SECTION 5

SPECIAL PROBLEMS IN TRANSPORTATION, LAND ACQUISITION, AND USE

I doubt if any Alabama judge or Justice has had his or her property acquired by eminent domain as often as I have. The federal government acquired property in which I owned an interest for the impoundment of Lake Eufaula (Lake Walter F. George) and later to establish a Canadian Goose Fly Way (the Eufaula Wildlife Refuge). The State of Alabama acquired property in which I owned an interest to create the Barbour County Wildlife Refuge and to extend and widen two roads (U.S. Highway 431 and Alabama Highway 165). Because of this personal experience, I am keenly aware of the supreme and plenary sovereign power of eminent domain.

"The sovereign power of eminent domain is inherent in government as such, requiring no constitutional recognition, and is as indestructible as the state itself; and 'that all private property, tangible and intangible, is held subject to the exercise of the right by the sovereign power….'"[1]

[1] Alabama v. Howington, 859 So. 2d 1093, 1094 (Ala. 2002) (Houston, J., dissenting) (arguing that the state's right of eminent domain cannot be forever terminated because a lawyer in attempting to appeal a probate court's order failed to timely file the notice of appeal in the probate office but filed it instead in the circuit court's office) (*quoting* Adirondack Ry. v. New York, 176 U.S. 335, 346–47, 20 S. Ct. 460, 464, 44 L. Ed. 492, 499 (1900)).

A. OVERVIEW OF SPECIAL PROBLEMS DISCUSSED IN THIS SECTION

Section 5 discusses a number of special issues that may arise in the context of eminent domain proceedings or inverse condemnation actions.

Section 5.B discusses the theories that have been used in support of excess condemnation when the transportation department takes more land that is actually necessary for a public improvement. Section 5.B also discusses the practice pursuant to which the government takes land belonging to one owner and uses it as just compensation when taking the land and/or access of another owner.

Section 5.C discusses condemnation blight that may result because of a transportation department's planning and precondemnation activities. A property owner may attempt to bring an inverse condemnation case alleging that condemnation blight has resulted in a taking of his or her property prior to the date of a *de jure* taking of the property. Alternatively, in a *de jure* condemnation the property owner may seek to exclude a loss of the market value of the property caused by condemnation blight when determining the value of the property as of the date of the *de jure* taking.

Although Section 2 discussed inverse condemnation claims for damages caused by flooding resulting from transportation projects, Section 5.D discusses the rules applicable to the liability of a transportation department for damages caused by surface water.

Section 5.E discusses the Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs Act ("Uniform Relocation Act" or "URA") and payments to property owners and owners forced to relocate because of federal or federally assisted projects. Section 5.E also discusses relocation assistance caused by a federally funded project, as well as federal land acquisition policies with which states must comply to receive federal funds.

Section 5.F discusses payments to public utilities for relocation from the highway right-of-way, including in connection with relocation caused by federal-aid highway projects.

Finally, Section 5.G addresses control of outdoor advertising and in particular issues arising under the Highway Beautification Act of 1965 regarding the prohibition, restriction, or removal of billboards and other forms of outdoor advertising.

B. EXCESS AND SUBSTITUTE CONDEMNATION

B.1. Theories of Excess Condemnation

Excess condemnation may be defined as that property "contiguous to a highway but outside of the right-of-way required for the actual, immediate, physical location and construction of the highway."[2] "Excess condemnation is an exercise of eminent domain wherein the condemning authority takes more land than actually is necessary for the public improvement."[3] Excess condemnation has been permitted when the extra taking is for a public use.[4] As discussed herein, if a public use has been demonstrated the courts are inclined to defer to a legislative judgment regarding what land is reasonably necessary in the condemnor's judgment for the project or improvement. It should be noted that with respect to excess and substitute condemnation, the breadth of statutory language is important as it may be permissible to acquire excess or substitute property and later sell or dispose of it.[5] It is reported, for example, that in Wisconsin, the transportation department has used joint-acquisition to justify the acquisition in fee of very large parcels for interim use and subsequent conveyance of part to others. It is further reported that the transportation department and a certain redevelopment authority have entered into a joint cooperative agreement. The transportation department uses its own authority as well as the authority of its partner to acquire a large parcel in fee. The joint authority is used mostly for staging during a 4-year project, with only a 1/6 portion retained permanently for the facility itself. The remainder is conveyed to the redevelopment authority after the transportation department completes the pro-

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[2] *Acquisition of Land for Future Highway Use: A Legal Analysis*, HRB Special Report 27 (1957), at 46.

[3] Gary P. Johnson, *Comment: The Effect of the Public Use Requirement on Excess Condemnation*, 48 TENN. L. REV. 370, 370 (1981), hereinafter cited as "Johnson."

[4] *See* Johnson, *supra* note 3, at 379.

[5] *See, e.g.,* WIS. STAT. 84.09(1) (2007):

> The department may acquire by gift, devise, purchase or condemnation any lands for establishing, laying out, widening, enlarging, extending, constructing, reconstructing, improving and maintaining highways and other transportation related facilities, or interests in lands in and about and along and leading to any or all of the same; and after establishment, layout and completion of such improvements, the department may convey such lands thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such lands so as to protect such public works and improvements and their environs and to preserve the view, appearance, light, air and usefulness of such public works. Whenever the department deems it necessary to acquire any such lands or interests therein for any transportation related purpose, it shall so order and in such order or on a map or plat show the old and new locations and the lands and interests required, and shall file a copy of the order and map with the county clerk and county highway committee of each county in which such lands or interests are required or, in lieu of filing a copy of the order and map, may file or record a plat in accordance with s. 84.095. *For the purposes of this section the department may acquire private or public lands or interests in such lands. When so provided in the department's order, such land shall be acquired in fee simple….*

(Emphasis supplied).

ject that extends over many years.[6]

There are three theories on which condemnors have relied to support an excess taking: the remnant theory, the protective theory, and the recoupment theory.[7] Regardless of the theory, "where an excess appropriation of private property is sought it must be shown by the appropriating agency that the excess property sought is reasonably necessary for furtherance of the public use or improvement."[8] Such authority may be provided by a state's constitution or by statute in furtherance of state constitutional authority. For example, the Ohio Constitution, Article 18, Section 10 provides:

> A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law.

B.1.a. The Remnant Theory

As explained by one court, [u]nder the "remnant" theory of appropriation, where an agency's [appropriation] of all or parts of a parcel, for public use, leaves fragments of land which are rendered useless or valueless by the appropriation, so that the appropriating agency would have to pay for the entire parcel including the fragments, [the] appropriation of the fragments is permitted.[9] A *physical remnant* is a remainder in such condition that it "has little practical value to the landowner because it is small, odd-shaped, or landblocked."[10] It should be noted, however, that it has been held that a statute that is not narrowly drafted, that does not define properly what a remnant is, and that fails to connect a taking to a public purpose is unconstitutional.[11] Furthermore, even though a state's statute may permit a condemnor "to take more land 'than is needed for actual construction in the laying out [of] highways or streets,'" a constitutional provision or statute authorizing excess condemnation does not permit a condemnor "to condemn…excess land long after [the street] has been laid out and thrown open to the public…."[12]

Although "[t]he physical remnant theory is widely accepted," two new economically oriented theories of remnant acquisition have developed: economic remnants and financial remnants.[13] *Economic remnants* have value after the part necessary for the public improvement is used, thus securing an economic advantage of the government. [14] As with the taking of a physical remnant, there must be statutory authorization permitting the condemning authority to take the entire parcel and not just the necessary portion thereof. Furthermore, a landowner may object to a condemnor's petition to appropriate a parcel of the owner's land on the basis that the condemnor has failed to take an uneconomic remnant.[15] Statutes have been upheld that permit the taking of an entire parcel as the least expensive alternative to the condemnor.[16]

For example, California Code of Civil Procedure § 1240.410 (2007) provides:

> (a) As used in this section, *"remnant" means a remainder or portion thereof that will be left in such size, shape, or condition as to be of little market value*.
>
> (b) Whenever the acquisition by a public entity by eminent domain of part of a larger parcel of property will

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[6] With respect to a particular parcel for which the above information was received, the parcel had already been identified as blighted property.

[7] *See* Johnson, *supra* note 3, at 382. Although the article questions the rationale, the author enumerates a fourth theory: "the broader public purpose theory…of excess condemnation [that] can be recognized in recent federal cases. These cases allow the government to take excess land not needed for the particular project in order to achieve broad public purposes associated with the original condemnation." *Id.* at 381–82 (*citing* United States *ex rel.* Tenn. Valley Auth. v. Two Tracts of Land, 532 F.2d 1083 (6th Cir. 1976) (conveyed for development); Midkiff v. Tom, 483 F. Supp. 62 (D. Hawaii 1979) (redistribution of land holdings); United States *ex rel*. Tenn. Valley Auth. v. Welch, 327 U.S. 546, 66 S. Ct. 715, 90 L. Ed. 843 (1946) (physical, social, economic development)). *See also* Montana v. Chapman, 152 Mont. 79, 84, 446 P.2d 709, 712 (1968) (discussing the three theories used to support excess takings).

[8] Village of Holland v. Yoder, 1990 Ohio App. LEXIS 333, at *11 (Ohio App. 6th Dist. 1990), (*citing* City of East Cleveland v. Nau, 124 Ohio St. 433, 179 N.E. 187 (Ohio 1931)).

[9] *Id.* at *5, n.1 (*citing* Cincinnati v. Vester, 33 F.2d 242 (6th Cir. 1929), *aff'd,* 281 U.S. 439, 50 S. Ct. 369, 74 L. Ed. 950 (1930)).

[10] Johnson, *supra* note 3, at 382, 383 (*citing* People v. Thomas, 108 Cal. App. 2d 830, 836, 239 P.2d 914, 917 (Cal. Ct. App. 1952) (describing a physical remnant as small, irregular in shape, and in a location inaccessible to the owner)).

[11] *See* City of Richmond v. Carneal, 129 Va. 388, 403–04, 106 S.E. 403, 408–09 (1907) (holding state statute unconstitutional as permitting a taking without a public use when the city had sought to condemn land for a boulevard and additional land that was to be replatted and resold).

[12] *In the Matter of the Application of the City of Rochester*, 237 N.Y.S. 147, 155, 227 A.D. 151, 155 (N.Y. 1929).

[13] Johnson, *supra* note 3, at 384 (*See also* Note, *An Expanded Use of Excess Condemnation*, 21 U. PITT. L. REV. 60, 62 (1959)).

[14] Johnson, *supra* note 3, at 384 (*citing* United States *ex rel.* Tenn. Valley Auth. v. Welch, 327 U.S. 546, 66 S. Ct. 715, 90 L. Ed. 843 (1946); People *ex rel*. Dep't of Pub. Works v. Superior Court, 68 Cal. 2d 206, 436 P.2d 342 (Cal. 1968); State v. Buck, 94 N.J. Super. 84, 226 A.2d 840 (N.J. App. 1967)).

[15] *See* State v. Howington, 859 So. 2d 1093 (Ala. 2003).

[16] *See, e.g.,* State by Commissioner of Transp. v. William G. Rohrer, Inc., 80 N.J. 462, 466, 404 A.2d 29, 31 (N.J. 1979), (*quoting* N.J. STAT. ANN. § 20:3-37 (1979); *Buck*, 94 N.J. Super. at 87–88, 226 A.2d at 842–43 (holding that the State must pay not only for the land it takes but also for the land it damages)).

> leave a remnant, the public entity may exercise the power of eminent domain to acquire the remnant in accordance with this article.
>
> (c) Property may not be acquired under this section if the defendant proves that the public entity has a reasonable, practicable, and economically sound means to prevent the property from becoming a remnant.[17]

Financial remnants relate to severance damage. When the payment for the land taken for the public improvement plus the cost of any damage to the remainder would nearly equal the value of the property, the law permits the acquisition of the entire property.[18] In *People, ex rel Department of Public Works v. Superior Court of Merced County,*[19] ("*Rodonis*" case), "the California Supreme Court created the notion of a financial remnant…a specific type of economic remnant in which the severance costs to the remnant property approach or exceed the costs of condemning the entire parcel."[20] In *Rodonis* the court held with respect to a taking of .65 acres of the Rodonis's property for a freeway that the department also could take the remaining 54 landlocked acres.[21] In the *Rodonis* case the court accepted the department's argument that if the department were allowed to condemn the entire parcel, the Rodonises would receive full value for the property; that "the risk of excessive severance damages will be eliminated"; and that ultimately the department would be able "to reduce the cost of the freeway by selling the part of the parcel not needed for freeway purposes."[22]

The landowners argued that "excess condemnation must be limited to parcels that may properly be deemed remnants with respect to which the public interest in avoiding fragmented ownership comes into play…."[23] However, the court held that the statute in question "validly authorizes the trial court to proceed with the action to condemn the 54 acres," but that the trial court

> must refuse to condemn the property if it finds that the taking is not justified to avoid excessive severance or consequential damages. The latter holding will assure that any excess taking will be for a public use and preclude the department from using the power of excess condemnation as a weapon to secure favorable settlements.[24]

In the *Rodonis* case the court recognized that the 54 ac was not a physical remnant but "a financial remnant: its value as a landlocked parcel is such that severance damages might equal its value…. There is no reason to restrict this theory to the taking of parcels negligible in size and to refuse to apply it to parcels negligible in value."[25] Other courts have not followed the *Rodonis* case, ostensibly in part because of differences in the applicable statutory language. In a Montana case the court affirmed a judgment limiting the amount of property that could be appropriated by the state.[26] The remainder that the state wanted to take was ten times the size of the parcel needed for the project. The court distinguished the *Rodonis* ruling on the basis that "the California statute requires the remainder to be…'of little value to its owner' while the Montana statute provides that the remainder be 'of little market value.'"[27] The court held not only that there was not a total loss of value but also agreed with the trial court that "broadening the 'remnant' theory…raise[es] serious constitutional questions."[28]

Similarly, in a Michigan case the court held that, although an excess taking of a remnant was lawful, "economic considerations alone" were not a sufficient justification.[29] "[A] condemnation based solely on the theory that it would save money 'was a wrong theory or basis upon which to determine the question of necessity….'"[30] As in the Montana case the court's opinion was that the Michigan statute differed materially from the statute at issue in the *Rodonis* case:

> In Michigan, the agency may acquire an entire parcel only if the practical value or utility of the remaining or excess portion of the parcel would be "destroyed" by a more limited acquisition…. Our statutes are consistent with the "physical remnant theory" of condemnation which allows the agency to take the remaining fragments of land which because of their size or location would be of no use or value to the original owner. *The alternative economic and financial remnant theories which allow condemnation on the basis of the expense to the condemnor require a different statutory authority not found in Michigan.*[31]

Thus, although the majority view appears to be that physical remnants may be taken, depending on the jurisdiction the applicable statutory authority may not be so broad as to permit the taking of a remnant under the financial remnant theory.

B1.b. The Protective Theory

Excess condemnation may be utilized to protect the public from the risk of an unsafe highway environment

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[17] Emphasis supplied.

[18] People, *ex rel* Dep't of Public Works v. Superior Court of Merced County, 68 Cal. 2d 206, 221, 436 P.2d 342, 351–52 (Cal. 1968) (holding that the trial court must refuse to condemn the property if the court found that a taking was not justified to avoid excessive severance or consequential damages).

[19] 68 Cal. 2d 206, 436 P.2d 342 (Cal. 1968).

[20] Johnson, *supra* note 3, at 386 (citation omitted).

[21] 68 Cal. 2d at 212–13, 436 P.2d at 346.

[22] 68 Cal. 2d at 208–09, 436 P.2d at 343–44.

[23] 68 Cal. 2d at 209, 436 P.2d at 344.

[24] 68 Cal. 2d at 210, 436 P.2d at 344–45.

[25] 68 Cal. 2d at 212–13, 436 P.2d at 345.

[26] Montana v. Chapman, 152 Mont. 79, 446 P.2d 709 (1968).

[27] *Id.* at 83, 446 P.2d at 712.

[28] *Id.* at 84, 446 P.2d at 712.

[29] Nelson Drainage Dist. v. Filippis, 174 Mich. App. 400, 406, 436 N.W.2d 682, 685 (Mich. Ct. App. 1989).

[30] *Id.* at 407, 436 N.W.2d at 685 (*quoting* Grand Rapids Bd. of Ed. v Baczewski, 340 Mich. 265, 272, 65 N.W.2d 810 (Mich. 1954)).

[31] *Id.* at 407–08, 436 N.W.2d at 686 (emphasis supplied), (*quoting* MICH. COMP. LAWS §§ 213.54, 213.365; MSA 8.265(4), 8.261(5)).

that could result from a more limited taking.[32] Moreover, "[u]nder the 'protective' theory of excess appropriation an appropriating agency may take land adjacent to the proposed public improvement where it deems it necessary for preserving the public improvement."[33] As one article explains:

> Under the protective theory excess land adjacent to the public improvement but unnecessary to its construction is taken so that the government may control the use of that land either by holding the property or by selling it with the appropriate use restrictions attached…. The constitutionality of this concept is well settled because purposes such as protection and preservation of public improvements are well within the broad definition of public use. Therefore, challenges to this type of taking often raise the issue whether condemnation for protective purposes is within the statutory grant of authority to condemn.
>
> The most common grant of authority to condemn for protective purposes has been to state highway commissions for the development of safe highways. States have responded to the great increase in traffic volume and high-speed expressways with a variety of enactments that specifically authorize condemnation of areas adjacent to highway projects. Some statutory grants of authority are very broad. *The grants of excess condemnation in Missouri, New Jersey, New York, Ohio, Pennsylvania, and Wisconsin are so broad that they encompass excess condemnation for public uses such as airports, slum clearance, and parking lots as well as for highways. Nine states have highway legislation which specifies that excess condemnation promoting safe roads and enhancing their beauty will be a public use.* Delaware, New Hampshire, Vermont, and Tennessee limit excess condemnation for highway purposes to controlled-access highways. Over half the states have some variation of the Model Controlled-Access Highway Act, which allows takings that are in the best interest of the public.[34]

Although a New Jersey case more directly concerns the economic remnant theory, the New Jersey Supreme Court has pointed out in a case in which a partial taking left a remnant "drained … of all economic worth"[35] that the *landowner* should be protected from risks posed by a remnant. The court held that even though the state had not sought to condemn the entire property, the state had the authority to condemn the entire property. Thus, under the applicable New Jersey statutes the remnant may be appropriated when it has "little or no economic value" or the remnant "*is so situated that the cost of acquisition to the State will be practically equivalent to the total value of the whole parcel of land.*"[36] The court, moreover, ruled that the *landowner* should be allowed to elect to receive the full value of the property and convey it to the state. The court reasoned that the "valueless remnant, with its exposed and unoccupied building left in the hands of the condemnee, poses a serious risk…. [of] property damage or personal injury for which the landowner might be liable…. The condemnee is entitled to be relieved of this risk."[37]

B.1.c. The Recoupment Theory

A third theory is the recoupment theory. Although the recoupment theory permits a condemning authority to condemn property for the purpose of selling it after completion of the project to reduce the overall cost of the public improvement, the theory does not appear to have widespread acceptance in the United States.[38]

> In the parlance of eminent domain jurisprudence such is normally referenced as a "recoupment" sale, and universally frowned upon as an unconstitutional condemnation in excess of that which is necessary for public use (except in those situations where peculiar provisions of a state constitution expressly authorize it). "Thus, the basis of recoupment theory is that the government may finance public improvements by condemning more land than is needed and then sell the surplus at a price enhanced by the improvement. The aim here is to recoup the cost of the public project." 2A Nichols § 7.06[7][d], supra, at 7-184.[39]

There is a dearth of recent cases upholding the use of the recoupment theory. As one article states,

> *[a]lthough recoupment is used frequently in Europe to finance public projects, it has not been used widely in the United States*. Recoupment has been used, however, in conjunction with other theories of condemnation. For example, the city may take several physical remnants, replat the boundaries, and then resell the property. In those cases, however, the recoupment motive is usually secondary. In most cases the acceptability of the initial action makes the subsequent sale acceptable because it is only secondary or incidental. The exercise of excess condemnation for the sole purpose of recoupment is the most difficult action to justify under the federal constitution. Only

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[32] *See* Johnson, *supra* note 3, at 382, 389–90 (*citing* Forest Preserve Dist. v. Wike, 3 Ill. 2d 49, 119 N.E.2d 734 (1954) (protect and preserve a forest area)).

[33] Village of Holland v. Yoder, 1990 Ohio App. LEXIS 333, at *5 (citation omitted).

[34] Johnson, *supra* note 3, at 388–89 (emphasis supplied) (footnotes omitted).

[35] State by Commissioner of Transp. v. William G. Rohrer, Inc., 80 N.J. 462, 464, 404 A.2d 29, 30 (1979).

[36] 80 N.J. at 466, 404 A.2d at 31 (emphasis in original), (*quoting* N.J. STAT. ANN. §§ 20:3-37, 27:7-22.6).

[37] 80 N.J. at 466–67, 404 A.2d at 31.

[38] *See* Johnson, *supra* note 3, at 391–93 (*citing*, however, Atwood v. Willacy County Nav. Dist., 271 S.W.2d 137 (Tex. Civ. App. 1954) (excess condemnation and sale allowed district to be self-supporting); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 72, 33 S. Ct. 667, 57 L. Ed. 1063 (1913) (sale was incidental purpose); Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth., 12 N.Y.2d 379, 389, 190 N.E.2d 402, 405 (1963) (incidental revenue production); Ryan v. Louisville & N. Terminal Co., 102 Tenn. 111, 125, 50 S.W. 744, 747 (1899) (purely incidental right)).

[39] State *ex rel.* Wash. State Convention & Trade Ctr. v. Evans, 136 Wash. 2d 811, 841–42, 966 P.2d 1252, 1267 (1998) (Sanders, J, dissenting).

> some of the state constitutions authorizing excess condemnation are broad enough to allow recoupment.[40]

Recoupment appears to have been the motive in *Cincinnati v. Vester,*[41] in which the U.S. Supreme Court affirmed the Sixth Circuit's decision enjoining the city's condemnation proceedings for the alleged purpose of widening a street. As the Court observed, it had appeared to the trial and appellate courts that "the sole purpose" of the takings of the landowners' property by the city was "recoupment by the resale of the properties in question of a large part of the expense of the street widening," and that the takings were not "for a public use 'within the meaning of that term as it heretofore has been held to justify the taking of private property.'"[42]

In *State ex rel. State Highway Department v. 9.88 Acres of Land,*[43] the condemnor recognized that the cost of an entire parcel would be as much as paying just compensation for a portion of the land and for damages for denial of access from the remainder. Thus, the Delaware Highway Department argued "that it [would be] uneconomical to compel it to pay such an amount and not obtain the land, itself, which it could possibl[y] thereafter sell to private persons, thus recouping some of the cost."[44] However, the court rejected the department's attempted taking under the recoupment theory:

> The recoupment theory is rejected by at least the majority of the states which still adhere to the doctrine that private property may be taken for public purposes only when the taking authority has an immediate public use for the property, or has plans for a public use of the property in the foreseeable future. In our opinion, the Highway Department has no foreseeable future use for this excess land and, consequently, may not take it through the power of eminent domain.[45]

Notwithstanding some courts' rejection of the recoupment theory, there are cases in which "profits made by the government from the sale of excess property have been upheld and will not defeat a project that has a public use."[46] More recently, in a condemnation of property for the expansion of a convention center, the Supreme Court of Washington upheld the planned private uses of the property on the basis that they were incidental to the public use. A dissenting opinion in the case argued that the use was really private, not public. "As found by the trial court, the unnecessary or "surplus" portion of the property to be condemned is, as part of the same transaction, to be resold to a private entrepreneur for his private use subject only to an easement servitude for the aerial estate reserved in the government."[47]

The dissenting justice, who maintained that a taking for a recoupment violated the state's constitution, wrote that "[o]nly six state constitutions authorize the condemnation of land in excess of that actually needed for public use, and Washington is not one of them."[48]

Finally, a state statute may authorize a condemnor that has acquired property in good faith to sell it later. For example, in North Carolina

> "When any property condemned by the condemnor is no longer needed for the purpose for which it was condemned, it may be used for any other public purpose or may be sold or disposed of in the manner prescribed by law for the sale and disposition of surplus property." …When a town condemns land for some public use, there is always a potential that unforseen (though perhaps foreseeable) events will frustrate that use. To require *certainty* that the land condemned will be put to the intended public use would be to doom to failure most such proceedings at their conception.[49]

Thus, although acquiring property for the purpose of recoupment may fail to satisfy the state's construction of the public use and necessity requirements, it appears

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[40] Johnson, *supra* note 3, at 391–92 (footnotes omitted) (emphasis supplied).

[41] 281 U.S. 439, 50 S. Ct. 360, 74 L. Ed. 950 (1930).

[42] *Id.* at 444, 50 S. Ct. at 362, 74 L. Ed. at 954.

[43] 253 A.2d 509 (Del. 1969).

[44] *Id.* at 510.

[45] *Id.* at 511 (emphasis supplied) (rejecting also the department's attempted use of the remnant theory as a basis for the taking because a remnant must be "practically worthless." *Id*. *See also* E. L. Strobin, Annotation, *Right to Condemn Property in Excess of Needs for a Particular Purpose*, 6 A.L.R. 3d 297 (1966).

[46] Johnson, *supra* note 3, at 380 (*citing* United States v. Chandler Dunbar Wales Power Co., 229 U.S. 53, 66 33 S. Ct. 667, 57 L. Ed. 1063 (1913); Cottrill v. Myrick, 12 Me. 222, 233 (Me. 1835); Gardner Water Co. v. Town of Gardner, 185 Mass. 190, 194, 69 N.E. 1051, 1053 (Mass. 1904); Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth., 12 N.Y.2d 379, 389, 190 N.E.2d 402, 405 (N.Y. 1963)). *See* HTK Mgmt., LLC v. The Seattle Popular Monorail Auth., 155 Wash. 2d 612, 637–38, 121 P.3d 1166, 1179–80 (2005) (apparently agreeing with the condemnor that City of Cincinnati v. Vester, 281 U.S. 439, 50 S. Ct. 360, 74 L. Ed. 950 (1930), was distinguishable on the basis that in *Vester* the city had no public use at all for the property except for possible recoupment). *See also* Bond v. City of Baltimore, 116 Md. 683, 685, 82 A. 978, 980 (Md. 1911) (holding that a statute in part permitting the city "to acquire by purchase or otherwise…property in and adjacent to said highway, and to dispose of property so acquired not in bed of said highway" was a valid power); Miller v. Town of Pulaski, 114 Va. 85, 89, 75 S.E. 767, 769 (1912)

> (Conceding that the property condemned will furnish more power than the town needs now, or will need for years to come, it does not appear that less than the whole could have been condemned, and the evidence tends to show that if there was any taking at all the whole property must be condemned.)

[47] Washington v. Evans, 136 Wash. 2d 811, 840, 966 P.2d 1252, 1266 (1998).

[48] *Id.* at 843, n.14, 966 P.2d at 1267, n.14 (Sanders, J. dissenting) (identifying Massachusetts, Missouri, New York, Ohio, Rhode Island, and Wisconsin and stating that "three of these six—Massachusetts, New York, and Rhode Island—require that an excess condemnation be specifically approved as such by the legislative body").

[49] Town of Highlands v. Hendricks, 164 N.C. App. 474, 481, 596 S.E.2d 440, 445–46 (N.C. Ct. App. 2004), *rev. denied*, 2004 N.C. LEXIS 1137 (N.C. 2004) (*quoting* N.C. GEN. STAT. § 40A-10 (2003)).

that property that has been acquired but not used may be sold later by the condemnor.

B.2. Uneconomic Remnants and Federal Real Property Acquisition Policy

The principle that no more land shall be taken than is needed for a public improvement for highway purposes appears in 23 U.S.C. § 109(f) (2007).

> The Secretary shall not, as a condition precedent to his approval under section 106 of this title, require any State to acquire title to, or control of, any marginal land along the proposed highway in addition to that reasonably necessary for road surfaces, median strips, bikeways, gutters, ditches, and side slopes, and of sufficient width to provide service roads for adjacent property to permit safe access at controlled locations in order to expedite traffic, promote safety, and minimize roadside parking.[50]

Notwithstanding the above section, Section 301 of the Real Property Acquisition Policies Act[51] provides that

> [i]f the acquisition of only a portion of a property would leave the owner with an uneconomic remnant, the head of the Federal agency concerned shall offer to acquire that remnant. For the purposes of this chapter, an uneconomic remnant is a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner's property and which the head of the Federal agency concerned has determined has little or no value or utility to the owner.[52]

The legislative history indicates that the purpose behind the enactment of Section 301(9) was to effect substantial justice for landowners left with marginal land after a taking and to premise the acquisition of such property on established principles of eminent domain law relating to allowable excess condemnation.[53] To bring about state compliance with federal land acquisition policies, the states are required as a condition of receiving federal assistance to give assurances that they will comply "to the greatest extent practicable under State law" with the provisions of the Uniform Relocation Act, Title III of which is the Real Property Acquisition Policies Act.[54] Thus, unless lacking authority under local law to do so, the states are required as a condition of receiving federal funding for the acquisition of right-of-way to offer to acquire a remnant when the acquisition of only part of the property would leave the landowner with an uneconomic remnant.[55] Although the acquisition of land under the remnant theory was new to federal law, the theory has a long history under state law as both a creature of statute and the law of excess condemnation.

As stated in *Georgia 400 Industrial Park, Inc. v. Department of Transportation,*[56] the Real Property Acquisition Policies Act "'creates no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation.'"[57] "'[T]he section is no more than a statement by Congress of what it perceives to be the preferred method of dealing with landowners when the government wants to acquire their land.'"[58] Furthermore, the Georgia Relocation Assistance and Land Acquisition Policy Act[59] "does not create a private right of action in favor of a [Condemnee] but merely addresses policies that should guide state agencies when they acquire real property for federal-aid projects."[60]

B.3. Excess Condemnation and Public Use and Necessity

Notwithstanding the foregoing theories supporting the practice of excess condemnation, the ability of condemning authorities to take private property is governed by the Fifth and Fourteenth Amendments of the U.S. Constitution and the various state constitutions. For example, Louisiana's constitution prohibits the taking of private property for private purposes.[61] It is a universal requirement that to qualify for a condemnation a taking must be for a public use or public purpose as opposed to a private use or purpose.[62] However, as

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[50] 23 U.S.C. § 109(f) (2007). 23 U.S.C. § 106 (2007) pertains to approval by the U.S. Secretary of Transportation of plans, specifications, and estimates.

