12, 352 P.2d 343, 350 (1960) (upholding the admission of the evidence because "[o]pinion evidence is also usually admitted from persons who are not strictly experts, but who from residing and doing business in the vicinity have familiarized themselves with land values") (citation omitted) (internal quotation marks omitted).

[21] *Parker*, 89 Ariz. at 128, 359 P.2d at 65 (citation omitted).

[22] Missouri v. Max Pracht, 801 S.W.2d 90, 95 (Mo. App. E. Dist. 1990) ("Although a commissioner is competent to testify, the fact that he was a commissioner may not be made known to the trier of fact as such identification interferes with a party's right to a trial de novo in the circuit court.)" (citation omitted). *Compare with* Baumer, *supra* note 3, at 802–03 (stating that the "Mississippi Rules of Evidence prohibit…court-appointed appraisers from testifying at the eminent domain trial and further prohibit the appraiser's report from being admitted into evidence") (*citing* MISS. R. EVID. 601(c) and 706, and Hudspeth v. State Highway Comm'n, 534 So. 2d 210, 213 (Miss. 1988)).

[23] E. Tenn. Natural Gas Co. v. 7.72 Acres, 228 F. Appx. 323, at *12–13 (4th Cir. 2007) (Unrept.); Buch v. State Highway Comm'n, 15 Wis. 2d 140, 142, 112 N.W. 2d 130 (1961) ("Of course, the jury is the judge of the credibility of a witness and the weight to be given his testimony.").

[24] Southwick v. Mass. Turnpike Auth., 339 Mass. 666, 669, 162 N.E.2d 271, 273–74 (1959).

[25] Boles v. Nat'l Dev. Co., Inc*.,* 175 S.W.3d 226, 235 (Tenn. App. 2005) (citations omitted), *appeal denied*, 2005 Tenn. LEXIS 896 (Tenn. 2005).

B.1.b. Admission of Expert Opinion Based on Hearsay

In some jurisdictions, there may be an issue whether an expert may rely on hearsay or other evidence that ordinarily would be inadmissible or whether the reliance on hearsay information will preclude or result in the disallowance of an expert's testimony.[26] The admission of expert testimony in federal courts is controlled by the Federal Rules of Evidence; in a state court, the state's statutes and court's rules will apply to the admission of evidence in condemnation cases.

Under Rule 703 of the Federal Rules of Evidence, the issue of experts and their reliance on hearsay is handled in the following manner:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. *If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.* Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.[27]

According to the notes to the 2000 amendment to Rule 703, the rule was "amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted" into evidence.[28] As the notes observe, previously federal courts had "reached different results on how to treat inadmissible information when it is reasonably relied upon by an expert in forming an opinion or drawing an inference."[29]

As argued in an article preceding the 2000 amendment, when

> an expert forms an opinion based on underlying facts or data which have not been admitted into evidence, Rule 703 permits the expert to disclose and the court to admit those facts or data but only for the limited purpose of supporting, and thereby making more persuasive, the expert's opinion. Courts should allow disclosure of this information only if it meets the requirements of Rule 703, and satisfies, of course, Rule 403. Permitting such disclosure fosters truth-telling in the courtroom by allowing an expert to describe fully the reasons that support the proffered testimony or opinion.[30]

In addition, the foregoing article argues that if

> an expert has relied on facts or data not admitted into evidence, Rule 703 bars the opinion as well as the information on which it is based unless the court determines affirmatively that reliance on the facts or data was reasonable. Where the facts or data underlying the opinion are otherwise inadmissible, this inquiry is particularly crucial. Courts should not equate assessments of reasonable reliance with determinations of the reliability of the information. That is, customary reliance by experts in the field is not dispositive of reasonable reliance.[31]

Of course, in regard to state practice, counsel should be familiar with the rule in his or her jurisdiction. However, in federal court, under Rule 703, if an expert relies on hearsay or other inadmissible information, the court is to apply a balancing test in deciding whether to allow the evidence, and, if the evidence is admitted, the court is to give an appropriate limiting instruction.

> When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert's opinion, a trial court applying this Rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes on the other. The information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect. *If the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes*. See Rule 105. In determining the appropriate course, the trial court should consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances.[32]

As the notes further state, "[t]his amendment covers facts or data that cannot be admitted for any purpose

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[26] State *ex rel.* Mo. Highway and Transp. Comm'n v. Pracht, 801 S.W.2d at 94 ("It is to be expected that an owner's opinion, like that of an expert, will be based to some degree on hearsay.") (citation omitted).

[27] FED. R. EVID. 703, as amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 17, 2000, eff. Dec. 1, 2000, available at http://www.law.cornell.edu/rules/fre/rules.htm#Rule703 (emphasis supplied).

[28] *Id*.

[29] *Id*. (*citing, e.g.,* United States v. 0.59 Acres of Land, 109 F.3d 1493, 1496 (9th Cir. 1997) (error to admit hearsay offered as the basis of an expert opinion, without a limiting instruction). The note to Federal Rules of Evidence Rule 703 observes that "[c]ommentators have also taken differing views." *Id*. (*citing*, *e.g*., Ronald Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577 (1986) (advocating limits on the jury's consideration of otherwise inadmissible evidence used as the basis for an expert opinion); Paul Rice, *Inadmissible Evidence as a Basis for Expert Testimony: A Response to Professor Carlson*, 40 VAND. L. REV. 583 (1987) (advocating unrestricted use of information reasonably relied upon by an expert)).

[30] JoAnne A. Epps, *Clarifying the Meaning of Federal Rules of Evidence 703*, 36 B.C. L. REV. 53, 60 (1994) (footnotes omitted).

[31] *Id*., *supra* note 30, at 61 (emphasis supplied).

[32] Note, FED. R. EVID. 703. Note available at http://www.law.cornell.edu/rules/fre/ACRule703.htm (emphasis supplied).

other than to assist the jury to evaluate the expert's opinion" and "provides a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert."[33]

B.1.c. Effect of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970

It should be noted that URA has appraisal standards applicable to federal acquisitions[34] and federal or federally-assisted programs or projects.[35] As long as federal funds are used for a program or project, even if no federal funds are used in the acquisition of the subject real property, the Act's appraisal and acquisition requirements, including standards on qualifications of appraisers, are applicable. For an appraiser to be qualified under URA and its regulations, an agency must make a determination of the appraiser's competency or the state's certification or licensure of an appraiser may suffice to qualify the appraiser. An agency may set its own independent criteria for qualification.[36] However, if a contract appraiser is used, then he or she must be licensed or certified by the state.[37] The URA and its regulations allow for additional qualification criteria by an agency when it has been deemed necessary to effectuate the agency's statutory responsibilities.[38]

B.2. Selection of an Appraiser

One of the most critical, if not the most critical, steps in preparing for an eminent domain trial is the choice of an appraisal witness.[39] "If all possible, trial counsel should participate in the selection of the valuation expert."[40] Because there exists a bewildering array of credentials and designations, it is important for a trial attorney to choose an appraiser carefully and assure that the appraiser has the expertise and experience to express and defend his or her opinion as to the value of the property in question when cross examined.[41] Matters to consider when choosing and later preparing an appraiser for a deposition or trial include the following:

1. Verify that the appraiser sees the property prior to any alteration or removal. The best practice is for the attorney and appraiser to visit the property jointly on the date of valuation, making photographs and possibly a video of the property as close to the trial date as possible.
2. Verify an appraiser's work product because even the best appraisers may make mathematical errors, apply the law incorrectly, include noncompensable items, use an inappropriate method, or simply get the facts wrong.[42]
3. Verify an appraiser's comparable sales because an appraiser may rely too much on multiple listings or on a "spawn sheet"[43] and not cross-check the data.
4. Verify that an appraiser stays within his or her qualifications because an appraiser may be certified only for one type of property, such as residential. Some appraisers may hold themselves out as being capable of appraising property that presents special uses or problems, such as property on or under which there is hazardous waste or property on which there is equipment that is unique to a business. If there are mineral deposits in place or lumber, plant nurseries, cattle operations, or gas stations on the property or if the property is a special-use property, it may be necessary to include another appraiser with expertise in the relevant area.
5. Verify that an appraiser will be able to defend his or her opinion as it is not uncommon for an appraiser to be technically proficient but be unable to express or explain an opinion clearly or defend it under cross-examination.
6. Verify that an appraiser did his or her own work and that an appraiser properly acknowledges what portions of the fieldwork were performed by others and what steps he or she took to verify any information on which the appraiser relied.

For a suggested format for an appraiser's data and verification sheets, counsel may be interested in the one provided in *Nichols on Eminent Domain*.[44] Counsel should meet with the appraiser before a draft appraisal report is prepared to review, for example, "the comparable sales [and] any special studies and conclusions," as well as meet with the appraiser after the report is prepared to make "certain the conclusions of value are

[33] *Id*.

[34] *See* 42 U.S.C.A. §§ 4601, *et seq*., 4651 and 4652 (2007). *See* 49 C.F.R. § 24 (2007).

[35] 49 C.F.R. § 24.101(a)-(b) (2007).

[36] *Id*. § 24.103(d) (2007).

[37] *Id*. (*citing* Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. § 3331, *et seq*.). *See* 12 U.S.C. § 3345(a)-(b) (2007) (defining "state certified real estate appraiser" to "mean[ ] any individual who has satisfied the requirements for State certification in a State or territory whose criteria for certification as a real estate appraiser currently meets the minimum criteria for certification issued by the Appraiser Qualification Board of the Appraisal Foundation," including "a passing grade upon a suitable examination administered by a State or territory that is consistent with and equivalent to the Uniform State Certification Examination issued or endorsed by the Appraiser Qualification Board of the Appraisal Foundation").

[38] 12 U.S.C. § 3345(d) (2007).

[39] *See* "Choosing an Expert Appraisal Witness," available at www.propertyvalu.com/chuzxwit.htm.

[40] 7A NICHOLS ON EMINENT DOMAIN § G13.03, at G13-11. For suggestions on matters to consider in the selection of the valuation expert, *see id*. § G13.03.

[41] *See* Smith, *100 Questions Which Will Worry Weak Witnesses*, THE REAL ESTATE APPRAISER 15–16 (Feb. 1967).

[42] *See* discussion in J.D. EATON, REAL ESTATE VALUATION IN LITIGATION 205 (1995), hereinafter cited as "EATON."

[43] Brennan v. Molina, 934 S.W.2d 631, 634 (Mo. App. E. Dist. 1996) (referring to agent's use of a spawn sheet).

[44] 7A NICHOLS ON EMINENT DOMAIN, § G13.04, at G13-13–-18.

in fact credible."[45] Counsel has to exercise caution so as not to be making "significant" revisions in the report that would be revealed later at a deposition or trial.[46]

There are several professional organizations that certify appraisers; for example, the Appraisal Institute[47] issues two designations, Member Appraisal Institute and Senior Residential Appraiser.[48] Another certifying organization is the American Society of Appraisers,[49] which provides designations in a number of areas. Although designations may not guarantee that a witness is qualified to render an opinion for a particular property, the designations are important in establishing a witness's qualifications and credibility based on training and knowledge.

As discussed below, other specialists may be needed as "foundational expert witnesses" at the trial such as "a surveyor, a project engineer, a land planner, a traffic engineer, a real estate market analyst, an architect, a construction contractor/builder, a hydrologist, a mining engineer, and/or a developer."[50]

B.3. Experts Other Than Appraisers

B.3.a. Engineering Experts

The construction of a new road may have many impacts on remaining property, including congestion or traffic control and impairment of access or visibility. When any one of these issues is present, a traffic engineer may be invaluable in explaining the project's impact to the witness on valuation and later to the jury.[51] A traffic engineer may explain the extent to which a property will be visible from the highway after construction of a public improvement, again a matter of particular importance for commercial property, or how traffic will be controlled from the standpoint of congestion or other safety concerns, matters that may affect a remainder's value after construction of a proposed project. For example, a Florida court ruled that the trial court improperly excluded the testimony of the property owners' engineers regarding "the suitability of residential development of [the property], the permitting process, and whether the County was responsible for any condemnation blight," stating that the lower court's ruling impermissibly "undermined the foundation for the property owners' appraisal experts and led to the exclusion of their testimony."[52]

An engineer may testify on how traffic will be able to enter and leave a remaining tract or otherwise be managed after a taking, an important issue for office buildings and other commercial establishments, as well as other properties. It must be emphasized that another expert may be needed as foundation in the record to support the expert testimony on the value of the property. In a 2005 case from the State of Washington, the court held that the facts in the record did not support the conclusions of the owner's expert, a professional traffic engineer, that there had been an impairment of access to the owner's property causing trucks to be "unable to negotiate the grade safely."[53]

Other experts one may consider using include an expert on access management, who, although similar to a traffic engineer, specializes in the effect of construction on ingress-egress and internal traffic control. A design engineer may testify how highway drainage will be handled to avoid flooding that could affect the remaining property.[54] In cases involving runoff of surface water causing possible erosion or flooding, a hydrology expert may be needed to explain the proposed construction and its effect on the utility of the remaining property.

B.3.b. Land-Use Experts

B.3.B.1. Importance of Land-Use Regulations.—Land-use experts, those who have training in the comprehensive planning of developments and public projects and in city planning, may be pivotal in establishing the highest and best use of a property. As the Georgia Supreme Court has observed, "[l]and value depends upon land use and in a zoning contest the more intense use sought by the landowner invariably would increase the value of the land in question."[55] As discussed in the next subsection, a land-use expert may be

[45] *Id.* at G13-21.

[46] *Id*.

[47] *See* the Appraisal Institute's Web site for more information, available at http://www.appraisalinstitute.org/.

[48] City of Lincoln v. MJM, Inc., 270 Neb. 587, 591, 705 N.W.2d 432, 437 (2005) (noting that testifying expert was a member of Appraisal Institute); State of Texas v. Bristol Hotel Asset Co., 2007 Tex. App. LEXIS 5565, at *9 (July 18, 2007) (noting that testifying expert was a member of the Appraisal Institute), *rehearing denied*, 2007 Tex. App. LEXIS 10038 (Tex. App. 2007), *petition for review filed* (Dec. 2007).

[49] *See* the American Society of Appraisers' Web site for more information, available at http://www.appraisers.org/.

[50] 7A NICHOLS ON EMINENT DOMAIN, § G13.04, at G13-20.

[51] MooreFORCE, Inc. v. United States, 243 F. Supp. 2d 425, 439 (M.D. N.C. 2003) (court noting that the North Carolina DOT's expert, a transportation engineer supervisor, argued that the opposing expert's "analysis was improper because a reliance solely on annual average daily traffic numbers does not consider actual data collection").

[52] Savage v. Palm Beach County, 912 So. 2d 48, 52 (Fla. Dist. Ct. App. 2005).

[53] Monk v. City of Auburn**,** 2005 Wash. App. LEXIS 1958, at *21 (Wash. Ct. App. 2005) (Unrept.), *affirmed in part, reversed in part, and remanded,* 128 Wash. App. 1066 (Wash. Ct. App. 2005), *review denied by, motion to strike denied by, motion to strike granted,* 157 Wash. 2d 1023, 142 P.3d 608 (2006).

[54] *See* City of McKinney, Tex. v. Eldorado Park, LTD., 206 S.W.3d 185, 188, 190 (Tex. Ct. App. 11th Dist. 2006) (involving an expert appraiser who relied on a drainage study written by engineers*), petition for review denied*, Eldorado Park, Ltd. v. City of McKinney, 2008 Tex. LEXIS 466 (Tex. 2008).

[55] Town of Tyrone v. Tryone, LLC, 275 Ga. 383, 385, 386, 565 S.E.2d 806, 809 (2002) (noting that the Town's city planning consultant concluded in a report to the town council that the "current agricultural zoning of the property does not support establishment of economic uses, whether these are very low density residential uses or agricultural uses").

important in establishing the required zoning for a development or in proving a reasonable likelihood of a rezoning relevant to a particular property.

Because an appraiser's estimate of highest and best use must be a use of the property that is legal, land-use regulations are of utmost importance in determining a property's highest and best use and in appraising its value. Market value is not inherent in tangible real property; rather, market value results from the utility of the real estate. In a sense, market value is a measurement of a property's utility. Market value is based also on scarcity, demand, and purchasing power, factors that are influenced by zoning and other land-use regulations. Consequently, it is imperative that an appraiser be thoroughly familiar with the applicable land-use regulations and their impact on the utility and therefore the value of the property. Land-use regulations include building codes, such as structural codes, fire codes, electrical codes, plumbing codes, and health codes; comprehensive plans, zoning ordinances, and off-street parking ordinances; regulations or ordinances on environmental impact statements, management of shorelines or flood plains, and platting and shortplats;[56] and regulations concerning rent control, timber-harvesting, and air, water, and noise pollution.

Because these issues are basic to a determination of the value of property, a condemning authority should have a land-use expert as a witness so that an appraiser may rely on the land-use expert's opinions in appraising the property and later in testifying as to its value.

B.3.b.2. Importance of Zoning.—As stated, zoning and planning significantly affect the value of property. Because the zoning classification is an essential component of a property's value, a property's zoning is admissible into evidence.[57] City planners and zoning officials are particularly knowledgeable about both issues, and in the proper case should be called on to testify regarding, for example, the highest and best use of a property and whether there is a reasonable likelihood of the property's rezoning.

As pointed out in a Kansas case, a "jury would not necessarily be required to determine the actual zoning classification at the time of the taking but could take into consideration the impact of this question—and its certainty, probability, or improbability—in determining what a well-informed buyer is justified in paying and a well-informed seller is justified in accepting for property in an open market."[58] As stated in *City of San Diego v. Rancho Penasquitos Partnership,*[59]

> "[a] determination of the property's highest and best use is not necessarily limited to the current zoning or land use restrictions imposed on the property; the property owner 'is entitled to show a reasonable probability of a zoning [or other change] in the near future and thus to establish such use as the highest and best use of the property.' [Citations omitted] The property owner has the burden of showing a reasonable probability of a change in the restrictions on the property."[60]

If the zoning of property is in dispute, a jury may hear expert testimony "on the zoning classification of the property at the time of the taking."[61]

Zoning involves numerous regulatory requirements, for example, relating to setback, minimum lot size, minimum building size, parking ratios, maximum building heights, and permitted and prohibited uses. Each of these requirements should be reviewed to determine the applicability of each requirement to the subject property. Therefore, in a condemnation case both counsel and his or her expert, first, should ascertain the applicable zoning on the subject property from the current zoning map; second, reconfirm the determination with the zoning authority's staff; and, third, recheck the status of the zoning prior to trial due because of the possibility that the property owner later may have requested a change in zoning. The highest and best use of a tract of land is an important issue in any condemnation case. In determining highest and best use, an appraiser must look at the uses physically possible, legally permissible, financially feasible, and maximally profitable.

The possibility that the property could be rezoned to permit a higher and better use must be considered. In a 2005 case, the Supreme Court of Michigan held that the "defendants were properly permitted to present evidence that they had met with city officials regarding their plans for the area, and that these officials had expressed a willingness to make the required zoning changes."[62]

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[56] *See* McDonald v. Davis, 2002 Wash. App. LEXIS 730, at *2 (Wash. Ct. App. 2002) (Unrept.) (involving short-plat development).

[57] People *ex rel.* Dep't of Pub. Works v. Investors Diversified Servs., Inc., 262 Cal. App. 2d 367, 372, 68 Cal. Rptr. 663, 666 (Cal. App. 2d Dist. 1968) (holding that "it is necessary to consider the existence of any zoning law which depresses value by limiting the use to which the property may be put" but that "if there is a reasonable probability that in the near future the zoning will change, then the effect of that probability upon the minds of purchasers generally may be taken into consideration") (citation omitted).

[58] Bd. of County Comm'rs v. Smith, 280 Kan. 588, 599, 123 P.3d 1271, 1278 (2005).

[59] 105 Cal. App. 4th 1013, 130 Cal. Rptr. 2d 108 (Cal. App. 4th Dist. 2003).

[60] *Id.* at 1028, 130 Cal. Rptr. 2d at 119 (*quoting* County of San Diego v. Rancho Vista Del Mar, 16 Cal. App. 4th 1046, 20 Cal. Rptr. 2d 675 (Cal. App. 4th Dist. 1993)). *See also* Hous. Auth. of Macon v. Younis, 279 Ga. App. 599, 601, 631 S.E.2d 802, 805 (Ga. Ct. App. 2006) (stating that "'[t]estimony about the highest and best use of property…is not admissible when it involves a use precluded by applicable zoning regulations…[unless] the condemnee [can] show that a change in zoning to allow the usage is probable….'") (citation omitted).

[61] Bd. of County Comm'rs v. Smith, 280 Kan. at 599, 123 P.3d at 1278.

[62] Mich. Dep't of Transp. v. Haggerty Corridor Partners Ltd. P'ship, 473 Mich. 124, 139, 700 N.W.2d 380, 388 (2005).

> The possibility of a zoning modification must, indeed, be a "reasonable" one in order, as a matter of logic, for it to have any bearing on fair market value. However, this is only part of the equation. The "reasonable possibility" of a zoning change bears on the calculation of fair market value *only* to the extent that it *could* have affected the price that a theoretical willing buyer would have offered for the property immediately prior to the taking. Thus, the "fact that is of consequence" is the reasonable possibility of a zoning modification, *as that possibility might have been perceived by a market participant on condemnation day*.[63]

In contrast, in a Missouri case an appellate court found that the testimony of the appraisers was erroneous and prejudicial because they "were permitted to express their opinion of the value of an acre of the farm designated for multi-family or commercial use upon the basis of their opinion that there was a 'reasonable probability' the farm would be rezoned," but "they did not discount the value of a comparable sale of real estate zoned for commercial use or zoned for multi-family use."[64]

In *State ex rel. Mo. Highway and Transportation Commission v. Modern Tractor and Supply Co.*,[65] the court explained it this way:

> [W]hen determining just compensation for condemned property, it is proper to take into account rezoning which was reasonably probable just before or after the taking and which affected the fair market value of the property at either of those times. …The property '*must be evaluated under the restrictions of the existing zoning* and consideration given to the impact upon market value of the likelihood of a change in zoning.' …This may be done either by determining the subject property's value as rezoned, minus a discount factor to allow for the uncertainty that rezoning would actually take place, or by determining the property's value with its existing zoning, plus an incremental factor because of the probability of rezoning.[66]

Even in cases when there exists a substantial probability of rezoning, it is improper for any witness to value the property "as if rezoning was an accomplished fact."[67] Thus, if a "claimant proves a reasonable probability of such a rezoning or declaration of invalidity, the value of the property as zoned or restricted on the day of taking will be augmented by an increment, representing the premium a knowledgeable buyer would be willing to pay for a potential change to a more valuable use…."[68] This rule of reasonable probability "has its genesis in the rule against collateral attack of land use restrictions in condemnation proceedings."[69] That is, "[t]he validity or constitutionality of a zoning ordinance cannot be collaterally attacked in a condemnation proceeding in which the authority enacting the zoning ordinance is not a party to that proceeding."[70]

Whenever the possibility of rezoning is discussed, the probability of any such rezoning actually happening must also be proved. The probability is based at least on there being evidence of the rezoning of nearby property, on the growth pattern of the neighborhood or area, on any changes in the pattern of use, of the character of the neighborhood, of the existing or future demand for certain uses, of the physical characteristics of the land, of the age of the existing zoning, and on the likelihood of that the zoning authority will allow changes in the zoning.[71] In brief, "[t]he trier of fact may consider the effect of future rezoning or variances on the highest and best use of the condemned property when determining its value."[72]

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[63] *Id.* at 138–39, 700 N.W.2d at 388 (footnotes omitted) (emphasis in original).

[64] State *ex rel.* Mo. Highway and Transp. Comm'n v. Modern Tractor and Supply Co., 839 S.W.2d 642, 651 (Mo. App. S. Dist. 1992) (noting that the limitations vary from state to state regarding the admissibility of testimony concerning rezoning) (*citing* Annotation, *Eminent Domain—Damages—Zoning*, 9 A.L.R. 3d at 309–23).

[65] 839 S.W.2d 642 (Mo. App. S. Dist. 1992).

[66] *Id.* at 650–51 (citations omitted). *See also* State *ex rel.* Mo. Highway and Transp. Comm'n v. Sturmfels Farm Ltd. P'ship, 795 S.W.2d 581, 858 (Mo. App. E. Dist. 1990).

[67] City of Springfield v. Love, 721 S.W.2d 208, 216 (Mo. App. S. Dist. 1986) (citations omitted).

