

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

¹Proprietors 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

² R.I. Econ. Dev. 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 unflinching 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 tak-

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).

ings."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

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 de-

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).

struction 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 law³⁹ 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

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 prop-

erty 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

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), *review 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. Cmty. 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 remain-

ing 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

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 function⁸⁰ 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 compensa-

tion 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); *Leverly & 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 trans-

portation 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. Schrempff*, 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

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).

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*.

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

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. Cmty. 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. Cmty.*, 142 Wash. 2d at 355–56, 13 P.3d at 187 (*citing* *Guimont v. Clarke*, 121 Wash. 2d 586, 121 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.

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-

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-

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,

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.

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-*

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 oc-

curs 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 privacy¹⁶⁴ 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); *Gulledge 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....

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.

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).

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 circuitry 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

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 circuitry 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)).

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

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 power¹⁹⁹ 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 condemnation²⁰¹ 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

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.

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-

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) (interlinear 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 relocation²⁴⁶ 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

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).

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

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 condem-

nation.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-

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 *Uniwel, L.P. v. City of Los Angeles*,²⁸² the property owner Uniwel applied to the city for approval of Uniwel’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 Uniwel that the City “would not certify...that Uniwel had complied with the conditions of the Tentative Tract Map unless and until Uniwel 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 *Uniwel*, 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.

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. Leever 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

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.*

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

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 South-*

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

western 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

(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

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

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 Rookwood.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

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 impli-

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).

cates 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 is³⁴⁸ 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

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

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 takings³⁷⁴ 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

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.).

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

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

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.

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-

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*

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

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 exer-

cise 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.