[51] P.L. No. 91-646, 84 Stat. 1894 (Jan. 2, 1971) (codified at 42 U.S.C. § 4651(9) (2007)).

[52] 42 U.S.C. § 4651(9) (2007).

[53] *See* Report of the House Committee on Public Works, H.R. NO. 91-1656, *as reprinted in* 1970 U.S.C.C.A.N. 5850.

[54] 42 U.S.C. § 4655(a)(1) (2007).

[55] *See* 42 U.S.C. § 4651(9) (2007).

[56] 274 Ga. App. 153, 616 S.E.2d 903 (Ga. Ct. App. 2005).

[57] *Id.* at 158, 616 S.E.2d at 908 (*quoting* 42 U.S.C. § 4602(a)). *See also* Tenn. Gas Pipeline Co. v. New England Power, C.T.L., Inc., 6 F. Supp. 2d 102, 104–05 (D. Mass. 1998) (stating that courts have consistently held that this provision does not create any rights in condemnees); Portland Natural Gas Transmission System v. 4.83 Acres of Land, 26 F. Supp. 2d 332, 336 (D. N.H. 1998) (noting the provision does not create any substantive rights and could not be cited as an "impediment to an eminent domain action"); United States v. 410.69 Acres of Land, Etc., 608 F.2d 1073, 1074, n.1 (5th Cir. 1979) (emphasizing Congress's clear intent that this provision creates no rights in landowners).

[58] *Id.* (*quoting* Benton v. Savannah Airport Comm'n, 241 Ga. App. 536, 539, 525 S.E.2d 383, 386 (Ga. Ct. App. 1999)).

[59] GA. CODE ANN. § 22-4-9.

[60] *Id.* at 158–59, 616 S.E.2d at 908–09 (internal quotation marks omitted).

[61] *See* LA. CONST., § 4, providing in part that

> [p]roperty shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question.

[62] *See* HTK Mgmt., LLC v. The Seattle Popular Monorail Auth., 155 Wash. 2d 612, 651, 121 P.3d 1166, 1186 (2005) (acknowledging that this rule has been called a "universal rule"), (*citing* City of Tacoma v. Humble Oil & Ref. Co., 57 Wash. 2d 257, 356 P.2d 586 (1960)); Daniels v. Area Plan Comm'n, 306

seen in Section 1, *supra*, the definition of what constitutes a public use or purpose has been broadened by the courts. Indeed, the consensus seems to be that "[t]he definition of public use…expanded greatly as a result of slum clearance and urban redevelopment."[63] As the New Jersey Supreme Court stated in an excess condemnation case, "in New Jersey, especially in recent years, both the Legislature and the courts have adopted an extremely liberal and comprehensive interpretation of public use."[64]

A condemnor, however, pursuing excess condemnation may not be able in every case to meet the requirements of public use and necessity. For example, in *Village of Holland v. Yoder, supra*, the property owners alleged that an excess taking by the village was contrary to law. Although the village had appropriated real property for the stated purpose of relocating Railroad Street and for other unspecified purposes, the landowners alleged

> that the appropriation of their property was not for the public purposes stated, which was the relocation of Railroad Street to solve traffic and noise problems, but rather for underlying non-public purposes including providing assistance to Solar Con in the expansion of its business, controlling the future industrial development of the area, and gaining profits from the future sale or lease of the property.[65]

Evidence at a "necessity hearing showed that Solar Con was interested in expanding its business and constructing a new building on its property," and that the village had assisted the company financially with its expansion and sought to acquire additional land to alleviate parking problems for the company that would be caused by the expansion.[66] The appellate court held that there was "competent, credible evidence to support the trial court's findings that the excess appropriation was not for [a] public purpose, [that it] was not justified under either the remnant or the protective theories, …that [the] appellant abused its discretion in appropriating the excess property,"[67] and that under the applicable statute the village had "failed to give any reason for the appropriation of property beyond what was actually needed for the relocated road."[68]

By comparison, however, in 2005 the Supreme Court of Washington addressed the public use and necessity requirements in connection with an excess condemnation case and upheld a taking in spite of some aspects of private use associated with the taking. In *HTK Management, L.L.C. v. Seattle Popular Monorail Authority*,[69] involving a taking of property by the Seattle Popular Monorail Authority for the Seattle Monorail Project (SMP), the property owner HTK argued that the trial court's finding of public use and necessity was improper. HTK argued that although SMP could condemn "a fee interest in the property comprising the monorail footprint," SMP "should have been limited to a multi-year lease on the remainder."[70] HTK also argued that SMP "should have decided to condemn a fee interest in only the portion of the property that was likely to contain the monorail station and to condemn an easement interest in the remainder of the property that is to be used for construction staging and development of the Green Line alignment."[71]

The court stated that it had developed a three-part test to evaluate eminent domain cases: "For a proposed condemnation to be lawful, the condemning authority must prove that (1) the use is really public, (2) the public interest requires it, and (3) the property appropriated is necessary for that purpose."[72] The court explained that whether a taking is for a public use is a judicial question,[73] but that "determinations by the condemning authority as to the type and extent of property interest necessary to carry out the public purpose have historically been considered legislative questions and are thus analyzed under the third prong of the test"—namely whether the property being taken is necessary for that purpose.[74] Accordingly, the court agreed with SMP that "a condemning authority's decision as to the type and extent of property interest is a legislative question."[75] If a court reviews a government's decision

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F.3d 445, 459–50 (7th Cir. 2002) (discussing public purpose or use and noting that the "Fifth Amendment is a requirement that the government not take property for private purposes"), (*citing* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984); Thompson v. Consol. Gas Utils. Corp., 300 U.S. 55, 80, 57 S. Ct. 364, 81 L. Ed. 510 (1937); Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239, 251–52, 25 S. Ct. 251, 49 L. Ed. 462 (1905); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158, 17 S. Ct. 56, 41 L. Ed. 369 (1896); Calder v. Bull, 3 U.S. 386, 388, 1 L. Ed. 648, 649 (1798) (Chase, J.) (noting that because "it is against all reason and justice, for a people to entrust a Legislature with such powers" to enact "a law that takes property from A and gives it to B," the legislature cannot be presumed to have such powers))).

[63] Johnson, supra note 3, at 374 (citing Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 214–16 (1978)).

[64] State by Commissioner of Transp. v. William G. Rohrer, Inc., 80 N.J. at 465, 404 A.2d at 30–31 (citations omitted).

[65] Village of Holland v. Yoder, 1990 Ohio App. LEXIS 333, at *3.

[66] *Id.* at *6.

[67] *Id.* at *12–13.

[68] *Id.* at *14.

[69] *In re Seattle Monrail Auth.,* 155 Wash. 2d 612, 121 P.3d 1166 (2005).

[70] *Id.* at 616, 121 P.3d at 1168.

[71] *Id.* at 630, 121 P.3d at 1175.

[72] *Id.* at 629, 121 P.3d at 1174–75 (citations omitted).

[73] *Id.* 121 P.3d at 1175 (*quoting* WASH. CONST. art. I, § 16 and *citing* Dickgieser v. State, 153 Wash. 2d 530, 535, 105 P.3d 26, 29 (2005)).

[74] *Id.* at 630, 121 P.3d at 1175.

[75] *Id.* at 631, 121 P.3d at 1175 (*citing* St. Andrew's Episcopal Day Sch. v. Miss. Transp. Comm'n, 806 So. 2d 1105, 1111 (Miss. 2002) (selection of the particular land to condemn as well as the amount of land necessary are legislative questions to be determined by the condemning authority); Regents of

on necessity as a legislative question, it becomes quite difficult for the condemnee to overturn the government's decision on necessity. A "declaration of necessity by a proper municipal authority is conclusive in the absence of actual fraud or arbitrary and capricious conduct, as would constitute constructive fraud."[76]

The court agreed that a taking of the entire property was necessary as maintained by SMP, even if not all of the property was used for the monorail station, because "the record indicates that the remaining portion of the property could be used for at least 10 years for construction and remediation of property in downtown Seattle."[77] Even if there was a possibility that SMP would sell some surplus property, such a possibility did not defeat the character or nature of the taking: "HTK points to no authority that requires a condemning authority to have a public use planned for property *forever*."[78] Thus, the court held "that SMP's determination to condemn a fee interest in KTK's property is a legislative question."[79] Although SMP had indicated at a public community hearing that "a portion of HTK's property might yield 'surplus property,' suitable for Associated Development,"[80] the court held that the taking was reasonably necessary. The court, moreover, held that "[t]he record support[ed] SMP's contentions that it needs all of the property for a substantial period of time to build and construct a monorail station and may need all of it indefinitely."[81]

Univ. of Minn. v. Chicago & Nw. Transp. Co., 552 N.W.2d 578 (Minn. Ct. App. 1996) (analyzing whether university demonstrated that proposed taking is "necessary" under the legislative standard of review); Westrick v. Approval of Bond of Peoples Natural Gas Co., 103 Pa. Commw. 578, 581, 520 A.2d 963, 965 (Pa. Commw. 1987) ("[A]dministrative decisions of a condemnor concerning the amount, location, or type of estate condemned are not subject to judicial review unless such decisions are in bad faith, arbitrary, capricious, or an abuse of power."); Concept Capital Corp. v. Dekalb County, 255 Ga. 452, 453, 339 S.E.2d 583, 584 (Ga. 1986) (court following the rule that "'[i]n the absence of bad faith, the exercise of the right of eminent domain rests largely in the discretion of the authority exercising such right, as to the necessity, and what and how much land shall be taken'") (*quoting* City of Atlanta v. Heirs of Champion, 244 Ga. 620, 621, 261 S.E.2d 343, 344 (Ga. 1979)); City of New Ulm v. Schultz, 356 N.W.2d 846, 849 (Minn. Ct. App. 1984) (holding that the city need only show that acquiring a fee interest rather than an easement was a reasonable means of acquiring airport protection privileges); City of Phoenix v. McCullough, 24 Ariz. App. 109, 114, 536 P.2d 230, 235 (Ariz. Ct. App. 1975) ("[W]e believe the rule to be that a condemnor's determination of necessity should not be disturbed on judicial review in the absence of fraud or arbitrary and capricious conduct.")).

[76] *In re Seattle Monrail Auth*. 155 Wash. 2d at 629, 121 P.3d at 1175 (citations omitted).

[77] *Id.* at 633, 121 P.3d at 1176.

[78] *Id.* at 634, 121 P.3d at 1177 (emphasis in original).

[79] *Id.* at 635, 121 P.3d at 1177.

[80] *Id.* at 634, 121 P.3d at 1178.

[81] *Id.* at 638, 121 P.3d at 1178.

B.4. Substitute Condemnation

Substitute condemnation permits a state or other agency having the power of eminent domain to take land under an agreement to compensate an owner with land—to be taken in condemnation from another property owner—instead of compensating the owner with money.[82]

Substitute condemnation therefore is compensation in kind, *i.e*., replacing the land taken with other land rather than money.[83] It should be noted that a jurisdiction may prohibit the practice of substitute condemnation on the basis that the practice constitutes the taking of private property for a private purpose.[84]

Two concepts appear to have been used by the courts to uphold the constitutionality of substitute condemnation: the separate-public-use doctrine and the incident-to-the-taking doctrine.

The separate-public-use doctrine allows the condemnation of a third person's land for the purpose of compensating the owner of land required for a public use, if the latter's activity on the third person's land will itself constitute a public use, as may occur with respect to takings by railroads or utilities or for a school. The incident-to-the-taking doctrine is not limited to situations in which the first taking is from a public or quasi-public corporation. As seen in the discussion in prior sections, there may be a taking of one neighbor's property to provide access to a condemned parcel to avoid the condemned property being landlocked, in which event the condemnor would have to acquire the entire property.

There may be an objection to substitute condemnation on the basis that the property of the ultimate condemnee is not being taken for the public use of the condemnor but for the private use of another person in violation of the Fifth and Fourteenth Amendments to

[82] *See* N.C. State Highway Comm'n v. Farm Equip. Co., Inc., 281 N.C. 459, 474, 189 S.E.2d 272, 281 (N.C. 1972) (holding that a railroad only had the power to condemn land for a right-of-way, which could only be an easement, and the highway commission could not exercise any more power than the railroad).

[83] *See* Town of Highlands v. Hendricks, 164 N.C. App. 474, at 480, 596 S.E.2d 440, at 445 (holding that although the case was one of direct and not substitute condemnation, the latter means is "a valid exercise of a power of eminent domain only when the substitution of other property is the sole method by which the owner of land taken for public use can be justly compensated, and the practical problems resulting from the taking can be solved").

[84] *See* Ark. State Highway Comm'n v. Alcott, 260 Ark. 225, 539 S.W.2d 432 (1976) (holding that because the Commission's witnesses testified that the purpose of the condemnation was to provide a private driveway, the taking was not for a public use); s*ee*, *however*, Dowling v. Erickson, 278 Ark. 142, 644 S.W.2d 264 (Ark. 1983) (noting that ARK. STAT. ANN. § 76-110 (1981) sets forth the procedures for establishing a road when an owner has no access to his land and upholding a county court decision for the condemnation of a portion of a landowner's property for a public access road to an adjoining property totally encircled by the other landowner's property); *see also* LA. CONST. § 4).

the U.S. Constitution. Nevertheless, there is statutory authority for substitute condemnation that has been upheld and applied by the courts.[85] According to one source with respect to substitute condemnation, although "the question of public use and necessity are so entwined as to be inseparable,"[86] there must be a "close factual connection between the taking" of one party's land with the taking of the other party's land.[87]

Substitute condemnation has been used to provide access to another owner's property.[88] For example, where one property owner became landlocked as the result of an appropriation, a New York court held that it was permissible under a provision of New York's Highway Law "to acquire by appropriation such property as may be necessary to re-establish private access to other property where such access has been destroyed by an acquisition of part of the other property for the reconstruction or maintenance of a State highway."[89] According to the court, "the substitute condemnation is, in fact, incident to the original taking," as well as for a "public purpose."[90] "Although the concept of substitute condemnation has not been the subject of explicit judicial approval in this State, the courts have consistently recognized the validity of appropriations of property for quasi-private use."[91] The use of substitute condemnation has been rejected where the court found that a highway commission had abused its discretion.[92]

Because utilities often are located adjacent to public highways within their own rights-of-way, it may be necessary to acquire land for the purpose of relocating utilities as needed for highway construction.[93] When a highway is widened or its character is changed from conventional to limited access, substitute right-of-way may have to be obtained for a utility as the only practical and measurable method of compensation.[94] Even if there is no specific statutory authorization (i.e., the right to condemn for substitute right-of-way for utilities), the courts have upheld the use of condemnation for such purposes.[95]

The use of substitute condemnation has been upheld also for the purpose of relocating tracks of a railroad[96] or arranging an exchange of sites for a railroad right-of-way.[97]

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[85] *See* United States *ex rel.* TVA v. Welch, 327 U.S. at 546, 554, 66 S. Ct. at 719, 90 L. Ed. at 849 ("And when serious problems are created by its public projects the government is not barred from making a common sense adjustment in the interests of all the public); Dohany v. Rogers, 281 U.S. 362, 366, 50 S. Ct. 299, 301, 74 L. Ed. 904, 910 (1930) ("It is enough that although the land is to be used as a right of way for a railroad, its acquisition is so essentially a part of the project for improving a public highway as to be for a public use."); Brown v. United States, 263 U.S. 78, 81–82, 44 S. Ct. 92, 68 L. Ed. 171 (1923) ("It was a natural and proper part of the construction of the dam and reservoir to make provision for a substitute town as near as possible to the old one…. The incidental fact that in the substitution and necessary adjustment of the exchanges, a mere residuum of the town-site lots may have to be sold does not change the real nature of what is done…."); Pitznagle v. W. Ry. Co., 119 Md. 673, 679–80, 87 A. 917, 919–20 (Md. 1913)

> ([I]t was not intended by the framers of the Constitution that there should be no adequate relief from the conditions that we have mentioned, resulting from the taking of said private road for public use. The condemnation of a part of this land, here sought to be condemned, for a substitute private road or way is incident to and results from the taking, by reason of public necessity, of the existing private road for public use, and the use of it for such purposes should, we think, be regarded as a public use within the meaning of the Constitution.).

[86] N.C. State Highway Comm'n v. Farm Equip. Co., Inc., 281 N.C. 459, at 470, 189 S.E.2d at 278.

[87] *Id.*

[88] *See, e.g.*, N.C. State Highway Comm'n v. Asheville Sch., Inc., 276 N.C. 556, 563–64, 173 S.E.2d 909, 914–15 (N.C. 1970) (permitting substitute condemnation to provide access to private property that otherwise would have been landlocked by the construction of a nonaccess highway).

[89] KJC Realty, Inc. v. New York, 69 Misc. 2d 99, 100, 329 N.Y.S.2d 252, 254 (N.Y. Sup. Ct. 1972), *aff'd*, 32 N.Y.2d 664, 295 N.E.2d 797 (N.Y. 1973).

[90] 69 Misc. 2d at 102, 329 N.Y.S.2d at 256.

[91] *Id.* at 101, 329 N.Y.S.2d at 254–55 (*citing* Ross v. New York, 291 N.Y.S.2d 926, 30 A.D. 2d 681 (N.Y. App. Div. 1968), *aff'd*, 23 N.Y.2d 807, 244 N.E.2d 877 (N.Y. 1969); Courtesy Sandwich Shop v. Port of N.Y. Auth., 12 N.Y.2d 379, 190 N.E.2d 402 (N.Y. 1963); Cannata v. City of New York, 11 N.Y.2d 210, 182 N.E.2d 395 (N.Y. 1962), *app. dismissed*, 371 U.S. 4, 83 S. Ct. 28, 9 L. Ed. 2d 48 (1962); Cuglar v. Power Auth. of State of N.Y., 4 Misc. 2d 879, 163 N.Y.S.2d 902 (N.Y. Sup. Ct. 1957), *aff'd*, 164 N.Y.S.2d 686, 4 A.D. 2d 801 (N.Y. App. Div. 1957), *aff'd*, 3 N.Y.2d 1006, 147 N.E.2d 733 (N.Y. 1957); Kaskel v. Impellitteri, 306 N.Y. 73, 115 N.E.2d 659 (N.Y. App. Div. 1953); Matter of Watkins v. Ughetta, 78 N.Y.S.2d 393, 273 A.D. 969 (N.Y. App. Div. 1948), *aff'd*, 297 N.Y. 1002, 80 N.E.2d 457 (N.Y. 1948)).

[92] Miss. State Highway Comm'n v. Morgan, 248 Miss. 631, 637–38, 160 So. 2d 77, 79 (Miss. 1964) (holding that the state highway commission abused its discretion condemning an easement).

[93] *See* Benton v. State Highway Dep't, 111 Ga. App. 861, 143 S.E.2d 396 (Ga. Ct. App. 1965) (involving the relocation of gas lines); United States v. 10.47 Acres, 218 F. Supp. 730 (D. N.H. 1953) (involving substitute water system for a municipality).

[94] *See* § 5F, *infra*.

[95] Dep't of Transp. v. Livaditis, 129 Ga. App. 358, 364, 199 S.E.2d 573, 578 (Ga. Ct. App. 1973) (stating that the condemnor had the power to condemn land as "substituted compensation" to minimize damages to be paid to the condemnees). *See also* Missouri v. Eakin, 357 S.W.2d 129, 134–35 (Mo. 1962) (upholding substitute compensation by a state to a utility in part to meet the public welfare objectives of a highway project).

[96] Hinson v. Dep't of Transp., 230 Ga. 314, 317, 196 S.E.2d 883, 885 (Ga. 1973).

[97] Langenau Mfg. Co. v. Cleveland, 159 Ohio St. 525, 528–29, 533, 112 N.E.2d 658, 659–60, 661 (Ohio 1953) (holding that the condemnation "for a substitute private road or way [was] incident to and results from the taking, by reason of public necessity of the existing private road for public use…within the meaning of the Constitution"). *See also* George D. Harter Bank of Canton v. Muskingum Watershed Conservancy Dist., 53 Ohio App. 315, 4 N.E.2d 996 (Ohio 1935) (upholding right of the district to condemn property for relocation of railroad track pursuant to statutory authorization).

Finally, the principle of substitute condemnation has been upheld to enable the government to acquire land having deposits that were suitable for use in the construction of a public dam to be located near the property to be taken.[98]

C. PLANNING AND PRECONDEMNATION ACTIVITIES—CLAIMS FOR CONDEMNATION BLIGHT

C.1. Introduction

Condemnation blight may occur as the result of the complex and often lengthy planning of a highway project.[99] Condemnation blight may be defined as the result of the government's noninvasive action that nevertheless causes a decline in the value of property between the date the property is first *considered* for public acquisition and the date the property is *actually* acquired.[100] Condemnation blight also may be defined as "the impairment of marketability caused by the knowledge that any ownership interest in the property is short lived."[101] A cause of action in inverse condemnation may arise prior to the actual condemnation of the property if a complaint alleges that the property owner has been deprived of all, or substantially all, of the beneficial use of the property.[102] However, a property owner may be unable to meet his or her burden of proof on the issue of deprivation of all or substantially all of the owner's use of the property.[103] The wording of the applicable inverse condemnation statute also may be a significant factor.[104]

Although the U. S. Supreme Court held in *Monongahela Navigation Co. v. United States*[105] that just compensation does not include payment for condemnation blight, there has been considerable evolution in the law on this subject since 1893. Although there is a legal basis in some jurisdictions on which a property owner may claim either that there has been a *de facto* taking of his or her property or that the valuation of property in eminent domain proceedings must take into account the effect of condemnation blight on the property's value, the legal test or standard applicable to such a claim, as will be discussed, is quite high.

The general rule is that the announcement of a projected public improvement, together with preparation of plans and maps showing the property in question as being within the limits of the project without any interference with the owner's use, does not constitute a compensable taking even though the project may reduce the marketability of the property.[106] The general rule both excludes an inverse condemnation action[107] and sets the date for the value of the property to be acquired as of the date of condemnation of the property.[108] Nevertheless, "[s]everal jurisdictions have recognized landowners' claims for condemnation blight, usually on an 'inverse condemnation' theory.'" Some courts, thus, find that there was a *de facto* taking at a date earlier than the actual taking.[109]

In the subsections that follow, cases are discussed first that apply the most restrictive rule, followed by a discussion of somewhat less restrictive rules that have been applied in other cases. Although the following subsections attempt to categorize the cases by the rule that the courts have followed, in some instances the courts have altered the language of the rule or used language applicable to more than one rule concerning when a *de facto* taking has occurred because of condemnation blight.

C.2. No Taking Absent a Direct Invasion or Restriction on the Use of Property

Courts have responded to condemnation blight claims in a variety of ways. Some courts apply the "rigid rule that compensation is valued at the date of the actual appropriation of property."[110] As the Supreme Court of Texas has observed, courts in other states as well as courts in its own state "have determined that government action which may result in a future loss of prop-

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[98] Harwell v. United States, 316 F.2d 791, 792–93 (10th Cir. 1963).

[99] The planning phase involves various precondemnation activities such as completion of demographic, topographic, and other preliminary studies; preparation of maps and surveys; designation of route alignment; appraisals of affected property; negotiations with owners for purchase of land; and the holding of corridor and design hearings to name just some of the likely precondemnation activities.

[100] *See* Jackovich Revocable Trust v. State, Dep't of Transp., 54 P.3d 294, 296 n.3 (Alaska 2002) (*citing* 8A NICHOLS ON EMINENT DOMAIN § 18.04(3) (3d ed. 1998)).

[101] *See* Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1435-36 (2006) (*citing* Robert H. Freilich, *Planning Blight: The Anglo-American Experience*, 29 URB. LAW. vii, xi–xiv (1997)).

[102] Howell Plaza, Inc. v. State Highway Comm'n, 66 Wis. 2d 720, 226 N.W.2d 185 (1975).

[103] *See* Howell Plaza, Inc. v. State Highway Comm'n, 92 Wis. 2d 74, 284 N.W.2d 887 (Wis. 1979).

[104] *See also* discussion of regulatory takings in § 4, *supra*.

[105] *See* 148 U.S. 312, 326, 13 S. Ct. 622, 37 L. Ed. 463 (1893), *noted in* Bell & Parchomovsky, *supra* note 101, at 1436–37.

[106] *See* Jackovich Trust v. State, 54 P.3d at 303–04 (Ala. 2002); Thurow v. City of Dallas, 499 S.W.2d 347, 348 (Tex. Ct. Civ. App. 1973).

[107] Thurow v. City of Dallas, 499 S.W.2d at 348.

[108] *See* City of Cleveland v. Carcione, 118 Ohio App. 525, 531–32, 190 N.E.2d 52, 56–57 (Ct. App. 1963).

[109] Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 697 (2005) (*citing* City of Buffalo v. J.W. Clement Co., N.Y.2d 241, 269 N.E.2d 895 (1971); Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966)).

[110] *See* discussion in Serkin, *supra* note 109, at 697 (*citing* Kirby Forest Indust., Inc. v. United States, 467 U.S. 1, 14–15, 104 S. Ct. 2187, 81 L. Ed. 2d 1 (1984); United States v. 3.95 Acres of Land, 470 F. Supp. 572, 574 (N.D. Cal. 1972) (mem.)).

erty does not give rise to a present cause of action…."[111] Moreover, the court noted that other jurisdictions have held that "publicly targeting a property for condemnation, resulting in economic damage to the owner, generally does not give rise to an inverse condemnation cause of action unless there is some *direct restriction* on use of the property."[112] One reason, of course, is that

> [s]ound public policy supports this result. Construction of public-works projects would be severely impeded if the government could incur inverse-condemnation liability merely by announcing plans to condemn property in the future. Such a rule would encourage the government to maintain the secrecy of proposed projects as long as possible….[113]

A case recognizing a restrictive rule applicable to condemnation blight cases is *City of Buffalo v. J.W. Clement Co*.[114] In *J.W. Clement*, on being advised over a period of several years that its property would be taken for a redevelopment project, the plaintiff began the acquisition and development of a new site for its business. Over time the subject area slated for redevelopment fell into a state of general disrepair. "Indeed, the city's principal appraisal witness acknowledged that by reason of the threat of condemnation property values were drastically reduced."[115] In holding that there had not been a *de facto* taking, the New York Court of Appeals stated:

> Although the condemning authority is generally not liable to a condemnee until title to the property is officially taken…it has long been recognized by the courts of this State that the constitutional provision against the taking of property without just compensation may be violated without a physical taking. Indeed, injuries which in effect deprive individuals of full or unimpaired use of their property may constitute a taking in the constitutional sense…. Thus, we held in *Forster* v. *Scott*…that whenever a *law* deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment that materially affect its value, it deprives him of his property within the meaning of the Constitution. And it is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property, so long as it affects its free use and enjoyment or the power of disposition at will of the owner. These words are pervasive and would at first blush require affirmance herein. *However, the concept of de facto taking has traditionally been limited to situations involving a direct invasion of the condemnee's property or a direct legal restraint on its use…and to hold that there can be a de facto appropriation absent a physical invasion or direct legal restraint would, needless to say, be to do violence to a workable rule of law*. It is our view that only the most obvious injustice compels such a result. The Appellate Division, discerning so substantial an interference with the use of the subject property, found the essential elements of ownership to have been destroyed and held that the city's action constituted a *de facto* taking. We firmly disagree with that determination.[116]

The court held that the evidence did not show that there had been a "most obvious injustice" depriving the owner of the use of the property, thereby reversing the appellate court, which had held that there had been a *de facto* taking because the "essential elements of ownership" had been "destroyed."[117] In reversing, the Court of Appeals stated:

> The facts herein fail to disclose any act upon the part of the condemning authority which could possibly be construed as an assertion of dominion and control. Indeed, it cannot be said that the city, by its actions, either directly or indirectly deprived Clement of its possession, enjoyment or use of the subject property. We simply have a manifestation of an intent to condemn and such, even considering the protracted delay attending final appropriation, cannot cast the municipality in liability upon the theory of a "taking" for there was no appropriation of the property in its accepted legal sense.[118]

The *J.W. Clement* case stands for the proposition that there can be no *de facto* taking unless the government has impaired the use of the property either by a physical invasion of or by a direct legal restraint on the property. The court explained, however, that there could be "interferences short of physical invasion of the condemnee's property [that] may…be sufficient to constitute a taking…where the property has been the subject of some direct legal restraint on its use…."[119] However, "the idea that there can be a *de facto* taking in the absence of a physical invasion or direct legal restraint is not without current support and finds some viability in the decisions of sister States and the broader pronouncements of other courts…."[120]

Nevertheless, the Court of Appeals used language that implied that a *de facto* taking could be cognizable in the courts, as discussed in the next subsection, if there has been a substantial destruction of the owner's

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[111] Westgate, Ltd. v. State, 843 S.W. 2d 448, 1992 Tex. LEXIS 160, at *10 (Tex. 1992) (*citing* Allen v. City of Texas City, 775 S.W.2d 863, 865 (Tex. Ct. App. 1989); Hubler v. City of Corpus Christi, 564 S.W.2d 816 (Tex. Ct. Civ. App. 1978)).

[112] *Id.* at *12 (emphasis supplied) (*citing* Kirby Forest Indus. v. United States, 467 U.S. at 14–16, 104 S. Ct. 2187, 81 L. Ed. 2d 1; Hood v. Chadick, 272 Ark. 444, 615 S.W.2d 357 (1981); Sproul Homes of Nev. v. State, 96 Nev. 441, 611 P.2d 620 (1980); City of Chicago v. Loitz, 61 Ill. 2d 92, 329 N.E.2d 208 (1975); Orfield v. Hous. & Redevelopment Auth., 305 Minn. 336, 232 N.W.2d 923 (1975); Bakken v. State, 142 Mont. 166, 382 P.2d 550 (1963); Littman v. Gimello, 115 N.J. 154, 557 A.2d 314 (1989); Empire Constr., Inc. v. City of Tulsa, 1973 OK 66, 512 P.2d 119 (1973)).