[68] Chase Manhattan Bank, N. A. v. State, 103 A.D. 2d 211, 217, 479 N.Y.S.2d 983, 988 (N.Y. App. 2d Dep't 1984) (citation omitted).

[69] *Id.* at 217–18, 479 N.Y.S.2d at 988 (noting also that "[o]ther courts have held that even if the zoning authority is a party to the condemnation proceeding, the only proper method for challenging a zoning ordinance is by direct attack, such as a declaratory judgment action") (citations omitted).

[70] State *ex rel.* State Highway Comm'n v. Graeler, 527 S.W.2d 421, 425 (Mo. App. St. Louis Dist. 1975) (*citing* Hull v. Detroit Equip. Installation, Inc., 12 Mich. App. 532, 163 N.W.2d 271, 272 (Mich. Ct. App. 1968)).

[71] City of Las Vegas v. Bustos, 119 Nev. 360, 75 P.3d 351 (2003).

[72] *Id.* at 362, 75 P.3d at 352 (footnote omitted). *See also* Broward County v. Patel, 641 So. 2d 40, 42 (Fla. 1994) (stating that the condemnee must demonstrate a reasonable probability that rezoning or a variance would be granted in the near future for it to be considered in the valuation of the condemned property). In W. Jefferson Levee Dist. v. Coast Quality Constr. Corp., 640 So. 2d 1258, 1274 (La. 1994) (footnote omitted), the court stated:

> Another major factor…affecting the probability land could be put to a certain use in the not-too-distant future, is the requirement of a permit for or the impact of a zoning ordinance on the development of the property into its asserted highest and best use. Where there is no reasonable probability a permit for the necessary development could be obtained or that a change to a zoning classification allowing such development could occur in the reasonably foreseeable future, the asserted higher use may not be considered as the highest and best use of the property for purposes of market valuation because such use would be illegal.

See also State by Com'r of Transp. v. Caoili, 135 N.J. 252, 264, 639 A.2d 275, 281 (1994) (holding that evidence of zoning changes that a reasonable buyer and seller would take into consideration in an arm's length transaction was admissible after the trial court had determined that there was sufficient

Evidence of a highest and best use of the property that is precluded by current zoning is inadmissible unless the condemnee "show[s] that a change in zoning to allow the usage is probable, not remote or speculative, and is so sufficiently likely as to have an appreciable influence on the present market value of the property."[73] However, "'changes in land use, to the extent that they were influenced by the proposed improvement, [are] properly excluded from consideration in evaluating the property taken.'"[74] Thus, it has been held that

> "any testimony of reasonable probability of zone change may not take into account the proposed [project] or any influence arising therefrom. …The probability of rezoning or even an actual change in zoning which results from the fact that the project which is the basis for the taking was impending cannot be taken into account in valuing the property in a condemnation proceeding."[75]

There are other limitations in regard to the use of the admission of evidence of a property's zoning. For example, in *City of San Diego v. Rancho Penasquitos Partnership*, *supra*, the court held that it was proper for the trial court to grant the motion *in limine* of Rancho Penasquitos Partnership (RPP) to exclude from evidence the city's zoning regulations that prohibited a rezoning of RPP's property from agricultural use absent approval of a highway project known as SR-56. The court held that "where the condemning agency and zoning authority are the same, zoning restrictions on property to be condemned that are enacted to freeze or depress land values of property to be condemned should not be considered in the valuation of that property."[76]

B.4. Testimony by Owners

It is generally acknowledged that an owner is permitted to express an opinion regarding the value of the owner's property being taken or damaged as a result of a taking.[77] As stated in *Arkansas Oklahoma Gas Corp. v. Boggs*,[78]

> [a] landowner is generally held to be qualified to express his [or her] opinion about the value of his property. ...A landowner is entitled to show every advantage that his property possesses, present and prospective, to have his witnesses state any and every fact concerning the property that he would naturally adduce in order to place it in an advantageous light if he were selling to a private individual, and to show the availability of this property for any and all purposes for which it is plainly adopted or for which it is likely to have value and induce purchases. …The latitude allowed the parties in bringing out collateral and cumulative facts to support value estimates made by witnesses is left largely to the discretion of the trial judge.[79]

However, the right of an owner to testify as to the value of property may be limited to the owner of the fee interest in the property.[80]

B.5. Exclusion of Evidence: Motions *in Limine*

There may be inadmissible evidence that counsel knows or has reason to believe the opposing side will attempt to offer at trial. Counsel may want to use a motion *in limine* and have a determination by the court prior to trial that the anticipated evidence is inadmissible. As a Georgia court has stated, "[a] motion in limine should be granted when "there is no circumstance under which the evidence under scrutiny is likely to be admissible at trial."[81] Furthermore, "[a]lthough a trial court has broad discretion to determine the admissibility of evidence, irrelevant evidence that does not bear

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evidence that a zoning change was probable); Greene v. Burns, 221 Conn. 736, 745, 607 A.2d 402, 407 (1992) (stating that a reasonably probable change in zoning is a proper element to be considered in determining the value of condemned property).

[73] Unified Gov't of Athens-Clarke v. Watson, 276 Ga. 276, 277, 577 S.E.2d 769, 770 (2003).

[74] Rancho Penasquitos P'ship, 105 Cal. App. 4th at 1029, 130 Cal. Rptr. 2d at 120 (*quoting* People *ex rel.* Dep't Pub. Works v. Arthofer, 245 Cal. App. 2d 454, 465, 54 Cal. Rptr. 878, 885 (Cal. App. 4th Dist. 1966)).

[75] *Id.* at 1028–29, 130 Cal. Rptr. 2d at 119–20 (citation omitted).

[76] *Id.* at 1034, 130 Cal. Rptr. 2d at 124.

[77] State *ex rel*. Smith v. 0.15 Acres of Land, 53 Del. 58, 62, 164 A.2d 591, 593 (1960) (citation omitted) ("The doctrine that an owner of a chattel is qualified by reason of that relationship alone to give his estimate as to its value is supported by the great weight of authority."); Shelby County v. Baker, 269 Ala. 111, at 124, 110 So. 2d at 908 (citation omitted) ("An owner of land, by virtue of his ownership, may testify as to its value."); Ark. State Highway Comm'n v. Muswick Cigar and Beverage Co., 231 Ark. 265, 270, 329 S.W.2d 173, 176 (1959) (holding that the owner's "personal interest was something which went only to the weight his testimony should have with the jury"); People v. Frahm, 114 Cal. App. 2d 61, 63, 249 P.2d 588, 589 (1952) (holding that a sublessee operating a drive-in restaurant and a public accountant keeping the books of such business were sufficiently qualified as experts on the market value of leasehold interests to testify in an eminent domain proceeding that the sublease had a market value of 20 percent of the gross receipts whereas the sublessee was paying 10 percent as rental).

[78] 86 Ark. App. 66, 159 S.W.3d 808 (2004). *See also Southwick*, 339 Mass. at 668–70, 162 N.E.2d at 273–74 (stating that "[a]n owner of real estate or personal property having adequate knowledge of his property may express an opinion as to its value").

[79] *Id.* at 74, 159 S.W.3d at 813 (citations omitted).

[80] *See, e.g.,* State *ex rel.* Mo. Highway & Transp. Comm'n v. Kuhlmann, 830 S.W.2d at 570 (citation omitted) ("The presumption extends only to the fee owner and if he demonstrates at trial an absence of knowledge of the property or that his opinion is based on an improper standard then the presumption is rebutted and the testimony may be disallowed or stricken.")

[81] Hous. Auth. of Macon v. Younis, 279 Ga. App. 599, 631 S.E.2d 802, 803 (Ga. Ct. App. 2006) (*citing* Andrews v. Wilbanks, 265 Ga. 555, 556 (458 S.E.2d 817) (1995)).

directly or indirectly on the questions being tried should be excluded."[82]

In *Rancho Penasquitos Partnership,* discussed *supra* in connection with zoning, the court affirmed the trial court's granting of a motion *in limine* "excluding from evidence the City's zoning regulations that prohibited a rezoning of RPP's property" because the condemned property had to "be valued at its 'before' condition" so as to exclude "the fact and impact of the SR-56 project."[83] The city "could not base its valuation upon land use regulations that prohibited development pending the SR-56 project, whose very purpose was to minimize the City's acquisition costs."[84] Furthermore, the appellate court also rejected the city's argument and agreed that the trial court properly ruled that RPP's experts could testify regarding the rezoning and sale of neighboring properties; "it was a matter of proof and argument to the jury as to whether they were 'project-enhanced' or would have occurred even without SR-56."[85]

Clearly the use of motions *in limine* is important in obtaining rulings prior to trial regarding whether certain testimony or other evidence is admissible.

C. DISCOVERY IN EMINENT DOMAIN CASES

C.1. Methods of Discovery Available

As one article notes, "[i]f eminent domain statutes do not define the procedures which govern in condemnation trials, courts typically use general civil procedure rules."[86] For example, "comparable sales to be used by either party…are properly subjects of discovery—provided the rules on discovery are correctly employed."[87]

Using the Federal Rules of Civil Procedure as a guide, there are basic means or tools of discovery insofar as they are relevant to a condemnation case: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; and requests for admission. In proceedings in a federal court, the particular court's local rules should be consulted for any restrictions or limitations on the use of discovery, such as the number or form of interrogatories or the number or length of depositions. As Rule 26(b)(2)(A) states, discovery may be limited also by court order. "[T]he court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36."[88]

C.2. Mandatory Initial Disclosures

Many states have adopted a rule identical or nearly identical to Rule 26 of the Federal Rules of Civil Procedure.[89] Consequently, it is important to ascertain whether under the state court's rules initial disclosures must be made "without awaiting a discovery request" as provided for in federal practice under Rule 26(a)(1).[90] (Some proceedings are exempt from the initial disclosure requirement.[91]) There are also pretrial disclosures that must be made under Rule 26(a)(3)[92] and a duty to

[82] *Id. (citing* Ballew v. Kiker, 192 Ga. App. 178, 179, 384 S.E.2d 211 (1989) (trial court properly excluded irrelevant evidence)).

[83] City of San Diego v. Rancho Penasquitos P'ship, 105 Cal. App. 4th at 1018, 130 Cal. Rptr. 2d at 112.

[84] *Id.*

[85] *Id.*

[86] Baumer, *supra* note 3, at 803.

[87] State Highway Comm'n v. Havard, 508 So. 2d 1099, 1104 (Miss. 1987).

[88] FED. R. CIV. P. 26(b)(2)(C) furthermore provides:

> On motion or on its own, the court must limit the frequency or extent of use of the discovery methods otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of discovery in resolving the issues.

[89] The Federal Rules of Civil Procedure were amended effective Dec. 1, 2007.

[90] As stated in FED. R. CIV. P. 26(a)(1)(A)(i)-(iv):

> (1) *Initial Disclosure.* (A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:
>
> (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment; (ii) a copy—or a description by category and location—-of all documents, electrically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment; (iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and (iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

[91] *See* FED. R. CIV. P. 26(a)(1)(B).

[92] FED. R. CIV. P. 26(a)(3)(A)-(B) states:

> (A) In General. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:
>
> (i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those

supplement one's discovery responses as provided under in Rule 26(e)(1).

According to one source, at least 12 states "have adopted discovery rules that go as far (or nearly as far) as Federal Rule 26(a) in requiring the mandatory disclosure of information concerning expert witnesses."[93]

C.3. Disclosure of the Identity of Experts and Their Opinions and Reports

As for the disclosure of expert witnesses and their expected opinions, Rule 26(a)(2)(A)[94] provides that in addition to the initial disclosures required by Rule 26(a)(2)(A), "a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705." Thus, the identity must be disclosed timely of any experts who testify at trial. As a state court has held, "[i]n eminent domain proceedings the paramount issue, if not the only issue, concerns the amount of the condemnee's damages. …Hence, the 'seasonable' or 'timely' discovery of the identity of expert witnesses assumes great importance."[95] One court has noted that "[a]ppraisers in a condemnation action are to be treated as any other so-called witness."[96]

When an expert is to be used in a case, not only must the person's identity be disclosed but also the disclosure must be "accompanied by a written report—prepared and signed by the witness."[97] The Federal Rules specify what the report must contain:

> [A] complete statement of all opinions the witness will express and the basis and reasons for them; the data or other information considered by the witness in forming them; any exhibits that will be used to summarize or support them; the witness's qualifications, including a list of all publications authored in the previous ten years; a

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the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

[93] 7 NICHOLS ON EMINENT DOMAIN § G7A.01[1][b], at G7A-8-9 (*citing* ALASKA R. CIV. P. 26(a)(2)(A) (2008) ("In addition…a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Evidence Rules 702, 703, or 705."); ARIZ. R. CIV. P. 26(b)(4); CAL. CODE CIV. PROC. § 2025; C.R.C.P. 26(a) (2008) ("Except to the extent otherwise directed by the court, a party shall, without awaiting a discovery request, provide to other parties…. In addition…a party shall disclose to other parties the identity of any person who may present…with an identification of the person's fields of expertise."); IOWA R. CIV. P. 1.508(1) (2007) ("In addition…discovery of facts known, mental impressions, and opinions held by an expert whom the other party expects to call as a witness at trial…may be obtained…."); LA. CODE CIV. PROC. art. 1425(A) (2008) ("A party may through interrogatories or by deposition require any other party to identify each person who may be used at trial to present evidence under Articles 702 through 705 of the Louisiana Code of Evidence."); ME. R. CIV. P. 26(b)(4) (2007); Md. R. 2-402(g) (2007) ("A party by interrogatories may require any other party to identify each person…whom the other party expects to call as an expert witness at trial…."); NEV. R. CIV. P. 26(b)(4) (2007); N.J. Ct. R. 4:10-2(d) (2008); TEX. R. CIV. P. 195 (2008); UTAH R. CIV. P. 26(a)(3)(A) (2007) (Utah) ("A party shall disclose to the other parties the identity of any person who may be used at trial to present evidence….")).

[94] FED. R. CIV. P. 26(a)(2) provides:

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the data or other information considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within 30 days after the other party's disclosure.

(D) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

[95] State *ex rel.* Mo. Highway & Transp. Comm'n v. Dooley, 738 S.W.2d 457, 461 (Mo. App. E. Dist. 1987) (citations omitted).

[96] *Id.* at 464 (internal quotations omitted) (citation omitted).

[97] FED. R. CIV. P. 26(a)(2)(B).

> list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and a statement of the compensation to be paid for the study and testimony in the case.[98]

If a deadline is not set by an order of the court,

> the disclosures shall be made…at least 90 days before the date set for trial or for the case to be ready for trial; or if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within 30 days after the other party's disclosures.[99]

Expert witnesses may be subject to discovery depositions. Under Rule 26(b)(4)(A), "[a] party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided."[100]

C.4. Retained but Nontestifying Experts

Of course, an expert may have been retained who will not be used at trial. Under limited circumstances, discovery may be had of such an expert but only if "(i) as provided in Rule 35(b); or (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means."[101] Thus, "[m]aterials prepared in anticipation of litigation are not per se protected," because the rules permit "discovery of such materials if the requesting party shows he has 'substantial need of the materials prepared in the preparation of his [or her] case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.'"[102]

As for experts retained who will not be testifying, there may be an issue of whether the nontestifying expert at least must be identified, with some courts holding that the identity of a nontestifying expert must be disclosed and others holding that a party has to show "exceptional circumstances."[103] Even if counsel has to identify the nontestifying expert, an opposing party is likely to find it to be "extremely difficult" at least under Rule 26(b)(4)(B) or its equivalent in the states "to obtain any information concerning the substance of the nontestifying experts' reports."[104]

Finally, the identity of experts "informally consulted" does not have to be disclosed under Rule 26(b)(4).[105]

C.5. State Discovery Rules

Many states have adopted the equivalent of the federal rules, but the federal rules were amended again, effective December 1, 2007.[106] However, according to *Nichols on Eminent Domain*, "[f]or the most part, the state rules continue to follow the model utilized by Federal Rule 26 prior to its amendment in 1993."[107] Thus, states following the federal rules may or may not have adopted recent or the most recent amendments. Several states have adopted a modified version of the federal rule that requires a specific showing of need or exceptional circumstances as a condition to any expert discovery.[108] Some states have a specific prohibition of ex-

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[98] FED. R. CIV. P. 26(a)(2)(B)(i)-(vi).

[99] FED. R. CIV. P. 26(a)(2)(C).

[100] FED. R. CIV. P. 26(b)(4) provides:

> (A) Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.
>
> (B) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:
>
> (i) as provided in Rule 35(b); or
>
> (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.
>
> (C) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:
>
> (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B); and
>
> (ii) for discovery under (B), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

[101] FED. R. CIV. P. 26(b)(4)(B)(i)-(ii).

[102] Baumer, *supra* note 3, at 804–05 (footnote omitted).

[103] 7 NICHOLS ON EMINENT DOMAIN § G7A.01[2], at G7A-15, (*citing* Ager v. Jane C. Stormont Hosp. & Training Sch. for Nurses, 622 F.2d 496 (10th Cir. 1980) (holding that a party must show exceptional circumstances before the nontestifying experts have to be identified)).

[104] *Id.* at G7A-16.

[105] *Id.*

[106] *See, e.g.,* ALASKA R. CIV. PROC. 26 (2008); ARIZONA R. CIV. P. 26 (2007); C.R.C.P. 26 (2008) (Colorado); DEL. SUPER. CT. CIV. R. 26 (2008); FLA. R. CIV. P. 1.390 (2007); Ga. Unif. Super. Ct. Rule 5 (2007); IND. R. TRIAL P. 26 (2007); KY. R. CIV. P. 26 (2008); ME. R. CIV. P. 26 (2007); Nev. R. CIV. P. 26 (2007); OHIO CIV. R. 26 (2008); OR. R. CIV. P. 36 (2008) (Oregon); VT. R. CIV. P. 26 (2008) (Vermont); Va. Sup. Ct. R. 3 (2007); WASH. REV. CODE 26 (2007); and WYO. R. CIV. PROC. Rule 26 (2007).

[107] 7 NICHOLS ON EMINENT DOMAIN § G7A.01, at G7A-5.

[108] *See, e.g.,* MASS. ANN. L. R. CIV. P. Rule 26 (2007); R.I. R. CIV. P. Form 26 (2007); UTAH R. CIV. P. 26, 34 (2007) (Utah). For example:

> A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

MASS. ANN. L. R. CIV. P. Rule 26(b)(4)(B) (2007). *See also* UTAH R. CIV. P. Rules 26(b)(4)(B) (2007).

Also, for example:

pert discovery.[109] Some states have retained their former special discovery rules but have amended them to allow expert discovery.[110] In sum, counsel must be familiar with the applicable rules, because "most of the states have *not* adopted the current version of Federal Rules 26(a) and (b)(4)" but "many states have adopted specific rules addressing the exchange of appraisal reports…."[111]

C.6. Discovery of Appraisals

Under the Federal Rules of Civil Procedure, because of the Rule 26(a)(2) mandate that "a 'written report' containing a 'complete statement of all opinions to be expressed and the basis and reasons therefor' for any expert appraiser retained to provide testimony" must be produced, "the Rule seemingly requires each party to disclose an appraisal report (or the equivalent of one) for each of the *testifying* appraisers."[112] The authors of *Nichols on Eminent Domain*, however, concede that they have been "unable to find a reported decision explicitly interpreting Rule 26(a)(2) as requiring the disclosure of the actual appraisal report prepared by a party's testifying expert appraiser…."[113] Nevertheless, the authors conclude that the testifying experts' actual appraisals are discoverable under Federal Rule 26.[114]

In *United States v. Meyer,*[115] in which the court required the experts to answer questions at depositions and to produce their reports, the court stated:

> The appraisers' opinions and their factual and theoretical foundation are peculiarly within the knowledge of each appraiser and, to a degree, that of the party who employed him. The opposing party can obtain this information in advance of trial only by discovery. Since this material will constitute the substance of the trial, pretrial disclosure is necessary if the parties are to fairly evaluate their respective claims for settlement purposes, determine the real areas of dispute, narrow the actual issues, avoid surprise, and prepare adequately for cross-examination and rebuttal.[116]

> Any party may serve on any other party a request
>
> (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect, copy, test or sample any designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form), or to inspect, copy, test or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or
>
> (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

UTAH R. CIV. P. Rules 34(a).

Another example is that:

> (B) A party may discover facts known and opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

R.I. R. CIV. P. Form 26(b)(4)(B) (2007).

[109] *See, e.g.,* PA. R. CIV. P. No. 4009.1 (2007):

> Discovery of facts known and opinions held by an expert, otherwise discoverable under the provisions of Rule 4003.1 and acquired or developed in anticipation of litigation or trail, may be obtained…through interrogatories…[or] [u]pon cause shown…. A party may not discover facts known or opinions held by an expert who has been retained…by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial….

Pa. R.C.P. No. 4003.5 (2007).

[110] *See, e.g.,* Mo. Sup. Ct. R. 56.01 (2007); TEX. R. CIV. P. 195.1 (2008); Md. Rule 2-422 (2007). For example, "[a] party may discover by deposition the facts and opinions to which the expert is expected to testify." Mo. Sup. Ct. R. 56.01(b)(4) (2007). Another example is that "[a] party may request another party to designate and disclose information concerning testifying expert witnesses only through a request for disclosure under Rule 194 and through depositions and reports as permitted by this rule." TEX. R. CIV. P. 195.1 (2008). In Maryland:

> Any party may serve one or more requests to any other party (1) as to items that are in the possession, custody, or control of the party upon whom the request is served, to produce and permit the party making the request, or someone acting on the party's behalf, to inspect, copy, test or sample designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, images, sound recordings, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form) or to inspect and copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 2-402 (a); or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection, measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on the property, within the scope of Rule 2-402 (a).

Md. Rule 2-422(a) (2007).

[111] 7 NICHOLS ON EMINENT DOMAIN § G7A.01[1][b], at G7A-8.

[112] *Id.* § G7A.01[1][a], at G7A-6 (emphasis supplied).

[113] *Id.* at G7A-6, n.16.

[114] *Id.*

[115] 398 F.2d 66 (9th Cir. 1968).

[116] *Id.* at 69. *See also* Barrett v. State Highway Comm'n, 385 So. 2d 627, 628 (Miss. 1980) (holding that the landowners were entitled to discovery and that "pretrial access to information held by the commission would have been helpful to the landowners in preparing their case"). In Alaska v. Leach, 516 P.2d 1383, 1384 (Alaska 1973), in upholding an order granting an individual's motion for production of all the state's property appraisal reports on the land, including reports that the state did not intend to offer in evidence, the court ruled "that the very nature of a condemnation case in and of itself constitutes

However, in *Hoover v. United States Dep't of the Interior,*[117] the Fifth Circuit stated that the "essence of the decision in *Meyer* is not that appraisals per se are discoverable, but that landowners should be able to discover the opinions and views of the appraisers in order to prepare for effective cross-examination."[118]

Nichols also notes that "[i]n contrast to the new Federal Rule, there is nothing in the old rule (followed by most states) that requires, in the first instance, the production of actual 'reports' for each testifying expert."[119] Consequently, attorneys may have to resort to other means of discovery to obtain more information or perhaps the actual appraisal.[120] Nevertheless, "[s]everal jurisdictions have enacted laws providing for the mutual exchange of appraisal reports during eminent domain proceedings."[121] In short, there seems to be a lack of uniformity in approach. Statutes, for example, in California, New York, and Texas "require disclosure of information relating to expert appraisers in eminent domain proceedings,"[122] whereas in some states the rules "do not require that the appraisal reports be exchanged but rather qualify that the information contained therein may be discovered."[123] Local rules also may provide for the exchange of appraisal and other expert reports.[124]

State rules vary regarding the discoverability of expert documents and opinions, but there are cases holding, whether by statute or rule of court, that appraisal reports must be produced or the expert's opinions at least must be disclosed during discovery if timely requested by the opposing party.[125] Counsel, therefore, must be familiar with the applicable state rules; for example, a state with discovery rules similar to the pre-1993 Federal Rules of Civil Procedure could even require counsel to show a "compelling need" before obtaining an adversary's appraisal report.[126] Many condemnation attorneys may prefer to enter into a stipulation providing for the mutual exchange of appraisers' reports because they may not want to produce "such a valuable piece of information without any assurance of getting the same quality of information in return."[127]

As indicated previously, Rule 26(b)(4)(B) "does not protect the identity or opinions of experts unless the information or opinions were developed or acquired 'in anticipation of litigation or preparation for trial.'"[128] Thus, appraisal reports prepared for tax assessment offices or for other municipal purposes are discoverable, as well as appraisals that a condemnee may have obtained for purposes other than litigation or preparation for trial.[129]

Two objections that one may anticipate regarding the production of expert reports such as appraisal reports or of the underlying documents or information are the attorney-client privilege and the attorney work-product doctrine. As for the attorney-client privilege, "[t]he majority of courts…do not apply the attorney-client privilege to eminent domain experts who merely appraise property and reduce their findings to writing."[130] As for the attorney work-product doctrine, although "some courts protect expert appraisal reports from discovery under the work product doctrine…the majority of courts hold that the work product doctrine does not protect experts' documents."[131] Of course, counsel must be "careful about written communications be-

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'exceptional circumstances' within the intendment of Civil Rule 26(b)(4)(B) and therefore justifies the superior court's discovery order."