[113] Westgate, Ltd. v. State, 1992 Tex. LEXIS 160, at *13.

[114] 28 N.Y.2d 241, 269 N.E.2d 895 (1971), *appeal after remand*, 337 N.Y.S.2d 642, 40 A.D. 2d 753 (App. Div. 1972), *app. dismissed*, 31 N.Y.2d 958, 293 N.E.2d 252 (1972).

[115] *Id.* at 249, 269 N.E.2d at 900.

[116] *Id.* at 253–54, 269 N.E.2d at 902 (citations omitted) (emphasis supplied).

[117] *Id.*

[118] *Id.* at 255, 269 N.E.2d at 903.

[119] *Id*. at 256, 269 N.E.2d at 904.

[120] *Id*. at 257, 269 N.E.2d at 904 (citations omitted).

beneficial use and enjoyment of the property. "Despite these divergent lines of authority, the policy of this State has been to deny recovery *in the absence of a substantial impairment of the claimant's right to use or enjoy the property* at any time prior to the date of final appropriation."[121] However, in the next sentence the court seemed to retreat from recognizing such a rule.

> Accordingly, the mere announcement of impending condemnations, coupled as it may well be with substantial delay and damage, does not, in the absence of other acts which may be translated into an exercise of *dominion and control* by the condemning authority, constitute a *taking* so as to warrant awarding compensation.[122]

As stated, although some language in the *J.W. Clement* opinion suggests that the government's substantial impairment of the use of the property caused by condemnation blight would be a basis for an inverse condemnation claim for a *de facto* taking, other language indicates that any substantial impairment of use and enjoyment must be the result of a physical invasion of the property by the government or a direct legal restraint. As discussed in subsection C.7, *infra*, although the owner may be unable to establish a *de facto* taking caused by condemnation blight, the *J.W. Clement* decision does stand for the proposition that if there is an eventual *de jure* condemnation of the property in eminent domain, the *valuation* of the property may be determined so as to exclude depreciation in value caused by precondemnation activities.

More recently, in *Westgate, Ltd. v. State*, *supra*, the Supreme Court of Texas stated that it previously had not addressed the issue of whether there could be a taking or damaging under the Texas Constitution, Article 1, Section 17, when "the government has not directly restricted use of the landowner's property," a direct restriction meaning "an actual physical or legal restriction on the property's use, such as a blocking of access or denial of a permit for development."[123] Westgate's claim was based on "a decline in the marketability of the property caused by the government's proposal to condemn in the future;"[124] thus, the court found cases cited by Westgate to be inapposite because Westgate's cases involved a direct restriction on a landowner's present use of his or her property,[125] a situation that was not present in the *Westgate, Ltd*. case.

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

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

[123] Westgate, Ltd. v. State, 1992 Tex. LEXIS 160, at *8.

[124] *Id.* at *8–9.

[125] *See id.* at *7 (citing cases that involved government action directly restricting present use: City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978) (denial of permit for development); City of Waco v. Texland Corp., 446 S.W.2d 1 (Tex. 1969) (material and substantial denial of access caused by construction of a viaduct adjacent to property); San Antonio River Auth. v. Garrett Brothers, 528 S.W.2d 266 (Tex. Ct. Civ. App. 1975) (denial of permit for a sewer installation)).

C.3. No Taking Absent a Substantial Interference With the Beneficial Use and Enjoyment of the Property

Although the courts may state the rule in slightly different ways, the majority view in those jurisdictions recognizing that condemnation blight may give rise to a claim for a *de facto* taking appears to be that there has not been a taking unless the owner proves that the precondemnation activities caused a substantial interference with the owner's use and enjoyment of his or her property. The mere announcement of a plan or project generally will not suffice to satisfy the substantial impairment test.

For example, in *Selby Realty Company v. City of San Buenaventura,*[126] a city and county adopted a plan indicating the general location of existing and proposed streets, including the extension of one street over one parcel of the plaintiff's property.[127] As of the date of the California Supreme Court's decision, the city and county had not taken any action with respect to the plan. The court held that the adoption of the plan, a legislative act, did not amount to a taking of the property.[128]

> The adoption of a general plan is several leagues short of a firm declaration of an intention to condemn property. It is too clearly established to require extensive citation of authority that under certain circumstances a governmental body may require the dedication of property as a condition for its development…and it may not be necessary for the county to acquire the land by eminent domain even if it is ultimately used for a public purpose.
>
> *In order to state a cause of action for inverse condemnation*, there must be an invasion or an appropriation of some valuable property right which the landowner possesses and *the invasion or appropriation must directly and specially affect the landowner to his injury*…. The county has not placed any obstacles in the path of plaintiff in the use of its land. Plaintiff has not been refused permission by the county to build on or subdivide its county land, and its posture is no different than that of any other landowner along the streets identified in the plan. Furthermore, the plan is subject to alteration, modification or ultimate abandonment, so that there is no assurance that any public use will eventually be made of plaintiff's property.[129]

One policy reason for the court's holding is that

> [i]f a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of these several authorized plans, the process of community planning would either grind to

[126] 10 Cal. 3d 110, 514 P.2d 111 (1973).

[127] *Id.* at 115, 514 P.2d at 114.

[128] *Id.* at 118, 514 P.2d at 116.

[129] *Id.* at 119–20, 514 P.2d at 117 (citations omitted) (emphasis supplied).

> a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land.[130]

A case illustrating the application of the substantial impairment test caused by condemnation blight resulting from unreasonable delay on the part of an agency is *Washington Market Enterprises, Inc. v. City of Trenton.*[131] The city had commenced a redevelopment project, including the development of a mall; the city later designated the mall area to be a blighted area, and for several years the city acquired property within the redevelopment area. However, the city never took the plaintiff's property. Finally, about 10 years after commencing the redevelopment project, the city notified the plaintiff that the project would be abandoned. The plaintiff's inverse condemnation action alleged that tenants began moving out of its building in direct response to the condemnation when threatened initially, that after the declaration of blight the area deteriorated rapidly with its building generating a fraction of its former rentals, and that thereafter it was impossible to secure tenants.[132]

"The court held that where planning for urban redevelopment is clearly shown to have had such a severe impact as *substantially to destroy the beneficial use* which a landowner has made of his property, then there has been a "taking of property" within the meaning of that constitutional phrase."[133]

Thus, the court expanded the concept of *de facto* taking to include a situation in which there had been neither a physical invasion nor a direct legal restraint on the use of the owner's property. The court restricted the expanded concept of a taking caused by condemnation blight to a situation in which the beneficial use of the property has been substantially destroyed. The expanded rule on *de facto* takings in these circumstances did not apply to a mere diminution in value of the property.[134]

Another case in which the test of substantial destruction of the owner's use of the property was upheld is *Lincoln Loan Co. v. State Highway Commission.*[135] In *Lincoln Loan Co*., the plaintiff argued that the Oregon State Highway Commission had taken its property "in the process of the construction of [a freeway] by allegedly placing a 'cloud of condemnation' over the property, which resulted in a 'condemnation blight' and a de facto taking, not of the possession of the property, but of a substantial use and benefit thereof."[136] Specifically, the plaintiffs alleged that about 10 years prior to their complaint the defendant had declared that the plaintiff's property was necessary for the project and gave other precondemnation notices, including one that stated that "no compensation would be awarded for improvements to said real property" needed for the project.[137]

The court held that the complaint stated a cause of action:

> Plaintiff has alleged adequate facts which indicate a *substantial interference by the state with the use and enjoyment of its property.* The combination of the acts alleged in plaintiff's complaint, the alleged pervasive extent of that combination of acts and the alleged duration of those acts over a ten year period unite to allege *a substantial interference with the use and enjoyment* of its property by plaintiff.[138]

Furthermore, quoting a Pennsylvania case, the court stated that

> "[r]ecognizing, as we do, that the Commonwealth is required to publicize and hold hearings in advance of the initiation of formal condemnation proceedings, we believe that when these hearings and this publicity cause the owner of a property to lose tenants *to such an extent that the property no longer generates sufficient income to pay the taxes, which, in turn, leads to a threatened loss of the property*, that property owner has a right to the appointment of viewers to award it compensation for its property."[139]

Thus, the question in *Lincoln Loan* was whether the precondemnation activity constituted a taking: "It will be for the trier of fact to determine whether the evidence establishes an interference with the use and enjoyment of its property by plaintiff substantial enough to constitute a taking."[140]

As discussed in the next subsection, the courts in Alaska require evidence that the condemnor's precondemnation activity included a manifestation that *specific property* would be condemned for a project. Thus, in connection with the substantial impairment test, the minimum standard in Alaska is that "the government must have publicly announced a present intention to condemn specific properties…and it must have done something that substantially interferes with the landowners' use and enjoyment of their properties."[141] On the other hand, the Supreme Court of Alaska has not ruled out the possibility of a taking caused by other precondemnation governmental activity.

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[130] *Id.* at 120, 514 P.2d at 117 (footnote omitted).

[131] 68 N.J. 107, 343 A.2d 408 (1975).

[132] 68 N.J. at 110–12, 343 A.2d at 409–10.

[133] 68 N.J. at 110, 343 A.2d at 409 (emphasis supplied).

[134] *See* 68 N.J. at 113–15, 343 A.2d at 411–12.

[135] 274 Or. 49, 545 P.2d 105 (1976).

[136] *Id*. at 51, 545 P.2d at 106.

[137] *Id.*

[138] *Id.* at 57, 545 P.2d at 109 (emphasis supplied) (*citing* Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968); Klopping v. City of Whittier, 8 Cal. 3d 39, 53, 500 P.2d 1345, 1356 (1972); City of Detroit v. Cassese, 376 Mich. 311, 317–18, 136 N.W.2d 896, 900 (1965); City of Cleveland v. Carcione, 118 Ohio App. 525, 532, 190 N.E.2d 52, 56–57 (Ohio App. 8th Dist. 1963); Conroy-Prugh Glass Co. v. Commonwealth Dep't of Transp., 456 Pa. 384, 321 A.2d 598, 602 (1974); Luber v. Milwaukee County, 47 Wis. 2d 271, 278–79, 177 N.W.2d 380, 384 (1970)).

[139] *Id.* at 57, 545 P.2d at 109 (emphasis supplied) (*quoting* Conroy-Prugh Glass Co. v. Commonwealth Dep't of Transp., 456 Pa. 384, 392–93, 321 A.2d 598, 602 (1974)).

[140] *Id.* at 58, 545 P.2d at 110.

[141] Jackovich Revocable Trust v. State, Dep't of Transp., 54 P.3d at 300–01(footnotes omitted).

> [W]e recognized in *Homeward Bound* that pre-condemnation governmental activity could in theory amount to a temporary taking that would entitle an owner to compensation even if the plan to condemn were abandoned. One can imagine that pre-condemnation publicity could depress income actually realized from improved commercial property, leading to a temporary taking that requires compensation. But it is not so obvious what standards should be applied to such a claim. How long must an owner endure such publicity before it becomes a compensable temporary taking? What decline in value is large enough to be cognizable? Our decisions do not answer those questions.[142]

In appears that to meet the substantial impairment test in Pennsylvania the landowner must demonstrate "exceptional circumstances." In *Pepper Center v. Blair County Convention and Sports Facilities Authority,*[143] the trial court found that the construction of a convention center near the plaintiff's property had permanently changed the rural character of the property. However, the appellate court reversed, holding that under the Eminent Domain Code a *de facto* taking only "occurs when an entity clothed with the power of eminent domain has, by even a non-appropriative act or activity, substantially deprive[d] an owner of the beneficial use and enjoyment of his property."[144] The court furthermore held that there must be "exceptional circumstances" causing the substantial deprivation, a test not satisfied by the facts of the case.[145] Here, the owner had not been deprived of the beneficial use of the property, whose highest and best use was still as a residence.[146]

Once more, there are variations in how the substantial impairment test is phrased. In a case in which an airport authority announced publicly in 1994 the proposed expansion of the airport, which included the property that WBF Associates had purchased 4 years earlier for residential development, the Supreme Court of Pennsylvania held: "the Airport Authority failed to show that WBF continued to have full and normal use of the condemned property as established by the use to which it was devoted prior to the declaration…."[147] Thus, the court held that a *de facto* taking had occurred.

C.4. No Taking Absent a Concrete Manifestation of Intent to Take a Specific Property

For the owner to be successful in an inverse condemnation case based on precondemnation activity, some courts will require that the activity specifically target the property of the owner seeking to recover for a *de facto* taking. For example, in *Jackovich Revocable Trust v. State, Department of Transportation, supra,* the property owners' inverse condemnation claims alleged that information published by the state regarding its intention to acquire land for a highway project deprived the owners of the "full use and enjoyment of their properties, reduced the value of their properties, and constituted *de facto* takings."[148] Eventually, however, the transportation department abandoned the plan. The department argued that there was no evidence of its intention to condemn the plaintiffs' "specific properties."[149] The court agreed that "the publicity in this case does not satisfy the 'concrete intention' test."[150] In so holding, the court stated that there was

> *no evidence the state actively interfered with the beneficial use* of these properties by (1) limiting their development, improvement, or occupancy; (2) denying the landowners any permits needed to develop, improve, or use these properties; (3) notifying tenants they would have to vacate or would be compensated for vacating; or (4) informing the owners that in event of condemnation, they would not be compensated for maintaining or improving their properties. Instead, the common thread in the landowners' superior court affidavits is that they are unable to sell their properties and that they lost rental income because pre-condemnation announcements discouraged buyers and renters and made improvements infeasible or economically imprudent.[151]

For the court in this case the absence of "'objective manifestations of the government's intention to take the property [were] critical to the decision whether there was a taking.'"[152]

The *Jackovich* court pointed out that in *Selby Realty Co*., *supra*, the California Supreme Court similarly had held that the mere enactment of a general plan showing proposed streets extending through private property did not constitute a taking because there was "'no present concrete indication that the county…intends to acquire the property by condemnation.'"[153]

C.5. No Taking Absent a Substantial Decline in the Value of the Property

There is authority "that property should be valued in a statutory condemnation proceeding without regard to devaluation caused by the government's pre-condemnation activities."[154] In some jurisdictions there

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[142] *Id.* at 300 (footnote omitted).

[143] 805 A.2d 51 (Pa. Commw. Ct. 2002), *appeal denied*, Genter v. Blair County Convention & Sports Facilities Auth., 2003 Pa. LEXIS 951 (2003).

[144] *Id.* at 55 (citation omitted).

[145] *Id.* at 56.

[146] *Id.* at 56–57.

[147] I*n Re: De Facto Condemnation and Taking of Lands of WBF Assoc*., 588 Pa. 242, 258, 903 A.2d 1192, 1201 (2006).

[148] 54 P.3d at 295.

[149] *Id.* at 296.

[150] *Id.* at 297.

[151] *Id.* at 298 (emphasis supplied).

[152] *Id.* (*quoting* Homeward Bound, Inc. v. Anchorage Sch. Dist., 791 P.2d 610, 614 (Alas. 1990)).

[153] *Id.* at 299 (*quoting Homeward Bound, Inc.*, 791 P.2d at 614).

[154] Westgate, Ltd. v. State, 1992 Tex. LEXIS 160, at *14 n.4, (*citing* Lange v. State, 86 Wash. 585, 547 P.2d 282 (1976) (*en banc*); City of Fort Worth v. Corbin, 504 S.W.2d 828 (Tex. 1974)).

is an exception if condemnation blight has devalued an owner's property to such an extent that the property is virtually worthless.

Thus, in *Washington Market Enterprises, supra,* the question was whether there could be a taking in the absence of "a physical invasion of the property or a direct legal restraint on its use."[155] In 1958 Trenton undertook a feasibility study for redevelopment of part of the downtown area; in 1967 an area that was declared to be blighted included the plaintiff's property. Although declaring an area to be blighted does not constitute a taking, there may be a taking "where, in addition to the declaration of blight, other related activities together with the passage of time are said to have shorn property of literally all or most of its value."[156]

The court pointed out that "[m]any cases, while not finding any taking prior to a condemnation award or some form of physical appropriation, have nonetheless allowed the property owner to include the loss he has suffered in the determination of the damages to which he becomes ultimately entitled in eminent domain proceedings."[157] In remanding the case the court held that the plaintiff would have to show that the precondemnation activity *substantially destroyed the value of the property* and the approximate date that the destruction of value occurred, as the value of the property would have to be determined "as of the date of the hypothesized taking…."[158]

In the above New Jersey case, the court observed a substantial-destruction-of-value test in determining whether precondemnation activity resulted in a *de facto* taking. California appears to have set a somewhat lower standard in allowing an owner to recover for damage to property allegedly caused by delay in instituting direct condemnation. That is, the value of the property does not have to be substantially destroyed for there to be a recovery for condemnation blight; a diminution in value may suffice. For example, in *Klopping v. City of Whittier*,[159] an action in inverse condemnation to recover, although the city instituted proceedings to acquire properties from the plaintiffs for the purposes of a parking district, the city later dismissed the proceedings. However, at the time of the dismissal the city publicly announced that it intended to resume the action in the future, thus continuing the threat of condemnation with respect to the properties.[160] The plaintiffs alleged that "the fair market value of their properties was diminished," that "they were unable to fully use their properties and suffered a loss of rental income," and that the causes of the damages were the precondemnation activities and government statements.[161]

The court held that such allegations were not sufficient to state a cause of action for a *de facto* taking of the entire properties, but that the plaintiffs were entitled to recover damages if they established that the city either unreasonably delayed condemnation proceedings or was guilty of other unreasonable conduct prior to condemnation:

> [W]hen the condemner acts unreasonably in issuing precondemnation statements, either by excessively delaying eminent domain action or by other oppressive conduct, our constitutional concern over property rights requires that the owner be compensated. This requirement applies even though the activities which give rise to such damages may be significantly less than those which would constitute a de facto taking of the property so as to measure the fair market value as of a date earlier than that set statutorily by Code of Civil Procedure section 1249.[162]

The court held

> that a condemnee must be provided with an opportunity to demonstrate that (1) the public authority acted improperly either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation; *and* (2*) as a result of such action the property in question suffered a diminution in market value*.[163]

Under the *Klopping* doctrine, even though the property owner may not recover for a *de facto* taking of the entire property, the owner may recover for a diminution in the market value of the property if it can be shown that the public agency acted unreasonably in delaying condemnation after an announcement of an intention to condemn. In the *Klopping* case, of course, the threat of government appropriation of the property did not cease with the city's abandonment of condemnation proceedings that the city finally had instituted. The *Klopping* opinion indicates that the standard for finding a loss of value of property is not as high as the standard for finding that precondemnation activity has caused the owner to suffer a *de facto* taking.

C.6. Factors Considered in Determining Whether Precondemnation Activities Resulted in a *De Facto* Taking

In *City of Chicago v. Loitz,*[164] the court recognized that a "distinct minority" of federal and state courts had held that "various precondemnation activities [are] sufficient to constitute a *de facto* 'taking' of private prop-

[155] Wash. Market Enter. v. City of Trenton*,* 68 N.J. at 110, 343 A.2d at 409.

[156] *Id.* at 115, 343 A.2d at 412.

[157] *Id.* at 121, 343 A.2d at 412 (*citing In re Elmwood Park Project Sect. 1, Group B*, 376 Mich. 311, 136 N.W.2d 896 (1965); City of Buffalo v. J.W. Clement Co., Inc., 28 N.Y.2d 241, 269 N.E.2d 895 (1971); City of Cleveland v. Carcione, 118 Ohio App. 525, 190 N.E.2d 52 (Ohio App. 8th Dist. 1963); Cleveland v. Hurwitz, 19 Ohio Misc. 184, 249 N.E.2d 562 (Probate 1969)).

[158] *Id.* at 123–24, 343 A.2d at 416, 417 (emphasis supplied).

[159] 8 Cal. 3d 39, 500 P.2d 1345 (1972).

[160] *Id.* at 42–43, 500 P.2d 1348.

[161] *Id.* at 53, 500 P.2d 1355–56.

[162] *Id.* at 51–52, 500 P.2d 1355.

[163] *Id.* at 52, 500 P.2d at 1355 (emphasis supplied).

[164] 61 Ill. 2d 92, 93, 329 N.E.2d 208, 209 (1975) (responding to the city's suit to demolish two buildings on the plaintiffs' property, the plaintiffs counterclaimed alleging that the city's ordinance authorizing a street realignment constituted a taking.)

erty."[165] The court held that although condemnation proceedings were never initiated, the general rule is that "mere planning or plotting in anticipation of a public improvement does not constitute a 'taking' or damaging of the property affected."[166] In another case, it was held that a government declaration that the plaintiffs' property was a potential site for a hazardous waste facility did not constitute a taking. "Government plans ordinarily do not constitute invasion or taking of property."[167] Furthermore, "decreases in the value of property during governmental deliberations, absent extraordinary delay, are incidents of ownership and do not constitute a taking."[168] The court reiterated its view

> that a compensable taking can occur when governmental action substantially destroys the beneficial use of private property.... [Nonetheless], it is only when "the threat of condemnation has had such a substantial effect as to destroy the beneficial use that a landowner has made of his property, [that] there has been a taking of property within the meaning of the Constitution."[169]

Bad faith on the part of the government is another factor that may be considered. It has been held that an act of bad faith in dealing with the property owner is sufficient to establish a *de facto* taking based on a date earlier than the date of the *de jure* taking.[170] Indeed, one article argues that "courts explicitly compensating for condemnation blight usually do so only after finding that the government acted in bad faith."[171]

Several jurisdictions have adopted the position that precondemnation activities constitute a taking when the government "*unreasonably delays* the actual acquisition."[172] In some jurisdictions, precondemnation publicity that impairs the marketability of property may constitute an "imputed taking" even without a showing of unreasonable delay.[173] However, in other jurisdictions a property owner may have a claim "only where the precondemnation publicity in effect renders the property worthless." [174]

Negligence has been urged as a factor to consider in determining whether precondemnation activity resulted in a *de facto* taking. For example, in *Westgate, Ltd*., *supra*, the property owner argued that "the government was negligent in failing to warn Westgate of the highway project before Westgate constructed the shopping center."[175] However, the court held that a "failure to warn, *absent any showing of bad faith*, was not a taking or damaging of property, since it resulted in no restriction on the property's use."[176]

C.7. Effect of Condemnation Blight on Valuation of Property in Condemnation Proceedings

The general rule is that "compensation is paid for the value of property as of the day it is actually taken, rather than the day on which the taking was announced."[177] However, as seen in the *J.W. Clement Co*. case in New York and the *Klopping* case in California, even though the evidence may be insufficient for the court to rule that there has been a *de facto* taking, assuming there is an eventual *de jure* taking of an owner's property, the owner may be able to recover in the condemnation proceedings for the loss of value of the property caused by the government's precondemnation activities. Thus, it may be possible to use the actual day of the taking of the property but "disentangle[] the depreciation in market value due to the government's action" so as to exclude the loss caused by condemnation blight in the calculation of total compensation.[178] A rationale for the above rule is that because "[t]he so-called 'scope of the project rule' provides that the government need not pay for any *increase* in a property's fair market value resulting from the government ac-

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[165] *Id.* at 97, 329 N.E.2d at 212 (*citing* Drakes Bay Land Co. v. United States, 424 F.2d 574 (Ct. Cl. 1970); Foster v. City of Detroit, 405 F.2d 138 (6th Cir. 1968); R.J. Widen Co. v. United States, 357 F.2d 988 (Ct. Cl. 1966); Foster v. Herley, 330 F.2d 87 (6th Cir. 1964); Eleopoulos v. Richmond Redevelopment Agency, 351 F. Supp. 63 (N.D. Cal. 1972); Haczela v. City of Bridgeport, 299 F. Supp. 709 (D. Conn. 1969); Inmobiliaria Borinquen, Inc. v. Garcia Santiago, 295 F. Supp. 203 (D. P.R. 1969); Sayre (*ex rel*. Liberty Mortgage Corp.) v. United States, 282 F. Supp. 175 (N.D. Ohio 1967) (mem.); *In re Elmwood Park Project*, 376 Mich. 311, 136 N.W.2d 896 (1965); Conroy-Prugh Glass Co. v. Commonwealth Dep't of Transp., 456 Pa. 384, 321 A.2d 598 (1974); *In re Philadelphia Parkway*, 250 Pa. 257, 95 A. 429 (1915); *In re Commonwealth's Crosstown Expressway*, 3 Pa. Commw. 1, 281 A.2d 909 (1971)).

[166] 61 Ill. 2d at 97, 329 N.E.2d at 211 (citations omitted).

[167] Littman v. Gimello, 115 N.J. 154, 161, 557 A.2d 314, 318 (1989) (citations omitted).

[168] 115 N.J. at 163, 557 A.2d at 319.

[169] 115 N.J. at 164, 557 A.2d at 319 (internal quotation marks omitted) (citations omitted).

[170] *See* Foster v. City of Detroit, 405 F.2d 138 (6th Cir. 1968); *see also* Jackovich Revocable Trust v. State, Dep't of Transp., 54 P.3d 294 (Alaska 2002) (discussing bad faith acts by the government).

[171] Serkin, *supra* note 109, at 710 (*citing Klopping,* 8 Cal. 3d at 44–45, 500 P.2d at 1349–50).

[172] Westgate, Ltd. v. State, 1992 Tex. LEXIS 160, at *14 (*citing Klopping*, 8 Cal. 3d 39, 500 P.2d 1345 (1972); Nadler v. City of Mason City, 387 N.W.2d 587 (Iowa 1986); *In re Elmwood Park Project*, 376 Mich. 311, 136 N.W.2d 896 (1965); City of Sparks v. Armstrong, 103 Nev. 619, 748 P.2d 7 (1987); Lincoln Loan Co. v. State, 274 Or. 49, 545 P.2d 105 (1976)).

[173] *Id.* at *14 n.4 (*citing* Ehrlander v. State, 797 P.2d 629 (Alaska 1990)).

[174] *Id.* (*citing* Horak v. State, 171 Conn. 257, 368 A.2d 155 (1976); Wash. Market Enters., Inc. v. City of Trenton, 68 N.J. 107, 343 A.2d 408 (1975); Conroy-Prugh Glass Co. v. Commonwealth, 456 Pa. 384, 321 A.2d 598 (1974)).

[175] 1992 Tex. LEXIS 160, at *20-21.

[176] *Id.* at *21 (emphasis supplied).

[177] Bell & Parchomovsky, *supra* note 101, at 1435.

[178] Serkin, *supra* note 110, at 697 (citations omitted).

tion,"[179] it is only fair that the property owner not have to suffer a *loss* because of the government's precondemnation announcement and associated activity.

In *Klopping*, although the court held that there had not been a taking, the condemnee was not left without a remedy, according to the New York Court in the *JW Clement* case:

> Indeed, the aggrieved property owner has a remedy where it would suffer severely diminished compensation because of acts by the condemning authority decreasing the value of the property…. In such cases *where true condemnation blight is present, the claimant may introduce evidence of value prior to the onslaught of the "affirmative value-depressing acts"…of the authority and compensation shall be based on the value of the property as it would have been at the time of the de jure taking, but for the debilitating threat of condemnation*…. This, in turn, requires only that there be present some proof of affirmative acts causing a decrease in value and difficulty in arriving at a value using traditional methods….
>
> Thus, when damages are assessed on the claim for the de jure appropriation, the claimant's property should be evaluated not on its diminished worth caused by the condemnor's action, but on its value except for such "affirmative value-depressing acts" of the appropriating sovereign.[180]

In 2005 in *Savage v. Palm Beach County,*[181] an appellate court agreed with the property owners that it was error for the trial court to exclude expert testimony on "'property blight' and its effect on the value of the condemned property."[182] Two government districts apparently reached an agreement that one would obtain the necessary permits to construct improvements to a drainage system affecting property in an area known as "Unit 11."[183] The permits were not obtained, resulting in the property being unsuitable for residential development. After the county eventually initiated condemnation actions, the property owners hired two engineers, one of whom concluded that "Palm Beach County appears to have conspired with other Federal and State agencies" to prevent any building in the area so that it would return to its natural state—a wildlife area.[184] In holding that the trial court improperly excluded the expert testimony, the court stated that the rule in Florida was that "'the threat of condemnation restricts the owner's economic use of property in the interim leading to the actual taking'"[185] and that "'a condemning authority cannot benefit from a depression in property value caused by a prior announcement of the intent to condemn.'"[186]

In *City of Cleveland v. Carcione,*[187] following an ordinance authorizing an urban renewal plan, the city "pursued a policy of demolishing buildings piecemeal in the area" that was the direct cause of the decline in the gross income of the Carcione property.[188] The court held that the property had to be valued not at the time of the trial, when the property was "virtually abandoned, vandalized and badly deteriorated, in the midst of a wasteland," but as it had existed at the time the city took "any affirmative steps to effectuate" the urban renewal project.[189]

> "Where one entire plan has been adopted for a public improvement and from the inception a certain tract of land has been actually included therein, the owner of such tract in a condemnation proceeding therefor is not entitled to an increased value which may result from the improvement, where its appropriation is a condition precedent to the existence of the improvement…."
>
> The reverse of such a situation—the depreciation in value of a parcel of property at the time appropriated where the property is included in a general plan of condemnation to carry out a specific program of the condemnor—is analogous in principle and should, we believe, invoke the application of a parallel rule of law.[190]

In the *Littman* case the court observed that "the holding in *Washington Market* clearly contemplates a reduction in value to 'near zero'…."[191] The court in *Littman* also addressed some of the factors that must be balanced to determine whether there has been "a compensable-taking claim flowing from pre-condemnation activity,"[192] such as "extraordinary delay or other unreasonable conduct on the part of the condemning authority"[193] or "the imminence of condemnation" that may cause a property owner to be more "inclined to take or refrain from taking action."[194]

As stated in *Klopping, supra,* "[t]he length of time between the original announcement and the date of actual condemnation may be a relevant factor in determining whether recovery should be allowed for blight or

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[179] Serkin, *supra* note 110, at 698 (emphasis supplied) (*citing* Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 477–78, 93 S. Ct. 791, 35 L. Ed. 2d 1 (1973)).

[180] Buffalo v. J.W. Clement Co., 28 N.Y.2d at 257–8, 269, N.E.2d at 905 (citations omitted) (emphasis supplied).

[181] 912 So. 2d 48 (Fla. App. 4th Dist. 2005), *rehearing denied*, 2005 Fla. App. LEXIS 17584 (2005).

[182] *Id.* at 49.

[183] *Id.*

[184] *Id.* at 50.

[185] *Id.* at 52 (*quoting* State Road Dep't v. Chicone, 158 So. 2d 753, 756 (Fla. 1963)).

[186] *Id.* (*quoting* Dep't of Transp. v. Gefen, 636 So. 2d 1345, 1346 (Fla. 1994) (citations omitted)). It may be noted that the court agreed that the experts' "references to 'government conspiracies' and 'collusion' were inappropriate. However, the court could have restricted the use of that terminology without striking the experts' testimony completely." *Id.*

[187] 118 Ohio App. 525, 190 N.E.2d 52 (Ohio App. 8th Dist. 1963).

[188] *Id.* at 527, 190 N.E.2d at 54.

[189] *Id.* at 530, 190 N.E.2d at 56.

[190] *Id.* at 531–32, 190 N.E.2d at 56 (citations omitted).

[191] Littman v. Gimello, 115 N.J. 154, at 166, 557 A.2d at 320 (1989) (some internal quotation marks omitted) (citation omitted).

[192] *Id.*

[193] *Id.*

[194] *Id.,* 557 A.2d at 321.

for other oppressive acts by the public authority designed to depress market value."[195]

Klopping involved actions in inverse condemnation for damages caused by the city prior to the eventual condemnation of the plaintiffs' properties.[196] After having instituted condemnation suits for financial reasons, the city council approved the dismissal of the pending condemnation actions of the plaintiffs' properties. The court ruled that the city's precondemnation activities, namely "the precondemnation publicity…directly aimed at plaintiffs' properties and not at an undesignated area," did not constitute condemnation blight.[197] However, the court emphasized that the plaintiffs were not arguing that the subject properties should be treated actually as having been taken at an earlier date. "Rather plaintiffs submit that any decrease in the market value caused by the precondemnation announcements should be disregarded and that the property should be valued without regard to the effect of the announcements on the property."[198]

In *Klopping* the court reasoned that since appreciation in value following the announcement of a condemnation project is to be disregarded, "it follows that where there is decline in value such decreases are likewise to be disregarded. This can be accomplished only by *allowing* testimony as to what decline, if any, was due to any announcements made prior to condemnation."[199] The court concluded that "a public authority is not required to compensate a landowner for damages to his property occurring after the announcement if the injury is not unreasonably caused by the condemning agency; interest is likewise to run not from the announcement but from the valuation date."[200] However, "a condemnee must be provided with an opportunity to demonstrate that (1) the public authority acted improperly either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation; and (2) as a result of such action the property in question suffered a diminution in market value."[201]

[195] Klopping v. Whittier, 8 Cal. 3d at 45, 500 P.2d at 1350 n.1 (citation omitted).

[196] Although the court reversed and remanded a judgment dismissing one of the plaintiff's actions, the court affirmed the dismissal of the other plaintiff's action because his land was taken in a condemnation action preceding the judgment below in this case. *See Klopping,* 8 Cal. 3d at 56–59, 500 P.2d at 1359–60.

[197] 8 Cal. 3d at 45, 500 P.2d at 1350.

[198] 8 Cal. 3d at 47, 500 P.2d at 1351.

[199] 8 Cal. 3d 48, 500 P.2d at 1352–53.

[200] 8 Cal. 3d at 52, 500 P.2d at 1355.

[201] *Id.* (footnote omitted).

D. RULES ON LIABILITY FOR SURFACE WATER

D.1. Relevance of the Rules of Liability for Surface Water

"Surface waters are 'waters of a casual or vagrant character having a temporary source, and which diffuse themselves over the surface of the ground, following no definite course or defined channel.'"[202] Surface water causing damage to an owner's property may give rise to a claim in inverse condemnation or, depending on the jurisdiction, a claim in strict liability or for negligence, trespass, or nuisance.[203] For example, according to courts in Washington, there is strict liability for diverting surface water: "[A] landowner has no right to divert naturally occurring water from his to another's land and to cause harm thereby, irrespective of the diligence and care used in erecting the diversion."[204] Although other claims may be included, it appears that most claims against transportation departments are in inverse condemnation. Of course, property owners also are liable for flooding highways; correlative duties are imposed on owners of land and users to protect highways from flooding or water damage.[205]

[202] Gunstone v. Jefferson County, 2004 Wash. App. LEXIS 499, at *10 n.2 (Wash. Ct. App. 2004) (Unrept.), *review denied*, 152 Wash. 2d 1030, 103 P.3d 200 (2004) (*quoting* Dahlgren v. Chicago, Milwaukee & Puget Sound Ry. Co., 85 Wash. 395, 405, 148 P. 567, 570 (1915)).

[203] *See,* e.g., Collier v. City of Oak Grove, 2007 Mo. App. LEXIS 643, *21 (Ct. App. 2007), *rev'd on other grounds*, 246 S.W.3d 923 (2008) (reiterating the rule in Missouri that "'when private property is damaged by a nuisance operated by an entity having the power of eminent domain, the proper remedy is an action in inverse condemnation'") (*quoting* Heins v. Mo. Highway and Transp. Comm'n, 859 S.W.2d 681, 693 (Mo. 1993))). By comparison, in *Gunstone*, *supra*, the court held that the plaintiffs' inverse condemnation action was "redundant" because if the "Gunstones prove either negligence or strict liability, they will recover." *Gunstone*, 2004 Wash. App. LEXIS 499, at *28.

[204] Gunstone v. Jefferson County, 2004 Wash. App. LEXIS 499, at *22 (footnote omitted).

[205] *See, e.g.,* Wis. Stat. 88.87(3)(a) and (b) (2007):

> (3)(a). It is the duty of every owner or user of land who constructs any building, structure or dike or otherwise obstructs the flow of stream water through any watercourse or natural or man-made channel or obstructs the flow of surface water through any natural or man-made channel, natural depression or natural draw through which surface waters naturally flow:
>
> 1. To provide and at all times maintain a sufficient drainage system to protect a downstream highway or railroad grade from water damage or flooding caused by such obstruction, by directing the flow of surface waters into existing highway or railroad drainage systems; and
>
> 2. To protect an upstream highway or railroad grade from water damage or flooding caused by such obstruction, by permitting the flow of such water away from the highway or railroad grade substantially as freely as if the obstruction had not been created.
>
> (3)(b). Whoever fails or neglects to comply with a duty imposed by par. (a) is liable for all damages to the highway or rail-

Although inverse condemnation for claims caused by flooding are discussed in Section 2, *supra*, of the report, a public entity confronted with a claim for a taking of an owner's property caused by surface water will need to be aware of the rule in its jurisdiction on liability for surface water, whether based on a statute or a judicial precedent. Thus, in a case in which highway construction had the effect of channeling the excess flow of two streams instead of permitting the water to spread naturally over the land, a Louisiana court stated that

> La. Civ. Code art. 655 provides that "an estate situated below is bound to receive the surface waters that flow naturally from an estate situated above unless an act of man has created the flow." Additionally, La. Civ. Code art. 656 provides in part that "the owner of the dominant estate may not do anything to render the servitude more burdensome." Furthermore, the owner of the dominant estate "cannot stop [water running through it] or give it another direction and is bound to return it to its ordinary channel *where it leaves his estate*." La. Civ. Code art. 658.[206]

The court held that although the department had "returned the water to its ordinary channel, DOTD did not comply with the mandate of La. Civil Code art. 658 in that it returned the water to its ordinary channel some 400 feet south of its property" and "the water arrives at the Taylors' property much more quickly" than previously.[207] Thus, the court agreed that the owners were entitled to just compensation.[208]

In *Kohlbeck v. Wisconsin Department of Transportation,*[209] the court addressed the surface water issue, stating that

> [s]ection 88.87 creates an obligation on state and local governments to refrain from obstructing natural drainage when constructing and maintaining highways….
>
> The essence of this provision is that DOT is prohibited from "impeding the general flow of surface water or stream water in any unreasonable manner." *When DOT fails to follow this requirement, an injured property owner "may bring an action in inverse condemnation under ch. 32 or sue for such other relief, other than damages, as may be just and equitable*" if DOT fails to remedy the problem on its own.[210]

In *Kohlbeck* the property owners alleged that a transportation department project had "diverted surface and ground water to their property, causing environmental contamination,"[211] and forcing the property owners to install a higher curb to prevent more water from entering their property. The court held that the owners had stated a claim for injunctive relief and that they were not barred from seeking injunctive relief for "an ongoing problem…[that] is…a permanent occupation of their property."[212] Moreover, the court held that "DOT cannot convert the Kohlbecks' request for an injunction into one for damages by simply pointing out that the Kohlbecks have made efforts to protect their property on their own."[213]

D.2. Rules Applicable to Surface Water

There are four rules that have been applied to liability for surface water causing damage to the property of an adjacent or downstream landowner: the common enemy rule, the modified common enemy rule, the civil law rule, and the reasonable use rule. In general, according to one source, these rules mean:

1. The Common Enemy Doctrine: all landowners can divert or block diffused surface water without liability.
2. Modified Common Enemy: landowners are not liable for diverting water unless they block a natural drainway, collect water and channel it, or fail to exercise due care.
3. Civil Law or Natural Flow: a landowner who interferes with the natural flow of diffused surface water is liable.
4. Reasonable Use: landowners will not be liable so long as the resulting interference with the plaintiff's land is not unreasonable.[214]

The law on liability for surface water developed from the common law principles governing the duty and liability of a landowner.[215] The doctrines are associated closely with the law of real property and "such terms as easements, the dominant estate, the servient estate, and servitudes…."[216] Application of these rules has been vexing because of the lack of uniformity in legislation

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road grade caused by such failure or neglect. The authority in charge of maintenance of the highway or the railroad company which constructed or maintains the railroad grade may bring an action to recover such damages. An action under this paragraph shall be commenced within the time provided by s. 893.59 or be barred.

[206] Taylor v. State, 879 So. 2d 307, 316 (La. App. 3d Dist. 2004) (alteration in original).

[207] *Id.* at 317.

[208] *Id. See*, however, Satari v. Comm'r of Transp., 2002 Conn. Super. LEXIS 22, at *12 (Super. Ct. 2002) (Unrept.) (holding that the state's evidence was more persuasive that there was no significant impact to the drainage area after the taking and reconstruction of the highway). The *Satari* case is instructive in regard to the kind of soil studies and other expert evidence and testimony that were used successfully by the transportation department to rebut the claim for surface water damages.

[209] 256 Wis. 2d 235, 647 N.W.2d 277 (Ct. App. 2002).

[210] *Id.* at 241, 647 N.W.2d at 280 (emphasis supplied).

[211] *Id.* at 240, 647 N.W.2d at 279.

[212] *Id.*

[213] *Id.* at 245, 647 N.W.2d at 281 (footnote omitted).

[214] Wendy B. Davis, *Diffused Surface Water: Reasonable Use Has Become the Common Enemy* 5 (Berkeley Elec. Press, Working Paper No. 13, 2003), available at http://law.bepress.com/expresso/eps/13/.

[215] *See* Tom Clark Chevrolet v. Pa. Dep't of Envtl. Prot., 816 A.2d 1246 (Pa. Commw. 2003); *see also* Fazio v. Fegley Oil Co. Inc., 714 A.2d 510 (Pa. 1998), *appeal denied*, 557 Pa. 656, 734 A.2d 863 (1999).

[216] Butler v. Bruno, 115 R.I. 264, 269, 341 A.2d 735, 738 (1975).

and court decisions. More recently, as discussed herein, many states either have modified the common enemy or civil law rule or adopted the reasonable use rule.

> However, [s]everal states impose even more complex schemes by statutes that use a different standard depending on whether the land is within city limits, or has been artificially improved, or if the water has reached a drainway. Some states impose different rules depending on whether the property is considered urban or rural.[217]

D.2.a. Common Enemy Rule and the Modified Common Enemy Rule

Under the common enemy doctrine, water is a common enemy of all landowners and each may confront surface water without liability for damages caused to other landowners.[218] According to an early case, under the *common enemy* doctrine

> [t]he obstruction of surface water or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil. This principle seems to have been lost sight of in the instructions given to the jury. While the right of the owner of land to improve it and to change its surface so as to exclude surface water from it is fully recognized, even although such exclusion may cause the water to flow on to a neighbor's land, it seems to be assumed that he would be liable in damages, if, after suffering the water to come on his land, he obstructed it and caused it to flow in a new direction on land of a conterminous proprietor where it had not previously been accustomed to flow. But we know of no such distinction. A party may improve any portion of his land, although he may thereby cause the surface water flowing thereon, whencesoever it may come, to pass off in a different direction and in larger quantities than previously. If such an act causes damages to adjacent land, it is *damnum absque injuria.*[219]

The Rhode Island Supreme Court has pointed out that "New Jersey was the first jurisdiction to describe the rule by employing the phrase 'common enemy.'"[220] The court observed that

> [s]everal courts in adopting this rule have said that it encourages the development and improvement of real estate and clearly delineates the rights of all interested parties. Concededly, litigation is kept to a minimum because in its application no one's rights are invaded. However, the simplicity of the rule does create problems, for, as one commentator has expressed it: "landowners are encouraged to engage in contests of hydraulic engineering in which might makes right, and breach of the peace is often inevitable."[221]

Thus, the common enemy doctrine "shields a landowner from liability only when he diverts water onto another's land for the *protection* of his own land."[222] The common enemy doctrine allows a landowner to do whatever is necessary to dispose of surface water without liability to another property owner.

The modified common enemy doctrine, on the other hand, excludes specific acts and analyzes the reasonableness of a party's conduct and whether a party's action was necessary under the circumstances.[223] The modification effectively curtailed the landowner's right, amounting to free reign to confront surface water without liability from any resulting damages. The reasonableness inquiry is merely an element of the modified doctrine and is not the substance of the doctrine.

No state applies the unmodified common enemy doctrine.[224] For example, in *Tom Clark Chevrolet, supra,* the plaintiff appealed from a grant of summary judgment in favor of the Pennsylvania Department of Transportation, resulting in a dismissal of a claim for flood damages to the plaintiff's property. The court acknowledged that Pennsylvania applies the rule that "regards surface waters as a common enemy which every landowner must fight to get rid of as best he may."[225] However, the court went on to state that "'it is clear that only where water is diverted from its natural channel or where it is unreasonably or unnecessarily changed in quantity or quality has the lower owner received a legal injury.'"[226]

In *Anderson v. Griffin* the court stated that under the common enemy doctrine, "a landowner may dispose of unwanted surface water without incurring liability for injury caused to adjacent land."[227] However, the state of Washington has made exceptions to the doctrine as

> 1) a landowner may not block a watercourse or natural drain way; (2) a landowner may not collect and discharge

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[217] Davis, *supra* note 214, at 5 (footnotes omitted).

[218] Tom Clark Chevrolet v. Pa. Dep't of Envtl. Prot., 816 A.2d 1251, 1252.

[219] Gannon v. Hargadon, 92 Mass. 106, 110 (1865).

[220] Butler v. Bruno, 115 R.I. at 268, 341 A.2d at 737 (*quoting* Town of Union v. Durkes, 38 N.J.L. 21 (1875)).

[221] 115 R.I. at 268, 341 A.2d at 737–38 (*quoting* Maloney & Plager, *Diffused Surface Water: Scourge or Bounty*, 8 NAT. RESOURCES J. 73, 78 (1968)).

[222] Gunstone v. Jefferson County, 2004 Wash. App. LEXIS 499, at *21 n.4 (Unrept.) (citation omitted) (emphasis in original).

[223] *See* Ostrem v. Alyeska Pipeline Service Co., 648 P.2d 986, 990–91 (Alaska 1982).

[224] Although the Davis article states that "[o]nly Pennsylvania adheres to the Common Enemy rule without modification, and then only for land in urban areas," Davis, *supra* note 214, at 6 (*citing* Fazio v. Fegley Oil Co., Inc., 714 A.2d 510 (Pa. 1998)), the rule, nonetheless, includes a reasonableness inquiry. *Tom Clark Chevrolet*, 816 A.2d at 1253 ("[A] landowner in urban areas is liable for the effects of surface waters only where he either (a) artificially diverts the water from its natural channel, or (b) *unreasonably or unnecessarily increases the quantity or changes the quality of water discharged from his property*.") (citation omitted) (emphasis supplied).

[225] Tom Clark Chevrolet v. Pa. Dep't of Envtl. Prot., 816 A.2d at 1252 (citation omitted).

[226] *Id.* (*quoting* Lucas v. Ford, 363 Pa. 153, 156, 69 A.2d 114, 116 (1949)).

[227] Anderson v. Griffin, 2002 Wash. App. LEXIS 2542, *10 (Ct. App. 2002) (Unrept.), 2005 Wash. App. LEXIS 1172 (Wash. Ct. App. 2005) (affirming trial court's decision on remand).

> water onto their neighbors' land in quantities greater than or in a manner different from its natural flow; and (3) a landowner must exercise their rights with due care by acting in good faith and by avoiding unnecessary damage to the property of others.[228]

It appears that 12 states apply the common enemy doctrine but with state-specific modifications:[229] Alabama,[230] Arkansas,[231] the District of Columbia,[232] Indiana,[233] Kansas,[234] Maine,[235] Montana,[236] Nebraska,[237] Oklahoma,[238] South Carolina,[239] Virginia,[240] and Washington.[241]

D.2.b. Civil Law Rule

According to the civil law rule, a landowner's surface water may flow in its natural course over the property of another without incurring liability for any resulting damages.[242] The doctrine

> was first adopted in this country by Louisiana in 1812.... It is said to have its roots in Roman Law and the Napoleonic Code.... The rule is usually expressed in terms of an easement of natural drainage so that the owner of the lower land must accept the surface water which naturally drains onto his land but the upper owner may do nothing to increase the flow. Expressed in a more precise manner, the rule is that "A person who interferes with the natural flow of surface water so as to cause an invasion of another's interests in the use and enjoyment of his land is subject to liability to the others."[243]

Under the civil law rule "the owner of the dominant or higher land has a natural easement over the servient or lower land to allow surface water to flow naturally off the dominant estate and onto the servient estate."[244] Although the civil law rule has the advantage of predictability in that a landowner knows what his or her liability is from the beginning, the rule may serve to discourage development.[245] Furthermore, the application of the doctrine is difficult because of the need to know "the exact course of the 'natural flow' of the surface water...."[246]

In *Menzies v. Hall,* the Supreme Court of Georgia affirmed the trial court's order granting injunctive relief to alleviate excessive rain and surface water run-off and determining whether and how to require the defendant-appellant to abate the problem.[247] After acquiring possession of property above that of the plaintiff, the defendant removed grass and other vegetation and replaced it with gravel. In describing the civil law rule, the court stated that

> one land proprietor has no right to concentrate and collect [water], and thus cause it to be discharged upon the land of a lower proprietor in greater quantities at a particular locality, or in a manner different from that in which the water would be received by the lower estate if it simply ran down upon it from the upper by the law of gravitation.[248]

Because any improvements to or development of the property would most likely change the natural flow, some states have modified the civil law rule. In Illinois, an owner of a dominant agricultural land is permitted to increase or alter the flow of water upon a servient estate for purposes of husbandry of the dominant estate.[249] This modification has also been extended to development in urban and suburban settings, i.e., limiting liability where increased flow of surface waters is a result of development such as paving of streets or construction of houses.[250]

It appears that the following jurisdictions apply the civil law rule:[251] Arizona,[252] Colorado,[253] Georgia,[254]

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

[229] *C.f.,* Davis, *supra* note 214, at 8–9.

[230] Peak v. Parks, 886 So. 2d 97 (Ala. Ct. Civ. App. 2003); Wal-Mart Stores v. Langham, 794 So. 2d 1170 (Ala. Ct. Civ. App. 2001); Easterling v. Awtrey Building Corp., 770 So. 2d 606 (Ala. Ct. Civ. App. 1999).

[231] Michael v. Roberson, 1998 WL 712745, *1 (Ark. App. 1998); Boyd v. Greene County, 7 Ark. App. 110, 644 S.W.2d 615 (Ct. App. 1983).

[232] Ballard v. Ace Wrecking Co., 289 A.2d 888 (D.C. 1971).

[233] Romine v. Gagle, 782 N.E.2d 369 (Ind. Ct. App. 2003), *rehearing denied*, 2003 Ind. App. LEXIS 453 (Ind. Ct. App. 2003); Pickett v. Brown, 569 N.E.2d 706 (Ind. Ct. App. 1991).

[234] Williamson v. Hays, 275 Kan. 300, 64 P.3d 364 (2003).

[235] Johnson v. Whitten, 384 A.2d 698 (Me. 1978).

[236] Mont. Dep't of Highways v. Feenan, 231 Mont. 255, 752 P.2d 182 (1988); Formicove, Inc. v. Burlington N., Inc., 207 Mont. 189, 673 P.2d 469 (1983).

[237] Schott v. Hennings, 2000 Neb. App. LEXIS 80, *1 (Neb. Ct. App. 2000) (Unrept.); Nu-Dwarf Farms, Inc. v. Stratbucker Farms, Ltd., 238 Neb. 395, 470 N.W.2d 772 (1991).

[238] Moneypenny v. Dawson, 2006 OK 53, 141 P.3d 549 (2006); Mattoon v. City of Norman, 1980 OK 137, 617 P.2d 1347, 1349 (1980).

[239] Silvester v. Spring Valley Country Club, 344 S.C. 280, 543 S.E.2d 563 (2001).

[240] Mullins v. Greer, 26 Va. 587, 311 S.E.2d 110 (1984); McCauley v. Phillips, 216 Va. 450, 219 S.E.2d 854 (1976).

[241] Anderson v. Griffin, 2002 Wash. App. LEXIS 2542, at *1; Currens v. Sleek, 138 Wash. 2d 858, 983 P.2d 626 (1999).

[242] *See* Bollweg v. Richard Marker Assocs., 353 Ill. App. 3d 560, 574–75, 818 N.E.2d 873, 884–85 (Ill. Ct. App. 2004).

[243] Butler v. Bruno, 115 R.I. at 269, 341 A.2d at 738.

[244] Bollweg v. Richard Marker Assocs., 353 Ill. App. 3d 560, 574–75, 818 N.E.2d 873, 884 (Ct. App. 2004).

[245] Butler v. Bruno, 115 R.I. at 269, 341 A.2d at 738 (citation omitted).

[246] *Id.*

[247] 281 Ga. 223, 637 S.E.2d 415 (2006).

[248] *Id.* at 224, n.1, 637 S.E.2d at 416, n.1.

[249] Dessen v. Jones, 194 Ill. App. 3d 869, 877, 551 N.E.2d 782, 786 (Ill. Ct. App. 1990).

[250] Templeton v. Huss, 57 Ill. 2d 134, 138–39, 311 N.E.2d 141, 143–44 (1974).

[251] *C.f.,* Davis, s*upra* note 214, at 8–9.

[252] See W. Maricopa Combine, Inc. v. Ariz. Dep't of Water Res., 200 Ariz. 400, 26 P.3d 1171 (Ariz. Ct. App. 2001); *see also* Gillespie Land & Irrigation Co. v. Gonzalez, 93 Ariz. 152, 379 P.2d 135, 146 (1963).

Idaho,[255] Illinois,[256] Iowa,[257] Louisiana,[258] Maryland,[259] Michigan,[260] New Mexico,[261] New York,[262] Oregon,[263] South Dakota,[264] Tennessee,[265] and Texas.[266]

D.2.c. Reasonable Use Rule

A majority of states have adopted the reasonable use rule that inquires solely into the reasonableness of the alleged infringement in light of competing party and state interests.[267] The factors are defined by each state and, when applied, permit flexibility in analysis that results in greater fairness than the other doctrines.

As an appellate court observed in *Thomas v. City of Kansas City, Missouri*,[268] a case involving a claim for surface water damage, the law on surface water, at least in Missouri, has changed.

> [I]n *Heins Implement Co. v. Missouri Highway and Transportation Commission*, 859 S.W.2d 681 (Mo. banc 1993)…the court discarded the "common enemy" doctrine as to surface waters and adopted the "rule of reasonable use…." That rule provides that each possessor of land is legally entitled to make reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others; however, *the possessor incurs liability when the harmful interference with the flow of surface waters is unreasonable…. The rule of reasonable use does not purport to lay down specific rights with respect to surface waters, but "leaves each case to be determined on its own facts, in accordance with general principles of fairness and common sense*."[269]

The change means that

> [t]he rule of reasonable use makes obsolete the negligence and trespass nomenclature in cases involving the diversion of surface waters, because the concepts of negligence and trespass are merged into, and made subject to, the rule of reasonable use. An attempt to plead a cause of action as to surface water flooding must plead the elements of unreasonable use. The rule of reasonable use is essentially a rule of nuisance law…. In *Heins*, the Supreme Court held that surface water rights and liabilities were not to be analyzed exclusively as property law questions, but were to be analyzed as a form of nuisance…. Under *Heins*, upper and lower landowners are to be treated alike and all questions of liability for actions taken with regard to surface water are to be analyzed under a reasonableness standard….[270]

In the *Thomas* case the court held that the petition stated a claim "[b]ecause the petition refers to the diversion of surface waters by unreasonable conduct causing flooding and damage…."[271]

In another case, *Graham v. Beverage P.C*,[272] in which the property owners alleged that the transportation department had altered the flow of surface water, the court held that a mandamus action was available to the property owners to compel the department to begin eminent domain proceedings.[273] However, a mandamus action was not available to compel the completion of promised construction of proper ditching and drainage to carry off the surface water that was being "blocked and ponded" on the plaintiff's property by a highway.[274]

In the *Graham* case, in regard to the owners' negligence claim, although holding that there were material facts in dispute that precluded summary judgment, the

[253] Bittersweet Farms, Inc., v. Zimbelman, 976 P.2d 326 (Colo. Ct. App. 1998); Hoff v. Ehrlich, 511 P.2d 523 (Colo. Ct. App. 1973).

[254] Menzies v. Hall, 281 Ga. 223, 637 S.E.2d 415 (2006); McMillen Dev. Corp. v. Bull, 228 Ga. 826, 188 S.E.2d 491 (1972).

[255] Utter v. Gibbins, 137 Idaho 361, 48 P.3d 1250 (2002); Burgess v. Salmon River Canal Co., 119 Idaho 299, 805 P.2d 1223 (1991); Smith v. King Creek Grazing Assoc., 105 Idaho 644, 671 P.2d 1107 (1983).

[256] Bollweg v. Richard Marker Assocs., 353 Ill. App. 3d 560, 818 N.E.2d 873 (Ill. Ct. App. 2004); Dessen v. Jones, 194 Ill. App. 3d 869, 551 N.E.2d 782 (Ill. Ct. App. 1990).

[257] Grace Hodgson Trust v. McClannahan, 569 N.W.2d 397 (Iowa Ct. App. 1997); O'Tool v. Hathaway, 461 N.W.2d 161 (Iowa 1990).

[258] Robinson v. Lincoln Parish Police Jury, 899 So. 2d 636 (La. App. 2d Cir. 2005); Carr v. Oake Tree Apartments, 786 So. 2d 230 (La. App. 2d Cir. 2001); Eubanks v. Bayou D'Arbonne Lake Watershed Dist., 742 So. 2d 113 (La. App., 2d Cir. 1999).

[259] Mark Downs, Inc. v. McCormick Props., Inc., 51 Md. App. 171, 441 A.2d 1119 (Md. Ct. Spec. App. 1982); Sainto v. Potter, 222 Md. 263, 159 A.2d 632 (Md. Ct. App. 1960).

[260] Swanson v. Shagbark Dev., 2005 Mich. App. LEXIS 2665 (Mich. Ct. App. 2005) (Unrept.); Kernan v. Homestead Dev. Co., 232 Mich. App. 503, 591 N.W.2d 369 (Mich. Ct. App. 1998).

[261] Walker v. L.G. Everist, Inc., 102 N.M. 783, 701 P.2d 382 (N.M. Ct. App. 1985).

[262] Selter v. MCM Distrib., Inc., 749 N.Y.S.2d 94, 299 A.D. 2d 332 (N.Y. App. 2d Dep't 2002); Marzo v. Fast Trak Structures, Inc., 747 N.Y.S.2d 637, 298 A.D. 2d 909 (N.Y. App. 4th Dep't 2002); Lawrence Wolf, Inc. v. Kissing Bridge Corp., 733 N.Y.S.2d 322, 288 A.D. 2d 935 (N.Y. App. 4th Dep't 2001).

[263] Wimmer v. Compton, 277 Or. 313, 560 P.2d 626 (1977); Wellman v. Kelley, 197 Or. 553, 252 P.2d 816 (1953).

[264] Knodel v. Kassel Township, 1998 SD 73, 581 N.W.2d 504 (1998) (significant exceptions to general rule).

[265] Broyels v. Standifer, 2006 Tenn. App. LEXIS 768 (Tenn. Ct. App. 2006); Genua v. Emory Assocs., 2002 Tenn. App. LEXIS 289 (Tenn. Ct. App. 2002); Zollinger v. Carter, 837 S.W.2d 613 (Tenn. Ct. App. 1992).

[266] Tex. Woman's Univ. v. Methodist Hosp., 221 S.W.3d 267 (Tex. Ct. App. 2006); Jefferson County Drainage Dist. No. 6 v. Lower Neches Valley Auth., 876 S.W.2d 940 (Tex. Ct. App. 1994), writ denied (Jan. 12, 1995).

[267] Anderson v. Griffin, 2002 Wash. App. LEXIS 2542, at *1.