[117] Hoover v. United States Dep't of the Interior, 611 F.2d 1132, 1140 (5th Cir. 1980) (footnote omitted).

[118] *Id.*

[119] 7 NICHOLS ON EMINENT DOMAIN § G7A.01[1][b], at G7A-9.

[120] *Id.* at G7A-10.

[121] *Id. See also* Baumer, *supra* note 3, at 808 (stating that "some jurisdictions require mandatory disclosure of…appraisal reports") (*citing* Connie C. Sandifer & Timothy J. Chang, *The Advantageous Use of Discovery in Eminent Domain*, SB48 ALI-ABA 183, 189 (1997) (listing six states mandating exchange of appraisal reports) and Uniform Eminent Domain Code § 702 (1974))).

[122] Baumer, *supra* note 3, at 808–09 (*citing* CAL. CIV. PROC. § 1258.210 (West 1998); N.Y. Ct. Rules § 202.61 (McKinney 1997); TEX. PROP. CODE ANN. § 21.0111 (West 1995)).

[123] *Id*. at 809 (*citing* N.J. STAT. ANN. § 20:3-6 (West 1997); MD. R. CIV. P. 3-421(A)(3) (Michie 1997)).

[124] 7 NICHOLS ON EMINENT DOMAIN § G7A.01[1][b], at G7A-10.

[125] *See* discussion in 7 NICHOLS ON EMINENT DOMAIN § G7A.01[1][a] & [b]. *See* City of Santa Clarita v. NTS Technical Systems, 137 Cal. App. 4th 264, 40 Cal. Rptr. 3d 244, 275–76 (2006) (requiring the exchange of expert witness information and valuation data under the statute) (citing CAL. COM. CODE § 1258.210 (2007)). Also cited in Baumer, *supra* note 3, are: New Jersey v. Town of Morristown, 129 N.J. 279, 27-288, 609 A.2d 409, 413–14 (1992) (condemnor required to disclose to condemnee appraisal reports used in calculating offer of compensation); Gerhart v. Honeoye Storage Corp., 88 A.D. 2d 757, 451 N.Y.S.2d 481, 482 (N.Y. App. 4th Dep't 1982) (requiring parties to exchange appraisal reports); Utah Dep't of Transp. v. Rayco Corp., 599 P.2d 481, 490-91 (Utah 1979) (requiring production of expert's appraisal report when landowner cross-examines appraiser); United States v. 23.76 Acres of Land, 32 F.R.D. 593, 596 (D. Md. 1963) (requiring government's real estate appraiser to answer deposition questions regarding his opinions).

[126] 7 NICHOLS ON EMINENT DOMAIN § G7A.01[1][b], at G7A-11–12.

[127] *Id*. § G7A.01[1][a], at G7A-7.

[128] *Id* § G7A.01[4], at G7A-17.

[129] *Id.*

[130] Baumer, *supra* note 3, at 814 (*citing* Note, *Condemnation in Indiana: Discovery of Expert Appraisal Reports*, 8 VAL. U. L. REV. 409, 434–35 (1974)). *See also* 7 NICHOLS ON EMINENT DOMAIN § G7A.02, at G7A-20.

[131] *Id.* at 814 (*citing* Lee Mickus, *Discovery of Work Product Disclosed to a Testifying Expert Under the 1993 Amendments to the Federal Rules of Civil Procedure*, 27 CREIGHTON L. REV. 773, 784–85 (1994) (stating that "bulk of the authority recognizes that the work product doctrine does not protect documents generated by experts who are expected to testify")).

tween counsel and the appraiser, especially in the age of e-mail," that could be subject to discovery and production.[132]

C.7. Discovery Based on Other Statutes

Although the Federal Freedom of Information Act (FOIA), 5 U.S.C. § 552, provides for broad powers of access to public information from federal agencies, the statute may not be used as a substitute for discovery or to expand one's ability to discover documents in a legal action that are otherwise protected from discovery. A person's rights under the Federal FOIA are neither diminished nor enhanced by a need arising during litigation for an agency's documents.[133] In other words, the need for a document is irrelevant to whether a statutory exemption allows an agency to withhold a document.[134] Although there are a variety of statutes at the state level with respect to obtaining public records and information, which may operate differently in the discovery arena than the federal rules with respect to FOIA, state public information acts for the most part also do not broaden the ability of a litigant to obtain discovery.[135]

The URA[136] and its implementing regulations[137] set out specific guidelines for the acquisition of property involving federal funds. Although there is no specific requirement that an appraisal must be given to a landowner, an owner or his or her representative must be given an opportunity to be present; the agency's offer cannot be lower than the appraised value; the agency must submit a summary statement of the basis for the offer of just compensation; and the agency must make all reasonable efforts to contact the owner or his or her representative to discuss its offer, including the basis for it.[138]

D. VOIR DIRE AND JURY SELECTION

As with other trials, if provable facts are presented clearly so that a jury comprehends the issue or issues in the case, more often than not the jury will arrive at an appropriate outcome. Because of the importance of the members of any jury, *voir dire* is the most important first contact with the jury.[139] Assuming the local rules of practice allow the attorney to conduct the *voir dire*, the *voir dire* should be used not only to discover any potentially biased juror but also to educate and impress the jury regarding the justness of one's cause. There are, of course, texts devoted to the techniques of effective jury selection.[140]

E. PRESENTATION OF EXPERT TESTIMONY

Valuation is the primary issue in a condemnation trial; hence, although there are other important facets of the trial, trial counsel necessarily must focus on the presentation of expert testimony and an effective cross-examination of the opposing party's expert or experts.

A condemnation trial presents some unique problems for an attorney. At its best, a condemnation case is one of the least interesting cases for a juror. The attorney therefore is challenged to choose witnesses and exhibits, as well as his or her own words and actions, that will maintain the jury's focus on the issues. With the exception of the owner, it is quite likely that the witnesses for both parties will be appraisal and engineering experts skilled both in their professions and in testifying effectively. The trier of the facts usually will be a jury that is unfamiliar with the technical aspects of valuation but which the jury nonetheless must evaluate. Furthermore, many if not most trials will be relatively brief, not permitting much time for thorough preparation for cross-examination and rebuttal evidence. In fact, skilled opposing counsel may attempt to time the appearance and length of the direct examination of an expert witness to prevent opposing counsel from being able to prepare overnight for cross-examination. However, either because of restrictions imposed by the rules of court or because of cost, each party may have only one or possibly two experts upon which to base an entire case, thus greatly increasing the importance of cross-examination and rebuttal evidence.

Any expert witness, including one on valuation, should present his or her well-supported opinion in a clear, easy-to-follow manner that is understandable by a layperson. Some experienced counsels recommend reducing an expert's opinion to the lowest common denominator. Most, if not all, attorneys believe it is best to keep the expert's opinion as straightforward as possible so that an untrained person will be able to understand the opinion and the basis for it.

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[132] 7 NICHOLS ON EMINENT DOMAIN § G7A.01[1][b], at G7A-11.

[133] Hoover v. U.S. Dep't of Interior, 611 F.2d at 1143 (citing "executive privilege" and prohibiting the discovery of an outside appraiser's report when the landowner filed suit under the Freedom of Information Act).

[134] 7 NICHOLS ON EMINENT DOMAIN § § G7A.01[1][b], at G7A-11.

[135] In *Hoover*, *supra*, "the court pointed out that as a general rule, a party is not entitled to his or her opponent's expert appraisal report (under the old rule)." 7 NICHOLS ON EMINENT DOMAIN § G7A.01[1][b], at G7A-11.

[136] 42 U.S.C. § 4651, *et seq.* (2008).

[137] 49 C.F.R. § 24.1, *et seq.* (2008).

[138] 42 U.S.C. § 4651(2)-(3) (2007); 49 C.F.R. § 24.102(c)-(f) (2007).

[139] S.L. Brodsky & D.E. Cannon, *Ingratiation in the Courtroom and in the Voir Dire Process: When More Is Not Better*, 30 LAW & PSYCHOL. REV. 103 (2006); Bruce Sales, *The Art and Science of Conducting the Voir Dire*, 9 PROF. PSYCHOL. 367 (1978).

[140] JEFFREY T. FREDERICK, AMERICAN BAR ASSOCIATION, MASTERING VOIR DIRE AND JURY SELECTION: GAIN AN EDGE IN QUESTIONING AND SELECTING YOUR JURY (2005); WILLIAM J. BRYAN, THE CHOSEN ONES: OR, THE PSYCHOLOGY OF JURY SELECTION (1971).

With respect to the organization of the direct examination of the expert and the presentation of his or her opinion, the following approach is suggested:

1. The qualification of the expert.
2. A description of the appraisal process.
3. A specific description of the work undertaken.
4. A description of the property.
5. The property's highest and best use.
6. One or more of the approaches to valuation (e.g., cost, income, and sales).
7. The final estimate of value.[141]

The parties' experts' testimony will be based on identical facts, such as the location of the property, the areas before and after the taking, the engineering of the condemnor's project vis-à-vis the subject property, the number and location of existing improvements on the property, the present use of the property, the property's existing use, the zoning and other governmental regulations applicable to the property, and the utilities now serving or available to serve the property. Nevertheless, the experts' testimony may diverge because of differences in the opposing experts' opinions and conclusions.

There are a number of areas for potential disagreement: the highest and best use of the property; whether comparable sales are indeed comparable; the probability of zoning changes; the analysis of income data to project future income; the analysis of construction costs and depreciation figures for improvements; and the damages, if any, to the remaining property caused by changes in size or shape of the property, access to the property, loss of improvements on the property, or the remaining property's proximity to the condemnor's project. There are myriad aspects of valuation that affect the basis of an expert's opinion, as well as the degree of importance placed by an expert on each factor. Therefore, any divergence in an expert's opinion relating to value is not based necessarily on the existence of different facts but on opinions and conclusions that differ concerning the effect of certain facts on the expert's opinion of the value of the property before and after an acquisition. Adequate preparation thus requires, among other things, effective use of discovery.

As noted, the property's highest and best use will be one issue on which the experts would be expected to testify, particularly if the highest and best use of the property is in dispute. One authority maintains that with respect to testimony by an appraiser regarding the highest and best use of the subject property, "the appraiser is generally well advised to testify under direct examination only as to the analytical methodology used in determining highest and best use, without specificity."[142] However, "[i]f the appraiser's estimate of highest and best use is questioned under cross-examination…the appraiser is often allowed to explain, in detail and with specificity, the process employed to arrive at the highest and best use conclusion."[143]

Many seminars, programs, and publications provide training and information regarding various aspects of trial practice, such as effective openings, closings, direct and cross-examination, the admission of evidence, the handling of exhibits, and the making of objections. *Nichols on Eminent Domain* includes a chapter on trial procedures and techniques covering such matters as pretrial preparation, identification of trial issues, trial planning, including experts and depositions, conduct of the trial, and other issues.[144] Another chapter is devoted to trial tactics and strategies in the presentation of comparable sales.[145] It should be noted that the treatise also devotes a chapter to sample testimonies of the type that may be expected in an eminent domain trial, including illustrative direct examinations, cross-examinations, and redirect examinations of a condemnee's and condemnor's appraiser.[146]

F. USE OF DEMONSTRATIVE EVIDENCE

F.1. Use of Photographs and Other Visual Aids

Of course, "[t]rial tactics and strategies sometime involve a degree of showmanship."[147] Photographs and videos are especially helpful in familiarizing a jury with property and the effect of a condemnation. "[D]igital images take the form of videos and photographs," and "[m]ore and more attorneys are utilizing digital images to support and illustrate their arguments in front of both judicial and administrative panels."[148] If properly authenticated,[149] photographs and videos usually are admissible into evidence without difficulty.[150] However,

[141] EATON, *supra* note 42, at 500.

[142] EATON, *supra* note 42, at 106.

[143] *Id*.

[144] 7 NICHOLS ON EMINENT DOMAIN, ch. G8.

[145] 7A NICHOLS ON EMINENT DOMAIN, ch. G13.

[146] *Id*., ch. G13A. *See id*. at § G13A.03 in regard to the cross-examination of the landowner's expert appraisal witness. *See also* Smith, *100 Questions Which Will Worry Weak Witnesses*, THE REAL ESTATE APPRAISER 15–16 (Feb. 1967).

[147] *Id.* § G13.07[6], at G13-66 (giving examples).

[148] Catherine Guthrie & Brittan Mitchell, *The Swinton Six: The Impact of State v. Swinton on the Authentication of Digital Images*, 36 STETSON L. REV. 661, 663, 669 (2007).

[149] Dina v. People *ex rel.* Dep't of Transp., 151 Cal. App. 4th 1029, 1039, 60 Cal. Rptr. 3d 559, 567 (Cal. App. 2d Dist. 2007) (upholding trial court's decision that photographs and other evidence not properly authenticated in a case for inverse condemnation, nuisance, and negligence), *review denied*, 2007 Cal. LEXIS 9723 (Cal. 2007).

[150] Inglewood Redevelopment Agency v. Akliu, 153 Cal. App. 4th 1095, 1116 64 Cal. Rptr. 3d 519, 535 (2007) (stating that the trial court found the Agency's offer of $35,000 for goodwill was not unreasonable, possibly in part because of photographs offered into evidence suggesting that the owner was performing automotive repairs without a license), *modified*, 2007 Cal. App. LEXIS 1360, *rehearing denied,* 2007 Cal. App. LEXIS 1553, *request denied*, 2007 Cal. LEXIS 12889 (Cal. 2007); Tunica County v. Matthews, 926 So. 2d 209, 217 (Miss. 2006) (upholding admission of photographs for the purpose for which they

admissibility depends on the purpose for which the photograph is offered and whether it accurately depicts the property. For example, in *Arkansas State Highway Comm'n v. Post.*,[151] the court held that the trial court "erred by admitting the photograph of the piles of dirt and dead trees that had resulted from the ongoing construction work. Evidence is inadmissible in partial-taking cases when it pertains to the temporary conditions of the property during the course of construction."[152] The court held that the "testimony in no way clarified to the jury that the conditions depicted in the photograph were merely temporary."[153]

As for aerial photographs, although there are commercial sources, it may be possible to obtain them inexpensively from sources that already have them, such as a county assessor's office in the county where the property is located, the local Agricultural Stabilization Conservation Services Office or the equivalent, or a transportation department.[154] Other sources include the United States Geological Survey, and the Tennessee Valley Authority and other power suppliers, as well as the Internet, where satellite images are accessible.

Of course, as with any demonstrative evidence, photographs or videos should illustrate a detail important to the property, usually should be in color, and should be large enough to be seen easily. One practitioner reports that a computer-enhanced photograph has been admitted to show how construction would appear when completed. Although no recent eminent domain cases were located dealing specifically with computer-enhanced photographs, other cases have permitted their use with proper foundation and authentication.[155] According to a New Jersey court, "the use of a computer-generated exhibit requires a more detailed foundation than for just photographs or photo enlargements," and testimony is required from a witness "who possesses sufficient knowledge of the technology used to create the exhibits."[156]

Videos are especially useful in assisting jurors in understanding problems concerning access, surface water, or drainage, or with the moving of equipment or inventory.[157] In *Trustees of Wade Baptist Church v. Mississippi State Highway Commission,*[158] although upholding the trial court's refusal to admit into evidence a videotape offered after a jury's view of the property for the "purpose of 'refreshing their minds,'" the court stated that "properly qualified and authenticated videotapes are often quite valuable aids to the trier of facts and they may be used in evidence in the courts of this state. …Where properly qualified and authenticated and not redundant, we welcome them."[159]

Plats, maps, plans, models, PowerPoint presentations, or just about anything an attorney may imagine may assist a jury's understanding.[160] The condemning authority presumably has surveyed the subject property and will have had plans drawn by the time it initiates condemnation of the property. However, unless there is a stipulation regarding the admission of certain trial aids, counsel will need to lay a proper foundation to assure their admission. Furthermore, during discovery, it is important to be precise when making discovery requests. A request for photographs does not include necessarily a request for any videotapes.[161]

As noted, zoning critically affects the use and value of a property. In some instances, rather than rely solely on oral testimony regarding an applicable ordinance,

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were offered); In re Acquisition of Real Prop. by Village of Marathon, 174 Misc. 2d 800, 802, 666 N.Y.S.2d 365, 367 (N.Y. Sup. Ct. 1997) (holding that the failure to include photographs of comparables was not a sufficient reason to strike an appraisal but noting that under the applicable rule, appraisal reports "may contain photographs of the property under review and of any comparable property that specifically is relied upon by the appraiser, unless the court otherwise directs") (*citing* 22 N.Y. COMP. CODES R. & REGS. 202.59[g][2]) (internal quotations omitted); State *ex rel.* Mo. Highway & Transp. Comm'n v. Vitt, 785 S.W.2d 708, 712 (Mo. App. E. Dist. 1990) (holding that "[t]he admission of photographs, being within the discretion of the trial court, will not be disturbed on appeal absent an abuse of that discretion") (citation omitted).

[151] 330 Ark. 369, 955 S.W.2d 496 (1997).

[152] *Id.* at 375, 955 S.W.2d at 499.

[153] *Id.* at 376, 955 S.W.2d at 499.

[154] Hudspeth v. State Highway Comm'n, 534 So. 2d 210, 214 (Miss. 1988) (reversing a trial court order that, *inter alia*, had denied discovery of photographs in the possession of the Commission).

[155] Nooner v. Arkansas, 322 Ark. 87, 104, 907 S.W.2d 677, 680 (1995) (Affirming the defendant's conviction, the court stated that with regard to computer-enhanced photographs, "[r]eliability must be the watchword" and "the reliability of the enhanced photographs was attested to by multiple witnesses.").

[156] Rodd v. Raritan Radiologic Assocs., P.A., 373 N.J. Super. 154, 169–70, 860 A.2d 1003, 1012 (2004) (reversing and holding that the computer-imaging displayed to the jury in a medical malpractice case was "susceptible of being accepted as substantive evidence") (*id.*, 373 N.J. Super. at 170–71, 860 A.2d at 1012).

[157] Most jurisdictions permit the use of videos. 7A NICHOLS ON EMINENT DOMAIN § 13.06, at G13-36. *See also* Cal. State Auto. Ass'n v. City of Palo Alto, 138 Cal. App. 4th 474, 41 Cal. Rptr. 3d 503 (Cal. App. 6th Dist. 2006) (apparently no issue regarding the use of video equipment to inspect the condition of a pipe), *review denied, request denied*, 2006 Cal. LEXIS 9072 (Cal. 2006).

[158] 469 So. 2d 1241, 1247 (Miss. 1985).

[159] *Id.* (citation omitted). *But see* City of Fort Smith v. Findlay, 48 Ark. App. 197, 207, 893 S.W.2d 358, 364 (1995) (upholding the trial court's ruling that a video tape showed "only the conditions that existed after the taking and gives the jury no basis for comparing the drainage conditions before and after the taking").

[160] Demonstrative evidence may include any one or more of the following: a blackboard, chart, graph, diagram, rendering, an enlargement of a document, color coding, projection slides, actual objects, or computer analysis or representation. *See* Eaton, *supra* note 42, at 465.

[161] County of Dallas v. Harrison, 759 S.W.2d 530, 531 (Tex. Ct. App. 5th Dist. 1988) (holding that "the County's request for production of photographs did not include a request for production of the video tape at issue").

counsel may want to have the ordinance admitted into evidence and shown to the jury via a computer-generated enlargement or have the ordinance displayed on a large poster board and easel for maximum effectiveness.

F.2. Hand-Made and Computer-Generated Models

Models may be used in imaginative ways. One attorney has described a case that involved the acquisition of a multi-use property. The property's current, primary use was for the underground mining of high-grade limestone deposits. A model of the entire property was constructed to show the jury each and every use of the property, which included residential, agricultural, industrial, and mining. The model was constructed with dowels so that when they were removed the jury could see the property's subsurface and remaining deposits.

The only reported case that has been located regarding the use of a model is *Commonwealth, Department of Transportation v. Becker.*[162] The transportation department objected at trial to the introduction of evidence concerning the owner's planned subdivision of his property and his use of a model and overlay to illustrate his testimony. The bases for the objection were that the model and overlay were inaccurate and misleading.[163] However, without addressing directly the department's argument, the court affirmed the judgment.[164]

Finally, depending on the issue, a condemnation attorney may be able to take advantage of a computer-generated model.[165]

F.3. Charts

Charts and diagrams are helpful trial aids. For example, counsel may use an exhibit as a way of graphically representing comparable sales data.[166] On the other hand, with regard to items of damages that are noncompensable, counsel may want to present the evidence visually to the jury rather than merely relying on testimony. For example, because "[t]raffic is generally not a proper element to be taken into consideration when determining the damage arising from the condemnation of land,"[167] it is a type of noncompensable damage that could be illustrated by use of a chart, diagram, or similar trial aid.

G. JURY VIEW OF THE PROPERTY

Although many states' statutes provide for a jury view, in other states, whether a jury may view the property is a decision committed to the discretion of the trial judge.[168] In a majority of the states, a jury view "constitutes evidence to be considered by the fact finder in conjunction with other evidence presented during the trial…."[169]

The importance of a jury view should not be underestimated. For example, in *Lehigh-Northampton Airport Authority v. Fuller,*[170] the court stated that "[w]here the jury views the premises, as in this case, its award is entitled to special weight upon appellate review. This Court has also held that the jury may base its decision on its own judgment and disregard the expert testimony entirely."[171] Similarly, in *Trowbridge Partners, L.P. v. Mississippi Transportation Commission,*[172] the court stated that it had "a long-standing history of not disturbing jury verdicts in eminent domain proceedings, especially when the jury has viewed the property being taken and the evidence in the record supports the jury's finding."[173] Although in some jurisdictions a jury view may be used infrequently, in the proper case a view may be of assistance to a jury, as well as to counsel on an appeal challenging a determination of compensation.

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[162] 118 Pa. Commw. 620, 546 A.2d 1282 (Pa. Commw. Ct. 1988).

[163] *Id.* at 626, 546 A.2d at 1286.

[164] *Id.* at 627, 546 A.2d at 1286.

[165] United States v. 87.98 Acres of Land, 530 F.3d 899, 906-907 (9th Cir. 2008) (In an appeal reviewing a district court's exclusion of expert testimony regarding electromagnetic fields (EMF), the appellate court stated that the expert's "computer models and studies are direct evidence…that EMF risk exist[s]," but that the exclusion of the evidence was not prejudicial because of other evidence that was allowed); N. Natural Gas Co. v. Nash Oil & Gas, Inc., 526 F.3d 626 (10th Cir. 2008) (affirming district court's dismissal of an action but noting that *Northern's* expert had used a "computer-generated reservoir-simulation model" to predict the flow of gas through porous media); *but see* Smith v. Papio-Missouri River Natural Res. Dist., 254 Neb. 405, 410, 576 N.W.2d 797, 802 (1998) (In holding that the Court of Appeals erroneously concluded that there was no evidence that it was reasonably probable that the Smith property could be used for residential purposes in the immediate future, the court noted, *inter alia*, that there was expert testimony in the record to the effect that "the FEMA floodway maps are computer-generated models that are inaccurate as to the actual elevations of land within a floodway."). *See also* City of Wichita v. Trs. of the Apco Oil Corp. Liquidating Trust, 306 F. Supp. 2d 1040 (D. Kan. 2003) (groundwater modeling); Jackson v. N.Y. State Urban Dev. Corp., 110 A.D. 2d 304, 310, 494 N.Y.S.2d 700, 704 (N.Y. App.,1st Dep't 1985) (holding that the Urban Development Corporation (UDC) had employed "the most appropriate computer model" to calculate automobile emissions and that UDC's calculations were reliable).

[166] 7A NICHOLS ON EMINENT DOMAIN § G13.06, at G13-37.

[167] State *ex rel.* Mo. Highway and Transp. Comm'n v. Mertz, 778 S.W.2d 366, 368 (Mo. App. E. Dist. 1989).

[168] 5 NICHOLS ON EMINENT DOMAIN § 18.08[1], at 18-54.

[169] *Id.* § 18.08[3], at 18-59.

[170] 862 A.2d 159 (Pa. Commw. Ct. 2004), *appeal denied*, 2005 Pa. LEXIS 3158 (Pa. 2005).

[171] *Id.* at 167 (2004) (*citing* Redevelopment Auth. of the City of Phila. v. Nunez, 109 Pa. Commw. Ct. 240, 530 A.2d 1041 (Pa. Commw. Ct. 1987); *Appeal of Redevelopment Auth. of the City of Scranton*, 156 Pa. Commw. Ct. 388, 627 A.2d 292 (Pa. Commw. Ct. 1993)).

[172] 954 So. 2d 935 (2007).

[173] *Id.* at 944. *See also* Miss. Transp. Comm'n v. Highland Dev., LLC, 836 So. 2d 731, 736 (Miss. 2002) (noting that "if there is any substantial evidence supporting the award, we will not interfere, especially when the jury has viewed the property") (citations omitted).

H. ADMISSIBILITY AND USE OF THE COMPARABLE SALES METHOD

H.1. Admissibility of Comparable Sales

As discussed in Section 6, *supra*, of the three traditional approaches to valuation—comparable sales, income, and cost—the comparable sales or market data approach is preferred.[174] The income and cost methods involve assumptions not found in the comparable sales approach that make them less reliable in determining market value. One source notes, however, that the term "comparable sales approach" is preferred to the term "market data approach" because all three methods—sales, income, and cost— "require the use of market data."[175] In any case, wherever possible, the three approaches should be used to support one another.[176]

Obviously, parcels of real estate are seldom if ever alike.[177] In general, dissimilarities between properties offered as comparables affect the weight accorded to the evidence rather than preclude the admissibility of the evidence. The issue is whether there is a reasonable comparability between the subject property and the properties being offered as comparables. The term comparable or similar does not mean identical.[178] Thus, "[n]o general rule can be laid down governing the degree of similarity which must exist between properties sold and that condemned to make evidence of sales admissible" and the decision whether to receive such "evidence must be determined by the trial judge within the proper limits of his discretion."[179]

Parcels may "have neither exactly the same location, nor exactly the same juxtaposition to other properties."[180] However, as stated in a 2007 case, "[c]omparable sales must relate to and possess similar qualities to the land involved in the sale."[181] Consequently, whether evidence of the values of other properties is admissible depends on whether the properties are sufficiently similar in character and location and in other ways that affect value.[182] Moreover, as discussed in a later subsection, because of the differences even in properties said to be comparable to the subject property, appraisers are allowed to adjust the comparable sales in determining the value of the condemned property.[183]

As stated, evidence of voluntary sales of similar property in the vicinity of the property reasonably close in time to the taking is usually admissible as evidence of the value of the subject property.[184] As discussed in connection with Federal Rules of Evidence, Rule 703, one question that may arise is whether a court or jury may consider testimony of comparable sales as independent, substantive evidence of value or only as support for an expert's opinion of value.[185] A trial attorney's method of presentation of his or case may depend on what the state's courts have ruled regarding the admission of hearsay evidence when expert testimony is offered on the sales prices of similar properties. *See* discussion in Section B.1.b. *supra*.

According to one authority, "[m]ost jurisdictions allow the price of comparable land to be admitted as direct, or independent, evidence of the market value of the property in dispute."[186]

> Independent substantive evidence of the value of the condemned property is a form of direct proof. It requires the testimony of at least one of the parties to the sale.... This type of proof was deemed necessary in many jurisdictions to avoid reliance on hearsay testimony given by a real estate expert witness in collecting and confirming information on comparable sales.[187]

As stated, the second basis for admission of evidence of comparable sales is "not as direct evidence of the value of the property under consideration, but in support of, and as background for, the opinion testified to

[174] United States v. Abbey, 2007 U.S. Dist. LEXIS 5701, at *4 (E.D. Mich. 2007) (noting that a "'comparable sale' analysis has long been and remains the preferred method of establishing a property's 'fair market value'") (citation omitted); United States v. 25.02 Acres of Land, Douglas, 495 F.2d 1398, 1400 (10th Cir. 1974).

[175] EATON, *supra* note 42, at 197. There is a minority view holding that "sales may only be admitted on cross-examination." *Id*. at 199 (explaining the reasons for the minority view). Furthermore, some states have enacted legislation allowing such evidence as an exception to the hearsay rule. *Id*. Such evidence is allowed in federal court under Federal Rules of Evidence Rule 703. *See id*.

[176] EATON, *supra* note 42, at 158. *See* Miss. Transp. Comm'n v. Williamson, 908 So. 2d 154, 157 (Miss. Ct. App. 2005) (acknowledging that Mississippi accepts all three approaches to valuation), *cert. denied*, 2005 Miss. LEXIS 477 (Miss. 2005).

[177] 7A NICHOLS ON EMINENT DOMAIN § G13.02[2], at G13-4.

[178] McKinney Indep. Sch. Dist. v. Carlisle Grace, Ltd., 222 S.W.3d 878, 886 (Tex. Ct. App. 5th Dist. 2007) ("[C]omparable sales are just that; they are not required to be identical....") (citations omitted), *petition for review filed*, Aug. 8, 2007.

[179] State Highway Comm'n v. McNiff, 395 P.2d 29, 31 (Wyo. 1964) (citation omitted).

[180] State Road Comm'n v. Wood, 22 Utah 2d 317, 320, 452 P.2d 872, 874 (1969).

[181] Trowbridge Partners, L.P. v. Miss. Transp. Comm'n, 954 So. 2d at 940 (citation omitted).

[182] State Road Comm'n v. Wood, 22 Utah 2d 320, 452 P.2d 874 (footnote omitted).

[183] Trowbridge Partners, L.P. v. Miss. Transp. Comm'n, 954 So. 2d 940.

[184] EATON, *supra* note 42, at 198 (stating that "[e]vidence of comparable sales has been admitted in nearly all jurisdictions, but the reasons for admitting such evidence vary"); *see also* City of Portland v. Therrow, 230 Or. 275, 281, 369 P.2d 762, 765 (1962).

[185] 7A NICHOLS ON EMINENT DOMAIN § G13.02[3], at G13-7. *See* Honolulu v. Bishop Trust Co., 48 Haw. 444, 462–63, 404 P.2d 373, 385 (1965), stating that evidence of comparable sales may be admitted "upon two separate theories and for two distinct purposes") (citation omitted).

[186] EATON, *supra* note 42, at 199.

[187] 7A NICHOLS ON EMINENT DOMAIN § G13.02[3], at G13-7.

by an expert as to the value of the property taken."[188] In an instance, when "evidence of sales of similar property is offered not as substantive proof of value, but merely in support of, and as background for, the opinion of an expert as to the value of the land in question," the requirement of foundation for the evidence is not as "strict."[189] For example, in *Department of Transportation v. Brannan,*[190] the court held that although the transportation department argued that "the jury was not authorized to use the comparable sales in determining the value of the acquired land…it was not inappropriate for the sales to have been presented to the jury because the sole purpose for the evidence was to state the factual basis of the expert's opinion…."[191] Thus, "[t]he modern trend has been to liberalize the admission of comparable sales, especially when presented in support of an expert's opinion of value, relying on vigorous cross-examination on the facts surrounding the comparable sales to impeach that expert's opinion of value."[192]

Although it may not matter to an appraiser whether evidence of comparable sales is admitted as direct evidence or as support for his or her opinion, there is a practical consideration, as courts "will often rule on the comparability of a sale, as a matter of law, before the appraiser is allowed to testify to the price of the comparable."[193] The condemnation attorney must be aware of local practice regarding whether evidence of comparable sales is admissible into evidence "by pretrial conference, motions in limine, voir dire of the expert, proffer, objection at the time of presentation, motions to strike or some other local practice."[194] Indeed, there may be a local rule that limits the number of comparable sales.[195] Of course, with respect to testing the admissibility or credibility of the opinion of an expert witness on valuation it is proper to inquire into the expert's knowledge of voluntary sales of comparable property in the vicinity of the property.

In sum, the primary concern is with what constitutes a comparable sale.[196] Sales of property located near the one involved in the case and reasonably close to the time of the taking are admissible to aid the trier of fact in determining the compensation to which an owner is entitled. Whether sales are sufficiently close in time to the taking of the property to be fairly comparable to the subject property usually is a matter committed to the discretion of the trial judge.[197] The court may permit an attorney considerable latitude concerning what constitutes comparable sales and leave it to the opposing party to show by cross-examination or otherwise any differences in the comparables.[198] Moreover, "[a] trial court's determination of the acceptability of sales as comparables will not be reversed in the absence of clear error."[199]

H.2. Application of the Comparable Sales Approach

H.2.a. Comparable Size

Although a difference in the size of parcels does not necessarily make a sale not comparable, clearly size is a factor that makes one sale different from another.[200] Whether a sale of different size is comparable depends on many circumstances. For example, in *Township of Wayne v. Cassatly,*[201] a case involving the taking of a 40-acre parcel, the court upheld the trial court's exclusion of various sales. First, as to one sale, it "really consisted of two sales separated by about nine months. One sale involved somewhat over ten acres, and the other in excess of eight acres."[202] Second, as to other sales properly excluded, they were "parcels located in other municipalities and counties, at substantial distance from the subject property, and had as their only similarity the fact that they were located near major shopping centers."[203]

In a South Carolina case, sales of property from the same 160-acre tract ranging from to 1.8 to 2.57 acres were held not to be comparable to the 8.87 acres that the state was condemning.[204] In an Iowa case in which

[188] Honolulu v. Bishop Trust Co., 48 Haw. 444, at 462, 404 P.2d 373, at 385 (*quoting* United States v. Johnson, 285 F.2d 35, 40–41 (9th Cir. 1960) (internal quotation marks omitted).

[189] *Id.* at 463, 404 P.2d 385 (*quoting Johnson*, 285 F.2d at 40–41).

[190] 278 Ga. App. 717, 629 S.E.2d 481 (2006), *cert. denied*, 2006 Ga. LEXIS 720 (Ga. 2006).

[191] *Id.* at 719, 629 S.E.2d 483.

[192] 7A NICHOLS ON EMINENT DOMAIN § G13.02[3], at G13-9.

[193] EATON, *supra* note 42, at 199.

[194] 7A NICHOLS ON EMINENT DOMAIN § G13.02[3], at G13-10.

[195] *Id.* § G13.04, at G13-20.

[196] Rademann v. State Dep't of Transp., 252 Wis. 2d 191, 209, 642 N.W.2d 600, 608 (Wis. Ct. App. 2002) (stating that "income evidence is never admissible where there is evidence of comparable sales") (citation omitted), *review denied*, 254 Wis. 2d 261, 648 N.W.2d 476 (2002).

[197] *Id.* at 204, 642 N.W.2d 606.

[198] State Road Comm'n v. Wood, 22 Utah 2d 320, 452 P.2d 874 ("Because of the responsibility of the trial judge as the authority in charge of the trial, he is allowed considerable latitude in his judgment upon the matter; and his ruling should not be disturbed unless it appears he was clearly in error, and that this redounded to the prejudice of the complaining party.").

[199] Rademann v. State DOT, 252 Wis. 2d 204, 642 N.W.2d 606 (citation omitted).

[200] Bd. of Trustees of the Univ. of Ill. v. Shapiro, 343 Ill. App. 3d 943, 952, 799 N.E.2d 383, 390 (Ill. Ct. App. 1st Dist. 2003) (stating that "[e]vidence of the sale of improved property is inadmissible as a comparable sale of a vacant property unless the properties are otherwise closely comparable in size, use, zoning and locale") (citation omitted).

[201] Township of Wayne v. Cassatly, 137 N.J. Super. 464, 349 A.2d 545 (N.J. Super. Ct. 1975).

[202] *Id.* at 470, 349 A.2d at 548.

[203] *Id.*

[204] S.C. State Highway Dep't v. Estate of League, 251 S.C. 368, 374, 162 S.E.2d 532, 534 (1968) (stating that "[t]he dissimilarities between the parcels [involved] in the prior sales and the land being acquired in this proceeding, especially as to

the state condemned 17 acres of a farm, the court agreed that it was difficult to find comparable sales but held that it was proper to admit evidence of comparable sales, which included a sale of 160 acres that was 13 mi from the property, a sale of unspecified size that was 15 mi from the property, and a sale of 320 acres of unspecified distance from the property.[205] Furthermore, it has been held that "sales of several parcels of land from one-half to five acres for residential purposes in the vicinity of the plaintiffs' farm" were comparable to 5.5-acre and 12.4-acre tracts being taken by condemnation.[206]

In *Trowbridge Partners, L.P., supra,* the court agreed with the trial court's determination that the appraiser "considered seven comparable sales, with similar qualities to the sale in question, to determine the fair market value of the property…."[207] Thereafter, the appraiser "made positive adjustments for size to the comparable sales that involved larger tracts of land than the condemned property…."[208] In the determination of value, the appraiser "relied solely upon the comparable sales that were similar in size to the remaining parcels" [and] because he "did not consider the comparable sales involving larger tracts of land," the appraiser did not make adjustments to the properties for size.[209]

In a California condemnation of property for airport expansion, the court upheld the admission of evidence of leased properties at other airports. In doing so the court recognized that "there is an obvious danger in admitting evidence as to the rental value of larger parcels; their greater size may make them more flexible and valuable, even in terms of price per-unit of surface area, than the condemned land."[210] The court held, however, that when leases are admitted into evidence regarding parcels smaller than the owner's land, "it is the defendant's parcel which, due to its size, might be more valuable per-unit of surface area. Consequently, it has been held that transactions in property of smaller sizes are not per se noncomparable."[211]

H.2.b. Distance from the Property

Another important factor to consider is the distance between properties. For example, in addition to the above cases in which the courts also considered distance from the subject property, a New Jersey court held that sales of properties, which differed materially in size from the subject property and were located from 3 to 22 mi from the property being condemned, were not comparable sales.[212]

H.2.c. Proximity in Time to the Taking

The closer a sale is to the date of the taking of the condemned property the more relevant the sale is, but "there is 'considerable latitude in the exercise of discretion by the lower court in determining comparable sales….'"[213] In Maryland, for example, "'the comparable sales approach estimates market value by looking to recent voluntary sales transactions involving properties similar to the subject property, and adjusts for any differences between each comparable property sold and the subject property.'"[214] Nevertheless, "Maryland has adopted as a 'rule of thumb' the 'five year–five mile' rule; that is, sales concluded more than five years prior to the date of the taking and those more than five miles from the property can be excluded."[215] In Maryland, however, experts still may adjust more "remote in time sales…for time by use of the consumer price index…in very limited circumstances…absent the availability of alternative, preferable methods."[216] Other courts may find that comparable sales that are not close to the date of taking are too remote to be admissible. As one court has stated, it must be shown that the purchases were very recent and "that values have not changed in the area since the purchase" for evidence of comparable sales to be admissible.[217]

H.2.d. Sales After the Date of Taking

Typically, an expert must use sales of comparable property prior to the date of the taking. However, in some circumstances, it may be possible for an expert to rely on a sale or sales after the date of the taking, if uninfluenced by the condemnation, and make upward or downward adjustments based on inflation. Indeed, sales 5 months and not more than 20 months after the date of valuation have been held to be admissible.[218]

size and commercial advantages due to location, were sufficient to justify and sustain the rulings of the trial judge").

[205] Perry v. Iowa State Highway Comm'n, 180 N.W.2d 417, 419–20 (Iowa 1970).

[206] Van De Hey v. Calumet County, 40 Wis. 2d 390, 394, 161 N.W.2d 923, 925 (1968).

[207] Trowbridge Partners, L.P. v. Miss. Transp. Comm'n, 954 So. 2d at 940.

[208] *Id.*

[209] *Id.*

[210] City of Ontario v. Kelber, 24 Cal. App. 3d 959, 971, 101 Cal. Rptr. 428, 436 (Cal. App. 4th Dist. 1972).

[211] *Id.* (citation omitted).

[212] Township of Wayne v. Cassatly, 137 N.J. Super. at 470, 349 A.2d at 548–49.

[213] Bern-Shaw Ltd. P'ship v. Mayor & City Council, 377 Md. 277, 292, 833 A.2d 502, 511 (2003) (citation omitted).

[214] *Id. (citing* Wash. Suburban Sanitary Comm'n v. Utils., 365 Md. 1, 10 n.5, 775 A.2d 1178, 1183 n.5 (2001)).

[215] *Id.* at 292–93, 833 A.2d at 511 (*quoting* Taylor v. State Roads Comm'n, 224 Md. 92, 167 A.2d 127 (1961) and *citing* State Roads Comm'n v. Adams, 238 Md. 371, 209 A.2d 247 (1965); Maryland Pattern Jury Instructions, MPJI-Cv 13:3(c)(3)(c) (4th ed. 2002)).

[216] *Id.* (*citing* Colonial Pipeline v. Gimbel, 54 Md. App. 32, 456 A.2d 946 (Md. Ct. Sp. App. 1983)).

[217] *Id.* at 294, 833 A.2d at 512 (holding that in a case involving a taking in 2000, a "1982 sale, unadjusted to present value, was not 'recent' enough to have had any measure of probity").

[218] Burchell v. Commonwealth, 350 Mass. 488, 490, 215 N.E.2d 649, 651 (1966) (stating that a statement in the applicable statute at the time that

However, sales after the date of valuation also have been ruled inadmissible, such as a sale made 2 years later.[219]

H.2.e. Sales to the Condemnor

As noted by one authority, "[b]efore a property can be considered a comparable, the appraiser must ensure that the sale was an *open market transaction*."[220] Comparable sales must have been voluntary arms-length sales; that is, the owner of a comparable property must have sold the land "freely and not under compulsion."[221] The majority rule is that sales made to an agency with the power of eminent domain are not admissible because they are not considered to be open-market transactions.[222]

For example, a recent opinion by the North Carolina Court of Appeals states that

> [t]he majority rule is "that evidence as to the price paid by the same or another condemning agency for other real property which, although subject to condemnation, was sold by the owner without the intervention of eminent domain proceedings, is rendered inadmissible to prove the value of the real property involved merely because the property was sold to a prospective condemnor."[223]

The court explained that

> [t]he rationale is that a sale to a prospective condemnor is in effect a forced sale; that at best it represents a compromise and consequently furnishes no true indication of the price at which the property could be sold in the open market to a "willing buyer"; that the condemnor may pay more in order to avoid the expense and uncertainty of the condemnation proceeding, while the seller may accept less in order to avoid the same or similar burdens. This reasoning also applies to amounts paid by a condemnor for neighboring land taken for the same project—however similar the lands may be—whether the payment was made as the result of a voluntary settlement, an award, or the verdict of a jury.[224]

Although another court states that "[j]urisdictions are split on the issue of whether a purchaser's power of eminent domain by itself renders a sale compulsory and not voluntary,"[225] some courts have permitted the use of such sales on the basis that the identity of the purchaser—an agency with the power to condemn—goes to the weight of the evidence and not its admissibility.[226] According to a 2006 Michigan decision, Michigan follows the "minority approach" that sales to a condemnor are not inadmassable.[227] The court observed that "[o]ther jurisdictions…have recognized that purchases by public bodies are not inevitably tainted with threats of compulsion" and that some states do not regard the power of condemnation "as a 'club' held by [the] government" but as a "'defense against extortion' by government."[228] Thus, in Michigan and other states, such as Hawaii, following the minority rule,

> [t]he admissibility of such evidence as to its probative value weighed against elements of compulsion, coercion,

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> "[t]he damages for property taken under this chapter shall be fixed at the value thereof before the recording of the order of taking…" *does not bar the admission of evidence of subsequent sales* which the judge, without abuse of discretion, rules to be material as the value at the time of taking)

(*citing* Roberts v. Boston, 149 Mass. 346, 21 N.E. 668, 670 (1889) (emphasis supplied).

[219] Booras v. Iowa State Highway Comm'n, 207 N.W.2d 566, 567 (Iowa 1973). *See In re Condemnation of 23.015 Acres*, 895 A.2d 76 (Pa. Commw. Ct. 2006), *appeal denied*, 590 Pa. 670, 912 A.2d 839 (2006), in which the Commonwealth Court noted that under 26 P.S. § 1-705(2)(i):

> (2) A qualified valuation expert may testify on direct or cross-examination in detail as to the *valuation of the property on a comparable market value*, reproduction cost or capitalization basis, which testimony *may include* but shall not be limited to the following:
>
> (i) The price and other terms of any sale or contract to sell the condemned property or *comparable property* made within a reasonable time *before or after the date of condemnation*.

8 95 A.2d, at 83, n.5 (emphasis supplied).

[220] Eaton, *supra* note 42, at 204 (emphasis in original) (identifying seven conditions that normally, but not always, must be met for a sale to be considered a voluntary sale).

[221] Bd. of Pub. Bldgs. v. GMT Corp., 580 S.W.2d 519, 523 (Mo. App. E. Dist. 1979).

[222] Pinczkowski v. Milwaukee County, 286 Wis. 2d 339, 352, 706 N.W.2d 642, 648 (2005) (stating that "'the price paid in settlement of condemnation proceedings, or the price paid by the condemnor for similar land, even if proceedings had not been begun, where the purchaser has the power to take by eminent domain, is not admissible'" and that "[t]his general rule of inadmissibility is firmly rooted in market principles and logic") (citation omitted); Miss. Transp. Comm'n v. Williamson, 908 So. 2d 154, 158 (Miss. Ct. App. 2005) (noting that sales of properties made to agencies vested with the power of eminent domain cannot be used as comparable sales because such exchanges are more akin to compromises), *cert. denied*, 920 So. 2d 1008 (Miss. 4, 2005); City of Austin v. Capitol Livestock Auction Co., Inc., 434 S.W.2d 423, 438 (Tex. Ct. Civ. App. 3d Dist. 1968).

[223] City of Charlotte v. Ertel, 170 N.C. App. 346, 349, 612 S.E.2d 438, 441, 442 (N.C. Ct. App. 2005).

[224] *Id.* at 350, 612 S.E.2d at 442.

[225] *Phoenix Redevelopment Corp.*, 812 S.W.2d 881, 884 (Mo. Ct. App. 1991).

[226] Honolulu Redevelopment Agency v. Pun Gun, 49 Haw. 640, 642, 426 P.2d 324, 325 (1967) (stating that "we think the better view is that *such evidence should not be automatically excluded as a matter of law*" and that

> [i]f it can be shown to the satisfaction of the trial court that the price paid was sufficiently voluntary to be a reasonable index of value, or that there is a necessity for the evidence because the only sales of comparable property in the area in recent years have been to the condemnor, such evidence should be admitted)

(emphasis supplied) (citations omitted).

[227] City of Detroit v. Detroit Plaza Ltd. P'ship, 273 Mich. App. 260, 730 N.W.2d 523 (Mich. Ct. App. 2006), *appeal denied*, 478 Mich. 925, 733 N.W.2d 42 (2007) (*following* Honolulu Redevelopment Agency v. Pun Gun, 49 Haw. 640, 426 P.2d 324 (1967)).

[228] 273 Mich. App. at 280–81, 730 N.W.2d at 534–35 (citation omitted).

> or compromise [should be] left to the trial court in its discretion so that the jury may be placed in the best position to pass upon the ultimate question of fact," and … therefore, "evidence of other sales to a condemnor used in support of an expert witness' opinion is admissible in the discretion of the trial court.[229]

A slightly different approach seems to be illustrated by *Phoenix Redevelopment Corp., supra,* in which the court stated that in Missouri the rule is that

> the price of property sold to a purchaser with the power of eminent domain is admissible EXCEPT when (1) the offeror's own evidence shows the sales were made after condemnation proceedings started; or (2) there is evidence from which a trial judge reasonably should have concluded that the sale was not voluntary; or (3) the opposing party produces other evidence that the sale was not voluntary.[230]

Finally, there is authority holding that if an agency with the power of eminent domain uses a straw man to acquire property and the real purchaser is later identified, the sale should not be admitted into evidence.[231]

H.2.f. Sales of Property With Different Zoning or Uses

The zoning classification of a property is an essential component of its value.[232] An issue that may arise is whether a property that is zoned differently from the subject property is still a comparable property.[233] A difference in zoning does not always render a sale one that is not a comparable sale. For example, the Illinois Supreme Court has held that zoning differences do "not render other types of evidence of value inadmissible."[234]

As stated previously, because no two properties are alike, expert witnesses must make adjustments for the differences in the properties.[235] However, one court rejected the use of adjusted *commercial* sales to value properties primarily used for *industrial* purposes.[236] The court stated that "[t]o permit a witness…to relate to the jury sales of tracts obviously not similar, and then 'adjust' these sales and the prices paid to the opinion of the witness so as to call them 'comparable' is to set up an unlimited artificial standard by which almost any conceivable sale could be 'adjusted' so as to be made available in support of opinion as to value."[237]

Another difficulty that may arise is an attempted comparison of vacant land with improved land. The problem with comparing sales of improved property with sales of unimproved property is that prices are either facts or they are not. For example, without evidence in the deed showing how much was paid for a parcel of land and how much was paid for a building thereon, it is not possible without the testimony of a seller or purchaser to establish what the purchaser paid only for the land to enable an appraiser to compare the price of the land with the land being condemned.