[268] 92 S.W.3d 92 (Mo. App. W. Dist. 2002).

[269] *Id.* at 98 (some citations omitted) (emphasis supplied).

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

[271] *Id.* at 100. The court noted that other claims may exist such as a claim for personal injury caused by a city's negligence in the performance of a proprietary function. *Id.*

[272] 211 W. Va. 466, 566 S.E.2d 603 (2002).

[273] *Id.* at 473, 566 S.E.2d at 610.

[274] *Id.,* n.11. The case was not time-barred "because the alleged negligence…constitutes continuing wrongful conduct from which continuing injuries emanate." *Id.,* 211 W. Va. at 477, 566 S.E.2d at 614.

court addressed West Virginia's rule regarding liability for surface water.

> Generally, under the rule of reasonable use, the landowner, in dealing with surface water, is entitled to take only such steps as are reasonable, in light of all the circumstances of relative advantage to the actor and disadvantage to the adjoining landowners, as well as social utility. Ordinarily, the determination of such reasonableness is regarded as involving factual issues to be determined by the trier of fact….
>
> When a plaintiff alleges that a defendant has caused or allowed surface water to damage the plaintiff, the mere fact that the water does not originate on the land of the defendant, does not, in and of itself, make the defendant's conduct "reasonable" under the test….[275]

Furthermore, the court stated that

> [i]n the absence of a valid waiver or other contractual arrangement, altering the natural flow or drainage of surface water upon one's land such that the water causes damage to another party is not "reasonable" merely because the person altering the flow of water sought to protect his or her own property and did not intend to harm any other party.[276]

The *reasonable use* doctrine does not prescribe any specific rights or privileges concerning surface water; each case is determined on its own facts.

> Reasonableness is a question of fact, to be determined in each case by weighing the gravity of the harm to the plaintiff against the utility of the defendant's conduct…. Liability arises when the defendant's conduct is either (1) intentional and unreasonable; or (2) negligent, reckless, or in the course of an abnormally dangerous activity…. Perhaps the rule can be stated most simply to impose a duty upon any landowner in the use of his or her land not to needlessly or negligently injure by surface water adjoining lands owned by others, or in the breach thereof to pay for the resulting damages. The greatest virtue of the reasonable use standard is its ability to adapt to any set of circumstances while remaining firmly focused on the equities of the situation.[277]

In *Crowell v. Kogut*[278] the defendant averred that the plaintiff had not alleged that her interference with surface water was unreasonable as mandated by an earlier case, *Page Motor Co. v. Baker*.[279] The plaintiff countered that the reasonable use doctrine applied to repulsion of water, not to diversion of water as was the case here.[280] The law on repulsion and diversion of surface waters prior to *Page Motor* detailed the rights of adjacent landowners as follows:

> A landowner is under no duty to receive upon his land surface water from the adjacent properties but in the use or improvement of it he may repel such water at his boundary. On the other hand, he incurs no liability by reason of the fact that surface water falling or running onto his land flows thence to the property of others in its natural manner. *But he may not use or improve his land in such a way as to increase the total volume of surface water which flows from it to adjacent property, or as to discharge it or any part of it upon such property in a manner different in volume or course from its natural flow to the substantial damage of the owner of that property*.[281]

In *Crowell* the court explained that the above statement was a modified version of the common enemy doctrine and that it provided immunity to a landowner who repelled surface water but imposed liability on a landowner who diverted surface water so as to cause substantial damage to an adjacent landowner.[282] In adopting the reasonable use doctrine, the court observed that a repelling landowner would not be immune from liability any longer.[283] Instead, he or she would be "'entitled to take only such steps as are reasonable, in light of all circumstances of relative advantage to the actor and disadvantage to the adjoining landowners, as well as social utility.'"[284] Moreover, the rule of reasonable use only applied to repelling water, whereas a landowner who diverts surface water from its natural flow resulting in substantial damage to adjacent landowners is liable regardless of the reasonableness of his or her actions.

It appears that 21 states apply the reasonable use rule:[285] Alaska,[286] California,[287] Connecticut,[288] Delaware,[289] Florida,[290] Hawaii,[291] Kentucky,[292] Massachu-

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[275] *Id.* at 475, 566 S.E.2d at 612 (citation omitted)) (noting that the reasonable use test was adopted in Morris Assocs., Inc. v. Priddy, 181 W.Va. 588, 383 S.E.2d 770 (1989)).

[276] *Id.*

[277] Heins Implement Co. v. Mo. Highway & Transp. Comm'n, 859 S.W.2d 681, 689–90 (Mo. 1993) (citations omitted).

[278] 2005 Conn. Super. LEXIS 2783, at *3–4 (Super. Ct. 2005) (Unrept.).

[279] *See* 182 Conn. 484, 438 A.2d 739 (1980).

[280] 2005 Conn. Super. Lexis 2783, at *4.

[281] *Id.* at *4–5 (*quoting* Tide Water Oil Sales Corp. v. Shimelman, 114 Conn. 182, 189–90, 158 A. 229, 231 (1932) (emphasis in original)).

[282] *Id.* at *5 (citation omitted).

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

[284] *Id.* (*quoting* Ferri v. Pyramid Constr. Co, 186 Conn. 682, 686, 443 A.2d 478, 481 (1982)).

[285] C.f., Davis, *supra* note 214, at 8–9.

[286] Ostrem v. Alyeska Pipeline Serv. Co., 648 P.2d 986 (Alaska 1982); Weinberg v. N. Alaska Dev. Corp., 384 P.2d 450 (Alaska 1963) (adopting New Jersey Supreme Court's formulation of the rule in Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956)).

[287] Arreola v. County of Monterey, 99 Cal. App. 4th 722, 122 Cal. Rptr. 2d 38 (Cal. App. 6th Dist. 2002), *review denied*, 2002 Cal. LEXIS 6194 (Cal. Sept. 18, 2002); Locklin v. City of Lafayette, 7 Cal. 4th 327, 27 Cal. Rptr. 2d 613, 867 P.2d 724 (1994); Bunch v. Coachella Valley Water Dist., 15 Cal. 4th 432, 63 Cal. Rptr. 2d 89, 935 P.2d 796 (1997).

[288] Crowel v. Kogut, 2005 Conn. Super. LEXIS 2783, at *1.

[289] Weldin Farms, Inc. v. Glassman, 414 A.2d 500 (Del. 1980).

[290] Westland Skating Ctr., Inc. v. Gus Machado Buick, Inc., 542 So. 2d 959 (Fla. 1989).

[291] Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co., 100 Haw. 97, 58 P.3d 608 (2002); Cootey v. Sun Investment, Inc., 68 Haw. 480, 718 P.2d 1086 (1986).

setts,[293] Minnesota,[294] Mississippi,[295] Missouri,[296] Nevada,[297] New Hampshire,[298] New Jersey,[299] North Carolina,[300] North Dakota,[301] Ohio,[302] Rhode Island,[303] Utah,[304] West Virginia,[305] and Wisconsin.[306]

No present case law was located for either Vermont or Wyoming that applied any of the above rules.[307]

D.3. Other Rules Applicable to Liability for Surface Water

Most of the highway cases for damages caused by drainage have arisen because of the failure of public officials to control surface water properly; for example, in connection with highway construction, improvements, or facilities that caused a change in the natural flow of surface water.[308] There is authority that an

[292] Mason v. City of Mt. Sterling, Transp., 122 S.W.3d 500 (Ky. 2003), *rehearing denied*, 2004 Ky. LEXIS 22 (Ky. 2004) (noting that Kentucky follows a modified version of the civil law rule); Cabinet, Bureau of Highways v. Leneave, 751 S.W.2d 36 (Ky. Ct. App. 1988); Ky. Dep't of Highways v. S & M Land Co., 503 S.W.2d 495 (Ky. Ct. App. 1972); Klutey v. Commonwealth, Dep't of Highways, 428 S.W.2d 766 (Ky. Ct. App. 1967).

[293] Trenz v. Town of Norwell, 68 Mass. App. Ct. 271, 861 N.E.2d 777 (Mass. Ct. App. 2007); DeSanctis v. Lynn Water and Sewer Comm'n, 423 Mass. 112, 666 N.E.2d 1292 (1996); Triangle Center, Inc. v. Dep't of Pub. Works, 386 Mass. 858, 438 N.E.2d 798 (1982); Tucker v. Badoian, 376 Mass. 907, 384 N.E.2d 1195 (1978) (Kaplan, J., concurring) (announcing intention to replace common enemy rule with reasonable use doctrine).

[294] Wendinger v. Forst Farms, Inc., 662 N.W.2d 546 (Minn. Ct. App. 2003) (applying reasonable use doctrine in nuisance action); Gillette v. Peterson, 2004 Minn. App. LEXIS 614, at *1 (Minn. Ct. App. 2004) (Unrept.); Kral v. Boesch, 557 N.W.2d 597 (Minn. Ct. App. 1996); Evers v. Willaby, 444 N.W.2d 856 (Minn. Ct. App. 1989); Enderson v. Kelehan, 226 Minn. 163, 32 N.W.2d 286 (1948).

[295] Martin v. Flanagan, 818 S.W.2d 1124 (Miss. 2002); Hall v. Wood, 443 S.W.2d 834 (Miss. 1983).

[296] Klokkenga v. Carolan, 200 S.W.3d 144 (Mo. App., W. Dist. 2006) (noting that Missouri adopted the reasonable use doctrine to replace the common enemy doctrine); Heins Implement Co. v. Mo. Highway & Transp. Comm'n, 859 S.W.2d 681 (Mo. 1993).

[297] County of Clark v. Powers, 96 Nev. 497, 611 P.2d 1072 (1980).

[298] Dudley v. Beckley, 132 N.H. 568, 567 A.2d 573 (1989); Franklin v. Durgee, 71 N.H. 186, 51 A. 911 (1901).

[299] Posey v. Bordentown Sewerage Auth., 171 N.J. 172, 793 A.2d 607 (2002); Sheppard v. Frankford, 261 N.J. Super. 5, 617 A.2d 666 (N.J. App. 1992).

[300] Rainey v. St. Lawrence Homes, Inc., 174 N.C. App. 611, 621 S.E.2d 217 (N.C. Ct. App. 2005); BNT Co. v. Baker Precythe Dev. Co., 151 N.C. App. 52, 564 S.E.2d 891 (N.C. Ct. App. 2002); Pendergrast v. Aiken, 293 N.C. 201, 236 S.E.2d 787 (1977).

[301] Burlington N. and Santa Fe Ry. Co. v. Benson County Water Res. Dist., 2000 ND 182, 618 N.W.2d 155 (2000); Martin v. Weckerly, 364 N.W.2d 93 (N.D. 1985).

[302] Verchio v. Gregory, 2007 Ohio 832 (Ohio App., 8th Dist. 2007), *discretionary appeal not allowed*, 2007 Ohio 4884 (Ohio 2007); McGlashan v. Spade Rockledge Terrace Condo Dev. Corp., 62 Ohio St. 2d 55, 402 N.E.2d 1196 (Ohio 1980); Mays v. Moran, 1999 Ohio App. LEXIS 1245 (Ohio Ct. App. 1999), *cause dismissed*, 85 Ohio St. 3d 1468, 709 N.E.2d 173 (1999).

[303] Zannini v. Arboretum Dev., 1988 R.I. Super. LEXIS 197 (R.I. Super. Ct. 1988) (Unrept.); Butler v. Bruno, 115 R.I. 264, 341 A.2d 735 (1975).

[304] Lovendahl v. Jordan Sch. Dist., 2002 UT 130, 63 P.3d 705 (2002); Morgan v. Quailbrook Condo. Co., 704 P.2d 573 (Utah 1985).

[305] *In Re: Flood Litigation*, 216 W. Va. 534, 607 S.E.2d 863 (2004); Graham v. Beverage, 211 W. Va. 466, 566 S.E.2d 603 (2002).

[306] Osberg v. Kienitz, 292 Wis. 2d 485, 713 N.W.2d 191 (Wis. Ct. App. 2006); Getka v. Lader, 71 Wis. 2d 237, 238 N.W.2d 87 (1976); Wisconsin v. Deetz, 66 Wis. 2d 1, 224 N.W.2d 407 (1974).

[307] *See* Davis, *supra* note 214 (stating that neither jurisdiction applies any of the rules discussed) (*citing* Lee v. Brown, 357 P.2d 1106, 1109 (Wyo. 1960); Tompkins v. Byrtus, 72 Wyo. 537, 267 P.2d 753 (1954); Canton v. Graniteville Fire Dist. No. 4, 171 Vt. 551, 762 A.2d 808 (Vt. 2000)).

[308] *See* Semon v. City of Shreveport, 389 So. 2d 438 (La. App., 2d Cir. 1980) (judgment affirmed for homeowner in connection with construction of highway ramp); Beane v. Prince Georges County, 20 Md. App. 383, 315 A.2d 777 (Md. Ct. Spec. App. 1974) (record established an unreasonable use of surface water by the county that warranted injunctive relief); Musumeci v. State, 43 A.D. 2d 288, 351 N.Y.S.2d 211 (N.Y. App. 4th Dep't 1974) (state not immune for nuisance it caused by collecting water from its land into an artificial channel and discharging it onto the landowners' farms); Wells v. State Highway Comm'n, 503 S.W.2d 689 (Mo. 1973) (affirming judgment for the property owners in case in which extensive highway grading damaged owners' lake); Spradley v. S.C. State Highway Dep't, 256 S.C. 431, 182 S.E.2d 735 (1971) (affirming a judgment that surface water had resulted in a taking).

agency may have a responsibility to anticipate future needs with respect to surface water.[309]

Transportation agencies may avoid such claims for surface water damages by showing that they have engineered the project properly. The failure to do so may result in compensation being awarded to the affected property owner; for example, for an inadequate culvert.[310] In planning a project it may be necessary to perform a satisfactory analysis of drainage requirements;[311] in some circumstances to consider future development as well;[312] and to consider the possibility of soil erosion.[313]

Finally, although general transportation authorities may be held liable in inverse condemnation only for their own design and construction, even if the governmental authority had the right to review and approve the plans of a developer, there is some authority to the contrary.[314] For example, in *Arreola v. County of Monterey*[315] the court observed that the plaintiffs could recover if their damages were substantially caused by a public agency's design, construction, or maintenance of a flood control project that is shown to have posed an unreasonable risk of harm.[316] The *Arreola* court affirmed the jury's verdict that apportioned damages between the county and a separate legal entity after finding that the county exercised dominion and control over the project concurrently with the public entity.[317] Furthermore, the court stated that a "public entity is a proper defendant in an action for inverse condemnation if the entity substantially participated in the planning, approval, construction, or operation of a public project or improvement that proximately caused injury to private property."[318]

E. UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES FOR FEDERAL AND FEDERALLY-ASSISTED PROGRAMS

E.1. Uniform Relocation Assistance

The URA sets forth with respect to federal and federally-assisted programs the federal policies in subchapter II for relocation assistance and in subchapter III for the acquisition of real property.[319] With the URA, the Congress "intended to provide uniform relief from economic dislocation which occurs in the acquisition of real property for federal or federally assisted programs."[320] The URA's policies seek to provide for "fair, uniform and equitable treatment of all affected persons" as a "direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance."[321]

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[309] Gunstone v. Jefferson County, 2004 Wash. App. LEXIS 499, at *9 (noting that the duty to maintain culverts so as not to obstruct the natural flow of surface water includes removal of an obstruction within a reasonable time after actual or constructive notice); Arreola v. County of Monterey, 122 Cal. Rptr. 2d at 54, 99 Cal. App. 4th at 743 (discussing the imposition of liability in inverse condemnation actions where the public entity fails to maintain a project) (*citing* McMahan's of Santa Monica v. City of Santa Monica, 146 Cal. App. 3d 683, 194 Cal. Rptr. 582 (Cal. App. 2d Dist. 1983), *disapproved on other grounds*, 15 Cal. 4th 432, 935 P.2d 796 (Cal. 1997); Pacific Bell v. City of San Diego, 81 Cal. App. 4th 596, 96 Cal. Rptr. 2d 897 (Cal. App. 4th Dist. 1997) (involving a city's failure to accelerate its program of water main replacement where a water rate study showed that it was necessary to prevent deterioration of the system)). *See also* Dep't of Transp. v. Hanes, 448 So. 2d 1130, 1132 (Fla. App. 1st Dist. 1984)

> (DOT is responsible for coordination of the total highway and road system within the state, including the operation and maintenance of roads and culverts, drains, sluices, ditches, etc. See §§ 334.11; 334.03(7); 335.04(4); Florida Statutes. DOT is also charged with a responsibility for anticipating future needs within the total environment of the community. *See* § 334.211(2)(a) and (f), Florida Statutes. And as the governmental entity with operational and maintenance responsibility DOT is liable for torts related thereto. *See* § 337.29(3), Florida Statutes.).

[310] Heins Implement Co. Mo. Hwy. & Transp. Comm., 859 S.W.2d at 691.

[311] K & W Elect., Inc. v. Iowa, 712 N.W.2d 107 (Iowa 2006) (affirming judgment that the state was immune from tort liability because the highways were constructed in accordance with a generally recognized engineering standard, criterion, or design theory in existence at the time of the construction and inverse condemnation claim was barred by the statute of limitations).

[312] Dep't of Transp. v. Hanes, 448 So. 2d 1130, 1132 (Fla. App. 1st Dist. 1984).

[313] Casado v. Melas Corp., 69 N.C. App. 630, 318 S.E.2d 247 (N.C. Ct. App. 1984).

[314] *See* Cootey v. Sun Inv., 68 Haw. 480, 718 P.2d 1086 (1986).

[315] 99 Cal. App. 4th 722, 122 Cal. Rptr. 2d 38 (Cal. App. 6th Dist. 2002), *review denied*, 2002 Cal. LEXIS 6194 (Cal. 2002).

[316] *Id.* at 761, 122 Cal. Rptr. 2d at 69.

[317] *Id.* at 760, 122 Cal. Rptr. 2d at 68.

[318] *Id.* at 761, 122 Cal. Rptr. 2d at 69 (*citing* Wildensten v. East Bay Reg'l Park Dist., 231 Cal. App. 3d 976, 283 Cal. Rptr. 13 (Cal. App. 1st Dist. 1991) (applying the "substantial-participation" test)); Frustuck v. Fairfax, 212 Cal. App. 2d 345, 28 Cal. Rptr. 357 (Cal. App. 1st Dist. 1963) (involving a city's approval of a subdivision and drainage plans for private property)).

[319] 42 U.S.C. § 4601, *et seq.* (2007). *See also* Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs, 49 C.F.R. § 24, *et seq.* (2007).

[320] Nagi v. United States, 751 F.2d 826, 829 (6th Cir. 1985) (reversing a lower court that had upheld a determination by a state agency that persons relocated were ineligible for replacement housing benefits because of extended travel abroad) (*citing* Alexander v. United States Dep't of Hous. and Urban Dev., 441 U.S. 39, 99 S. Ct. 1572, 1581, 60 L. Ed. 2d 28 (1979)).

[321] *See* 42 U.S.C. § 4621(a)(2) and (b) (2007); *see also* 49 C.F.R. §§ 24.1 and 24.101 (2007) (setting for the purpose of the regulations and the applicability of acquisition requirements).

Thus, the subchapter on relocation assistance provides for the payment of certain moving and related expenses to persons who are relocated;[322] expenses in searching for a replacement business or farm and the reestablishment of a displaced farm, nonprofit organization, or small business;[323] replacement housing for homeowners;[324] replacement housing for tenants and certain other persons;[325] and housing replacement by a federal agency as a last resort.[326] The URA also permits a displaced person who is eligible for payments under 42 U.S.C. § 4622(a) to elect a fixed expense and dislocation allowance.[327]

As explained in more detail below, a displaced person means an individual, partnership, corporation, or association who moves from real property, or moves personal property from real property, in response to an acquiring agency's written notice of intent to acquire real property,[328] or because of the permanent displacement of a residential tenant, a small business, or a farm operation in connection with a federal or federally-assisted acquisition of real property.[329] During the early stages of development of any project subject to the Act, an acquiring agency is to develop information regarding the estimated number of covered owners to be displaced and afford them relocation advisory services.[330] These services are to include a determination of relocation needs of each person to be displaced and current information on the availability and purchase price of comparable replacement dwellings.[331]

The URA does not create property rights that otherwise do not exist but only grants certain benefits by virtue of property rights that exist under the law.[332] The URA requires all federal agencies[333] having acquisition programs or projects to establish regulations and procedures for relocation assistance to be provided to displaced persons and businesses.[334] For the most recent federal regulations promulgated pursuant to the URA, see 49 C.F.R. Part 24.[335]

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[322] 42 U.S.C. § 4622(a)(1)-(4) (2007). *See* 42 U.S.C § 4626 (2007) (addressing the potential lack of comparable replacement dwellings and authorizing greater payments than those authorized under §§ 4623 and 4624); 42 U.S.C. § 4630 (2007) (requiring as a condition for any federal assistance resulting in the displacement of any person that fair and reasonable payments, assistance, and comparable replacement dwellings will be available). *See also* 49 C.F.R. § 24.204 (2007) (concerning availability of comparable replacement dwelling before displacement); 49 C.F.R. § 24.205 (2007) (concerning relocation planning, advisory services, and coordination); 49 C.F.R. § 24.301 (2007) (concerning payment for actual reasonable moving and related expenses; 49 C.F.R. § 24.302 (2007) (concerning election of fixed payment for residential moving expenses); 49 C.F.R. § 24.303 (2007) (concerning related nonresidential eligible expenses); 49 C.F.R. § 24.304 (2007) (concerning payment for expenses actually incurred in nonresidential moves); 49 C.F.R. § 24.305 (2007) (concerning election of a fixed payment for nonresidential moving expenses); 49 C.F.R. § 24.403 (2007) (additional rules governing replacement housing payments); 49 C.F.R. § 404 (2007) (concerning replacement housing as a last resort); and 49 C.F.R. § 24.501-503 (2007) (concerning replacement housing payments in connection with mobile homes).

[323] *See* 42 U.S.C. § 4622(a)(2)-(4) (2007).

[324] *See* 42 U.S.C. § 4623 (2007). *See* 42 U.S.C. § 4624 (2007) (extending benefits to qualifying tenants and certain others). *See also* 49 C.F.R. § 24.401 (2007) (concerning replacement housing payment for 180-day homeowner-occupants); 49 C.F.R. § 24.402 (2007) (concerning replacement housing payment for 90-day occupants); 49 C.F.R. §§ 24.501–503 (2007) (extending benefits to displaced 180-day mobile-home owners and 90-day mobile home occupants).

[325] *See* 42 U.S.C. § 4624 (2007).

[326] *See* 42 U.S.C. § 4626 (2007).

[327] *See* 42 U.S.C. § 4622(b) (2007); *see* 42 U.S.C. § 4622(c) (2007) (providing for an election of a fixed payment for a displaced business or farm operation). *See also* 49 C.F.R. § 24.302 (2007) (concerning a fixed payment for residential moving expenses).

[328] *See* 49 C.F.R. § 24.203 (2007) (setting forth the notice requirements under the URA).

[329] *See* 42 U.S.C. §§ 4601(5)-(6) (2007); *see* 49 C.F.R. § 24.2(a)(9)(i) (2007). *Compare* 42 U.S.C. §§ 4601(5)-(6) (2007) and 49 C.F.R. 24.2(a)(9)(i) (2007) *with* 42 U.S.C. § 4601(6)(B) (2007) and 49 C.F.R. § 24.2(a)(9)(ii) (2007) (excluding from the definition of a displaced person an unlawful occupant or a subsequent occupant of property after it has been acquired). Note that 42 U.S.C § 4625 (2007) requires that planning of projects consider potential problems with any displaced persons, including providing such persons advisory services. *See also* 49 C.F.R. § 24.205 (2007) (relocation planning, advisory services, and coordination).

[330] *See* 49 C.F.R. § 24.205 (2007).

[331] *See* 42 U.S.C. § 4625(c)(1)-(6) 2007; *see also* 49 C.F.R. § 24.205(a)(1)-(5) (2007).

[332] Consumers Power Co. v. Costle, 468 F. Supp. 375, 379 (E.D. Mich. 1979), *aff'd*, 615 F.2d 1146 (6th Cir. 1980) (holding that "[i]n order to prove an entitlement to benefits, it is necessary to find that the plaintiff has a basis in law existing outside the act for its claim"), *See also* 42 U.S.C. § 4602 (2007) (stating that the provisions of section 4651 of this title "create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation. Nothing in this act shall be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of value or of damage").

[333] The term "federal agency" means "any department, agency, or instrumentality in the executive branch of the Government, any wholly owned Government corporation, the Architect of the Capitol, the Federal Reserve banks and branches thereof, and any person who has the authority to acquire property by eminent domain under Federal law." 42 U.S.C. § 4601(1) (2007).

[334] *See* 42 U.S.C. § 4605 (2007) (requiring the DOT to promulgate regulations regarding eligibility); 42 U.S.C. § 4604 (2007) (requiring the DOT to promulgate regulations regarding state agency certification); 42 U.S.C. § 4622 (2007) (noting that the DOT may issue regulations regarding moving expenses); 42 U.S.C. § 4626 (2007) (stating that the DOT shall issue regulations regarding housing replacement as a last resort); 42 U.S.C. § 4633 (2007) (requiring the DOT to develop, publish, and issue regulations to carry out the URA).

[335] *See also* Pres. Mem., "Improvement of administration of this chapter," 50 Fed. Reg. 8953 (1985) (noting that the DOT is designated to coordinate and monitor the URARA implementa-

E.2. Displaced Persons, Eligibility, and Benefits

E.2.a. Definition of a Displaced Person

A displaced person

> means…any person who moves from real property, or moves his personal property from real property…as a direct result of a written notice of intent to acquire or the acquisition of such real property in whole or in part for a program or project undertaken by a Federal agency or with Federal financial assistance….[336]

A displaced person also includes

> any person who moves from real property, or moves his personal property from real property…on which such person is a residential tenant or conducts a small business, a farm operation, or a business…as a direct result of rehabilitation, demolition, or such other displacing activity…under a program or project undertaken by a Federal agency or with Federal financial assistance

where such displacement is determined to be permanent.[337]

Certain persons under the Act do not qualify as displaced persons. For example, a displaced person does not include "a person who has been determined, according to criteria established by the head of the lead agency, to be either in unlawful occupancy of the displacement dwelling or to have occupied such dwelling for the purpose of obtaining assistance under this chapter…."[338] The regulations, moreover, provide a "nonexclusive listing" of persons who are not considered to be displaced, such as "[a] person who moves before the initiation of negotiations…unless the Agency determines that the person was displaced as a direct result of the program or project";[339] "[a] person who initially enters into occupancy of the property after the date of its acquisition for the project";[340] or "[a] person who has occupied the property for the purpose of obtaining assistance under the Uniform Act…."[341]

A holdover tenant in possession is not entitled to receive relocation assistance if the acquiring public agency does not require the tenant to move or if the tenant moves as a result of the expiration of the lease. However, if a tenant is ordered subsequently to vacate the premises for the construction of a project while in lawful possession, even if the tenant has entered into a new lease with the agency, the tenant is entitled to relocation assistance.[342] Similarly, persons who are eligible for benefits as owner-occupants when their property is acquired retain these benefits even if they enter into short-term leases with the acquiring agency until actually required to vacate.[343]

E.2.b. Eligibility

Although in 42 U.S.C. § 4622 (relating to moving and related expenses) and § 4625 (relating to relocation planning, assistance coordination, and advisory services) no period of required occupancy is stated, there is a required period of occupancy stated in § 4623 concerning replacement housing for homeowners. Accordingly, in *Tullock v. State Highway Commission of Missouri,*[344] the Eighth Circuit held with respect to §§ 4622 and 4625 that Congress intended that all persons who move from real property as a result of the acquisition of property be entitled to reimbursement of moving expenses and advisory assistance regardless of the date occupancy commenced.[345]

Thus, with respect to § 4623 one must be "displaced from a dwelling *actually owned and occupied* by such displaced person for not less than [180] days prior to the initiation of negotiations for the acquisition of the property."[346] Furthermore, in 42 U.S.C. § 4624 relating to replacement housing for tenants, the dwelling must have been "actually and lawfully occupied by such displaced person for not less than 90 days immediately prior to…the initiation of negotiations for acquisition of such dwelling…."

Actual or constructive occupancy on the date a public agency formally announces its intention to acquire the

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tion while instructing all affected executive departments and agencies to propose common regulations under it).

[336] 42 U.S.C. § 4601(6)(A)(i)(I) (2007).

[337] 42 U.S.C. § 4601(6)(A)(i), (i)(II) (2007).

[338] 42 U.S.C. § 4601(6)(B)(i) (2007).

[339] 49 C.F.R. § 24.2(a)(9)(ii)(A) (2007).

[340] 49 C.F.R. § 24.2(a)(9)(ii)(B) (2007).

[341] 49 C.F.R. § 24.2(a)(9)(ii)(C) (2007). The regulations should be consulted for the complete listing at 49 C.F.R. § 24.2(a)(9)(ii)(A)-(M) (2007).

[342] 49 C.F.R. § 24.2(a)(9)(K) (2007) (excluding from displaced persons a person who is found to be in unlawful occupancy or a person who been evicted for cause). *See* 49 C.F.R. § 24.2(a)(29) (2007) (defining an unlawful occupant as "a person who occupies without property right, title or payment of rent or a person legally evicted, with no legal rights to occupy a property under State law" but stating that "[a]n Agency, at its discretion, may consider such person to be in lawful occupancy") and 49 C.F.R. § 24.206(a) (creating a presumption of lawful occupancy when a person occupies the real property legally on the date of the initiation of negotiations with exceptions). *See also* Superior Strut & Hanger Co. v. City of Oakland, 72 Cal. App. 3d 987, 995–96, 140 Cal. Rptr. 515, 518–19 (Cal. App. 1st Dist. 1977) [*superseded by statute as stated in* Melamed v. City of Long Beach, 15 Cal. App. 4th 70, 18 Cal. Rptr. 2d 729 (Cal. App. 2d Dist. 1993)] (applying the California Relocation Assistance Act, CAL. GOV'T CODE § 7260, *et seq*., and holding that the plaintiff was entitled to relocation benefits even though the lease had expired because the Port of Oakland had informed its tenant that it would eventually demolish the building but would continue to rent the building to the plaintiff during the interim and that the plaintiff's move was the result of an acquisition and a written notice to vacate).