In *State ex rel. State Highway Commission v. Klipsch,*[238] the Missouri Supreme Court made clear that in Missouri "a witness may not testify as to his opinion of the value of comparable land."[239] What the rule means is:

> [T]he "witness cannot state his opinion of the value of neighboring land. If the price at which such land was sold is in evidence and bears against his own contention, he may, within reasonable limits, point out the difference between the two lots, but he cannot state his opinion upon the effect of the differing features or upon the elements of value of the two lots. The rule is strict; if the jury is to be aided by evidence in regard to property similarly situated, it must be by facts and not by opinions."[240]

However, a more recent appellate court opinion in *City of Lee's Summit v. R & R Equities, LLC*[241] states that

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[229] *Id.* at 281, 730 N.W.2d at 535 (citation omitted).

[230] *Phoenix Redevelopment Corp.*, 812 S.W.2d at 884 (emphasis in original) (holding that the trial court erred in allowing the condemnee but not the corporation to admit into evidence comparable sales figures derived from properties located in the same neighborhood and sold under the threat of condemnation) (citation omitted).

[231] *See* City of Chicago v. Ave. State Bank, 4 Ill. App. 3d 235, 239, 281 N.E.2d 66, 69 (1972) (stating that as to the issue of whether "the sellers knew that the Illinois Bell Telephone Company was the actual purchaser…the court acted well within the bounds of reasonable discretion in rejecting [the] evidence").

[232] Maritimes & Ne. Pipeline, L.L.C. v. 0.714 Acres of Land, 2007 U.S. Dist. LEXIS 62930, at *14.

[233] Township of Wayne v. Cassatly, 137 N.J. Super. at 470, 349 A.2d at 548 (excluding comparable sales where zoning was one factor); City of Chicago v. Albert J. Schorsch Realty Co., 127 Ill. App. 2d 51, 73, 261 N.E.2d 711, 721 (Ill. App. 1st Dist. 1970) (holding that "defendants were not prejudiced by the court's exclusion of their zoning exhibits…[as] [t]hey were in fact permitted to present their theory of a reasonable probability of rezoning to the jury"), *cert. denied*, 402 U.S. 908, 91 S. Ct. 1381, 28 L. Ed. 2d 649 (1971).

[234] Metro. Sanitary Dist. of Greater Chicago v. Indust. Land Dev. Corp., 121 Ill. App. 2d 393, 393, 257 N.E.2d 532, 533 (Ill. App. 1st Dist. 1970).

[235] *See* R.I. Props. v. Providence Redevelopment Agency, 2003 R.I. Super. LEXIS 19 (R.I. Super. 2003), and R.I. Props. v. Providence Redevelopment Agency, 2003 R.I. Super. LEXIS 19 (R.I. Super. 2003) (involving adjustments for a potential retail and commercial property and three comparable sales of properties to account for differences between the property and the comparables).

[236] State v. Cloud Constr. Co., 476 S.W.2d 395 (Tex. Ct. Civ. App. 3d Dist. 1972).

[237] *Id.* at 398 (affirming the trial court's decision that even though there was error in the court's admission of testimony concerning the value of land, which was not comparable to the appellee's land, the amount awarded the appellee was well within the range of admissible testimony on value) (citation omitted).

[238] 392 S.W.2d 287 (Mo. 1965).

[239] *Id.* at 290 (citation omitted), characterizing this as the "Massachusetts Rule."

[240] *Id.* (citations omitted).

[241] 112 S.W.3d 38 (Mo. App. W. Dist. 2003), *rehearing denied*, 2003 Mo. App. LEXIS 1170 (Mo. Ct. App. W. Dist. 2003).

> [b]asing an opinion of [an] unimproved property's value on a comparison with the sale of [an] improved property is neither absolutely right nor absolutely wrong. Because no two properties are exactly alike, using a sale of improved, but otherwise comparable, property to determine the value of unimproved property is permissible so long as, as a matter of law, the properties are sufficiently similar that the sale assists the jury in determining the condemned property's fair market value.[242]

Thus, "[t]he degree of similarity is the determining factor. 'The question becomes how improved must the sale [of the improved property] be to warrant its exclusion.' If the properties are sufficiently similar, any differences between them go to weight rather than to admissibility."[243]

In *City of Lee's Summit, supra,* the court agreed, however, with the city that the owner's expert improperly compared the sale of improved property with the owners' unimproved property. Even though the witness testified that the improvements on the improved property did not add to the land's value, the court agreed that the witness used "improper opinion-on-opinion evidence."[244] The court held that the use of church property was not a proper comparable sale because it was markedly dissimilar in character from the owners' property.[245]

H.2.g. Use of Non-Cash Sales as Comparable Sales

It has been held that "bona fide offers to purchase property for cash, in the absence of evidence of comparable sales, are some evidence of fair cash market value."[246] Although sales must be for cash, the price may have been paid partly in cash with the balance in the form of a mortgage.[247] Although most jurisdictions also allow evidence of sales that were installment sales,[248] a comparable sale must have been made for money and not wholly or partially for consideration other than money, such as an exchange for other property.[249]

For example, in *Reynolds v. Coleman,*[250] the court held that a "transaction was not a 'sale' capable of evidencing the fair market value of the [property] as a matter of law. The evidence…clearly demonstrates that the…transaction was part of a complex arrangement involving a tax shelter syndication and was not a conveyance of property to a typical purchaser from a typical seller."[251] Such a transaction is not one that is "governed by…open market considerations."[252]

H.2.h. Adjustments to Comparable Sales

The best comparable sales are those that require "the fewest adjustments to equalize them to the property under appraisal."[253] With respect to the adjustment of comparable sales, "when the comparable is inferior to the subject property, the comparable is adjusted upward to reflect its inferior characteristic."[254] Moreover, sales may be adjusted in the following suggested sequence based on the property rights conveyed, financing, conditions of sale, expenditures made immediately after purchase, market conditions, location, physical characteristics, economic characteristics, use/zoning, and nonrealty components of value.[255]

An expert witness must identify the factors that affected his or her judgment regarding adjustments and show on a percentage or dollars-and-cents basis how the comparables were adjusted;[256] the failure to do so may result in a reversal.[257] In appraising the value of a build-

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[242] *Id.* at 40–41 (citations omitted).

[243] *Id.* at 41 (citation omitted) (internal quotation marks omitted).

[244] *Id.* at 40.

[245] *Id.* at 42.

[246] Village of Lake Villa v. Stokovich, 211 Ill. 2d 106, 134, 810 N.E.2d 13, 30 (2004), *rehearing denied*, 2004 Ill. LEXIS 999 (Ill. 2004), *cert. denied*, 543 U.S. 943, 125 S. Ct. 354, 160 L. Ed. 2d 256 (2004).

[247] Ark. State Highway Comm'n v. Rhodes, 240 Ark. 565, 567, 401 S.W.2d 558, 560 (1966) (noting for example that "[t]he witness carefully explained to the jury that in the 1959 sale for $57,500.00, the purchase price had been $10,000.00 cash and a mortgage for $47,500.00," a sale that was "in all respects admissible").

[248] EATON, *supra* note 42, at 205.

[249] The City of Cheyenne v. Frangos, 487 P.2d 804, 805 (Wyo. 1971) (reversing but not addressing one of the city's arguments, which was that some sales were actually "trades"); Dep't of Bus. and Econ. Dev. v. Baumann, 56 Ill. 2d 382, 384, 308 N.E.2d 580, 581 (1974) (stating that "evidence offered to prove a comparable sale must show that the sale was for money, and not wholly or partially for a consideration other than money, such as an exchange of land").

[250] 173 Ill. App. 3d 585, 527 N.E.2d 897 (1988).

[251] *Reynolds,* 173 Ill. App. 3d at 595, 527 N.E.2d at 904.

[252] *Id.*

[253] Eaton, *supra* note 42, at 204.

[254] Maritimes & Ne. Pipeline v. 0.714 Acres of Land, L.L.C., 2007 U.S. Dist. LEXIS 62930, at *14.

[255] *Id.*

[256] Cheyenne v. Frangos, 487 P.2d 804, at 807 (holding that although

> the witness stated…his method took into account inflation, availability of land, and the commercial use to which the land could be utilized…we are forced to conclude…that this expert erroneously reached his result mechanically since he did not make adjustments for prices of the properties more or less similar to that here taken)

(*citing* Latham Holding Co. v. State, 16 N.Y.2d 41, 46, 261 N.Y.S.2d 880, 883, 209 N.E.2d 542, 544 (1965) (stating also that

> an expert cannot reach his result mechanically by a mere mathematical process by averaging front footage sales prices of parcels having obvious differences one from another as denoted by their locations and sales prices, without making adjustments for the prices of those that are more similar or dissimilar to the one in question).

[257] Geffen Motor, Inc. v. State of New York, 33 A.D. 2d 980, 307 N.Y.S.2d 389, 390 (N.Y. App. 4th Dep't (1970) ("The claimant's appraiser did not give a dollar and cents adjustment in any instance between the comparable and the subject land; neither did he give a breakdown percentage-wise nor state the

ing, an expert must "'present[] the court with a report of the sales of comparable properties and a breakdown depicting how much of the purchase price was allocated to the land and how much to the buildings.'"[258] Although the averaging of the sales prices of comparables usually is not allowed, there is some authority supporting the averaging of sales prices.[259]

An appraiser must "estimate[] the degree of similarity or difference between the subject property and comparable sales by considering various elements of comparison…."[260] The appraiser must make "[adjustments] to the sale prices of the comparables because the values of the comparables are known, while the value of the subject property is not known. Through this comparative procedure, the appraiser estimates one or more kinds of value as of a specific date."[261] After making the necessary adjustments, the appraiser must "correlate" the values "into a final value estimate for the property being appraised. This correlated value is *not* an average of the various value indications developed."[262]

I. ADMISSIBILITY AND USE OF THE INCOME CAPITALIZATION APPROACH

I.1. Admissibility of the Income Approach

As discussed in more detail in § H.2, *infra*, the income capitalization approach values property based upon the present day worth of the stream of income the property is expected to produce.[263] Although many jurisdictions have recognized that the income capitalization approach is acceptable, particularly in cases involving farm land and land with minerals in place,[264] with respect to other situations there appear to be some fairly well-accepted rules concerning when the approach may or may not be used. First, the courts generally have rejected the use of the income approach if there is evidence of comparable sales.[265] Second, "'[t]he capitalization of income approach is used to value income-producing property when it is completely taken.'"[266] Therefore, the "[u]se of the income method in a case of partial taking is improper,"[267] as it is when "only land and improvements are taken and the business is continued."[268] Third, "'[i]ncome cannot be capitalized to produce a residual value where the appropriated land is neither producing income nor equipped to do so.'"[269] There are other situations in which the income approach may not be permitted, such as in the valuation

factors which entered into his judgment. His failure to do so affords no basis for review of his testimony and it is insufficient to justify an award.") (citations omitted); Paterson Redevelopment Agency v. Bienstock, 123 N.J. Super. 457, 459, 303 A.2d 598, 599 (N.J. Super. Ct. 1973) (reversing when "the plaintiff's expert was completely unaware of the damaged condition of the building and, when it was disclosed at trial, made no adjustment on account of it, the trial court declined to instruct the jury to disregard the sale") (citation omitted).

[258] Mastrobuono v. Providence Redevelopment Agency, 850 A.2d 944, 947 (R.I. 2004) (citation omitted).

[259] Sun-Lite P'ship v. Town of West Warwick, 838 A.2d 45, 48 (R.I. 2003) (affirming and holding that, notwithstanding Sun-Lite's argument on appeal that the trial justice erred by averaging the adjusted values of certain comparables, "[t]he appraisal process is designed to adjust for the differences between properties in order that valuations of dissimilar properties may be compared").

[260] *Id.* (quoting the appraiser's testimony) (internal quotation marks omitted).

[261] *Id.* at 48–49 (quoting the appraiser's testimony) (internal quotation marks omitted).

[262] Eaton, *supra* note 42, at 225 (emphasis in original) (noting that the averaging of the values of the comparable sales is a "faulty procedure").

[263] *See* Eaton, *supra* note 42, at 194 (stating that "[t]he income capitalization approach is a procedure…that acknowledges that a relationship exists between the amount of net income a property can produce and its market value…. [C]apitalization theory has been modified and expanded more than any other concept within the appraisal process").

[264] Marseilles Hydro Power, LLC v. Marseillers Land and Water Corp., 2004 U.S. Dist. LEXIS 25276 at *1 (income approach rather than the cost approach applied); Willsey v. Kansas City Power & Light Co., 6 Kan. App. 2d 599, 603, 631 P.2d 268, 272 (1981) (stating that "[a]n expert witness may take the gross profit from a business and reduce it to rent and then capitalize the rent for the purpose of arriving at the value of the property on which the business is located"); Dep't of Pub. Works and Bldgs. v. Brockmeier, 128 Ill. App. 2d 395, 262 N.E.2d 345, 348 (1970) (income from a sod-producing farm); Salt Lake County v. Kazura, 22 Utah 2d 313, 316, 452 P.2d 869, 871 (1969) (the court not accepting "the plaintiff's…argument that the evidence of projected income of the hotel is so uncertain and conjectural that estimates of value in which it was used should have been rejected"); Boring v. Metro. Edison Co., 435 Pa. 513, 521, 257 A.2d 565, 569 (1969) (stating that an appraiser's setting a specific value on a lease conveyed the impression that "this specific amount was lost by the Condemnees by virtue of the condemnation and was recoverable as a separate item of damages") (citation omitted).

[265] Lataille v. Hous. Auth. of City of Woonsocket*,* 109 R.I. 75, 77, 280 A.2d 98, 99 (1971).

[266] W.R. Assocs. v. Comm'r of Transp., 751 A.2d 859, 867 (Conn. Super. 1999) (*quoting* State *ex rel.* Highway & Transp. Comm'n v. Edelen, 872 S.W.2d 551, 557 (Mo. App. E. Dist. 1994) (internal quotation marks omitted). *See also* State *ex rel.* State Highway Comm'n v. Mann, 624 S.W.2d 4, 10 (Mo. 1981) (en banc) (stating the "use of the capitalization of income method where there is a partial taking is speculative").

[267] 751 A.2d at 867 (*quoting* State *ex rel* Highway & Transp. Comm'n v. Kuhlmann, 830 S.W.2d at 571) (internal quotation marks omitted). *See also* Humble Oil & Refining Co. v. State, 15 A.D. 2d 686, 223 N.Y.S.2d 448 (N.Y. App. 3d Dep't 1962) ("Where there is a complete taking, the capitalization method is proper…but here where there is only a partial taking there is no basis for the application of such a method."), *aff'd,* 12 N.Y.2d 861, 187 N.E.2d 791, 237 N.Y.S.2d 338 (1962).

[268] 751 A.2d at 867 (*citing* State v. Lewis, 142 So. 2d 652, 656 (La. App. 1st Cir. 1962)).

[269] 751 A.2d at 867 (*quoting* Lucre Corp. v. Gibson, 657 N.E.2d 150, 153 (Ind. App. 4th Dist. 1995), *cert. denied*, 519 U.S. 950, 117 S. Ct. 362, 136 L. Ed. 2d 253 (1996)).

of churches[270] or hotels[271] or other special-use properties; when the appraiser did not capitalize the income but merely applied a discount factor to the income;[272] or when the income is deemed to be unstable.[273]

In *West Haven Housing Authority v. CB Alexander Real Estate, LLC,*[274] the court stated that in using the income capitalization approach the appraiser must:

> (1) estimate gross income; (2) estimate vacancy and collection loss; (3) calculate effective gross income (i.e., deduct vacancy and collection loss from estimated gross income); (4) estimate fixed and operating expenses and reserves for replacement of short-lived items; (5) estimate net income (i.e., deduct expenses from effective gross income); (6) select an applicable capitalization rate; and (7) apply the capitalization rate to net income to arrive at an indication of the market value of the property being appraised. …The process is based on the principle that the amount of net income a property can produce is related to its market value. …This approach only has utility where the property under appraisal is income producing in nature. [275]

If the Model Eminent Domain Code is used as a guide, a "valuation witness may consider actual or reasonable net income attributable to the property when used for its highest and best use, capitalized at a fair and reasonable interest rate."[276] An appraiser must consider what the property would generate in annual gross rental income if the property were rented completely. The property's rent must be compared with rental income from similar properties.[277] In most instances an expert will determine the reasonable, annual, rental value of the property and, thereafter, subtract for items such as operating expenses, taxes, and vacancy rate to arrive at a net figure.[278] Based on the resulting analysis, "the appraiser estimates the economic, or market rent applicable to the property…."[279] The estimate of present worth is the amount that a willing buyer would pay for the right to receive the stream of income generated by the property.[280]

The majority view is that actual rent earned by real estate is to be used to estimate value or to be considered as one factor in arriving at an appraiser's reconstructed operating statement income.[281] "[H]owever, …the in-

[270] City of Baltimore v. Concord Baptist Church, Inc., 257 Md. 132, 141, 262 A.2d 755, 760 (1970) (stating that the "experts…conceded that capitalization of income is an inappropriate approach and all save the City's expert agreed that comparable sales are virtually unavailable for use in the appraisal of church property").

[271] Chicago Land Clearance Comm'n v. Darrow, 12 Ill. 2d 365, 373, 146 N.E.2d 1, 6 (1957) (holding that the trial court properly excluded owners' offer to prove the gross income, expenses, and net income from the operation of the hotel).

[272] Boring v. Metro. Edison Co., 435 Pa. 513, 521, 257 A.2d 565, 569 (1969).

[273] Saunders v. State, 70 Nev. 480, 483, 273 P.2d 970, 971 (1954).

[274] W. Haven Hous. Auth. v. CB Alexander Real Estate, LLC, 2007 Conn. Super. LEXIS 174 (Jan. 16, 2007) (Unrept.), *aff'd*, 107 Conn. App. 167, 944 A.2d 1010 (2008).

[275] *Id.* at *10–11 (citation omitted).

[276] 4 NICHOLS ON EMINENT DOMAIN § 12B.08[4], at 12B-56. The Model Eminent Domain Code "does not preclude admission of evidence that a business being conducted on the property is in fact profitable, if, under the circumstances a prospective purchaser would consider this as a measure of its suitability for business purposes." *Id*.

[277] It should be noted that a "[v]aluation based upon an estimate of the potential income which might be realized from utilization by the owner of the property in a manner of which it is capable (but of which he has not as yet availed himself) has been rejected on the ground that such income is too uncertain and conjectural to be acceptable." *Id.* § 12B.08[2], at 12B-52.

[278] EATON, *supra* note 42, at 194.

[279] *Id*. at 175.

[280] Carroll County Water Auth. v. L.J.S. Grease & Tallow, Inc., 274 Ga. App. 353, 357 n.21, 617 S.E.2d 612, 617 n.21 (2005) (stating that "[t]he income approach is defined as converting reasonable or actual income at a reasonable rate of return (capitalization rate) into an indication of value" and that "'[t]he income approach necessarily takes into account what future earnings would be were the property interest not extinguished") (citations omitted) (internal quotations omitted).

[281] County of Clark v. Sun State Props., Ltd., 119 Nev. 329, 345, 72 P.3d 954, 964 (2003) (Maupin, J., dissenting) (stating that "one such consideration [in making a purchase] is 'the rental value of the property condemned, as well as the actual rent which the property produces, because such elements of value are material in the determination of 'just compensation for the land taken'") (footnote omitted), *cert. denied*, Pyles v. Clark County, 540 U.S. 1177, 124 S. Ct. 1405, 158 L. Ed. 2d 77 (2004); United States v. Corbin, 423 F.2d 821, 824, 825 (1970) (holding in a case in which an owner lacked adequate books and records and both sides had used arbitrary elements in constructing income that the method used was not an improper one); Kozecke v. State, 34 A.D. 2d 599, 600, 308 N.Y.S.2d 488, 490 (N.Y. App. 3d Dep't 1970) (holding that although the state argued that rental value could not be based upon gallonage sold where there was no actual lease between the owner of the fee and the subtenant, "other evidence in the record indicat[ed] a direct relationship between the location of the subject premises and the fair market value resulting from the capitalization of rental values based on gallonage leasing"); Hicks Realty Assocs. v. State, 34 A.D. 2d 866, 310 N.Y.S.2d 825, 826 (N.Y. App. 3d Dep't 1970) (holding that an adjustment by the respondent's appraisers of the actual rentals to a higher figure was not supported by the record), *aff'd*, 32 N.Y.2d 662, 295 N.E.2d 797 (1973); Majal Realty Corp. v. State, 23 A.D. 2d 941, 942, 259 N.Y.S.2d 915, 916 (N.Y. App. 3d Dep't 1965) (holding that an appraisal was not erroneous because actual rent was used instead of economic rent or comparable rent); State v. Hollis, 93 Ariz. 200, 204, 379 P.2d 750, 752 (1963) ("Income from a business must be distinguished from income from the intrinsic nature of the property itself. If the property is rented for the use to which it is best adapted, the actual rent received, capitalized at the rate which local custom adopts for the purpose, forms one of the best tests of value and, accordingly, evidence of rent actually received at a time reasonably near the time of taking should be admitted."); Winepol v. State Roads Comm'n of Md., 220 Md. 227, 230, 151 A.2d 723, 725 (1959) (holding that because

come capitalization method 'can be effective only with thorough data including accurate actual income….'"[282] In a case in which a discounted cash flow analysis (DCF) (discussed below) was accepted, a Connecticut court in discussing the income approach stated:

> There appears to be no dispute in the cases on the propriety of using the income capitalization method in properly providing rental income and the defendant Housing Authority does not dispute use of this approach as such. But as discussed in *Matter of City of Albany*, [136 A.D.2d 818, 523 N.Y.S.2d 652 (App. Div. 1988)] "this method should be carefully scrutinized even where appropriate; therefore while it may be the only usable method under certain circumstances, its use must be based on a foundation which minimizes conjecture and uncertainty"….[283]

Furthermore, "[w]hile actual rentals are not an absolute criterion, nevertheless, where…there is no claim that the leases were improvident or that their terms were unusual, they should be considered in determining rental value."[284]

Assuming the leased income is equal to the economic rental of the property and assuming the property is leased to a responsible tenant on a long-term basis, the leased income approach is available to determine value.[285] Although many courts have approved the approach, some courts have held that it is the only approach that is applicable if the building has been under lease for a long time.[286] Unless a proper foundation for the evidence is offered and some foundation for the figures used is presented, some courts have been unwilling to permit an appraiser to reconstruct an operating statement.[287]

I.2. Derivation of the Income Capitalization Rate

A factor or rate must be developed from market data and applied to the net income of a property to indicate the property's market value. There are two principal methods for deriving the rate of capitalization—a rate

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> [t]here was explicit, competent testimony that, except for the coming of the road, the property would have been available for, and rented as, stores and apartments…[c]apitalization of the income which a property will produce is relevant and pertinent evidence of its value to a willing purchaser…and, so, on its market value)

(citation omitted).

[282] W. Haven Hous. Auth. v. C.B. Alexander Real Estate*,* 2007 Conn. Super. LEXIS 174, at *11 (citation omitted) (footnote omitted).

[283] *Id.* at *18. *See also* State v. Bare, 141 Mont. 288, 377 P.2d 357, 363 (1962); Dodge, Comm'r of Pub. Works v. Estate of Hiscock, 51 A.D. 2d 652, 378 N.Y.S.2d 202, 203 (N.Y. App. 4th Dep't 1976) (reversing finding in a condemnation case where rental value was based merely on appraiser's statement and where the record did not contain supporting evidence).

[284] Motsiff v. State, 32 A.D. 2d 729, 301 N.Y.S.2d 786, 787 (N.Y. App. 4th Dep't 1969), *aff'd,* 26 N.Y.2d 692, 257 N.E.2d 42, 308 N.Y.S.2d 860 (1970) (citations omitted). *See also* CMRC, Ltd. v. State, 2 A.D. 3d 303, 768 N.Y.S.2d 598 (N.Y. App. 1st Dep't 2003) (holding that the lower court properly valued the building signage at the actual rental), *appeal denied*, 5 N.Y.3d 704, 834 N.E.2d 780 (2005); Riverhead v. Saffals Assocs., Inc., 145 A.D. 2d 423, 424, 535 N.Y.S.2d 389, 390 (N.Y. App. 2d Dep't 1988) (holding that "[t]he actual income generated by the property in question is generally the surest indicator of its value").

[285] *See* discussion in EATON, *supra* note 42, at 174–75 (noting that some courts have rejected the income capitalization approach because the property was not actually rented, whereas other courts hold "that evidence of rental value is admissible even where the owner occupied the property himself and did not actually rent it") (*Id.* at 176).

[286] City of Buffalo v. Migliore, 34 A.D. 2d 334, 335, 312 N.Y.S.2d 142, 143 (N.Y. App. 4th Dep't 1970) (reversing the lower court that had used primarily the market data approach and stating that "[t]he proper method of fixing value would have been capitalization of income [when] [t]he property had been leased to a reputable tenant for many years and was income producing at the time of the appropriation") (citation omitted); State v. Hollis, 93 Ariz. 200, 204, 379 P.2d 750, 752 (1963) ("Income from a business must be distinguished from income from the intrinsic nature of the property itself. If the property is rented for the use to which it is best adapted, the actual rent received, capitalized at the rate which local custom adopts for the purpose, forms one of the best tests of value and, accordingly, evidence of rent actually received at a time reasonably near the time of taking should be admitted."); Honolulu v. Bishop Trust Co., 48 Haw. at 465, 404 P.2d at 386 (stating, however, that "[e]vidence as to long-term leases of property in a great city, or as to the rental value of other property similarly situated, may or may not be competent, depending upon the particular facts of the case."); *In re Port of New York Auth.*, 2 N.Y.2d 296, 301, 159 N.Y.S.2d 825, 826, 140 N.E.2d 740, 741 (1957) (stating that a lease for a rental in excess of the reasonable rental value may be considered as an item of value if the excess is due to the availability of the property for a particular use by the tenant in occupation*);* United States v. Certain Interests in Prop. in Champaign County, 165 F. Supp. 474 (E.D. Ill. 1958) (discussing capitalization of the leasehold interest), *aff'd in part, rev'd in part*, 271 F.2d 379 (7th Cir. 1959); United States v. Certain Interest in Prop. in Monterey County, 186 F. Supp. 167 (N.D. Cal. 1960) (discussing capitalization of leasehold valuation); In re Pub. Schs. 49, Borough of Bronx, City of N.Y., 41 Misc. 2d 654, 656, 246 N.Y.S.2d 715, 717 (N.Y. Sup. Ct. 1963) (noting use of the Inwood tables); United States v. Certain Interests in Prop. in Cumberland County, State of N.C., 185 F. Supp. 555, 557 (E.D. N.C. 1960) (using Inwood coefficient).

[287] United States v. Corbin, 423 F.2d 821, 827–28 (10th Cir. 1970) (noting that in connection with the valuation of a fish-farm operation, "[t]he capitalization approach was further refined to a capitalization of rent approach because the landowners had no evidence available that the property had in fact been income producing" and that "[t]herefore an arbitrary rent income had to be constructed"); *Hicks Realty Assocs.*, 34 A.D. 2d 866, 310 N.Y.S.2d 825, 826 (1970) (holding that the respondent's appraisers' adjustments to the gross rentals were not supported by the record and amounted to "sheer speculation"); City of Chicago v. Giedraitis, 14 Ill. 2d 45, 51, 150 N.E.2d 577, 580–81 (1958) (stating that "even though evidence of actual rental receipts may be admissible in a condemnation proceeding to determine the property value…we know of no instance in which speculative or future anticipated rentals were held to be competent valuation factors") (citations omitted)).

derived from comparable sales and a yield rate based on DCF.[288] As seen in the note below, there are some eminent domain cases illustrating the use of the DCF technique in the income capitalization approach.[289] As one authority points out, "[b]ecause the courts recognize the importance of the capitalization rate, they often insist that the rates selected be supported by market data," and "[t]he most easily understood method of rate selection is direct sales comparison."[290]

An appraiser applies the capitalization rate to the net rental figure to obtain a market value.[291] The capitalization rate selected by an expert is a rate based on an analysis of market factors, including prevailing interest rates, and is used to convert a property's income into the property's fair market value.[292] When presenting the income capitalization approach to a jury, one authority suggests illustrating "the relationship between value, income, and rate of return with something familiar to most jurors, such as the operation of a savings account."[293] Furthermore, although appraisers have various ways of deriving the capitalization rate, it has been said that the direct capitalization method "using an overall capitalization rate extracted directly from comparable sales…is often difficult to attack effectively on cross-examination."[294]

I.3. Building to Land Ratio

Building-to-land ratio is important when attempting to value property based on the income capitalization approach. In *Continental Assurance Co. v. Mayor of Lynbrook,*[295] the court cautioned that "'[i]n using capitalization of income it is important to ensure that an improper distortion is not introduced because of disproportionate values assignable to land and buildings…."[296] The court held that "the [trial] court erred in rejecting petitioner's split rate building residual technique, and in using respondents' expert's over-all capitalization rate which transparently failed to identify and provide for a building recapture factor."[297] The court emphasized that although "'an over-all rate of capitalization is useful, it may be vulnerable unless it is based upon separate capitalization rates computed by one or another residual method on land and buildings….'"[298]

I.4. Business Profits and Valuation

Another rule widely followed is that "evidence of the profits of a business conducted upon land taken for public use is not admissible in proceedings for the determination of compensation because the evidence is too speculative, uncertain and remote to be considered as a basis for ascertaining market value.'"[299] The reason is that income derived from business ventures or operations depends to a great extent on the managerial capabilities of the individual operating the business.

Consequently, "[m]ost jurisdictions…limit [the] use of the income method to situations where 'profits are derived from the intrinsic nature of the real estate itself, as distinguished from the profits derived from a

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[288] EATON, *supra* note 42, at 174–75. In Eaton's opinion, the DCF analysis is unlikely to gain traction for use in eminent domain cases. *See id*. at 193 (stating that "[b]ecause of the drawbacks in DCF analysis and the danger of its misuse, its applicability in eminent domain valuation is severely limited").

[289] However, there are eminent domain cases in which the discounted cash flow technique has been used or attempted. *See* Miller v. Glacier Dev. Co., L.L.C., 284 Kan. 476, 484, 161 P.3d 730, 738 (2007) (noting in a condemnation proceeding by the Kansas DOT the owner's expert's use of the income approach and discounted cash flow analysis), *cert. denied*, 128 S. Ct. 1657, 170 L. Ed. 2d 355 (2008); Portland Natural Gas Transmission Sys. v. 19.2 Acres of Land, 195 F. Supp. 2d 314, 326 (Mass. 2002) (finding that an expert's use of the DCF method with regard to valuation in the taking of temporary easements to be flawed); Union Pac. R.R. v. 174 Acres of Land Located in Crittenden County, 193 F.3d 944, 947 (8th Cir. 1999) (holding that excluded testimony would not have changed the verdict when the district court refused to allow an expert "to present an alternative income or discounted cash flow approach to valuing the land"); Clearwater Plaza Ltd. P'ship v. Urban Redevelopment Comm'n, 1998 Conn. Super. LEXIS 3234, at *9 (Conn. Super. 1998) (Unrept.) (court employing a different approach where the DCF analysis of the experts produced valuations that differed by $5 million); Davis v. S. Fla. Water Mgmt. Dist., 715 So. 2d 996, 998 (Fla. App. 4th Dist. 1998) (not resolving "what role the discounted cash flow model might otherwise play in considering highest and best use and fair market value had Appellants not raised the matter") (footnote omitted); Todesca/Forte Bros. v. State Dep't of Transp., 1994 R.I. Super. LEXIS 20, at 50 (R.I. Super. 1994) (rejecting as unreliable and inaccurate the discounted cash flow analysis presented by respondent's expert witnesses for lacking "an adequate foundation" or "industrial or engineering support" and for being based on unreliable U.S. Bureau of Mines reports); Crocker v. Miss. State Highway Comm'n, 534 So. 2d 549, 554 (Miss. 1988) (stating that "there is ongoing debate concerning the relevance of traditional capitalization techniques and the validity of discounted cash flow analysis") (citation omitted) (internal quotation marks omitted).

[290] Eaton, *supra* note 42, at 184. *See id*. at 185 for an example of "how overall capitalization rates can be developed from comparable sales…."

[291] *Id*. at 194.

[292] *See* ENCYCLOPEDIA OF REAL ESTATE APPRAISING 41–43 (3d ed. 1978) (discussing income approach).

[293] Eaton, *supra* note 42, at 182.

[294] *Id*. at 183. *See id*. at 184–85 for a table showing how overall capitalization rates may be determined from comparable sales.

[295] 113 A.D. 2d 795, 493 N.Y.S.2d 773 (N.Y. App. 2d Dep't 1985), *appeal after remand*, 130 A.D. 2d 745, 515 N.Y.S.2d 720 (N.Y. App. 2d Dep't 1987), *appeal denied*, 71 N.Y.2d 805, 524 N.E.2d 877, 529 N.Y.S.2d 276 (1988).

[296] *Id.* at 798, 493 N.Y.S.2d at 777 (citation omitted).

[297] *Id.* at 798, 493 N.Y.S.2d at 776.

[298] *Id.* at 798, 493 N.Y.S.2d at 777 (citation omitted).

[299] Ventura County Flood Control Dist. v. Security First Nat'l Bank, 15 Cal. App. 3d 996, 999, 93 Cal. Rptr. 653, 654 (Cal. App. 2d Dist. 1971) (citation omitted) (internal quotations omitted).

business operated on the land.'"[300] Thus, "income from property in the way of rents is a proper element to be considered in arriving at the measure of compensation to be paid for the taking of property."[301] Actual rent, "capitalized at the rate which local custom adopts for the purpose, forms one of the best tests of value…."[302]

Business profits usually are not the type of income that may be capitalized for the purpose of the income approach.[303] As a North Carolina court explained recently, although "[i]njury to a business, including lost profits, is [a] noncompensable loss…revenue derived directly from the condemned property itself, such as rental income, is distinct from profits of a business located on the property" and thus is compensable.[304] Accordingly, "[w]hen evidence of income is used to valuate property, 'care must be taken to distinguish between income from the property and income from the business conducted on the property.'"[305] In a later North Carolina case on the same issue, the court illustrated its point with this example: "if identical adjoining stores were taken in the condemnation of a shopping center, the owners of these two stores should be entitled to the same amount in damages, even if one owner ran a profitable fine jewelry business, while the other operated a failing shoe repair shop."[306]

Nevertheless, there are cases in which the use of business profits has been approved.[307] In *State Highway Commission v. Lee,*[308] the Supreme Court of Kansas, adopting what is regarded as the minority view, used the income approach by taking into account the income to be derived from the future sales of sites to be developed from what was presently undeveloped land.[309] The court stated that "[t]he importance of our decision herein lies in the application of the income approach used in the valuation of condemned property which is imminently ready for development."[310]

Other courts have used income derived from a business conducted on the property to determine the value of property, the rationale being that the income that was capitalized was not business profits but rather a rental value derived from an analysis of business income.[311] Thus, in some situations, "[e]vidence of business volume may be admitted…when it can be shown that is the basis of market value and/or economic rent within the industry."[312] As an earlier case explained, "the increasing vogue of leases of business property reserving rentals computed on a percentage of the volume of business transacted by the tenant, [makes it] artificial and illusory to reject an expert opinion of rental value that takes into account the volume of business which experience has shown a particular piece of property is capable of producing…."[313]

If the property is "unique," there may be a basis for recovery of lost profits as occurred in *Housing Authority of Atlanta v. Southern Railway Co.*[314] The Supreme Court of Georgia affirmed that part of the Court of Appeals' decision that allowed the condemnee Southern Railway to recover lost profits in a condemnation proceeding brought by the Housing Authority. The Court of Appeals had held that because "Southern had shown through ample evidence that it had 'suffered a business loss (whether partial or total), that the business was unique to Southern and the profits were…not…remote or speculative' it was entitled to recover the $132,500 the jury had awarded it for lost profits."[315]

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[300] Commonwealth v. R.J. Corman R.R. Co./Memphis Line, 116 S.W.3d 488, 496 (Ky. 2003) (citation omitted).

[301] Ventura County Flood Control Dist. v. Security First Nat'l Bank, 15 Cal. App. 3d at 999, 93 Cal. Rptr. at 654 (citation omitted) (internal quotations omitted).

[302] 4 NICHOLS ON EMINENT DOMAIN § 12B.10, at 12B-70.

[303] Lechliter v. State, 185 Neb. 527, 530, 176 N.W.2d 917, 919 (1970) ("There can be no damage allowed for the destruction of the business. The only issue relating to the business is the extent to which the operation of the business on the land enhanced the value of the property.")

[304] Dep't of Transp. v. M.M. Fowler, Inc., 361 N.C. 1, 7, 637 S.E.2d 885, 890 (2006).

[305] *Id.* (citation omitted).

[306] City of Charlotte v. Hurlahe, 178 N.C. App. 144, 149, 631 S.E.2d 28, 31 (2006) (holding that the owners' evidence of the net income from the operation of a parking lot on the property was not inadmissible evidence of lost profits and that each expert had performed the necessary calculations to convert rental income to fair market value), *petition withdrawn*, 360 N.C. 644, 636 S.E.2d 804 (2006).

[307] EATON, *supra* note 42, at 176 (noting that "[a] number of states have made specific statutory provisions allowing payment for the taking or destruction of business under certain circumstances") (*citing* California, Georgia, Florida, Louisiana, New York, Pennsylvania, and Vermont).

[308] 207 Kan. 284, 485 P.2d 310 (1971).

[309] *Id.* at 299, 485 P.2d at 321 (stating that although "[i]t must be conceded if it is established…that future development of the condemned tract is speculative, valuation of such tract based upon the development approach may be erroneous" but that "[i]f develoment, however, is not speculative but imminent, as here, then the development approach for valuing the property is a fair and reasonable approach").

[310] *Id.* at 299, 485 P.2d at 321–22.

[311] Sunnybrook Realty Co. v. State, 11 A.D. 2d 888, 203 N.Y.S.2d 286 (N.Y. App. 3d Dep't 1960), *aff'd,* 9 N.Y.2d 960, 176 N.E.2d 203, 217 N.Y.S.2d 227 (1961). *See also* Killip Laundering Co. v. State, 32 A.D. 2d 579, 580, 299 N.Y.S.2d 33, 35 (N.Y. App. 3d Dep't 1969); Private Prop. for Mun. Courts FAC v. Kordes, 431 S.W.2d 124, 126 (Mo. 1968) (upholding the use of the income approach for a parking lot business); State v. Ellis, 382 S.W.2d 225 (Mo. App. Springfield Dist. 1964) (holding that a gallonage figure derived from sales of gasoline was proper); St. Louis Hous. Auth. v. Bainteri, 297 S.W.2d 529, 535 (Mo. 1957) (indicating that fair market value may be based on a customary standard or formula used in the oil business).

[312] EATON, *supra* note 42, at 176.

[313] State Roads Comm'n v. Novosel, 203 Md. 619, at 624, 102 A.2d 563, at 565 (1954).

[314] 245 Ga. 229, 264 S.E.2d 174 (1980).

[315] *Id.* at 229, 264 S.E.2d at 175.

In affirming, the Georgia Supreme Court held that "[o]nce a condemnee gets over the hurdle of proving the property to be 'unique,' proving damages by an alternative, non-fair market value method is the sole remaining burden, and a question for the jury."[316] The court held:

> The jury was presented with testimony concerning the income method of valuation, one of the acceptable non-fair market value methods. As the Court of Appeals noted, the amount awarded Southern for lost profits was within the figures mentioned representing a range of expected loss, and the jury chose a sum to award. It was not incorrect to instruct the jury on lost profits as a means of awarding just and adequate compensation because the income approach necessarily takes into account what future earnings would be were the property interest not extinguished, which Southern's was.[317]

A later article, however, explains that in Georgia

> [b]usiness damages became compensable as a separate item of compensation in 1966 when the supreme court decided *Bowers v. Fulton County* [221 Ga. 731, 146 S.E.2d 884 (1966]. Before 1966 an owner could use business damage evidence to prove the value of the property before and after the taking, but an owner could not recover business damages as a separate item."[318] The article explains that after the *Bowers* case, there was a "drift toward the uniqueness requirement….[319]

Although it is beyond the scope of this section to discuss one state's law in any detail, it appears that the law developed in Georgia in such a manner that, for example,

> "[w]hen the business belongs to the landowner, total destruction of the business at the location must be proven before business losses may be recovered as a separate element of compensation. On the other hand, when the business belongs to a separate lessee, the lessee may recover for business losses as an element of compensation separate from the value of the land whether the destruction of his business is total or merely partial, provided only that the loss is not remote or speculative."[320]

In eminent domain cases in Vermont, compensation for land taken may include compensation for business losses because "[c]ompensation for business losses is statutory."[321] Vermont is "one of the few states to recognize loss to the individual over and above the value of the land."[322] Thus,

> [i]n Vermont, the value of the land taken at its highest and best use is first calculated, and then, if "'the plaintiff has suffered a loss to his business which has not necessarily been compensated for in the allowance made for his land,'" separate damages must be awarded for business loss. …*Compensation for business losses, however, is not the same as valuation of the property through consideration of the profits made by the business*.[323]

Finally, it may be noted that there is authority holding that a "condemnee may recover damages for lost profits when the condemnee has demonstrated that the condemnor caused unreasonable delay in bringing the action to trial."[324]

I.5. Variations in the Income Approach

There are several variations of the income capitalization approach, some of which will be noted briefly.[325]

First, with the gross rent multiplier approach an appraiser obtains a multiplier based on an examination of comparable properties and then divides the gross incomes of the properties into the price for which the properties sold to derive a gross rent multiplier or GRM.[326] Courts may refuse to permit the use of the method unless it is supported with an adequate foundation. As stated in a federal court decision, "to have probative value, that opinion or estimate must be founded upon substantial data, not mere conjecture, speculation or unwarranted assumption."[327]

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[316] *Id.* at 231, 264 S.E.2d at 176.

[317] *Id.*

[318] Charles M. Cork, III, *A Critical Review of the Law of Business Loss Claims in Georgia Eminent Domain Jurisprudence*, 51 MERCER L. REV. 11, 12 (1999) (footnotes omitted).

[319] *Id*. at 18 (footnote omitted) (noting that the trend continued in Hinson v. Dep't of Transp*.,* 135 Ga. App. 258, 259, 217 S.E.2d 606, 607 (Ga. Ct. App. 1975), in which the court stated that "[t]he destruction or loss of a business being operated upon the condemned property requires compensation where the land is shown to be 'unique'")).

[320] *Id.* at 22 (*quoting* Dep't of Transp. v. Dixie Highway Bottle Shop, Inc., 245 Ga. 314, 315, 265 S.E.2d 10 (1980)).

[321] *In re Appeal of Condemnation Award to 89-2 Realty*, 152 Vt. 426, 429, 566 A.2d 979, 980 (1989) (*citing* Penna v. State Highway Bd., 122 Vt. 290, 295, 170 A.2d 630, 634 (1961)).

[322] *Id.* (citation omitted).

[323] *Id.* at 429–30, 566 A.2d at 981 (*citing* Penna v. State Highway Bd., 122 Vt. 290, 295, 170 A.2d 630, 634 (1961) (some citations omitted) (emphasis supplied).

[324] County of Clark v. Sun State Props., Ltd., 119 Nev. 329, at 331, 72 P.3d 954, at 955.

[325] For a more detailed discussion of the various permutations of the income approach, *see* ch. 9 in EATON, *supra* note 42, at 173.

[326] *See*, generally, W. Bay Christian Sch. Ass'n, Inc. v. R.I. Dep't of Transp., 2007 R.I. Super. LEXIS 24, at *8 (R.I. Super. Ct. 2007) (agreeing with an appraiser's approach to the valuation of certain duplexes taken based on "the rental income each duplex could potentially generate…."); Lechliter v. State, 185 Neb. 527, at 531, 176 N.W.2d 917, 920 (upholding the granting of a new trial when "[t]he method used by plaintiffs' expert [was]…based upon the value of the real estate and improvements, plus a projection of possible profits for 8 years for the loss of the business").

[327] United States v. 179.26 Acres of Land, 644 F.2d 367, 372 (10th Cir. 1981) (stating without mentioning the gross rent multiplier method that because "'the law is not wedded to any particular formula or method for determining the fair market value as the measure of just compensation…[it] may be based upon comparable sales, reproduction costs, capitalization of net income, or an interaction of these determinants) (*quoting* Sill

A few cases identified in the note below were located in which the courts accepted the GRM approach in the valuation of billboards.[328] In addition, a few cases were located in which real property was taken by condemnation and the expert for the condemnor or the condemnee was permitted to give an opinion of value that included an income capitalization approach using a GRM.[329]

The court, however, may not necessarily permit an expert essentially to give an opinion of value using two forms of the income approach, such as a GRM approach and another method that purports to capitalize the rent. For example, in *Crocker v. Mississippi State Highway Commission,*[330] a strip of land was taken from an owner of a sporting goods business. The owner's expert, Morrow, gave an opinion of value based on "the market data approach" pursuant to which he "determined comparable property had a gross rent multiplier of 6.8 (fair market value of comparable property divided by its annual rental value)…."[331] Besides using the market data approach and the replacement cost method, the expert "used the income approach, a reconstructed income statement."[332] However, the trial court sustained an objection to Morrow's last approach, described as a "capitalized rent loss" method.[333] The Supreme Court of Missouri agreed with the trial court, holding that

> [w]hat [Morrow] is attempting through the disputed testimony is nothing more than a second income approach. Moreover, his projected rental loss of $49,000.00 is quite comparable to the yields of his other approaches to value. *Crocker had already given one valuation analysis using an income approach* to fair market value.[334]

Implicit in the *Crocker* decision, of course, is that the income method using a GRM is an acceptable method of valuation. However, the court observed that "'not all appraisers agree on the appropriate income valuation techniques to be applied today, and there is ongoing debate concerning the relevance of traditional capitalization techniques and the validity of DCF.'"[335] It may be noted, first, that the court in *Crocker* regarded the expert's rejected method as a variation of the residual method, an attempt "to input a lost rental income amount as a residual value, and then capitalize it to show its present value." However, the court did not reject the expert's methodology on that basis: "While it may be a twist on the concept of residuals (because the method is particularly suited for rent producing properties), …it is not incorrect nor improper per se."[336]

A second variation of the income approach is the use of a yield capitalization method that "is accomplished with [a] *mortgage-equity formula*, which is referred to as the *Ellwood equation*."[337] The approach enables an appraiser or a court to analyze an investment property by directly taking into consideration the effect on the valuation of property of the amortization of the mortgage and of depreciation or appreciation of the component parts of the investment.[338] A few cases note the use

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Corp. v. United States, 343 F.2d 411, 416 (10th Cir. 1965), *cert. denied*, 382 U.S. 840, 86 S. Ct. 88, 15 L. Ed. 2d 81 (1965)).

[328] Fla., Dep't of Transp. v. Powell, 721 So. 2d 795, 798 (Fla. App. 1st Dist. 1998) (holding in a billboard case that it was not improper for the expert witness for the owner of the billboard and leasehold to use the gross rent multiplier in testifying regarding the valuation of the billboard); Minnesota v. Weber-Connelly, Naegele, Inc., 448 N.W.2d 380, 385 (Minn. Ct. App. 1989) (stating that Minn. Stat. ch. 173 (1988) provides a special mechanism (separate from the general purpose and procedure of ch. 117 applicable to eminent domain procedures) that is directed specifically to the taking of billboards and that it was not erroneous for the trial court to conclude "that the most logical and fair method of providing just compensation for billboards was the gross rent multiplier"). *See also* Whiteco Indus., Inc. v. City of Tuscon, 168 Ariz. 257, 812 P.2d 1075 (1990) (reversing the trial court's award for the billboard owner because the billboard owner's leases had expired but also disagreeing with, but not specifically discussing, the use of the gross rent multiplier approach used by Whiteco's expert).