[343] *See, e.g.,* Albright v. State of California, 101 Cal. App. 3d at 21, 161 Cal. Rptr. at 321 (the court stating in a matter involving the state relocation assistance law that the court could not accept the argument that "individuals who are required to move because of a public entity's acquisition of their property would be ineligible for relocation benefits simply because they continued to rent from the public entity in the interim").

[344] 507 F.2d 712 (8th Cir. 1974).

[345] *Id.* at 715–17.

[346] 42 U.S.C. § 4623(a)(1) (2007) (emphasis supplied).

property for a proposed project is a prerequisite to receiving relocation benefits even if a person actually owns the property on that date.[347] The URA provides "protection…[only] for those who moved after receiving formal notice of an acquisition because of a proposed project, but not to those who moved without notice, based merely on speculation that acquisition might take place."[348] The URA's intent is to exclude from coverage persons who otherwise might attempt to obtain substantial relocation benefits by moving into property after the acquisition process had begun.[349]

Thus, for purposes of § 4623 the occupancy requirement is critical. For instance, owners of property acquired by a city who do not occupy the property are not displaced persons and therefore are not entitled to relocation benefits.[350] However, under the constructive occupancy rule that developed under the URA, as explained in *Ledesma v. Urban Renewal Agency,*[351]

> [o]rdinarily, the 180 day occupancy requirement for homeowners is intended to be the period immediately preceding initiation of negotiations. However, if a displaced homeowner has been required to temporarily leave his home for such reasons as being drafted into the Armed Forces, being detailed to another geographic location by his employer, or otherwise being employed for a limited period of time in a location which does not permit fulltime residency in his home, he may be deemed to be in 'constructive occupancy.' 'Constructive occupancy' may also be determined to exist if a person is temporarily confined to a hospital or is otherwise absent from his dwelling for reasons of health or an emergency. Determinations that a homeowner was in 'constructive occupancy' during the 180 day period prior to initiation of negotiations must be made on a case-by-case and HUD concurrence is required before a payment may be made. This concept of 'constructive occupancy' does not apply to an absentee owner.[352]

Certain displaced tenants or owner-occupants may be entitled to receive a payment of up to $5,250 for rent or down-payment assistance.[353] To be eligible, the displaced person must have "actually and lawfully occupied the displaced dwelling for at least 90 days immediately prior to the initiation of negotiations, and…rented, or purchased, and occupied a decent, safe, and sanitary replacement dwelling within one year…."[354] The formula in 49 C.F.R. § 24.402(b)-(c) specifies the amount that is to be paid to such displaced person.[355]

As stated, a person who moves in mere anticipation that the property will be acquired for a public project is not within the class of displaced persons who may obtain the benefits of the Act.[356] Also, if one enters into occupancy of a dwelling after its ownership has passed to an acquiring agency, the person is ineligible for a moving expense and dislocation allowance under the URA.[357] On the other hand, a person may be eligible to receive benefits even if the move is not from the actual parcel of property being acquired by the public agency.[358] Other situations, of course, have arisen requiring the courts to decide whether one is a displaced person who qualifies for assistance.[359]

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[347] *See* Messer v. V.I. Urban Renewal Bd., 623 F.2d 303, 306–07 (3d Cir. 1980). *See also* Carr v. City of Pittsburgh, 837 A.2d 655 (Pa. Commw. 2003), *appeal denied*, 582 Pa. 690, 870 A.2d 325 (2005) (noting that a tenant must be in legal possession at the time of acquisition under Pennsylvania's Uniform Relocation Act).

[348] S*ee* Messer v. V.I. URB, 623 F.2d at 306.

[349] *See* Alexander v. United States Dep't of Hous. and Urban Dev., 441 U.S. 39, 61, 99 S. Ct. 1572, 60 L. Ed. 2d 28 (1979).

[350] *See* Reasor v. City of Norfolk, Va., 606 F. Supp. 788, 791 (E.D. Va. 1984) (holding that "'displaced' persons include occupants, but not owners").

[351] *See* 432 F. Supp. 564 (S.D. Tex. 1977). *See also* Seeherman v. United States Dep't of Hous. and Urban Dev., 404 F. Supp. 1318, 1319, n.1 (M.D. Pa. 1975) (stating also that the constructive occupancy rule was not codified anywhere).

[352] *Id.* at 567 n.1 (stating that "[w]hile the rule is not definitively codified, it presumably stems from the Act's mandate that 'fair and equitable treatment' of those displaced as a result of federally assisted programs is required").

[353] *See* 49 C.F.R. § 24.402(c).

[354] *See* 49 C.F.R. § 24.402(a)(1)-(2).

[355] 49 C.F.R. § 24.503 provides the same assistance to displaced tenants or owner-occupants of a mobile home and/or site. *See* 49 C.F.R. § 24.503(a)-(c) (stating that the same general requirements found in 49 C.F.R. § 24.402 must be met for eligibility under this section).

[356] *See also* Messer v. V.I. Urban Renewal Bd., 623 F.2d 303, at 307 (holding that a person who moves before receiving a formal notice of intent to acquire the property is not entitled to benefits under the URA). *See also* 49 C.F.R. § 24.2(a)(9)(i)(A)-(C) (2007) (setting forth three bases for one to be deemed to be a displaced person, including a person who moves from real property as a *direct result* of written notice of intent to acquire); 49 C.F.R. § 24.2(a)(9)(i) (2007) (defining displaced person and appearing to differentiate between provisions that require occupancy and those that do not; 49 C.F.R. § 24(a)(9)(C) (2007) (excluding from the definition "a person who has occupied the property for the purpose of obtaining assistance under the Uniform Act").

[357] S*ee* Lewis v. Brinegar, 372 F. Supp. 424, 430–31 (W.D. Mo. 1974).

[358] S*ee* Beaird-Poulan Div. of Emerson Elec. Co. v. Dep't of Highways, State of La., 441 F. Supp. 866, 871–72 (W.D. La. 1977), *aff'd*, 616 F.2d 255 (5th Cir. 1980), *cert. denied*, 449 U.S. 971, 101 S. Ct. 383, 66 L. Ed. 2d 234 (1980), *reh. denied*, 449 U.S. 1104, 101 S. Ct. 903, 66 L. Ed. 2d 832 (1981).

[359] S*ee* Nagi v. United States*,* 751 F.2d 826 (6th Cir. 1985) (holding that a displaced couple's extended travel abroad did not show that the couple had separate tenancies that would preclude them from relocation benefits); Norfolk Redevelopment and Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Va.*,* 464 U.S. 30, 104 S. Ct. 304, 78 L. Ed. 2d 29 (1983) (holding that a utility company was not a displaced person within the meaning of the URA and that the Act did not deal with the separate problem posed by relocation of utility service lines); Alexander v. United States Dep't of Hous. and Urban Dev., 441 U.S. 39, 62, 99 S. Ct. 1572, 60 L. Ed. 2d 28 (1979) (holding that inasmuch as HUD had acquired the property as a result of a default under a mortgage the tenants were not displaced persons because HUD had not acquired the property in furtherance of a federal project). With respect to cases arising under

E.2.c. Relocation Benefits

Any covered person, whether owner-occupant or tenant of a dwelling, is entitled under the URA to payment for the actual expenses incurred because of relocation. As provided in 42 U.S.C. § 4622(a)(1)-(4), allowable expenses include, for example,

> (1) actual reasonable expenses in moving…; (2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation….; (3) actual reasonable expenses in searching for a replacement business or farm….; [and] (4) actual reasonable expenses necessary to reestablish a displaced farm, nonprofit organization, or small business at its new site, but not to exceed $10,000….[360]

As far as a partial taking of property is concerned, if a project would only take a portion of the real estate and leave the owner with an uneconomic remnant, the agency must make an offer to acquire the entire property.[361]

Pursuant to 42 U.S.C. § 4622(b) and 49 C.F.R. § 24.302, a covered person displaced from a dwelling who does not wish to complete the necessary documentation may receive "an expense and dislocation allowance." A displaced business also may accept a fixed payment "in lieu of the payments for actual moving and related expenses, and actual reasonable reestablishment expenses provided by §§ 24.301, 24.303 and 24.304. Such fixed payment…shall equal the average annual net earnings of the business…but not less than $1,000 nor more than $20,000."[362]

As for a displaced farm operation, the owner "may choose a fixed payment, in lieu of the payments for actual moving and related expenses and actual reasonable reestablishment expenses, in an amount equal to its average annual net earnings…but not less than $1,000 nor more than $20,000."[363] A farm operation must be conducted solely or primarily for the production of one or more agricultural products or commodities for sale or home use and be producing customarily such products or commodities in such quantity to be capable of contributing materially to the operator's support.[364]

Under 42 U.S.C. § 4623(a)(1), the "head of the displacing agency shall make an additional payment not in excess of $22,500 to any displaced person" otherwise meeting the section's 180-day ownership and occupancy requirement that is to include, for example, "[t]he amount, if any, which when added to the acquisition cost of the dwelling acquired by the displacing agency, equals the reasonable cost of a comparable replacement dwelling."[365] The regulations address what constitutes a comparable replacement dwelling.[366] As now provided in 49 C.F.R. § 24.403(4), "[t]o the extent feasible, comparable replacement dwellings shall be selected from the neighborhood in which the displacement dwelling was located or, if that is not possible, in nearby or similar neighborhoods where housing costs are generally the same or higher."[367]

For comparable housing to be acceptable, it must meet the definition of "decent, safe and sanitary" as provided in 49 C.F.R. § 24.2(a)(8), which provides in part that "decent, safe, and sanitary dwelling means a dwelling which meets local housing and occupancy codes." However, the dwelling may satisfy other standards as stated in the regulations that "are not met by the local code shall apply unless waived for good cause by the Federal Agency funding the project."[368]

If an owner is required to pay a higher rate of interest to acquire a substitute dwelling than he or she was paying on the dwelling acquired for the project, the owner is entitled to payment for additional interest.[369] A qualified relocatee may recover closing costs incidental to the purchase of a replacement dwelling.[370] Reimbursable incidental costs may include other items if the amounts involved are reasonable and if such costs are normally paid by the buyer.[371] If certain requirements are satisfied, "[a] tenant or owner-occupant displaced from a dwelling is entitled to a payment not to exceed

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the Pennsylvania and California relocation assistance laws, s*ee also Carr*, 837 A.2d at 661 (holding that the city's purchase of a mobile home park from the owner for purposes of building a community recreation center was not an "acquisition" and thus former residents of the park were not displaced persons entitled to reimbursement for their relocation expenses); Kong v. City of Hawaiian Gardens Redevelopment Agency, 101 Cal. App. 4th 1317, 125 Cal. Rptr. 2d 1 (Cal. App. 2d Dist. 2002) (concluding that the plaintiff did not forfeit eligibility for relocation payments by continued subleasing of the premises).

[360] *See* 49 C.F.R. § 24.301(g)(1)-(18) (2007) (regarding various expenses eligible for reimbursement). Note, however, that a business relocatee is not entitled to compensation under the URA for expenses that constitute an enhancement. *See* Supreme Oil Co. v. Metro. Transp. Auth., 157 F.3d 148, 151–52 (2d Cir. 1998), *cert. denied*, 528 U.S. 868, 120 S. Ct. 167, 145 L. Ed. 2d 142 (1999) (holding that nothing under the URA suggests a continuing obligation on the part of the federal government to pay for a business expansion or to comply with local codes after the business's initial relocation).

[361] Supreme Oil Co. v. Metro. Transp. Auth., 157 F.3d at 151–52.

[362] 49 C.F.R. § 24.304(c) (2007). *See also* 49 C.F.R. §§ 24.305(a)(1)-(6) (2007) for requirements that must be met by a business to qualify for the election.

[363] 49 C.F.R. § 24.304(c) (2007).

[364] 49 C.F.R. § 24.2(a)(12) (2007).

[365] 42 U.S.C. § 4623(a)(1)(B) (2007).

[366] 49 C.F.R. § 24.2(a)(6) (2007).

[367] *Compare* 49 C.F.R. § 24.403(4) (2007) with Mejia v. United States Dep't of Hous. and Urban Dev., 518 F. Supp. 935, 938 (N.D. Ill. 1981) (holding that a comparable dwelling does not mean a dwelling in the "immediate neighborhood.").

[368] See 49 C.F.R. § 24.2(a), (a)(8)(i)-(vii) (2007) for standards to be met that are not satisfied by the local code.

[369] *See* 42 U.S.C. § 4623(a)(1)(B) (2007); *see also* 49 C.F.R. § 24.401(d) (2007).

[370] *See* 42 U.S.C. § 4623 (a)(1)(C) (2007); *see also* 49 C.F.R. § 24.401(e) (2007).

[371] *See* 42 U.S.C. § 4623 (a)(1)(C) (2007); *see also* 49 C.F.R. § 24.401(b)(3) (2007).

$5,250 for rental assistance…or downpayment assistance…."[372]

Finally, as provided in 49 C.F.R. § 24.3, "[n]o person shall receive any payment under this part if that person receives a payment under Federal, State, local law, or insurance proceeds which is determined by the Agency to have the same purpose and effect as such payment under this part."[373] Thus, if the replacement housing payments are accepted by the homeowner under the relocation aspect of the case, the homeowner would not be entitled to additional payments in the condemnation until such payments exceed the replacement housing payment that would have been paid previously.[374]

E.3. Last Resort Housing

Under the provisions of the URA, no person may be required to move from his dwelling on account of any federal project unless the head of the agency that is displacing the person is satisfied that a comparable replacement dwelling is available to him. A state agency must provide "satisfactory assurances" to the head of the federal agency that comparable replacement dwellings will be available to displaced persons within a reasonable time prior to displacement as a condition to receiving federal financial assistance.[375] The purpose of these assurances is to protect persons displaced under federal law.[376]

Under 49 C.F.R. § 24.404 (a), "[w]henever a program or project cannot proceed on a timely basis because comparable replacement dwellings are not available within the monetary limits for owners or tenants…the Agency shall provide additional or alternative assistance under the provisions of this subpart." It has been held that a state adequately complied with § 4630 when

> [t]he state prepared an extensive relocation plan. As of the date the case was submitted to this court, the MSHC had relocated 312 persons, moved 105 homes and relocated 4 businesses from the southern segment. Almost 1,300 persons and 415 residences have been relocated from the northern segment. In preparing the study, the state defendants interviewed relocatees and tabulated their needs, conducted a spot check of 5 percent of the available housing in the area and considered the availability of financing.[377]

The broad discretion given to a displacing agency to provide last resort housing does not permit it to construct new housing if there is an adequate supply of existing housing available.[378] Similarly, the agency is not required to construct new housing if the agency is able to assure the availability of replacement housing by other means, including making a payment in excess of the statutory limits.[379] The regulations now provide that a comparable replacement dwelling should be "[i]n a location generally not less desirable than the location of the displaced person's dwelling with respect to public utilities and commercial and public facilities, and reasonably accessible to the person's place of employment."[380] The replacement housing does not have to be of the same type as long as it is comparable.[381]

E.4. Uniform Real Property Acquisition Policy

Section 4655 of subchapter III provides that "the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with, an acquiring agency…unless he receives satisfactory assurances from such acquiring agency" that the agency will be guided by the policies and provisions respectively of §§ 4651 and 4652 of the Act and that "property owners will be paid or reimbursed for necessary expenses as specified in sections [4653 and 4654]."[382] Duties imposed under the Act may be delegated from a federal agency to a requesting state agency.[383]

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[372] *See* 49 C.F.R. § 24.402(a) (2007); *see also* 42 U.S.C. § 4624(a)(2) (2007).

[373] *See* 42 U.S.C. § 4631(b) (2007).

[374] *See* 49 C.F.R. § 24.3 (2007) (prohibiting duplicate payments).

[375] 42 U.S.C. § 4630(3) (2007). *See also* 49 C.F.R. § 24.4 (2007).

[376] *See* 42 U.S.C. § 4621 (2007) (setting forth the policies of the URA to provide for fair, uniform, and equitable treatment of all displaced persons as a result of programs or projects undertaken by federal agencies or with the aid of federal funds); *see also* 49 C.F.R. §§ 24.1 (2007) (stating purpose of the URA) and 24.101 (stating applicability of acquisition requirements). *See also* La Raza Unida of S. Alameda County v. Volpe, 488 F.2d 559, 562 (9th Cir. 1973) (holding that it was "much too late for the State to avoid compliance by withdrawing State Project 238 from the Federal-aid system described in 23 U.S.C. § 103").

[377] Katsev v. Coleman, 530 F.2d 176, 180 (9th Cir. 1976). *See* 42 U.S.C. § 4630(3) (2007) (providing that the head of a federal agency shall receive satisfactory assurances that "within a reasonable period of time prior to displacement, comparable replacement dwellings will be available…"). *See also* 49 C.F.R. § 24.4 (2007) (concerning assurances, monitoring, and corrective action).

[378] *See* 49 C.F.R. § 24.404(c)(1)(iii) (2007) (concerning replacement housing of last resort). *See also* Soc'y Hill Civic Ass'n v. Harris, 632 F.2d 1045, 1056–57 (3d Cir. 1980) (holding that the Association had standing to bring claims that a consent decree contemplated housing more luxurious than permissible under applicable regulations).

[379] *See* 49 C.F.R. § 24.404(c)(1) (2007). *See also* Dukes v. Durante, 192 Conn. 207, 216, 471 A.2d 1368, 1378 (Conn. 1984) (noting that the URA requires an acquisition of property for there to be relocation benefits but the state relocation assistance law did not).

[380] *See* 49 C.F.R. § 24.2(a)(6)(v) (2007).

[381] *See* 49 C.F.R. § 24.2(a)(6) (2007) (defining comparable replacement dwelling and stating that it "need not possess every feature of the displacement dwelling").

[382] *See* 42 U.S.C. § 4655(a), (a)(1)-(2) (2007).

[383] *See* 42 U.S.C. § 4604 (2007). *See* 42 U.S.C. § 4632 (2007) (authorizing a state agency to contract with any entity or person for services in connection with relocation assistance programs while requiring that it utilize state or local housing agencies, or like agency, whenever practicable to carry out its obligations under § 4626). *See also* 49 C.F.R. §§ 24.205 (2007)

The URA sets forth a uniform policy on real property acquisition practices. Section 4651 states that

> to encourage and expedite the acquisition of real property by agreements with owners…
>
> (1) The head of a Federal agency shall make every reasonable effort to acquire expeditiously real property by negotiation.
>
> (2) Real property shall be appraised before the initiation of negotiations….
>
> (3) Before the initiation of negotiations for real property, the head of the Federal agency concerned shall establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established…. Where appropriate the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.
>
> (4) No owner shall be required to surrender possession of real property before the head of the Federal agency concerned pays the agreed purchase price, or deposits with the court….
>
> (5) [N]o person lawfully occupying real property shall be required to move from a dwelling…or to move his business or farm operation, without at least ninety days' written notice….
>
> ….
>
> (8) If any interest in real property is to be acquired by exercise of the power of eminent domain, the head of the Federal agency concerned shall institute formal condemnation proceedings….
>
> (9) If the acquisition of only a portion of a property would leave the owner with an uneconomic remnant, the head of the Federal agency concerned shall offer to acquire that remnant.[384]

A provision in 42 U.S.C. § 4651(3) requiring that a statement and summary of the appraisal be provided to the property owner does not entitle the owner to obtain a copy of the full appraisal.[385] Furthermore, a general policy of providing consistent treatment of property owners does not permit a condemnee to introduce into evidence the prices paid by the condemnor for other parcels acquired for the project.[386] The agency doing the displacing need not wait until 90 days before commencement of construction of a project to give a written notice to vacate as required by 42 U.S.C. § 4651(5).[387]

The failure of a state agency to comply with the URA's policies on the acquisition of real property may preclude the state from obtaining federal funding for a project, because "Congress may constitutionally impose conditions on voluntary programs providing states with federal funding."[388] However, an agency's noncompliance with the URA's specific policy provisions on the acquisition of real property has little, if any, effect on the validity of a condemnation action. Although "[n]o person to be displaced shall be required to move…unless at least one comparable replacement dwelling…has been made available to the person,"[389] a public agency is not required to provide relocation assistance or a hearing as a precondition to instituting an eminent domain action or obtaining the right to possession of the property.[390] In the event of litigation, if there is a judgment in favor of an owner or if the government abandons its condemnation proceedings, an owner may recover his or her reasonable litigation expenses.[391] However, an eminent domain action may be halted if state statutory provisions require the condemnor to follow specified acquisition procedures.[392]

E.5. Administrative Appeals and Judicial Review

E.5.a. Determinations of Relocation Benefits Under Subchapter II

Pursuant to 49 C.F.R. § 24.10(b), "[a]ny aggrieved person may file a written appeal with the Agency in any case in which the person believes that the Agency has failed to properly consider the person's application for assistance under this part." As for the time limit for initiating an appeal, "[t]he Agency may set a reasonable time limit for a person to file an appeal. The time limit shall not be less than 60 days after the person receives written notification of the Agency's determination on the person's claim."[393]

(relocation planning, advisory services, and coordination) and 24.601–602 (2007) (concerning certification).

[384] 42 U.S.C. § 4651 (2007). *See also* 49 C.F.R. § 24.102(c) (2007).

[385] *See* Wise v. United States, 369 F. Supp. 30, 32 (W.D. Ky. 1973). The court held nevertheless that the agency is "required to furnish the owner with a written statement of the basis for the amount established as a just compensation and a summary of that basis." *Id.*

[386] *See* Rapid City v. Baron, 88 S.D. 693, 699, 227 N.W.2d 617, 620 (1975).

[387] *See also* 815 Mission Corp. v. Superior Court, 22 Cal. App. 3d 604, 99 Cal. Rptr. 538 (Cal. App. 1st Dist. 1971) (involving the state relocation assistance law and rejecting petitioner's argument that the 90-day notice was given prematurely).

[388] *See* City of Columbia, S.C. v. Costle, 710 F.2d 1009, 1014 n.3 (4th Cir. 1983).

[389] *See* 49 C.F.R. § 24.204(a) (2007). *See also* City and County of Honolulu v. Toyama, 61 Haw. 156, 598 P.2d 168 (Haw. 1979) (construing Hawaii's State Assistance to Displaced Persons Act).

[390] *See* United States v. 131.68 Acres of Land, More or Less, 695 F.2d 872, 876 (5th Cir. 1983), *cert. denied*, 464 U.S. 817, 104 S. Ct. 77, 78 L. Ed. 2d 88 (1983).

[391] *See* 42 U.S.C. § 4654 (2007); *see also* 49 C.F.R. § 24.107 (2007).

[392] *See* State *ex rel*. Weatherby Adver. Co. v. Conley, 527 S.W.2d 334, 341–42 (Mo. 1975).

[393] *See* 49 C.F.R. § 24.10(c) (2007).

There was some question initially whether there was a right of review of an acquiring agency's determinations on relocation benefits. However, after a claimant has complied with the process for an administrative appeal but has not received the requested relief, the claimant is entitled to seek judicial review of the relocation benefit decision.[394] Actions taken under those sections of the Act regarding determinations on benefits are reviewable under Title 5 of the Administrative Procedure Act, §§ 551 *et seq*. and 701 *et seq*.[395] Thus, it appears to be settled that a district court has jurisdiction over a suit challenging a denial of benefits under subchapter II on relocation assistance.[396] As the court stated in *Smith v. Missouri State Highway Commission*[397] in reversing a lower court's judgment that had affirmed the highway commission's denial of relocation benefits under the URA:

> We hold that such judicial review of the action of respondent Highway Commission was authorized and appropriate….
>
> Neither do we agree with the respondent, that appellant's rights involved in this entire proceeding, are not "private rights" or that the determination thereof was not a quasi-judicial action…. The right of appellant for assistance and compensation for the necessary relocation of his business was assuredly not a public right….
>
> We hold that the order of respondent denying appellant's claim under the Federal "Highway Relocation Assistance" Act of 1968 was subject to judicial review and that, therefore, we have jurisdiction of this appeal.[398]

A failure to exhaust procedures at the administrative level usually will result in a court's dismissal of an action.[399]

E.5.b. No Private Right to Enforce Federal Real Property Acquisition Policies

Section 4602(a) provides that "the provisions of section 4651 of this title create no rights or liabilities." Thus, it has been held that issues involving acquisition policy set forth in § 4651 of subchapter III of the URA are not justiciable.[400] Although the court held in *Bethune v. United States Department of Housing and Urban Development*[401] that the requirement that a state or local agency must comply with the federal acquisition policies as a condition of receiving federal reimbursement created a right indirectly in displaced persons as third party beneficiaries to enforce compliance with such policies,[402] other federal courts specifically rejected this approach. Because "section 102(a) [42 U.S.C. § 4602(a)]…preclude[s] judicial review of federal and state agency actions under the real property acquisition practices of section 301 [§ 4651] of the Act…[f]ederal question jurisdiction is thus effectively barred."[403] The majority view appears to be that the federal policies and procedures on acquisition of real property may not be enforced based on a breach of contract theory as held in the *Bethune* case, *supra*.[404]

Finally, it has been held also that there is no subject matter jurisdiction to entertain a *private right of action* for equitable or legal relief under the URA.[405]

F. PAYMENTS TO PUBLIC UTILITIES FOR RELOCATION OF FACILITIES IN HIGHWAY RIGHTS-OF-WAY

F.1. Introduction

Although it is common for utilities to be relocated because of highway construction or improvements, there may be an issue regarding who pays for the relocation. Typically one of two situations is presented. The first situation is a matter between the utility and the condemning authority. When utilities are relocated because of highway construction or improvements, absent statutory authority to the contrary, usually the utility has to pay for the relocation.[406] As stated in *CenterPoint*

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[394] *See* United States v. 249.12 Acres of Land, More or Less, 414 F. Supp. 933, 934 (W.D. Okla. 1976) (citations omitted). *See also* 49 C.F.R. § 24.10 (2007) (concerning appeals).

[395] *Id.* at 934 (citations omitted).

[396] *See* 49 C.F.R. § 24.10(b) (2007) (noting that an eligibility determination may be grounds for an appeal). *See also* Supreme Oil Co. v. Metro. Transp. Auth., 157 F.3d at 151; Robzen's, Inc. v. United States Dep't of Hous. and Urban Dev., 515 F. Supp. 228, 231 (M.D. Pa. 1981) (involving 42 U.S.C. § 4622 but not reaching the question of whether there was a direct cause of action under the URA).

[397] 488 S.W.2d 230 (Mo. Ct. App. Kansas City Dist. 1972).

[398] *See id.* at 234–35.

[399] *See* 49 C.F.R. § 24.10 (2007).

[400] *See* United States v. 249.12 Acres of Land, More or Less, 414 F. Supp. at 934.

[401] *See* Bethune v. United States Dep't of Hous. and Urban Dev., 376 F. Supp. 1074 (W.D. Mo. 1972).

[402] *See id.* at 1074 (holding that owners of property within area proposed to be taken by the courts were third party beneficiaries of a contract between Department of Housing and Urban Development and enjoining the county from continued condemnations of property until the county complied with the URA).

[403] *See* Barnhart v. Brinegar, 362 F. Supp. at 472–73.

[404] *See* Nall Motors, Inc. v. Iowa City, Iowa, 410 F. Supp. 111, 116 (S.D. Iowa 1975), *aff'd per curiam*, 533 F.2d 381 (8th Cir. 1976). The district court in *Nall Motors, Inc.,* held that 42 U.S.C. § 4602(a) "clearly and convincingly evinces an attempt to preclude judicial review of agency action under § 4651" regarding land acquisition policies. *Id.* at 115. *See also* Bunker Props, Inc. v. Kemp, 524 F. Supp. 109, 112 (D. Kan. 1981) (holding that there was no federal jurisdiction of the plaintiffs' claim that they were third party beneficiaries to an agreement between the state transportation agency and the federal government).

[405] *See* MakCo, Inc. v. Smith, 763 F. Supp. 1003, 1005–06 (W.D. Ark. 1991) (citations omitted).

[406] *See, e.g.,* N. States Power Co. v. Fed. Transit Admin., 358 F.3d 1050, 1053 (8th Cir. 2004); Nw. Natural Gas Co. v. City of Portland, 70 Or. App. 647, 653–54, 690 P.2d 1099, 1103 (Ct. App. 1984); Hampton Roads Sanitation Dist. Comm'n v. City of Chesapeake, 218 Va. 696, 700, 240 S.E.2d 819, 822 (1978); N.Y.

Energy Houston Electric LLC v. Harris County Toll Road Authority[407]

> [t]he "long-established common law principle [requires] that a utility forced to relocate from a public right-of-way must do so at its own expense…." [B]ecause "the main purposes of roads and streets are for travel and transportation…[,] it is clear that [utilities may] be required to remove at their own expense any installations owned by them and located in public rights of way whenever such relocation is made necessary by highway improvements…." When applying this rule, "there is no material difference…between a utility company and a municipal corporation…." The common law, however, controls only where there is no conflicting or controlling statutory law.[408]

One limitation apparently on the state's power with respect to the relocation of utility facilities is that the state must be acting reasonably.[409]

The second situation, discussed *infra*, is presented when there is statutory authority for the reimbursement of utilities for relocating facilities from the highway right-of-way. Even prior to the Federal Highway Act of 1956,[410] some states had enacted statutes providing for reimbursement of utilities under some circumstances for having to relocate. Since the enactment of 23 U.S.C. § 123, the Federal Highway Administration (FHWA) reimburses states for much of their costs for utility relocation.[411] One effect of § 123 was to encourage states to enact legislation to reimburse utilities.