[329] *In the Matter of the City of N.Y. (Clinton Urban Renewal Project),* 59 N.Y.2d 57, 61, 449 N.E.2d 1246, 1247, 463 N.Y.S.2d 168, 169 (1983) (stating in a case in which the city's appraiser used a gross rent multiplier that "both sides agreed upon capitalization of net rental income as the proper measure of fair market value but differed as to the part played by the actual use in the determination of rental income"); Warren v. Waterville Urban Renewal Auth., 235 A.2d 295, 298 (Maine 1967) (condemnor's expert testifying without objection and "using several recognized and sound approaches to market values, such as the reproduction cost less depreciation, sales of comparable properties, and capitalization of income obtained by use of a gross rent multiplier"); City of New Haven *ex rel*. New Haven Bd. of Educ. v. Reg'l Rehab. Inst. of Conn., 2005 Conn. Super. LEXIS 1651, at *7, 30 (Conn. Super. Ct. 2005) (Unrept.) (noting that the condemnee's expert was permitted to testify regarding use of a gross rent multiplier in valuing the property along with other methods but the court finding that the witness's testimony was inconsistent on comparable sales data used by the expert).

[330] 534 So. 2d 549 (Miss. 1988).

[331] *Id.* at 551.

[332] *Id.* (The third method was described in this fashion:

> Here, all revenues and expenses were imputed, and the net capitalized. Morrow assumed gross income of $8,148.00/yr ($700/month rent minus vacancy loss) and expenses of $1,954.00/yr (fire insurance, taxes, repairs), for a net of $6,194.00/yr. Morrow then applied to that figure a capitalization "technique," for which there is no testimony, that shows before value of $56,500.00.)

[333] A proffer showed that the opinion was based "on capitalized rent loss, which Morrow described as annual rent loss ($450/month: the value of the gun shop alone, not the apartment) 'capitalized at 11% and we came up with the $49,000.00 that we mentioned.'" *Id*. (citation omitted).

[334] *Id.* at 553–54 (footnote omitted) (emphasis supplied).

[335] *Id*. at 554 n.3 (quoting THE APPRAISAL OF REAL ESTATE 347 (1983)).

[336] *Id.* (citation omitted).

[337] EATON, *supra* note 42, at 193 (emphasis in original).

[338] *See* discussion in EATON, *supra* note 42, at 193 (stating that "[t]o use the mortgage-equity method, the appraiser must project the property's net income over the entire projection term and estimate what the sale price of the property (as a

of the Ellwood tables, but no eminent domain cases were located that applied the mortgage-equity formula in regard to the income approach.[339] Although no other method discussed herein allows direct, independent consideration of these factors, one may want to be cautious in considering the use of this approach in an eminent domain case: "While this method of capitalization certainly has its place, its place is not in the courtroom;"[340] "[p]lacing the Ellwood equation on an exhibit board is a sure way to lose the trier of fact."[341]

Third, another variation of the income approach is the residual method, a technique that allows "for the capitalization of income allocated to an investment component of unknown value after all investment components with known values have been satisfied," such as land, buildings, or mortgages.[342] For example, the building-residual method subtracts "the value of the land from the sale price of the property [that] yields the value of the improvements, which [is] then divided by the total square foot of the improvement to arrive at a per square foot unit price [of the] building only."[343] As stated in the *Crocker* case, *supra*, "the present worth of but one of the values in a property (i.e., land, improvements, reversionary interest) may be estimated separate from the whole. This is known as residual appraisal."[344] The development approach is a form of the residual method, as it is used "for valuing undeveloped acreage [by] discounting the cost of development and the probable proceeds from the sale of developed sites."[345]

Although some courts have approved the use of the building-residual technique,[346] other courts generally reject the land-residual method of capitalization for being too speculative.[347] One authority argues that the residual approach has "no place in the courtroom or in eminent domain valuation" and that the procedure is appropriate only to determine the highest and best use of the subject property.[348] Because "[a] very important element in commercial or industrial properties is the land to building ratio,"[349] the use of an overall rate and a property residual does not eliminate the erroneous valuation produced if the subject property and the comparable sales have different land-to-building ratios.[350]

Although no recent cases were found discussing the method, a New York court in an earlier case stated "that an over-all rate may be vulnerable unless it is based upon separate capitalization rates computed by one or another residual method on land and building. Thus, one makes sure that an improper distortion is not introduced because of disproportionate values assignable to land and building."[351] *Nichols on Eminent Domain* notes that

> [r]esidual value analysis is more vulnerable to attack when used to estimate the value of the land by subtracting the value of the building, since determining the value of a building is subject to many more vagaries (depreciation, physical, functional and economic obsolescence) than using land sales to estimate the value of the land.[352]

J. ADMISSIBILITY AND USE OF THE COST-LESS-DEPRECIATION APPROACH

J.1. Admissibility of the Cost Approach

The cost approach to structural value traditionally has been used in determining compensation under fire policies for losses based on the fair value or cash value of improvements covered by such policies.[353] Experts use

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percent of present value) will be at the end of the projection period").

[339] Kemp Indus., Inc. v. Safety Light Corp., 857 F. Supp. 373, 377 (D. N.J. 1994) (*quoting* in connection with the economics of a purchase-leaseback of property the ELLWOOD TABLES FOR REAL ESTATE APPRAISING AND FINANCING 115 (2d ed. 1967)).

[340] EATON, *supra* note 42, at 193.

[341] *Id*. at 193, 194. *See id*. at 185–87 for a discussion of the approach.

[342] 7A NICHOLS ON EMINENT DOMAIN § G9A.04[1][c], at G9A-37.

[343] *Id*. § G13.07[5], at G13-65–66.

[344] Crocker v. Miss. State Hwy. Comm'n, 534 So. 2d at 554, n.3 (*quoting* WILLIAM N. KINNARD, INCOME PROPERTY VALUATION 238 (1971)).

[345] 7A NICHOLS ON EMINENT DOMAIN § G9A.04[1][c], at G9A-37.

[346] Wolnstein v. State, 33 A.D. 2d 990, 307 N.Y.S.2d 402 (N.Y. App. 4th Dep't 1970) (appellate court applying the building residual technique); *In re Cross-Bronx Expressway*, 195 Misc. 842, 855, 82 N.Y.S.2d 55, 60 (N.Y. Sup. Ct. 1948) (approving the use of the Inwood and other tables); *Bishop Trust Co*., 48 Haw. at 481, 404 P.2d 394 ("It is well settled that improvements affixed to land have only such value as they add to the land.").

[347] 7A NICHOLS ON EMINENT DOMAIN § G9A.04[1][c], at G9A-37.

[348] EATON, *supra* note 42, at 167, 168.

[349] 7A NICHOLS ON EMINENT DOMAIN § 13.07[3], at G13-57.

[350] *In the Matter of the City of N.Y. in re James Madison Houses*, 17 A.D. 2d 317, 321, 234 N.Y.S.2d 799, 803 n.** (App. Div. 1962).

> (While, for convenience, it is useful to use an over-all rate of capitalization, it is true that an over-all rate may be vulnerable unless it is based upon separate capitalization rates computed by one or another residual method on land and building. Thus one makes sure that an improper distortion is not introduced because of disproportionate values assignable to land and building.)

(citations omitted).

[351] *Id.* at 321, 234 N.Y.S.2d at 803.

[352] 7A NICHOLS ON EMINENT DOMAIN § G13.07[5], at G13-66, n.13.

[353] *See, e.g.,* Schreiber v. Pac. Coast Fire Ins. Co., 195 Md. 639, 645, 75 A.2d 108, 111 (1950) (stating that although some courts hold that "'actual cash value' is equivalent to cost of reproduction less depreciation," the court was of the opinion that "the best considered cases hold that cost of reproduction is not the measure of "actual cash value"…but…very important evidence of value") (citations omitted).

the approach in utility-rate cases, as well as for purposes of tax assessments and mortgage loans.[354]

In general, absent some special showing, evidence of reproduction cost is not admissible in a condemnation proceeding because the method almost invariably inflates the valuation of the property.[355] "To say that the cost approach is generally disliked by the courts is an understatement."[356] Use of the production cost of a structure results in a valuation that may not be approached very often in actual negotiations in the market. Some courts hold that reproduction cost evidence is admissible only in those cases in which indicia of value is not available using another method.[357]

Assuming the cost approach is admissible, the majority view permits evidence of the approach upon direct examination provided certain conditions are satisfied.[358] For example, the interest condemned must be one of complete ownership, the improvements must be adapted to the site, reproduction must be a reasonable business venture, and a proper allowance must be made for depreciation.

If the cost-less-depreciation of separate items plus the value of the land is offered as equivalent to the fair market value of the whole, one view seems to be that the cost-less-depreciation of an individual item seems to represent the best measure of the degree to which that item enhances the land.[359] Another view permits the cost approach when no other approach is indicated but dislikes the approach because it violates the unit rule; the latter view opposes the separate valuation of items such as buildings, fixtures, or trees.[360] That is, what is valued is the whole—the land as enhanced by its improvements and all of its attributes—not the sum of the values of the parts.

In sum, the cost approach generally is used when there are no comparable sales or an income stream to appraise or is used simply as a check against a valuation reached by another method.[361]

J.2. Replacement Versus Reproduction Cost

The terms replacement and reproduction are often used interchangeably;[362] however, the term replacement refers to the current structural costs of improvements that are similar in size and utility, whereas the term reproduction means duplication.[363]

As a Connecticut court has explained,

> A cost approach can be premised on one of either two types of cost: Reproduction Cost and Replacement Cost. A reproduction cost is the estimated cost to construct an exact duplicate or replica of the building. This would entail the same design, materials and quality. Replacement cost on the other hand is an estimate of the cost to construct a building of equal utility but not necessarily of equal design, materials or quality. …[T]he use of replacement cost eliminates the need to estimate some forms of depreciation such as functional obsolescence. Nevertheless, any economic impact from the functional obsolescence, such as increased operating expenses from an inefficient building design, must still be considered.[364]

In regard to estimating reproduction or replacement cost, the three standard methods are

> the quantity survey method, the unit-in-place method, and the comparative-unit method. The quantity survey method is generally considered the most accurate, while the comparative-unit method is the least reliable. Whichever method is used by the appraiser, it is important that all indirect costs be included in the cost estimate and that entrepreneurial profit be considered as an element of cost.[365]

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[354] *See, e.g., In re New Jersey Power & Light Co.*, 9 N.J. 498, 89 A.2d 26 (1952) (involving denial of proposed increased rates for electric service); Chesapeake & Potomac Tel. Co. v. Pub. Serv. Comm'n, 201 Md. 207, 93 A.2d 249 (1952) (holding that the Public Service Commission took reproduction costs into account when making its determination regarding a rate increase).

[355] Curry v. Lewis & Clark Natural Res. Dist., 267 Neb. 857, 866, 678 N.W.2d 95, 102 (2004) (stating that "the reproduction cost method as an independent test of value "may be used only in rare cases where there is a lack of comparable sales of similar property, where the structures on the property are in some sense unique, or where the character of the improvements is unusually well adapted to the kind of land upon which they exist") (citation omitted). *But see* State v. Bishop, 800 N.E.2d 918, 924–25 (Ind. 2003) (stating that in eminent domain proceedings virtually all courts have limited consideration of enhancement value to the evidence of the replacement or reproduction cost of the appropriated sign, less depreciation).

[356] EATON, *supra* note 42, at 158.

[357] *Curry*, 267 Neb. at 866, 678 N.W.2d 102.

[358] *See* EATON, *supra* note 42, at 158–60.

[359] State v. Bishop, 800 N.E.2d 918, 924–25 (Ind. 2003), *reh. denied,* 2004 Ind. LEXIS 375 (Ind. 2004). *See also* United States v. 55.22 Acres of Land, 411 F.2d 432 (9th Cir. 1969); Bridges v. Alaska Hous. Auth., 375 P.2d 696 (Alaska 1962); Adams v. Ark. State Highway Comm'n, 235 Ark. 837, 362 S.W.2d 425 (1962).

[360] City of Houston v. Lakewood Estates, 381 S.W.2d 697 (Tex. Ct. Civ. App. 1964); State v. Improved Parcel of Land, 55 Del. 487, 168 A.2d 513 (1963), *overruled,* State *ex rel.* Price v. Parcel No. 1-1.6401 Acres of Land, 243 A.2d 709 (Del. 1968); Commonwealth v. Rankin, 346 S.W.2d 714 (Ky. 1961).

[361] S. Minn. Beet Sugar Coop. v. County of Renville, 737 N.W.2d 545, 555 (Minn. 2007) (citation omitted) (noting that at least two approaches should be used by an appraiser because the alternative value can serve as a check for the other).

[362] EATON, *supra* note 42, at 161.

[363] *Id.* (stating that "[*r*]*eproduction cost* is the current cost to reconstruct the improvements physically using the same or very similar materials; *replacement cost* is the cost of constructing improvements equal in utility to those being appraised") (emphasis in original).

[364] Comm'r of Transp. v. Bakery Place Ltd. P'ship, 50 Conn. Supp. 299, 309, 925 A.2d 468, 474–75 (Conn. Super. Ct. 2005) (citation omitted).

[365] EATON, *supra* note 42, at 161. Eaton also explains that entrepreneurial profit historically has been built into estimates of value based on the cost approach but is now recognized as a separate item of cost. The term "is a market-derived figure that reflects the amount an entrepreneur expects to receive for his

As discussed in Section 6, *supra*, the cost approach assumes that the cost of construction of improvements on the property, less depreciation, plus the value of the site approximates the fair market value of the improved property. As one authority emphasizes,

> reproduction cost can never be the *criterion* of value…. [E]vidence of structural value is admissible under proper circumstances, but even in such cases it is improper merely to aggregate structural value with land value….[366]

> The proper measure of just compensation is market value of the land with the buildings on it…. When…it is shown that the character of the buildings is well adapted to the location, the structural cost of the buildings, after making proper deductions for depreciation by wear and tear, is a reasonable test of the amount by which the buildings enhance the market value of the property.[367]

In *Department of Transportation v. Foster,*[368] the court held that it was proper for the transportation department's appraiser and for the condemnees' appraiser to use the comparable sales approach in valuing the land based on "its current residential zoning classification in combination with the possibility and probability that it [would] be rezoned commercial."[369] As for the house on the property, neither appraiser used the comparable sales approach; the department's appraiser used the income approach, whereas the condemnees' appraiser used the cost-less-depreciation method. The court held that "[b]ecause the valuations of the land and improvements were thus independent of one another, use of the different methods was appropriate."[370]

J.3. Value the Land as if Vacant

Although previous discussion indicated that developed land may not be compared with undeveloped land, for the cost-less-depreciation approach an appraiser must determine the highest and best use of the property, as if vacant, and then value the land pursuant to the comparable sales approach.[371] An appraiser adds the value of the improvements as determined below to the value of the land of the subject real property.

or her contribution. It represents the degree of risk and expertise associated with the development of a project." *Id*. at 168.

[366] 4 NICHOLS ON EMINENT DOMAIN § 12B.11[1], at 12B-82, 83.

[367] *Id.* at 12B-84-85.

[368] 262 Ga. App. 524, 586 S.E.2d 64 (2003).

[369] *Id.* at 526, 586 S.E.2d at 66.

[370] *Id.* at 526–27, 586 S.E.2d at 66 (footnote omitted).

[371] United States v. 6.45 Acres of Land, 409 F.3d 139, 143 (3d Cir. 2005); Dep't of Transp. v. Fleming, 112 N.C. App. 580, 585, 436 S.E.2d 407, 411 (N.C. App. 1993) (stating that "[t]he cost approach used by plaintiff's witnesses…values the land as if it were vacant and then adds the depreciated value of the improvements"); Norman's Kill Farm Dairy Co. v. State, 53 Misc. 2d 578, 582, 279 N.Y.S.2d 292, 297 (Ct. Cl. 1967) (stating that the court had "correlated its discount for depreciation of the improvements with its discount from the present value of the land as if it were vacant….").

J.4. Value Improvements as if New and Depreciate

As stated, with the cost approach, an appraiser estimates the reproduction or replacement cost as of the date of valuation, deducts an amount equivalent to his or her estimate of accrued physical depreciation and, if applicable, of inherent or functional obsolescence. As a practical matter, most cost estimates are a mix of replacement and reproduction costs. Changes in technology, materials, and style dictate the substitution of modern substances and workmanship for antiquated materials and methods. In other areas, building materials and construction techniques have maintained constancy so as to permit reasonable duplication. For example, massive stone foundations and walls are usually replaced by concrete and steel, whereas carpentry and craftsmanship are often reproduced.

J.5. Depreciation of Improvements

Appraisers express depreciation in three ways: "physical depreciation—curable and incurable; functional obsolescence—curable and incurable; and external obsolescence—incurable. (In the past, external obsolescence has also been referred to as *environmental obsolescence* or *economic obsolescence*.)"[372]

Physical depreciation, calculated from the moment a building is completed, is the result of ordinary wear and tear on the improvement caused by weather, water, gravity, people, and, in some cases, animals.[373] An appraiser reproduces the improvement on the date of the valuation, not the date the improvements were actually constructed. Thus, wear and tear, even in a market that reflects rising real estate prices, must be taken into consideration. It has been observed by one court that "the cost approach is less reliable when the building improvements are older and reaching the end of their economic life. This is because of the difficulty in estimating a sound measure of depreciation for an old building."[374] Cross-examination about physical depreciation may assist counsel in detecting whether an expert witness understands the market forces that support a competent opinion of a property's value.

Functional depreciation relates to the function of property and its layout, style, and design and often reflects changing styles and technology.[375] In determining functional depreciation, an appraiser considers additions to real estate that may reflect differing styles of architecture or the necessity for additional heating or air conditioning or for blocking of views from windows or porches. Physical and functional items found to be correctible economically are referred to as curable; the cost of the cure often is a reasonable measure of depreciation and functional obsolescence. For example, a

[372] EATON, *supra* note 42, at 163 (emphasis in original).

[373] *Id.* (stating that "[d]epreciation is a loss in the value of improvements from any cause….").

[374] Comm'r of Transp. v. Bakery Place Ltd. P'ship, 50 Conn. Supp. 299, 308–09, 925 A.2d 468, at 474.

[375] *See* EATON, *supra* note 42, at 163–64.

house on a septic system near a public sanitary sewer line has curable functional obsolescence.

On the other hand, the term "economic obsolescence," now referred to as "external obsolescence," seeks to measure forces operating outside the boundaries of a particular tract that directly affect its value.[376] Extrinsic factors such as a change in neighborhood characteristics that may render a structure ill-adapted to its site; a lone dwelling in an area that has become entirely commercial or a nearby noxious manufacturing operation are examples of external depreciation. As with physical and functional depreciation, external depreciation, usually referred to as damage to the remainder, is expressed as a percentage. The analysis applies only to physically and functionally depreciated improvements and not to the land. It is seldom that the percentage of such depreciation may be measured accurately; thus, an appraiser's experience and judgment are important.

Finally, fixtures are items which, though once personal property, have become parts of the realty through actual or constructive annexation.[377] Fixtures, particularly machinery, are often subject to economic obsolescence related to advances in technology and to changing demand for the products of manufacture.

J.6. Use of Cost Manuals

A crude determinant of replacement cost is the use of factors based on footage.[378] Under this method, a unit cost is selected from a publication that purports to furnish reliable data of the cost of labor and materials nationwide on a square- or cubic-foot basis. After prescribed adjustments for time, location, and structural characteristics, the unit so found is multiplied by the number of units under construction in a building that is under consideration. The method has little to recommend it other than a convenient guide or beginning tool of reference. That is, cost data based on a manual requires independent verification by thorough research on the current costs of labor and materials in the specific area under consideration. One authority suggests that, regardless of whether in some jurisdictions the use of a published cost service as the sole source of data presents a hearsay problem, the method is "viewed with skepticism by some courts."[379]

K. THE DEVELOPMENT APPROACH

The development approach is also known as the lot method, the developer's residual method, the anticipated use method, the developer's absorption method, and the subdivision approach.[380] The general rule, however, is that "[i]f there are comparable sales, then the evidence of value based on a developmental approach should be excluded."[381] The development method values undeveloped land on the basis that the land is already improved with a specific use and subtracts the costs to develop that use.

According to one authority, there usually is no question regarding the use of the development approach "when the property being appraised is either raw land or fully subdivided land" but "[a] problem arises when the land…is neither raw acreage nor a fully developed subdivision…."[382] The best approach with respect to the valuation of "raw subdivision land" is the comparable sales method, with the development method being used to support the value indicated by the comparable sales approach.[383] On the other hand, the development approach may be indicated when the subject property falls somewhere between being raw acreage and fully subdivided land.[384]

The development approach is said to be the "primary" appraisal method and possibly the only method in three specific situations:

1. The appraiser concludes through proper market analysis that the property in question does, in fact, have a highest and best use for subdivision purposes.
2. Comparable before or after sales are lacking.

[376] *Id.* at 163.

[377] Escondido Union Sch. Dist. v. Casa Suenos De Oro, Inc., 129 Cal. App. 4th 944, 962, 963, 29 Cal. Rptr. 3d 89, 100–01 (Cal. App. 4th Dist. 2005) (stating that "California condemnation law, in keeping with most jurisdictions, has long incorporated an expansive view toward improvements to realty and compensable fixtures" and that "the common law's traditional three-prong test for fixtures—intention, annexation and adaptability—generally has been used"). *See* discussion in EATON, *supra* note 42, at 61–61, 72.

[378] State Farm Fire & Cas. Co. v. Evans, 956 So. 2d 390, 396 (Ala. 2006), *reh. denied,* 2006 Ala. LEXIS 401 (Ala. 2006) (noting that during a reinspection program of potentially underinsured dwellings, State Farm used data on "square footage, residence type, construction type, etc., and used the Boeckh calculator to calculate a new estimated replacement-cost figure"). *See also* Kingston Urban Renewal Agency v. Strand Props., 33 A.D. 2d 594, 304 N.Y.S.2d 413, 415 (N.Y. App. 3d Dep't 1969) (holding with respect to the condemnation of a building not a specialty that "[a]lthough evidence of reproduction cost less depreciation was admissible as an element or circumstance to be considered along with all other circumstances in arriving at a proper award, it was not admissible as a measure of damages"). *See also* Hous. and Redevelopment Auth. v. First Ave. Realty Co., 270 Minn. 297, 303, 133 N.W.2d 645, 650 (1965) (approving an expert witness's use of schedules, referred to by the court as memoranda to refresh the expert's recollection, that the witness compiled containing the costs of reproduction of the condemned structure).

[379] EATON, *supra* note 42, at 162.

[380] *Id*. at 245; Lehigh-Northampton Airport Auth. v. Fuller, 862 A.2d at 166 n.3.

[381] Consultation, Inc. v. City of Lawrence, 5 Kan. App. 2d 486, 491, 619 P.2d 150, 154 (1980) (affirming the trial court's decision finding that there were comparable properties and excluding the developmental or income approach to valuing property).

[382] EATON, *supra* note 42, at 256.

[383] *Id*. at 268 (noting also that generally "the courts will not allow the development approach to be admitted into evidence when it is applied to raw subdivision land") (*Id*. at 269).

[384] *Id*. at 269.

3. Sufficient market and technical data are available to estimate reliably the value of the property being appraised using the development approach.[385]

Earlier cases in Pennsylvania, for example, had rejected the development approach because it was too speculative.[386] However, in *Lehigh-Northampton Airport Authority v. Fuller,*[387] the condemnees had filed plans for a residential subdivision of the subject 107-acre parcel of land prior to the taking. The court stated:

> Although the use of the "Development Approach" has never been squarely before this Court in a condemnation proceeding, it is an approach commonly currently used in the field to value multiple unimproved lots in a subdivision or potential subdivision as a unit. In using the Development Approach to find the true market value the expected sale prices of the lots are considered as well as the direct and indirect development and marketing cost.
>
> Modern appraisal methods demand modern approaches which should be recognized by our courts so long as a proper foundation is laid to eliminate speculation….[388]

In the *Lehigh-Northampton Airport Authority* case, the court relied on cases in which "[t]he developmental approach to *assessing property* has been accepted by many courts as an appropriate valuation method"[389] and held "that the record reveals that the Condemnees did lay the proper foundation for the 'lot method' appraisal or 'developer's residual approach.'"[390]

In a 2006 case, *In re Condemnation of 23.015 Acres,*[391] the court not only did not reject the development method but also stated that in the *Lehigh-Northampton Airport* case

> [t]he proper foundation for use of the development method was laid by demonstrating "that the land was ripe for development, that their expectation of securing all of the necessary zoning and other required permits was reasonable, and that the development of the property was within the reasonably foreseeable future." …
>
> In this case, the record reveals that the best and most desirable use for the Property was as a residential development. The Showalters also testified that the planning authorities had been favorably disposed to a subdivision of the Property before Pennridge offered to buy it. It is not necessary for the Showalters to prove that all zoning and other permits had been finally secured; *under Lehigh-Northampton Airport they only had to demonstrate that their "expectation" for approval was reasonable, and that the development was within the "reasonably foreseeable future."* …The trial court prevented the Showalters from offering relevant evidence prepared for the condemnation proceedings, and the Showalters were prejudiced by the exclusion of that evidence.[392]

There is other authority seemingly recognizing or upholding the use of the development approach.[393] Nevertheless, the method may produce a valuation greatly in excess of a valuation determined by any other method.[394] One reason is that an appraiser must analyze the future expenses; determine when the property may

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[385] *Id*. at 246.

[386] Thorsen v. Johnson*,* 745 P.2d 1243, 1246 (Utah 1987) (stating in a case involving injury to property that a jury is "'not to inquire what a speculator might be able to realize out of a resale in the future, but what a present purchaser would be willing to pay for it in the condition it is now in'") (citation omitted); Dep't of Highways v. Schulhoff, 167 Colo. 72, 77, 445 P.2d 402, 405 (1968) ("It is proper to show that a particular tract of land is suitable and available for subdivision into lots and is valuable for that purpose. It is not proper, however, to show the number and value of lots as separated parcels in an imaginary subdivision thereof."); State Road Comm'n of W.Va. v. Ferguson, 148 W. Va. 742, 748, 137 S.E.2d 206, 210 (1964) (stating that "[e]vidence of the value of a tract of land based upon the total price of proposed lots into which the tract may be divided has been held improper and inadmissible in other jurisdictions"); Barnes v. N.C. State Highway Comm'n, 250 N.C. 378, 389, 109 S.E.2d 219, 228 (1959) ("It is proper to show that a particular tract of land is suitable and available for division into lots and is valuable for that purpose, but it is not proper to show the number and value of lots as separated parcels in an imaginary subdivision thereof."); N. Ind. Pub. Serv. Co. v. McCoy*,* 239 Ind. 301, 309, 157 N.E.2d 181, 185 (1959) ("'It is proper to inquire what the tract is worth, having in view the purposes for which it is best adapted; but it is the tract, and not the lots into which it might be divided, that is to be valued.'") (citation omitted).

[387] *See* Lehigh-Northampton Airport Auth. v. Fuller*,* 862 A.2d at 167 (affirming the trial court's holding that the condemnees placed development of the land squarely within the realm of a reasonable certainty).

[388] *Id.* (citation omitted).

[389] *Id.* at 166 (emphasis supplied) (*citing* Penn's Grant Assocs. v. Northampton County Bd. of Assessment Appeals, 733 A.2d 23, 28, n.11 (Pa. Commw. Ct. 1999); Clifford v. Algonquin Gas Transmission Co., 413 Mass. 809, 604 N.E.2d 697 (1992); Robinson v. Town of Westport, 222 Conn. 402, 610 A.2d 611 (1992); Ramsey County v. Miller, 316 N.W.2d 917 (Minn. 1982); United States v. 147.47 Acres of Land in Monroe County, Pa., 352 F. Supp. 1055 (M.D. Pa. 1972)).

[390] 862 A.2d 167.

[391] 895 A.2d 76 (Pa. Commw. Ct. 2006), *appeal denied*, 590 Pa. 670, 912 A.2d 839 (2006).

[392] *Id.* at 85 (citations omitted) (emphasis supplied).

[393] United States v. 174.12 Acres of Land, 671 F.2d 313, 316 (9th Cir. 1982) (holding that the "evidence was sufficient to support the jury's apparent conclusion that development of a port was a remote possibility"); United States v. 67.59 Acres of Land, 447 F. Supp. 844, 846 (M.D. Pa. 1978) (property owner "testified to what he envisioned as the potential development of his property had it not been condemned"); United States v. 100 Acres of Land in Marin County, 468 F.2d 1261, 1267 (9th Cir. 1972) (rejecting the government's contention that the trial court erred in allowing "testimony as to the reasonable probability that adjoining state owned tidelands would have been available in connection with the development of the subject property" because "evidence as to the reasonable probabilities of its use is admissible and may be considered" (citation omitted)), *cert. denied*, 414 U.S. 822, 94 S. Ct. 119, 38 L. Ed. 2d 54 (1973).

[394] *See* EATON, *supra* note 42, at 252.

be sold or developed; and select a discount rate that should be applied for delay until development.[395] Such estimates may be difficult to make, and if a factor is eliminated in using the approach the method may produce an extremely high valuation.[396]

A final word of caution may be in order regarding the use of the development approach: "[T]he development approach to value is generally quite time-consuming…and expensive…. [N]o other type of condemnation case requires as much pretrial conferences and pretrial preparation as a case involving the development approach to value."[397]

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[395] *Id*.

[396] *Id*.

[397] *Id*. at 270.

APPENDIX A

STATE CONSTITUTIONAL PROVISIONS

A. STATE CONSTITUTIONS WITH TAKING PROVISIONS

CONNECTICUT

CONNECTICUT CONST., art. I, sec. 11 ("The property of no person shall be taken for public use without just compensation therefor.")

FLORIDA

FLORIDA CONST., art. X, sec. 6.

(a) No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.
(b) Provision may be made by law for the taking of easements, by like proceedings, for the drainage of the land of one person over or through the land of another.
(c) Private property taken by eminent domain pursuant to a petition to initiate condemnation proceedings filed on or after January 2, 2007, may not be conveyed to a natural person or private entity except as provided by general law passed by a three-fifths vote of the membership of each house of the Legislature.

IDAHO

IDAHO CONST., art. I, sec. 14 ("Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor.")

INDIANA

INDIANA CONST., art. I, sec. 21 ("No person's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered.")

IOWA

IOWA CONST., art. I, sec. 18.

Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken.

KANSAS

As stated in *Butler County Rural Water Dist. No. 8 v. Yates*, 275 Kan. 291, 297, 64 P.3d 357, 363 (2003) (citations omitted) (internal quotation marks omitted):

The Fifth Amendment to the United States Constitution prohibits private property being taken for public use without just compensation. While the Kansas Constitution does not contain an identical provision, with the exception of Art. 12, § 4, governing corporations, the Fifth Amendment prohibition is applicable to the states by way of the Fourteenth Amendment. …Further, the constitutional prohibition is codified in Kansas in K.S.A. 26-513(a), which provides private property shall not be taken or damaged for public use without just compensation.

MAINE

MAINE CONST., art. I, sec. 21 ("Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it.")

MARYLAND

MARYLAND CONST., arts. 40, 40A, 40B, 40C, and 40D.

SEC. 40. The General Assembly shall enact no Law authorizing private property to be taken for public use without just compensation, as agreed upon between the parties, or awarded by a jury, being first paid or tendered to the party entitled to such compensation.
SEC. 40A. The General Assembly shall enact no law authorizing private property to be taken for public use without just compensation, to be agreed upon between the parties, or awarded by a jury, being first paid or tendered to the party entitled to such compensation, but where such property is situated in Baltimore City and is desired by this State or by the Mayor and City Council of Baltimore, the General Assembly may provide that such property may be taken immediately upon payment therefor to the owner or owners thereof by the State or by the Mayor and City Council of Baltimore, or into court, such amount as the State or the Mayor and City Council of Baltimore, as the case may be, shall estimate to be the fair value of said property, provided such legislation also requires the payment of any further sum that may subsequently be added by a jury; and further provided that the authority and procedure for the immediate taking of property as it applies to the Mayor and City Council of Baltimore on June 1, 1961, shall remain in force and effect to and including June 1, 1963, and where such property is situated in Baltimore County and is desired by Baltimore County, Maryland, the County Council of Baltimore County, Maryland, may provide for the appointment of an appraiser or appraisers by a Court of Record to value such property and that upon payment of the amount of such evaluation, to the party entitled to compensation, or into Court, and securing the payment of any further sum that may be awarded by a jury, such property may be taken; and where such property is situated in Montgomery County and in the judgment of and upon a finding by the County Council of said County that there is immediate need therefor for right of way for County roads or streets, the County Council may provide that such property may be taken immediately upon payment therefor to the owner or owners thereof, or into court, such amount as a licensed real estate broker or a licensed and certified real estate appraiser appointed by the County Council shall estimate to be the fair market value of such property, provided that the Council shall secure the payment of any further sum that may subsequently be awarded by a jury. In the various municipal corporations within Cecil County, where in the judgment of and upon a finding by the governing body of said municipal corporation that there is immediate need therefor for right of way for municipal roads, streets and extension of municipal water and sewage facilities, the governing body may provide that such property may be taken immediately upon payment therefor to the owner or owners thereof, or into court, such amount as a licensed real estate broker appointed by the particular governing body shall estimate to be a fair market value of such property, provided that the municipal corporation shall secure the payment of any further sum that subsequently may be awarded by a jury. This Section 40A shall not apply in Montgomery County or any of the various municipal corporations within Cecil County, if the property actually to be taken includes a building or buildings *(amended by Chapter 402, Acts of 1912, ratified Nov. 4, 1913; Chapters 224 and 604, Acts of 1959, ratified Nov. 8, 1960; Chapter 329, Acts of 1961, ratified Nov. 6, 1962; Chapter 100, Acts of 1962, ratified Nov. 6, 1962; Chapter 304, Acts of 1966, ratified Nov. 8, 1966; Chapter 589, Acts of 2002, ratified Nov. 5, 2002)*.
SEC. 40B. The General Assembly shall enact no law authorizing private property to be taken for public use without just compensation, to be agreed upon between the parties or awarded by a jury, being first paid or tendered to the party entitled to such compensation, except that where such property in the judgment of the State Roads Commission is needed by the State for highway purposes, the General Assembly may provide that such property may be taken immediately upon payment therefor to the owner or owners thereof by said State Roads Commission, or into Court, such amount as said State Roads Commission shall estimate to be of the fair value of said property, provided such

legislation also requires the payment of any further sum that may subsequently be awarded by a jury *(added by Chapter 607, Acts of 1941, ratified Nov. 3, 1942)*.
SEC. 40C. The General Assembly shall enact no law authorizing private property to be taken for public use without just compensation, to be agreed upon between the parties or awarded by a jury, being first paid or tendered to the party entitled to such compensation, except that where such property, located in Prince George's County in this State, is in the judgment of the Washington Suburban Sanitary Commission needed for water supply, sewerage and drainage systems to be extended or constructed by the said Commission, the General Assembly may provide that such property, except any building or buildings may be taken immediately upon payment therefor by the condemning authority to the owner or owners thereof or into the Court to the use of the person or persons entitled thereto, such amount as the condemning authority shall estimate to be the fair value of said property, provided such legislation requires that the condemning authority's estimate be not less than the appraised value of the property being taken as evaluated by at least one qualified appraiser, whose qualifications have been accepted by a Court of Record of this State, and also requires the payment of any further sum that may subsequently be awarded by a jury, and provided such legislation limits the condemning authority's utilization of the acquisition procedures specified in this section to occasions where it has acquired or is acquiring by purchase or other procedures one-half or more of the several takings of land or interests in land necessary for any given water supply, sewerage or drainage extension or construction project *(added by Chapter 781, Acts of 1965, ratified Nov. 8, 1966)*.

MICHIGAN

MICHIGAN CONST., art. 10, sec. 2.

Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. If private property consisting of an individual's principal residence is taken for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property's fair market value, in addition to any other reimbursement allowed by law. Compensation shall be determined in proceedings in a court of record.

"Public use" does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues. Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph.

In a condemnation action, the burden of proof is on the condemning authority to demonstrate, by the preponderance of the evidence, that the taking of a private property is for a public use, unless the condemnation action involves a taking for the eradication of blight, in which case the burden of proof is on the condemning authority to demonstrate, by clear and convincing evidence, that the taking of that property is for a public use. (146)

Any existing right, grant, or benefit afforded to property owners as of November 1, 2005, whether provided by this section, by statute, or otherwise, shall be preserved and shall not be abrogated or impaired by the constitutional amendment that added this paragraph.

NEVADA

NEVADA CONST., art. I, sec. 8 (two versions).

Sec. 8.

5. No person shall be deprived of life, liberty, or property, without due process of law.
6. Private property shall not be taken for public use without just compensation having been first made, or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterward made.

Sec. 8. …**[Effective November 23, 2010, if the proposed amendment is agreed to and passed by the 2009 Legislature and approved and ratified by the voters at the 2010 General Election.]**

6. Private property shall not be taken for public use without just compensation having been first made, or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterward made.
7. Except as otherwise provided in paragraphs (a) to (e), inclusive, the public uses for which private property may be taken do not include the direct or indirect transfer of any interest in the property to another private person or entity. A transfer of property taken by the exercise of eminent domain to another private person or entity is a public use in the following circumstances:
(a) The entity that took the property transfers the property to a private person or entity and the private person or entity uses the property primarily to benefit a public service, including, without limitation, a utility, railroad, public transportation project, pipeline, road, bridge, airport or facility that is owned by a governmental entity.
(b) The entity that took the property leases the property to a private person or entity that occupies an incidental part of an airport or a facility that is owned by a governmental entity and, before leasing the property:
(1) Uses its best efforts to notify the person from whom the property was taken that the property will be leased to a private person or entity that will occupy an incidental part of an airport or a facility that is owned by a governmental entity; and
(2) Provides the person from whom the property was taken with an opportunity to bid or propose on any such lease.
(c) The entity:
(1) Took the property in order to acquire property that was abandoned by the owner, abate an immediate threat to the safety of the public or remediate hazardous waste; and
(2) Grants a right of first refusal to the person from whom the property was taken that allows that person to reacquire the property on the same terms and conditions that are offered to the other private person or entity.
(d) The entity that took the property exchanges it for other property acquired or being acquired by eminent domain or under the threat of eminent domain for roadway or highway purposes, to relocate public or private structures or to avoid payment of excessive compensation or damages.
(e) The person from whom the property is taken consents to the taking.
8. In all actions in eminent domain:
(a) Before the entity that is taking property obtains possession of the property, the entity shall give to the owner of the property a copy of all appraisals of the property obtained by the entity.
(b) At the occupancy hearing, the owner of the property that is the subject of the action is entitled, at the property owner's election, to a separate and distinct determination as to whether the property is being taken for a public use.
(c) The entity that is taking property has the burden of proving that the taking is for a public use.
(d) Except as otherwise provided in this paragraph, neither the entity that is taking property nor the owner of the property is liable for the attorney's fees of the other party. This paragraph does not apply in an inverse condemnation action if the owner of the property that is the subject of the action makes a request for attorney's fees from the other party to the action.

9. Except as otherwise provided in this subsection, if a court determines that a taking of property is for public use, the taken or damaged property must be valued at its highest and best use without considering any future dedication requirements imposed by the entity that is taking the property. If property is taken primarily for a profit-making purpose, the property must be valued at the use to which the entity that is taking the property intends to put the property, if such use results in a higher value for the property.
10. In all actions in eminent domain, fair market value is the highest price, on the date of valuation, that would be agreed to by a seller, who is willing to sell on the open market and has reasonable time to find a purchaser, and a buyer, who is ready, willing and able to buy, if both the seller and the buyer had full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.
11. In all actions in eminent domain, just compensation is that sum of money necessary to place the property owner in the same position monetarily as if the property had never been taken, excluding any governmental offsets except special benefits. Special benefits may only offset severance damages and may not offset the value for the property. Just compensation for the property taken by the exercise of eminent domain must include, without limitation, interest and reasonable costs and expenses, except attorney's fees, incurred by the owner of the property that is the subject of the action. The district court shall determine, in a posttrial hearing, the award of interest and award as interest the amount of money which will put the person from whom the property is taken in as good a position monetarily as if the property had not been taken. The district court shall enter an order concerning:
(a) The date on which the computation of interest will commence;
(b) The rate of interest to be used to compute the award of interest, which must not be less than the prime rate of interest plus 2 percent; and
(c) Whether the interest will be compounded annually.
12. Property taken by the exercise of eminent domain must be offered to and reverts to the person from whom the property was taken upon repayment of the original purchase price if, within 15 years after obtaining possession of the property, the entity that took the property:
(a) Fails to use the property for the public use for which the property was taken or for any public use reasonably related to the public use for which the property was taken; or
(b) Seeks to convey any right, title or interest in all or part of the property to any other person and the conveyance is not occurring pursuant to subsection 7.
The entity that has taken the property does not fail to use the property under paragraph (a) if the entity has begun active planning for or design of the public use, the assembling of land in furtherance of planning for or design of the public use or construction related to the public use.
13. If any provision of subsections 7 to 12, inclusive, or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the provisions or application of subsections 7 to 12, inclusive, which can be given effect without the invalid provision or application, and to this end the provisions of subsections 7 to 12, inclusive, are declared to be severable.
14. The provisions of subsections 7 to 12, inclusive, apply to an action in eminent domain that is filed on or after January 1, 2011.

NEW JERSEY

NEW JERSEY CONST., art I, sec. 20 ("Private property shall not be taken for public use without just compensation. Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners.")

NEW YORK

NEW YORK CONST., art. I, sec. 7(a) ("Private property shall not be taken for public use without just compensation.")

NORTH CAROLINA

As stated in *Department of Transportation v. Rowe*, 353 N.C. 671, 676, 549 S.E.2d 203, 208 (2001):

Just compensation is clearly a fundamental right under both the United States and North Carolina Constitution. It is specifically enumerated in the Fifth Amendment to the United States Constitution and has been applied to the states through the 14th. …The right to just compensation is not expressly mentioned in the North Carolina Constitution, but "this Court has inferred such a provision as a fundamental right integral to the 'law of the land' clause." …("When private property is taken for public use, just compensation must be paid…. While this principle is not stated in express terms in the North Carolina Constitution, it is regarded as an integral part of the 'law of the land' …").

OHIO

OHIO CONST., art. I, sec. 19.
Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

OREGON

OREGON CONST., art. I, sec. 18.
Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use.

RHODE ISLAND

RHODE ISLAND CONST., art. I, sec. 16 (“Private property shall not be taken for public uses, without just compensation.”)

SOUTH CAROLINA

SOUTH CAROLINA CONST., art. I, sec. 13(A).
Except as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property. Private property must not be condemned by eminent domain for any purpose or benefit including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use.

WISCONSIN

WISCONSIN CONST. art. I, sec. 13 (“The property of no person shall be taken for public use without just compensation therefor.”)

B. STATE CONSTITUTIONS WITH TAKING OR DAMAGING PROVISIONS

ALASKA

ALASKA CONST. art. I, sec. 18 ("Private property shall not be taken or damaged for public use without just compensation.")

ARIZONA

ARIZONA CONST. art. II, sec. 17 ("No private property shall be taken or damaged for public or private use without just compensation having first been made….")

ARKANSAS

ARKANSAS CONST. art. II, sec. 22 ("[A]nd private property shall not be taken, appropriated or damaged for public use, without just compensation therefor.")

CALIFORNIA

CALIFORNIA CONST. art. I, sec. 19 ("Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.")

COLORADO

COLORADO CONST. art. II, sec. 15 ("Private property shall not be taken or damaged, for public or private use, without just compensation.")

GEORGIA

GEORGIA CONST. art. I, sec. 3, para. 1 ("[P]rivate property shall not be taken or damaged for public purposes without just and adequate compensation being first paid.")

HAWAII

HAWAII CONST. art I, sec. 20 ("Private property shall not be taken or damaged for public use without just compensation.")

ILLINOIS

ILLINOIS CONST. art. I, sec. 15 ("Private property shall not be taken or damaged for public use without just compensation as provided by law.")

LOUISIANA

LOUISIANA CONST. art. I, sec. 4 ("Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation ….")

MINNESOTA

MINNESOTA CONST. art. I, sec. 13 ("Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured.")

MISSISSIPPI

MISSISSIPPI CONST. art. III, sec. 17 ("Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof….")

MISSOURI

MISSOURI CONST. art. I, sec. 26 ("[P]rivate property shall not be taken or damaged for public use without just compensation.")

MONTANA

MONTANA CONST. art. II, sec. 29 ("Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss….")

NEBRASKA

NEBRASKA CONST. art. I, sec. 21 ("The property of no person shall be taken or damaged for public use without just compensation therefor.")

NEW MEXICO

NEW MEXICO CONST. art. II, sec. 20 ("Private property shall not be taken or damaged for public use without just compensation.")

NORTH DAKOTA

NORTH DAKOTA CONST. art. I, sec. 16 ("Private property shall not be taken or damaged for public use without just compensation….")

OKLAHOMA

OKLAHOMA CONST. art. II, sec. 24 ("Private property shall not be taken or damaged for public use without just compensation.")

SOUTH DAKOTA

SOUTH DAKOTA CONST. art. VI, sec. 13 ("Private property shall not be taken for public use, or damaged, without just compensation….")

UTAH

UTAH CONST., art. I, sec. 22 ("Private property shall not be taken or damaged for public use without just compensation.")

VIRGINIA

VIRGINIA CONST. art. I, sec. 11 ("[N]or any law whereby private property shall be taken or damaged for public uses, without just compensation….)

WASHINGTON

WASHINGTON CONST. art. I, sec. 16 ("No private property shall be taken or damaged for public or private use without just compensation having been first made….")

WEST VIRGINIA

WEST VIRGINIA CONST. art. III, sec. 9 ("Private property shall not be taken or damaged for public use, without just compensation….")

WYOMING

WYOMING CONST. art. I, sec. 33 ("Private property shall not be taken or damaged for public or private use without just compensation.")

C. STATES WITH SOMEWHAT DIFFFERENT CONSTITUTIONAL LANGUAGE

ALABAMA

ALABAMA CONST. art. I, sec. 23 ("[B]ut private property shall not be taken for, or applied to public use, unless just compensation be first made therefore….")

DELAWARE

DELAWARE CONST. art. I, sec. 8 ("[N]or shall any man's property be taken or applied to public use … without compensation being made.")

KENTUCKY

KENTUCKY CONST., Bill of Rights, sec. 13 ("[N]or shall any man's property be taken or applied to public use without the consent of his representatives and without just compensation being previously made to him.")

MASSACHUSETTS

MASSACHUSETTS CONST., pt. I, art. X.
…[B]ut no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor. [See Amendments, Arts. XXXIX, XLIII, XLVII, XLVIII, The Initiative, II, sec. 2, XLIX, L, LI and XCVII.]

NEW HAMPSHIRE

NEW HAMPSHIRE CONST. arts. 12 and 12a.
[Art.] 12. …But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. Nor are the inhabitants of this state controllable by any other laws than those to which they, or their representative body, have given their consent.
[Art.] 12-a. [Power to Take Property Limited.] No part of a person's property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property.

PENNSYLVANIA

PENNSYLVANIA CONST., art. I, sec. 10 ("[N]or shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.")

TENNESSEE

TENNESEE CONST., art. I, sec. 21 ("That no man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor.")

TEXAS

TEXAS CONST., art. I, sec. 17 ("No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made….")

VERMONT

VERMONT CONST., ch. I, art. II ("That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money.")

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The **National Research Council** was organized by the National Academy of Sciences in 1916 to associate the broad community of science and technology with the Academy's purposes of furthering knowledge and advising the federal government. Functioning in accordance with general policies determined by the Academy, the Council has become the principal operating agency of both the National Academy of Sciences and the National Academy of Engineering in providing services to the government, the public, and the scientific and engineering communities. The Council is administered jointly by both the Academies and the Institute of Medicine. Dr. Ralph J. Cicerone and Dr. Charles M. Vest are chair and vice chair, respectively, of the National Research Council.

The **Transportation Research Board** is a division of the National Research Council, which serves the National Academy of Sciences and the National Academy of Engineering. The Board's mission is to promote innovation and progress in transportation through research. In an objective and interdisciplinary setting, the Board facilitates the sharing of information on transportation practice and policy by researchers and practitioners; stimulates research and offers research management services that promote technical excellence; provides expert advice on transportation policy and programs; and disseminates research results broadly and encourages their implementation. The Board's varied activities annually engage more than 5,000 engineers, scientists, and other transportation researchers and practitioners from the public and private sectors and academia, all of whom contribute their expertise in the public interest. The program is supported by state transportation departments, federal agencies including the component administrations of the U.S. Department of Transportation, and other organizations and individuals interested in the development of transportation. **www.TRB.org**

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