As used herein and as defined in 23 U.S.C. § 123(b), "[t]he term 'utility,' …include[s] publicly, privately, and cooperatively owned utilities." As provided in the regulations, the term utility means

> a privately, publicly, or cooperatively owned line, facility or system for producing, transmitting, or distributing communications, cable television, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water not connected with highway drainage, or any other similar commodity, including any fire or police signal system or street lighting system, which directly or indirectly serves the public….[412]

Under § 123 federal funds are available in a particular case only when "a utility's costs are compensable under state law"[413]—that is, there may not be reimbursement if reimbursement for relocation under § 123 would "violate[] the law of the State or violates a legal contract between the utility and the State."[414]

F.2. Compensation for Taking or Damaging of a Utility's Property Interest

F.2.a. Compensation for Relocation from Utility-Owned Property or an Easement

A utility's facilities may be located on land that was acquired by the utility in fee simple from the owner; the facilities may be situated on privately-owned land over which the utility has purchased or condemned an easement for its facilities; or they may be on private property with the landowner's permission. The highway authority's right-of-way may be adjacent to the utility under one of the foregoing conditions, or the highway authority may have acquired or condemned property to which the utility may have some prior right that has not been extinguished by purchase or condemnation.

The nature of the utility's interest therefore is important in determining whether the utility must be paid for relocating its facilities from their present position along the right-of-way.[415] The authority of a state to regulate reasonably its streets and highways is well established.[416] Included within the scope of this author-

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City Tunnel Auth. v. Consol. Edison Co. of N.Y., Inc., 295 N.Y. 467, 474–75, 68 N.E.2d 445, 448 (N.Y. 1946).

[407] 436 F.3d 541 (5th Cir. 2006), *cert. denied*, 548 U.S. 907, 126 S. Ct. 2945, 165 L. Ed. 2d 956 (2006).

[408] *Id.* at 543–44 (some citations omitted) (footnotes omitted) (*citing* Norfolk Redevelopment & Hous. Auth. Potomac Tel. Co. of Va., 464 U.S. 30, 34, 104 S. Ct. 304, 78 L. Ed. 2d 29 (1983); State v. City of Austin, 160 Tex. 348, 331 S.W.2d 737, 741 (1960)). *See also* Benbrook Water & Sewer Auth. v. City of Benbrook, 653 S.W.2d 320, 323–24 (Tex. Ct. App. 1983); City of Grand Prairie v. City of Irving, 441 S.W.2d 270, 273 (Tex. Civ. App. 1969); City of Grand Prairie v. Am. Tel. and Tel. Co., 405 F.2d 1144, 1146 (5th Cir. 1969) (all holding as a general rule that utilities can be required to relocate from the public right-of-way at their own expense).

[409] *See* N. States Power Co. v. Minn. DOT, 2002 Minn. App. LEXIS 999, at *6 (finding that a deadline imposed by the Minnesota Department of Transportation was unreasonable).

[410] 23 U.S.C. § 123 (2007).

[411] *See* § 5F, *infra*.

[412] 23 C.F.R. § 645.105 (2007). *See also* 23 U.S.C. § 109(l)(2)(A) (defining "utility facility" in similar terms).

[413] Artesian Water Co. v. State of Del., Dep't of Highways and Transp., 330 A.2d 432, 437 (Super. Ct. 1974), *aff'd as modified by* 330 A.2d 441 (Del. 1974), (*citing* Potomac Elec. Power Co. v. Fugate, 211 Va. 745, 180 S.E.2d 657 (1971); S.C. State Highway Dep't v. Parker W. & S. Subdistrict, 247 S.C. 137, 146 S.E.2d 160 (1966); Dep't of Highways v. Sw. Elec. Power Co., 243 La. 564, 145 So. 2d 312, 329 (1962)).

[414] Artesian Water Co. v. Del. DOT, 330 A.2d at 436 (*quoting* 23 U.S.C. § 123).

[415] Although it is not known whether the right is a common one among the states, it is reported that in Wisconsin sanitary sewerage lines have a clear and unequivocal right to locate in highway rights-of-way in Wisconsin without a permit.

[416] *See, e.g.,* S. Bell Tel. & Tel. Co. v. State, 75 So. 2d 796, 799–800 (Fla. 1954)

> (The original location of poles in a street by…public service corporations, pursuant to permission of the authorities, creates no absolute, indefeasible right or irrevocable license to have such poles remain at the particular spot for all time; and irrespective of statutory provisions authorizing the public authorities to direct such changes, said authorities may enforce reasonable regulations requiring these companies to change the location of their poles in a street.) (citation omitted));

Duquesne Light Co. v. Pittsburgh, 251 Pa. 557, 566, 97 A. 85, 88 (1916) ("Such statutes and ordinances are simply a regulation of the exercise of the franchise or privilege granted, to the end that it shall be enjoyed in such a manner as to inconvenience and endanger the general public as little as possible.")

ity is the right to require a utility to relocate its facilities when required by highway construction or improvements.[417] However, if a utility is located entirely on its own private right-of-way or easement, the courts have held uniformly that before the highway agency may compel the relocation of the facilities, the utility's property interest must be purchased or condemned.[418] On the other hand, there may be circumstances in which a state may destroy or alter a lawfully erected structure of a public service corporation if the structure endangers public health or safety.[419]

Generally, however, if a utility is located on a fee or easement that the utility owns, there is no question that compensation must be paid when requiring the utility to relocate.[420] For example, in *Commonwealth, Department of Transportation v. Louisville Gas & Electric Co*.,[421] the grantor of property to the state's predecessor in title for a highway also had granted an easement to the utility's predecessor in interest. The court held that the state, as part of a project to widen the highway, was liable to the utility for the cost of the removal and relocation of the utility's lines.

> [W]hen the government requires the relocation of a perpetual easement for the public convenience its owner is entitled to compensation in the form of damages, which may be determined by the actual cost of relocation. L.G. & E. had a private easement which was taken by state action, therefore it is entitled to just compensation.[422]

The utility's property interest may be created or reserved expressly by deed, thereby requiring the highway authority to purchase or condemn the utility's property.[423] However, it is not always necessary that a utility have a recorded instrument to have an easement. As one court has recognized, "[a]n easement may be created by any one of four methods: 'by grant, implication, prescription, or estoppel.'"[424] Thus, it has been held that the taking of a prescriptive easement is compensable when the highway authority requires utility facilities to be relocated.[425] In *State Highway Commission v. Ruidoso Telephone Co*.,[426] the court held that a utility company's placement of its poles on private land served to create valid easements even though the company had not compensated the landowners prior to the placement of the poles, an event that occurred at about the same time that the road had been widened and reconstructed earlier.[427] "The Commission, having notice of the occupancy and rights of the Company, took its right of way easements subject to the burden of the right of the Company to maintain its lines on the lands in question."[428]

F.2.b. No Compensation for Relocation of Facilities of Utility as Holder of a Permit or Franchise

As a general rule, the courts have held that the placement of a utility's lines in a street, pursuant to a statute, ordinance, franchise, license, or permit, is not a property right but a mere privilege that is subject to reasonable regulation,[429] but the terms of the statute,

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(citation omitted)); W. Union Tel. Co. v. Richmond, 224 U.S. 160, 168, 32 S. Ct. 449, 56 L. Ed. 710 (1912) (involving an admission by the appellant, a utility, that it was subject to reasonable regulation).

[417] *See, e.g.,* CenterPoint Energy Houston Elec. LLC v. Harris County Toll Road Auth*.,* 436 F.3d 541, at 542 (involving a utility's move due to the construction of a highway); N. States Power Co. v. Fed. Transit Admin., 358 F.3d at 1056 (rejecting an argument that the Minnesota Department of Transportation's power was limited to "trunk highways" and not to city streets).

[418] *See CenterPoint Energy Houston Electric LLC,* 436 F.3d at 544, n.3 (*citing City of Grand Prairie,* 405 F.2d at 1146 (holding that where the utility facilities were located in a "private easement…the general rule…has no application"); Magnolia Pipe Line Co. v. City of Tyler, 348 S.W.2d 537, 540 (Tex. Ct. Civ. App. 1961) (noting that the utility's easement was property in the "constitutional sense").

[419] *See* City of Perrysburg v. Toledo Edison Co*.*, 2007 Ohio 1327, at *P 13 (Ohio App. 7th Dist. 2007), *discretionary appeal not allowed,* State v. Howard, 2007 Ohio 4884 (Ohio 2007).

[420] *See CenterPoint Energy Houston Electric LLC,* 436 F.3d at 543-444, 544, n.3 (noting that the common law principle requiring relocation costs at the expense of a utility generally has no application where the utility is located in a private easement). *But see Ark. La. Gas Co.*, 2007 Ohio 1237, at *P 13–14 (discussing state action in regulating a utility's property pursuant to its "police power").

[421] 526 S.W.2d 820 (Ky. 1975).

[422] *Id.* at 822.

[423] *See* 26 AM. JUR. 2D *Eminent Domain* § 860 (1966); *CenterPoint Energy Houston Elec. LLC,* 436 F.3d at 551 (holding as a matter of state statutory construction that the term "eligible utility facilities" described a utility that incurred relocation costs resulting from a county's acquisitions of highway rights-of-way and were thus eligible for reimbursement). *See also Louisville Gas & Electric Co*., 526 S.W.2d at 822 ("The rule is now as it was then, when the government requires the relocation of a perpetual easement for the public convenience its owner is entitled to compensation in the form of damages, which may be determined by the actual cost of relocation.").

[424] Ranallo v. First Energy Corp*.*, 2006 Ohio 6105, at *P 33 (Ohio App. 11th Dist. 2006) (citation omitted) (holding that the trial court erred in granting summary judgment on the basis that the utility company had a license coupled with an interest in a case not involving relocation payments).

[425] *See* State Highway Comm'n v. Ruidoso Tel. Co*.*, 73 N.M. 487, 491, 500, 389 P.2d 606, 608, 615 (1963) (upholding relocation costs for easements obtained by prescription). *See also* Arizona *ex rel*. Herman v. Elec. District No. 2 of Pinal County, 106 Ariz. 242, 474 P.2d 833, 835 (1970) (stating that although there is a general rule that utilities have no vested right to maintain lines on public highway rights-of-ways, an exception exists if the line was there before the dedication of the street or the acquisition of the road by the public body making the road improvement).

[426] 73 N.M. 487, 389 P.2d 606 (1963).

[427] *Id*. at 491, 500, 398 P.2d at 608, 615.

[428] *Id.* at 498, 398 P.2d at 614 (citations omitted).

[429] *See* CenterPoint Energy Houston Elec. LLC v. Harris County Toll Road Auth*.,* 436 F.3d at 543–44, 544 n.3 (discussing the common law principle that utilities forced to relocate from a public right-of-way must do so at their own expense); N.

license, permit, or franchise must be consulted as it likely will govern whether the utility is entitled to reimbursement of its relocation costs. In general, however, utilities that are located in highways or highway rights-of-way by virtue of a license, permit, or franchise that may be authorized by statute acquire no vested right to any specific location in the right-of-way;[430] therefore, a utility ordered to relocate has no property right for which it is entitled to reimbursement for its costs in doing so.[431]

Ordinarily, a franchise

> merely gives [the utility] a general but qualified right to locate its facilities beneath the public roads in order to effectuate its purpose…. [A statutory franchise] does not, in and of itself…grant anything specific to [the utility]; it does not categorize the nature of [the utility's] right to locate its facilities in the public way, for example, in terms of a license, a franchise or an easement. Instead, the nature of the right, as well as any conditions to be placed on its exercise, are to be determined by the appropriate local unit or agency having control over the public roads and whose consent is deemed a condition precedent to the exercise of the right…. [The utility's] interest in the subject location of its facilities must instead be determined by the nature and incidents of the particular franchise…granted.[432]

Accordingly, "the prevailing view in most jurisdictions is that a franchise conferred by the State on a public utility to locate its facilities in the public way creates no compensable property interest in the subject location."[433]

The Delaware Supreme Court in deciding the appeal in *Artesian Water Co. v. State, Department of Highways and Transportation*[434] observed that the franchise agreement in that case between the State and Artesian *did* state that if it became necessary to relocate any of the company's facilities, the highway department "shall designate and approve new and suitable locations…and, upon reasonable notice…the holder of the permit shall relocate…according to such designation."[435] The court held that the agreement was still in effect even though nearly all of the company's facilities had been relocated earlier, in part, because the utility company as a franchisee had continued to make payments after the first relocation.[436]

In another case in which a utility company's permit to locate its water lines in a state right-of-way was subject to the authority of the highway director to require relocation, the company had to do so without reimbursement.[437] The court emphasized that when a utility company accepts a permit to install a line in a highway right-of-way, what the company receives is only a franchise for which no consideration is paid and pursuant to which the company does not acquire any property interest in the right-of-way.[438] Moreover, the court held that it was the company's duty "to find and obtain an alternate route of [its] own."[439] On the other hand, in that case as a matter of the construction of two statutes applicable to the dispute, the court also held that the highway director neither had the authority to specify a new location for the line nor could the director "construct a line at a new location and assess the cost" to the company.[440]

A minority view appears to be represented by the New York Court of Appeals' decision in *In re New York (Gillen Place).*[441] Although the court recognized the common law rule that in the absence of statute a utility company pays its own relocation costs, the court held that the city's "street closing statute" expressly provided for compensation to owners of affected real property, defined in the statute to include, *inter alia*, all "subsurface" structures and every "franchise."[442] However, the court also stated that a franchise granted by the city vested in the utility companies "'a perpetual and indefeasible interest in the land constituting the streets,'"[443] a holding that appears to be a distinct minority view. Finally, the court stated that "[e]ven at common law, then, it would seem that the closing of a street would work a *pro tanto* destruction of claimants' easements and franchise rights for which compensation should be made…."[444]

F.2.c. Compensation for Relocation When the Utility Has a Contract or Lease

A contract or lease for the benefit of a utility may serve as a basis for a claim for reimbursement of the

States Power Co. v. FTA, 358 F.3d 1050, at 1053, 1056 (affirming a summary judgment requiring a utility company to relocate at its own expense due to an order by the Minnesota Department of Transportation).

[430] *See* CenterPoint Energy Houston Elec. LLC v. Harris County Toll Road Auth., 436 F.3d at 543–44; N. States Power Co. v. FTA, 358 F.3d at 1053–54. *See also* Peoples Gas Light & Coke Co. v. City of Chicago, 413 Ill. 457, 460, 474, 109 N.E.2d 777, 779, 786 (Ill. 1952); Merced Falls Gas & Elec. Co. v. Turner, 2 Cal. App. 720, 722, 84 P. 239, 240 (Cal. App. 3d Dist. 1906); New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans, 197 U.S. 453, 458–59, 474, 25 S. Ct. 471, 49 L. Ed. 831 (1905).

[431] Cent. Main Power Co. v. Waterville Urban Renewal Auth., 281 A.2d 233, 240–41 (Maine 1971) (holding that the Authority acted reasonably in requiring the facility to be located underground).

[432] Artesian Water Co. v. State Dep't of Highways & Transp., 330 A.2d 432, at 440 (Del. 1974) (citations omitted).

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

[434] 330 A.2d 441 (Del. 1974).

[435] *Id.* at 443 (citation omitted).

[436] *Id.* at 443–44.

[437] Green v. Noble, 114 Ohio App. 321, 325–27, 182 N.E.2d 569, 573–74 (Ohio App. 10th Dist. 1961).

[438] *Id.* at 327, 182 N.E.2d at 574.

[439] *Id.*

[440] *Id.* at 328, 182 N.E.2d at 575.

[441] 304 N.Y. 215, 106 N.E.2d 897 (1952).

[442] *Id.* at 221–22, 106 N.E.2d at 900.

[443] *Id.* at 223, 106 N.E.2d at 901 (citation omitted).

[444] *Id.* at 224, 106 N.E.2d at 901.

costs for having to relocate from the highway right-of-way. For example, in *City of Perrysburg v. Toledo Edison Co.,*[445] a case in which the utility company was forced to relocate poles for a highway widening project, the utility argued that it was a third party beneficiary. The court did rule that Perrysburg's relocation order was a valid exercise of the municipality's police power as a "'permissive right of use of public highways by public utilities is subordinate to the rights of the public.'"[446] However, the court held that there was an issue of fact concerning whether the utility was a third party beneficiary of an agreement between the city and the state transportation department because the "contract clearly contemplates an expense to be paid to a utility in furtherance of the project, even specifically using the word 'relocation.'"[447]

In another case a county-owned water line was leased to a water service company in a county right-of-way. The county and the company had property rights that could not be extinguished by the State to build a freeway except by purchase, gift, agreement, or condemnation.[448]

F.2.d. Compensation When the Relocation Is Not for a Governmental Purpose

In *Gillen Place, supra,* the court noted another exception to the common law rule that in the absence of a statute or agreement to the contrary, relocation must be for a governmental not a proprietary purpose. In *Gillen Place,* the city's street closing was for a public necessity but the street closing was not for a governmental purpose. Rather, the closing was to make room for the construction of a bus garage and shop, a purpose that the court deemed to be proprietary. Hence, although

> [i]t is true, of course, that street closings usually result in the ultimate appropriation of the land to private ownership, …there is a great difference where, as here found, the very purpose of the closing is to accomplish the devotion of the land to a use by the city which, although in the interest of the public, is nevertheless proprietary…. "[W]hen the change is required in behalf of other public service corporations or in behalf of municipalities exercising a proprietary instead of a governmental function," the common-law rule that utilities maintain their installations in public streets subject to the risk of relocating them at their own expense when public necessity so requires, does not apply.[449]

In a later case from Oregon, however, the Oregon Court of Appeals essentially agreed that the governmental-proprietary distinction was an "anachronism."[450] The case involved the relocation of utilities because of a highway project and the construction of a light rail transit system. The utilities argued that because they were being relocated for the purpose of the construction of a publicly-owned utility, the defendants were acting in a proprietary capacity rather than a governmental one.[451] The utilities argued moreover that they fell within a distinction

> embodied in *City of Los Angeles v. Los Angeles Gas and Electric Corp.*, 251 U.S. 32, 40 S. Ct. 76, 64 L Ed 121 (1919). In that case, the city required a private electric utility to move its fixtures in order to make way for the installation of a city-owned electrical system. The Supreme Court carved an exception to the general common law rule. The city was operating in a "proprietary" as opposed to "governmental" capacity and therefore had to compensate the utility.[452]

The Oregon court stated, however, that it did not find the governmental-proprietary distinction "to be a particularly helpful analytic tool in utility relocation law."[453] The court stated that "Oregon cases do not follow a governmental/proprietary distinction in deciding who must pay," that the "[t]he focus is on public need," and that "broad latitude is given to the legislative determination of that need."[454] Thus, the court held that "[t]he public need involved here has been established beyond question."[455] Finally, in a footnote the court observed that the New York courts, rather than rejecting the governmental-proprietary distinction outright, had stated that the cases decided on the basis of the distinction were limited to their facts.[456]

F.3. Federal Reimbursement of States for Relocation Payments Made to Utilities

F.3.a. Reimbursement as Authorized by 23 U.S.C. § 123

As seen, the general rule is that a state or highway agency is not required in the absence of statute to pay a utility the cost of relocating its facilities in the highway right-of-way when required by highway construction or improvements. In 1956, however, Congress authorized FHWA to reimburse the states for the cost of relocation

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[445] 171 Ohio App. 3d 174, 2007 Ohio 1327, 870 N.E.2d 189 (Ct. App. 2007).

[446] *Id.* at 180, 2007 Ohio 1327, at *P17, 870 N.E.2d at 193 (citation omitted).

[447] *Id.* at 182, 2007 Ohio 1327, at *P41, 870 N.E.2d at 195. The court also held that a provision of the Ohio statutes that authorized payments to a relocating utility because of a program or project was permissive rather than mandatory because of use of the term "may." *Id.,* 171 Ohio App. 3d at 184, 2007 Ohio 1327, at *P48, 870 N.E.2d at 196.

[448] Green v. Noble, 114 Ohio App. at 329, 182 N.E.2d at 575–76.

[449] *In re New York (Gillen Place),* 304 N.Y. at 221, 106 N.E.2d at 899–900.

[450] Nw. Natural Gas Co. v. City of Portland*,* 70 Or. App. 647, 655, 690 P.2d 1099, 1104, n.7 (Ct. App. 1984).

[451] *Id.* at 654, 690 P.2d at 1103.

[452] *Id.*

[453] *Id.* at 656, 690 P.2d at 1104 (footnote omitted).

[454] *Id.* at 656, 690 P.2d at 1105 (citations omitted).

[455] *Id.* at 657, 690 P.2d at 1105.

[456] *Id.* at 656, n.8, 690 P.2d at 1105, n.8 (citation omitted).

of utility facilities in the same proportion that federal funds were authorized for the project.

Section 123 states:

> (a) When a State shall pay for the cost of relocation of utility facilities necessitated by the construction of a project on any Federal-aid system, Federal funds may be used to reimburse the State for such cost in the same proportion as Federal funds are expended on the project. Federal funds shall not be used to reimburse the State under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State. Such reimbursement shall be made only after evidence satisfactory to the Secretary shall have been presented to him substantiating the fact that the State has paid such cost from its own funds with respect to Federal-aid highway projects for which Federal funds are obligated subsequent to April 16, 1958, for work, including relocation of utility facilities.
>
> (b) The term "utility," for the purposes of this section, shall include publicly, privately, and cooperatively owned utilities.
>
> (c) The term "cost of relocation," for the purposes of this section, shall include the entire amount paid by such utility properly attributable to such relocation after deducting therefrom any increase in the value of the new facility and any salvage value derived from the old facility.[457]

Because of § 123, states passed statutes authorizing payment to utilities for their right-of-way relocation cost on certain highways, usually Interstate, and other federal-aid projects. During the period immediately following the enactment of state statutes, several constitutional issues were litigated; however, the courts upheld the constitutionality of state reimbursement statutes.[458] Constitutional issues included claims that the reimbursement statutes were not for a public purpose,[459] extended the state's credit for nongovernmental purposes,[460] were prohibited as being special legislation,[461] or abrogated preexisting agreements requiring utilities to pay relocation costs.[462] Although the constitutionality of the laws generally was upheld, some provisions have been struck down on the basis that there was an unfair or unreasonable classification of utilities for purposes of payment.[463]

[457] 23 U.S.C. § 123(a)-(c) (2007).

[458] *See, e.g.,* Pack v. S. Bell Tel. and Tel. Co., 215 Tenn. 503, 387 S.W.2d 789 (1965); Edge v. Brice, 253 Iowa 710, 113 N.W.2d 755 (1962); Jones v. Burns, 138 Mont. 268, 357 P.2d 22 (1960).

[459] *See, e.g.,* Minneapolis Gas Co. v. Zimmerman, 253 Minn. 164, 91 N.W.2d 642 (1958).

[460] *See, e.g.,* State v. Gainer, 149 W. Va. 740, 143 S.E.2d 351 (1965).

[461] *See, e.g.,* Nw. Bell Tel. Co. v. Wentz, 103 N.W.2d 245 (N.D. 1960).

[462] *See, e.g.,* State Road Comm'n of Utah v. Utah Power & Light Co., 10 Utah 2d 333, 353 P.2d 171 (1960); N.M. *ex rel.* Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

[463] *CenterPoint Energy Houston Elec. LLC,* 436 F.3d at 545–47, 551 (finding the statutes at issue ambiguous as to the meaning of "eligible utility facilities").

F.3.b. States' Eligibility for Reimbursement of Utility Relocation Costs

As seen, on federal-aid primary or secondary systems or the Interstate system, the states may be reimbursed for the cost of relocating utility facilities in proportion to the amount of federal funds spent on the project. Moreover, as seen, reimbursement may be made for relocating utility facilities whether they are publicly, privately, or cooperatively owned.

The federal regulations pertaining to eligibility for reimbursement provide for three categories of federal funding.

> (a) When requested by the STD [State Transportation Department], Federal funds may participate, subject to the provisions of § 645.103(d) of this part and at the pro rata share applicable, in an amount actually paid by an TD [Transportation Department] for the costs of utility relocations. Federal funds may participate in safety corrective measures made under the provisions of § 645.107(k) of this part. Federal funds may also participate for relocations necessitated by the actual construction of highway project made under one or more of the following conditions when:
>
> (1) The STD certifies that the utility has the right of occupancy in its existing location because it holds the fee, an easement, or other real property interest, the damaging or taking of which is compensable in eminent domain,
>
> (2) The utility occupies privately or publicly owned land, including public road or street right-of-way, and the STD certifies that the payment by the TD is made pursuant to a law authorizing such payment in conformance with the provisions of 23 U.S.C. 123, and/or
>
> (3) The utility occupies publicly owned land, including public road and street right-of-way, and is owned by a public agency or political subdivision of the State, and is not required by law or agreement to move at its own expense, and the STD certifies that the TD has the legal authority or obligation to make such payments.[464]

It should be noted also that 23 C.F.R. § 645.107(g) (2007) provides:

> In lieu of the individual certifications required by § 645.107(a) and (c), the STD may file a statement with the FHWA setting forth the conditions under which the STD will make payments for the relocation of utility facilities. The FHWA may approve Federal fund participation in utility relocations proposed by the STD under the conditions of the statement when the FHWA has made an affirmative finding that such statement and conditions form a suitable basis for Federal fund participation under the provisions of 23 U.S.C. 123.

Thus, federal funds may participate if a utility comes within the purview of one or more of the three categories specified in 23 C.F.R. § 645.107(a) (2007); however, the state actually must have made payments to the utility for relocation costs. First, as appears in the regulation, there is reimbursement on a *pro rata* basis when the "utility has the right of occupancy in its existing location because it holds the fee, an easement, or other

[464] 23 C.F.R. § 645.107(a) (2007).

real property interest, the damaging or taking of which is compensable in eminent domain…."[465] On occasion it has been difficult for the utility to show ownership of a compensable interest in the land. For example, the utility may occupy property for many years without a recorded deed or instrument. Local law must be consulted to determine whether a utility may have acquired a property right by adverse possession or prescription.

If a utility places its facilities on private land without paying the landowners, it has been held that the highway department was liable, nevertheless, for the cost of relocation.[466] Moreover, when a utility has a leasehold interest it has a property right that is compensable.[467] On the other hand, it has been held that compensation is not required if the utility's lease is terminable on 60-days notice and the lease in fact is terminated.[468]

The second situation in which a state may be reimbursed for utility relocation costs is, as stated, when a "utility occupies privately or publicly owned land, including public road or street right-of-way, and the STD certifies that the payment by the TD is made pursuant to a law authorizing such payment in conformance with the provisions of 23 U.S.C. 123…."[469] It may be noted that there is some change here from the former regulation that appeared at 23 C.F.R. § 645.103(a). Previously, the federal regulation required that there must be an "affirmative finding" by FHWA that the state law formed a "suitable basis" for federal reimbursement. The regulation, however, now requires only that the state must certify "that the payment by the TD is made pursuant to a law authorizing such payment in conformance with the provisions" of 23 U.S.C. § 123.[470] Although federal law authorizes reimbursement of states for payments to utilities for relocation costs, a state may not be compelled to pay relocation costs to a utility merely because § 123 authorizes federal reimbursement of the state.[471]

The third category in which there is reimbursement is when the

> utility occupies publicy owned land, including public road and street right-of-way, and is owned by a public agency or political subdivision of the State, and is not required by law or agreement to move at its own expense, and the STD certifies that the TD has the legal authority or obligation to make such payments.[472]

Thus, the third subsection is concerned with reimbursement of utilities owned by an agency or political subdivision of a state when the utilities are located on publicly-owned lands or right-of-way. A state must, however, demonstrate to FHWA's satisfaction that it has some legal authority or obligation to pay relocation costs before qualifying for reimbursement.[473]

F.3.c. Utility Relocation and Reimbursable Expenses

The regulations issued pursuant to § 123 set forth in detail the technical requirements for obtaining reimbursement of the costs of relocating utility facilities.[474] Initially, there was some question whether relocation meant only a relocation involving the movement of facilities within the right-of-way or included relocation to a new site outside the right-of-way. The federal regulations provide, however, that expenses are reimbursable for relocation within and without the right-of-way. The term relocation means

> the adjustment of utility facilities required by the highway project. It includes removing and reinstalling the facility, including necessary temporary facilities, acquiring necessary right-of-way on the new location, moving, rearranging or changing the type of existing facilities and taking any necessary safety and protective measures. It shall also mean constructing a replacement facility that is both functionally equivalent to the existing facility and necessary for continuous operation of the utility service, the project economy, or sequence of highway construction.[475]

Most state statutes concerning utility relocation payments include a provision specifying relocation or removal. However, there are some statutes in which there is a reference only to relocation.[476] Where the state's law provides or has been interpreted to provide that a relocation means only those adjustments within the right-of-way, it is possible that reimbursement would not be authorized under § 123. As stated in 23 C.F.R. § 645.103(d):

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[465] 23 C.F.R. § 645.107(a)(1) (2007). *See also* Wichita v. Kan. Gas & Elec. Co., 204 Kan. 546, 464 P.2d 196, 205–06 (1970), (*quoting* a similar provision that appeared in the Federal Bureau of Public Roads, Policy and Procedure Memorandum, ¶ 3a(1)).

[466] State Highway Comm'n v. Ruidoso Tel. Co., 73 N.M. 487, 389 P.2d 606 (1964).

[467] Green v. Noble, 114 Ohio App. 321, 325–27, 182 N.E.2d 569, 573–74 (Ct. App. 1961) (involving a county-owned water line leased to a water service company and located in county right-of-way).

[468] Richfield Oil Corp. v. United States, 178 F. Supp. 799, 800 (1959).

[469] 23 C.F.R. § 645.107(a)(2) (2007).

[470] *Id.*

[471] S.C. State Highway Comm'n v. Parker Water and Sewer Sub-District, 247 S.C. 137, 140, 146 S.E.2d 160, 162 (1966) (holding that "[t]he fact however that Federal funds may be available to aid in the reimbursement of defendant for the cost of relocating its lines has no effect upon the determination of the liability of the state for such costs").

[472] 23 C.F.R. § 645.107(a)(3) (2007).

[473] *Id.*

[474] *See* 23 C.F.R. § 645.103 (2007) (stating when the statute applies); *see also* § 645.107 (2007) (setting forth the eligibility requirements).

[475] 23 C.F.R. § 645.105 (2007).

[476] City of Perrysburg v. Toledo Edison Co., 171 Ohio App. 3d 174, 2007 Ohio 1327, 870 N.E.2d 189 (Ohio App. 6th Dist. 2007) (referring to both relocation and/or removal); CenterPoint Energy Houston Elec. LLC v. Harris County Toll Road Auth., 436 F.3d 541 (5th Cir. 2006) (referring only to relocation); N. States Power Co. v. Fed. Transit Admin., 358 F.3d 1050 (8th Cir. 2004).

> The FHWA's reimbursement to the STD will be governed by State law (or State regulation) or the provisions of this regulation, whichever is more restrictive. When State law or regulation differs from this regulation, a determination shall be made by the STD subject to the concurrence of the FHWA as to which standards will govern, and the record documented accordingly, for each relocation encountered.

The regulations at 23 C.F.R. § 645 (2007), Subpart A, prescribe the policies, procedures, and reimbursement provisions for the utility relocation expenses claimed by state transportation departments. States may claim reimbursement for costs incurred under a transportation department utility agreement and for costs incurred under all FHWA utility agreements.[477] If the facilities at issue are privately owned, located on the owner's land, and devoted exclusively to private use and not directly or indirectly serving the public, then FHWA's right-of-way provisions apply.[478] Otherwise, either the applicable regulation or state law governs, depending on which one is more restrictive.[479]

Federal funds may be used for the costs of utility relocations, subject to § 645.103(d), for safety corrective measures, or for relocations necessitated as a result of highway projects under certain conditions.[480] However, funds may not be used if payments were made by a political subdivision, unless the state transportation department certifies the payments, or if a utility contributes or repays the transportation department.[481]

To simplify the process of utility relocations or adjustments, the state transportation department may act in FHWA's place for reviewing and approving the requirements to authorize the utility to proceed with and complete the work.[482]

The regulations at 23 C.F.R. § 645 (2007), Subpart B, prescribe the policies and procedures for accommodating utility facilities and private lines on the right-of-way of federally-related highway projects. New utility installations within the right-of-way, existing utility facilities retained, relocated, or adjusted within the right-of-way; and private lines permitted to cross the right-of-way all may be accommodated when doing so is lawful and does not jeopardize highway or traffic safety or impair the highway or its aesthetic quality.[483] A state transportation department, however, first must obtain FHWA's approval.[484]

F.4. Attempts to Obtain Reimbursement Under Other Statutes

F.4.a. 23 U.S.C. § 106(a)

In at least one case, because of the particular circumstances involved, a state obtained reimbursement under the Tucker Act of utility relocation cost where there was neither a private easement nor specific statutory authority. As seen in *Arizona by Arizona Highway Dept. v. United States,*[485] the United States had to pay the state because of the operation of 23 U.S.C. § 106(a) rather than 23 U.S.C. § 123.

F.4.b. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970

The concept of utility companies being eligible for the cost of relocating their facilities is relatively new. As seen, under the common law rule a public utility accepts franchise rights in public streets subject to an implied obligation to relocate its facilities at its own expense when required to do so for the construction of a public project.[486] With respect to utilities, 42 U.S.C. § 4622(d) provides for reimbursement of "extraordinary" relocation expenses.[487]

As a result of a 1987 amendment to the URA, adding subsection (d) to § 4622,[488] if a program or project (not undertaken itself for the purpose of relocating a utility) causes a utility to have to relocate, if the utility is located on state or local property for which it has a "franchise or similar agreement" to use the property, and if the relocation results in the owner of the utility "incurring an extraordinary cost in connection with such relocation," the utility is to be provided "a relocation payment which may not exceed the amount of such

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[477] *See* 23 C.F.R. § 645.105 (2007).

[478] 23 C.F.R. § 645.103(c) (2007) (*citing* Right-of-Way and Real Estate, 23 C.F.R. § 710.203 (2007)).

[479] 23 C.F.R. § 645.103(d) (2007).

[480] 23 C.F.R. § 645.107(a), (a)(1-3) (2007). *See* 23 C.F.R. § 645.107(i)-(j) (2007) (approving use of funds for incidental costs, including preliminary engineering and allied services, acquisition of replacement right-of-way, and physical construction work associated with utility relocations for the utility); *see also* 23 C.F.R. § 645.109 (2007) (preliminary engineering); 23 C.F.R. § 645.111 (2007) (right-of-way); 23 C.F.R. § 645.115 (2007) (construction); 23 C.F.R. § 645.117 (2007) (cost development and reimbursement).

[481] 23 C.F.R. § 645.107(b)-(d) (2007). *See* 23 C.F.R. § 645.107(h) (2007) (prohibiting use of funds solely for the benefit or convenience of a utility, its contractor, or a highway contractor). *See* 23 C.F.R. § 645.105 (2007) (defining State Transportation Department as "the transportation department of one of the 50 States, the District of Columbia, or Puerto Rico" and Transportation Department as "the department, commission, board, or official of any state or political subdivision thereof, charged by its law with the responsibility for highway administration").

[482] 23 C.F.R. § 645.119 (2007).

[483] 23 C.F.R. §§ 645.203–205 (2007).

[484] 23 C.F.R. § 645.215 (2007).

[485] 494 F.2d 1285, 1287 (1974) (holding that after Arizona entered into an agreement with a utility company to reimburse the utility for expenses it incurred in relocating its facilities, which was necessitated by construction of an Interstate highway, and an authorized federal representative signed a highway project agreement expressly including the utility adjustment as part of the project, the United States contractually was bound to pay Arizona's proportionate share of the utility relocation costs.)

[486] *See* discussion in § 5F, *infra*.

[487] *See* 49 C.F.R. § 24.306 (2007).

[488] Pub. L. No. 100–17, § 405(d) (Apr. 2, 1987).

extraordinary cost…."[489] What constitutes an "extraordinary cost" is described in § 4622(d).

Prior to 1987 there were unsuccessful attempts to have the URA construed to include relocation of utilities. In *Norfolk Redevelopment and Housing Authority v. Chesapeake & Potomac Telephone Co.,*[490] the U.S. Supreme Court held that the URA did not change the common law rule "that a utility forced to relocate from a public right-of-way must do so at its own expense,"[491] and that the URA did not grant utilities "a new, federal right to reimbursement" for relocating their facilities from the right-of-way.[492]

Also, even earlier in *Artesian Water Co. v. State, Department of Highways and Transportation,*[493] a Delaware court had held that the URA and the Delaware Relocation Assistance Act of 1970 "do not create an absolute right in a utility to be reimbursed for the cost of relocating its facilities in order to facilitate federally assisted highway improvements," and that the utility was not a displaced person within the meaning of the relocation statutes.[494]

G. CONTROL OF OUTDOOR ADVERTISING

Outdoor advertising, primarily billboards, involve competing interests. Although commercial enterprises want to advertise along highways, members of the traveling public and transportation safety specialists want unobstructed views of the highway environment. This section will discuss federal and state legislation and regulations regarding the removal of certain billboards near or visible from the Interstate system and the primary system of highways,[495] valuation and related issues, and relocation expenses for owners of certain billboards that must be removed, as well as the authority of state and local governments to enact laws restricting or even prohibiting billboards and other signs.

G.1. Highway Beautification Act

In 1965 Congress enacted what is popularly known as the Highway Beautification Act, herein the "HBA."[496] Outdoor advertisements adjacent to certain highways that are subject to regulation under the Act[497] include signs, displays, and devices in areas next to Interstate highways and the primary system of highways.[498] Title 23 of the U.S.C., § 131(c), limits signs, displays, or devices after January 1, 1968, if located within [660 feet] of the right-of-way, and on or after July 1, 1975…if located beyond [660 feet] of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way…."[499]

As explained in *Texas Department of Transportation v. Barber,*[500] a 2003 case upholding the constitutionality of the Texas Highway Beautification Act, the federal act

> requires states to effectively control the erection and maintenance of signs within 660 feet of interstate and primary highways and beyond 660 feet in non-urban areas if the signs are designed to be and are visible from such highways. The Federal Act seeks to curb the proliferation of signs along the nation's highways and to "protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." The Federal Highway Beautification Act provides that if states fail to make provisions for effectively controlling such signs, they risk losing ten percent of their federal highway funds.[501]

The HBA, thus, seeks to "protect the public investment in such highways, to promote the safety and rec-

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[489] *See* 42 U.S.C. § 4622(d)(1)(A)-(C) (2007); *see also* 49 C.F.R. § 24.306 (2007) (concerning discretionary utility relocation payments).

[490] 464 U.S. 30, 104 S. Ct. 304, 78 L. Ed. 2d 29 (1983). *See also Artesian Water Co.,* 330 A.2d at 437, 438 (holding that the URA and the Delaware Relocation Assistance Act of 1970 "do not create an absolute right in a utility to be reimbursed for the cost of relocating its facilities in order to facilitate federally assisted highway improvements" and that the utility was not a displaced person within the meaning of the relocation statutes).

[491] *Id.* at 34, 42, 104 S. Ct. at 307, 78 L. Ed. 2d at 33.

[492] *Id.* at 43, 104 S. Ct. at 311, 78 L. Ed. 2d at 38.

[493] 330 A.2d 432 (Del. Super. Ct. 1974), *aff'd as modified by* 330 A.2d 441 (Ct. 1974).

[494] *Id.* at 437, 438.

[495] "[T]he terms 'primary system' and 'federal-aid primary system' mean the federal and primary system in existence on June 1, 1991, and any highway which is not on such system but which is on the National Highway System." 23 U.S.C. § 131(t) (2007).

[496] 23 U.S.C. § 131 (2007). *See* Vermont v. Brinegar*,* 379 F. Supp. 606 (D. Vt. 1974) (upholding the constitutionality of the HBA).

[497] *See* 23 U.S.C. § 131 (2007)*.* The procedures applicable to the HBA are set forth in: Highway Beautification, 23 C.F.R. § 750 (2007); Junkyard Control and Acquisition, 23 C.F.R. § 751 (2007); and Landscape and Roadside Development, 23 C.F.R. § 752 (2007).

[498] 23 U.S.C. § 131(a) (2007). *See* 23 C.F.R. § 750.102(m) (defining a "sign") and 23 C.F.R. § 750.704 (2007) (defining "sign, display and device").

[499] Displays, and devices permitted by the Act are

> limited to (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder…, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, (3) signs, displays, and devices including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22, 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, …, and (5) signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee….

23 U.S.C. § 131(c) (2007).

[500] 111 S.W.3d 86 (Tex. 2003), *cert. denied*, 540 U.S. 1177, 124 S. Ct. 1404, 158 L. Ed. 2d 77 (2004).

[501] *Id.* at 89 (footnotes omitted).

reational value of public travel, and to preserve natural beauty."[502]

The Act seeks to have signs subject to the Act removed from federal-aid primary and Interstate highways that are not on land needed for right-of-way purposes.[503] The states are not required to remove nonconforming signs unless the federal government pays 75 percent of the just compensation required for the removal of signs.[504]

The failure of a state to comply with the HBA could result in the state incurring a penalty amounting to a 10 percent reduction in its federal-aid highway funds.[505] Although states are not required to comply, the penalty is considered to be an inducement for states to implement the HBA.[506] Consequently, the states enacted legislation so as to be in compliance with the HBA and avoid losing federal funds.

The HBA appears to satisfy the requirement that a taking be for a public use. In *Kamrowski v. State,*[507] although involving a taking of a scenic easement, the court upheld the taking of a scenic easement on the basis that the taking was for a public use. The State argued successfully that public enjoyment of scenic beauty was a public use and that physical occupancy by the State of the property was not an essential element of public use.[508] The court held that "[t]he enjoyment of the scenic beauty by the public which passes along the highway seems to us to be a direct use by the public of the rights in land which have been taken in the form of a scenic easement, and not a mere incidental benefit from the owner's private use of the land."[509] The HBA also appears to satisfy the public use requirement for the reasons discussed in Section I.G, *supra*, regarding cases upholding urban renewal statutes.

[502] *Id., quoting* 23 U.S.C. § 131(a).

[503] *See* 23 U.S.C. § 131(e) (2007).

[504] 23 U.S.C. at § 131(g) (2007). Under certain circumstances, nonconforming outdoor advertisements in existence prior to May 5, 1976, may remain if approved by the Secretary. *See* 23 U.S.C. § 131(o) (2007).

[505] 23 U.S.C. § 131(b) (2007). The Secretary maintains discretion to suspend the imposition of penalties. *See* 23 U.S.C. § 131(b) (2007); *see also* 23 C.F.R. § 750.705 (2007) (listing mandatory requirements for states under the HBA).

[506] Pima County v. Clear Channel Outdoor, Inc., 212 Ariz. 48, 52–53, 127 P.3d 64, 68–69 (Ariz. App., 2d Div. 2006), *review dismissed*, 2006 Ariz. LEXIS 106 (Ariz. 2006). *See also* Markham Adver. Co. v. State, 73 Wash. 2d 405, 439 P.2d 248 (1968), *appeal dismissed,* 393 U.S. 316, 89 S. Ct. 553, 21 L. Ed. 2d 512 (1969), *reh. denied,* 393 U.S. 1112, 89 S. Ct. 854, 21 L. Ed. 2d 813 (1969).

[507] 31 Wis. 2d 256, 142 N.W.2d 793 (1966).

[508] *Id*. at 263, 142 N.W.2d at 796.

[509] *Id.* at 265, 142 N.W.2d at 797. *See also* Wis. Builders Ass'n v. Wis. Dep't of Transp., 285 Wis. 2d 472, 702 N.W.2d 433 (Wis. Ct. App. 2005) (discussing *Kamrowski*); Richley v. Crow, 43 Ohio Misc. 94, 334 N.E.2d 542 (Ohio Ct. Common Pleas 1975) (stating that a scenic-easement acquisition under 23 U.S.C. § 131 was for a public purpose).

G.1.a. Requirement of Just Compensation Under the HBA

When an outdoor advertisement lawfully erected under state law is required to be removed pursuant to § 131(c) of the HBA, just compensation must be paid.[510] Just compensation is required for:

> (A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and
>
> (B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon.[511]

The HBA requires compensation for the "taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device" without regard to whether the nonconforming outdoor advertisement is personal or real property or a fixture.[512]

Although the federal share of compensation due to an owner for the "acquisition, removal and incidental costs legally incurred or obligated by the state" is set at 75 percent,[513] if the federal share of funding is unavailable then the removal of a nonconforming outdoor advertisement is not required.[514] If an owner of an illegal outdoor advertisement fails to remove the sign, the owner is liable to the state for its costs to remove the sign.[515]

Federal funds may participate in the compensation paid to an owner of a sign, for example, "for his right, title and interest in a sign, and where applicable, his leasehold value in a sign site," and may participate in the compensation paid "to a site owner for his right and interest in a site, which is his right to erect and maintain the existing nonconforming sign on such site."[516] Federal funds also may participate in "[t]he cost of relocating a sign to the extent of the cost to acquire the sign, less salvage value if any…."[517] Federal funds may not participate, for example, with respect to "[p]ayments to a sign owner where the sign was erected without permission of the property owner unless the

[510] *See* 23 U.S.C. § 131(g) (2007) (requiring just compensation to be made). *See also* 23 C.F.R. § 750.302(a) (2007) (requiring the same).

[511] 23 U.S.C. § 131(g)(A)-(B) (2007).

[512] 23 U.S.C. § 131(g)(A) (2007).

[513] 23 C.F.R. § 750.302(b) (2007). *See also* 23 U.S.C. § 131(g) (2007); 23 U.S.C. § 131(p) (2007) (federal government pays 100 percent of the just compensation if an outdoor advertisement was removed under the HBA and lawfully relocated but subsequent amendments require its removal again).

[514] 23 U.S.C. § 131(n) (2007) (excludes federal funds apportioned to states under 23 U.S.C. § 104 "except to the extent that the State, in its discretion, expends such funds for such a payment").

[515] *See* 23 U.S.C. § 131(r)(1)-(2) (2007).

[516] 23 C.F.R. § 750.305(a)(1) (2007). The regulations should be consulted fully for all compensable items in which federal funds may participate.

[517] 23 C.F.R. § 750.305(a)(2) (2007).

sign owner can establish his legal right to erect and maintain the sign."[518] Federal guidelines and regulations for control of outdoor advertising also are set forth in 23 C.F.R. § 750.701, *et seq*.[519]

Federal policies and procedures regarding a state's written policies and operating procedures for implementing its sign removal program are found in 23 C.F.R. § 750.304. Under the federal guidelines, a standard valuation method is recommended for each state.[520] If an owner disagrees with a valuation, an appraisal must be utilized and verified by an independent party.[521] As for severance damages, the state must justify the recognition of such damages before federal participation will be allowed.[522] The federal regulations allow the states considerable leniency in devising their own policies and procedures.[523] Moreover, a state may "establish standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway systems than those established under this section."[524]

As discussed in Section 4, *supra*, a state has the authority to exercise its police power in certain circumstances and take or destroy property without having to pay just compensation. The police power has been extended in at least one case to the taking of a billboard that was declared to be hazardous to traffic.[525] If a sign is illegal for some reason or if a sign is altered after receiving a permit and the alteration renders the sign illegal, then no compensation is due to the sign owner if the owner is ordered to remove the sign. The illegality of a sign removes the sign from the realm of constitutionally-protected property and thus any right to compensation.[526] Although 23 U.S.C. § 131(g) requires that just compensation be paid for requiring the removal of a lawfully erected outdoor advertisement, 23 C.F.R. § 750.705(d) requires the expeditious removal of an illegal outdoor advertisement.[527]

G.1.b. HBA's Rejection of Amortization

Because of the cost of the removal of billboards and other signs, some states enacted statutes for amortization of signs over a period of years rather than paying just compensation.

> "Amortization" properly refers to a liquidation, but in [the] context [of nonconforming uses] the owner is not required to take any particular financial step. "Amortization period" simply designates a period of time granted to owners of nonconforming uses during which they may phase out their operations as they see fit and make other arrangements. It is, in effect, a grace period, putting owners on fair notice of the law and giving them a fair opportunity to recoup their investment.[528]

Although challenged on constitutional grounds, the courts upheld amortization laws, thus allowing the states to require the removal of signs after the amortization period had passed.[529] The perceived injustice of this practice led to an amendment in 1978 of the HBA pursuant to which states now are prohibited from using amortization in lieu of paying for signs.[530] The 1978 amendment basically terminated the practice of amortizing signs on federal-aid primary and Interstate highways in lieu of paying just compensation as states must conform their outdoor advertising laws to avoid losing up to 10 percent of their federal funding.

G.1.c. Relocation Assistance

The HBA contains a provision for relocation costs under certain circumstances. Section 131(p) states:

> In the case of any sign, display, or device required to be removed under this section prior to the date of enactment of the Federal-Aid Highway Act of 1974, which sign, display, or device was after its removal lawfully relocated and which as a result of the amendments made to this section by such Act is required to be removed, the United States shall pay 100 per centum of the just compensation for such removal (including all relocation costs).[531]

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[518] 23 C.F.R. § 750.305(b)(2) (2007).

[519] *See* 23 C.F.R. § 750.709 (2007) (regulating on-property or on-premise advertising).

[520] 23 C.F.R. § 750.304(c) (2007).

[521] 23 C.F.R. § 750.304(c)(2) (2007).

[522] 23 C.F.R. § 750.304(c)(4) (2007). *See also* 23 C.F.R. § 750.304(c)(4)(i)-(iii) (2007) (outlining the required data to assist the FHWA in its evaluation of the submission).

[523] *See generally* 23 C.F.R. § 750.304 (2007).

[524] 23 U.S.C. § 131(k) (2007). *See also* 23 C.F.R. § 750.110 (2007) (authorizing the state to prohibit otherwise permissible signs without forfeiting its rights to any benefits provided for in the Act).

[525] Rochester Poster Adver., Inc. v. Town of Brighton, 374 N.Y.S.2d 510, 49 A.D. 2d 273 (N.Y. App. 4th Dep't 1975).

[526] Miss. State Highway Comm'n v. Roberts, 304 So. 2d 637 (1974).

[527] *See* Pima County v. Clear Channel Outdoor, Inc., 212 Ariz. at 52, 127 P.3d at 68.

[528] Adams Outdoor Adver., LP v. Zoning Hearing Bd. of Smithfield, 909 A.2d 469, 475 (Pa. Commw. Ct. 2006) (*quoting* Village of Valatie v. Smith, 83 N.Y.2d 396, 632 N.E.2d 1264, 1266 (N.Y. 1994) (citations omitted)). *See* City of Oakbrook Terrace v. Suburban Bank & Trust Co., 364 Ill. App. 3d 506, 518, 845 N.E.2d 1000, 1011 (Ill. App. 2d Dist. 2006) (involving a city's valid 2-year amortization ordinance).

[529] Iowa Dep't of Transp. v. Neb.-Iowa Supply Co., 272 N.W.2d 6 (Iowa 1978), *overruled on other grounds,* Estate of Grossman v. McCreary, 373 N.W.2d 113, 114 (Iowa 1985); Modjeska Sign Studios, Inc. v. Berle, 43 N.Y.2d 408, 373 N.E.2d 255 (N.Y. 1977), *appeal dismissed*, 439 U.S. 809, 99 S. Ct. 66, 58 L. Ed. 2d 101 (1978); Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741 (N.D. 1978); People *ex rel.* Dep't of Transp. v. Desert Outdoor Adver., Inc., 68 Cal. App. 3d 440, 137 Cal. Rptr. 221 (Cal. App. 4th Dist. 1977).

[530] 23 U.S.C. § 131(g) (2007) ("Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section….")

[531] 23 U.S.C. § 131(p).

However, the expense of relocating outdoor advertisements implicates another federal statute, the URA, discussed in subsection 5.E, *infra*.[532] The URA provides a "uniform policy for the fair and equitable treatment of persons displaced as a direct result of programs or projects undertaken by a federal agency or with federal financial assistance."[533]

Although the term "sign" or "billboard" does not appear in the URA, § 4601(6)(A)(i) defines "displaced person" as "any person who moves from real property, or moves his personal property from real property." Section 4652(a) requires any federal agency that acquires any interest in real property to

> acquire at least an equal interest in all buildings, structures, or other improvements located upon the real property so acquired and [the head of a federal agency] requires to be removed from such real property or which [the head of a federal agency] determines will be adversely affected by the use to which such real property will be put.[534]

Section 24.301(f) of the regulations promulgated pursuant to the URA specifically addresses outdoor advertisements:

> The amount of a payment for direct loss of an advertising sign, which is personal property shall be the lesser of:
>
> (1) The depreciated reproduction cost of the sign, as determined by the Agency, less the proceeds from its sale; or
>
> (2) The estimated cost of moving the sign, but with no allowance for storage.

Similar to the HBA, the URA requires that states seeking federal funds must comply with the Act.[535]

In a 2006 case, *Commissioner of Transportation v. Rocky Mountain, LLC,*[536] a court considered whether the URA applied to outdoor advertisements. Connecticut had responded to the enactment of the URA by enacting a statute providing for relocation expenses of outdoor advertising.[537] In deciding whether the URA applied to billboards, the court recognized that

> [a]t least one federal District Court has concluded that billboards are encompassed by this provision. *Whitman v. State Highway Commission*, 400 F. Supp. 1050, 1070 (W.D. Mo. 1975); see also *United States v. 40.00 Acres of Land, More or Less*, 427 F. Supp. 434, 440, 441 (W.D. Mo. 1976) (adopting analysis of Whitman); 8A P. Nichols, Eminent Domain (3d Ed. Rev. 2005, P. Rohan & M. Reskin, eds.) § 23.03, pp. 23-32 through 23-33. State courts that have considered whether billboards are structures for purposes of this section are divided on the question. *See* 8A P. Nichols, supra, p. 23-33. If, however, the uniform relocation act does require a condemnor to acquire billboards as "structures or other improvements," the commissioner would be authorized to comply with that obligation through the state relocation assistance statutes, which provide that the commissioner may conform to the requirements of the uniform relocation act by providing relocation payments and by doing "such other acts…as may be necessary to comply with…the [uniform relocation act]…."[538]

The court concluded that URA (or the state law) did not mandate the acquisition of billboards by way of eminent domain; instead, the property owner may reject a relocation payment under URA for just compensation.[539]

G.2. Removal, Restriction, or Prohibition of Other Billboards and Signs

G.2.a. Off-Site Signs

State or local governments may want to restrict or even prohibit prospectively billboards or signs of various types, particularly off-premise billboards or signs having nothing to do with the property on which they are located. The First Amendment is not a guarantee that billboards and other signs are not susceptible to regulation. It does not appear that the First Amendment has been a critical issue from the standpoint of state transportation agencies trying to enforce the HBA.

Nevertheless, in a case involving an off-site sign unrelated to the property on which the sign was located, the Supreme Court of Texas in *Texas Department of Transportation v. Barber*[540] upheld the Texas Highway Beautification Act. Barber, an attorney, installed a billboard measuring 8 x 16 ft on nonresidential property adjacent to Interstate 20. The billboard stated "Just Say NO to Searches" and displayed a telephone number. The Texas Supreme Court observed that outdoor advertising is prohibited

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[532] 42 U.S.C. § 4601, *et seq* (2007). Title III of the Uniform Relocation Act applies to compensation except "where complete conformity would defeat the purposes set forth in 42 U.S.C. 4651, would impede the expeditious implementation of the sign removal program or would increase administrative costs out of proportion to the cost of the interests being acquired or extinguished." *See* 23 C.F.R. § 750.302(c) (2007).

[533] 42 U.S.C. § 4621(b) (2007). *See also* 42 U.S.C. §§ 4622 (Moving and Related Expenses) and 4651 (Uniform Policy on Real Property Acquisition Practices) (2007).

[534] *See also* 49 C.F.R. § 24.105(a) (2007) (requiring the agency to offer to acquire any improvements located upon the real property).

[535] 49 U.S.C. §§ 4604 and 4655 (2007).

[536] 277 Conn. 696, 894 A.2d 259 (2006).

[537] *Id.* at 717–18, 894 A.2d at 274–75; *see also* CONN. GEN. STAT. §§ 8-267(5), 8-268(a); CONN. AGENCIES REGS. §§ 8-273-13, 8-273-14.

[538] 277 Conn. at 720, 894 A.2d at 276 (*quoting* CONN. GEN. STAT. § 8-263a) (*citing* CONN. GEN. STAT. § 8-267a).

[539] *Id.* at 721, 894 A.2d at 276 (*citing* 42 U.S.C. § 4652(b)(2)). In Pima County v. Clear Channel Outdoor, Inc., 212 Ariz. at 53, 127 P.3d at 69, Pima County claimed that the HBA, the Uniform Relocation Act, the related federal acts and regulations, and state implementing statutes for those acts required relocating billboards on property that complied with local law. The court did not, however, address the issue of relocation.

[540] 111 S.W.3d 86 (Tex. 2003), *cert. denied*, 540 U.S. 1177, 124 S. Ct. 1404, 158 L. Ed. 2d 77 (2004).

> in a limited area: (1) within 660 feet of a right-of-way, if the advertisement is visible from the interstate or primary highway system, or (2) if outside an urban area, more than 660 feet from the right-of-way, but visible from the highway and erected for the purpose of having its message seen from the highway.[541]

The court held that the Texas Highway Beautification Act is content neutral[542] and distinguished Barber's case from the ordinance at issue in *Metromedia*[543] (discussed *infra*) that

> only allowed onsite commercial signs, but prohibited other (offsite) commercial advertising and prohibited all noncommercial communications everywhere unless permitted by one of twelve exemptions. As discussed, the Texas Act is different. The Texas Act permits commercial and noncommercial speech everywhere that relates to an activity on the property. In addition, it permits both types of speech in all commercial and industrial areas, even if the speech does not relate to an activity on the property. Therefore, the Texas Act does not run afoul of the concerns the plurality or concurrence expressed in *Metromedia.*[544]

In *Mississippi State Highway Commission v. Roberts Enterprises, Inc.,*[545] the owner erected billboards after June 16, 1966, the effective date of Mississippi's Outdoor Advertising Act, which provided that with some exceptions "[n]o outdoor advertising shall be erected or maintained within [660] feet of the nearest edge of the right-of-way and visible from the main-traveled way of the interstate or primary highways in this state."[546] The owner erected two billboards that were situated within 660 feet of the right-of-way of a highway in violation of Section 49-23-5. The statute allowed for compensation to be paid for signs erected before but not after the enactment of the Act. The court held that the Act was constitutional.

> The first issue is whether the act violates section 17 of the Mississippi Constitution, which requires that landowners be compensated for property "taken or damaged for public use."
>
> We hold that the act is not concerned with a physical taking or damaging of property. Rather, it involves a use restriction, and is in essence a zoning of property adjacent to highways. Restrictions imposed upon the use of property through the lawful exercise of the police power of the state do not require compensation. The distinction between a use restriction and a taking of property was discussed in Jackson Municipal Airport Authority v. Evans, 191 So. 2d 126 (Miss. 1966), wherein we said: "…where the owner of property is merely restricted in the use and enjoyment of his property, he is not entitled to compensation." 191 So. 2d at 133. The question arises whether the state, through the exercise of police powers, may regulate billboards adjacent to its highways.[547]

The First Amendment has arisen with more frequency in the context of city ordinances[548] and regulations by other state agencies.[549] Beside the issue of commercial versus noncommercial free speech is the issue of on-site versus off-site advertising. In 1964 the U.S. Supreme Court held that the First Amendment protected advertising,[550] but in a later case has held that commercial speech had less protection than traditional speech.[551] In *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York,*[552] the Court devised a four-part test for determining the constitutionality of the regulation of commercial speech.[553]

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[541] *Id.* at 90 (footnote omitted).

[542] *Id.* at 98. The court stated:

> The Act defines "outdoor advertising" broadly. It includes both commercial and noncommercial speech, encompassing "advertising or information." Further, the Act permits both types of speech in noncommercial and non-industrial areas as long as that speech relates to activities on the property. It also permits both types of speech in commercial and industrial areas, regardless of whether that speech relates to activities on the property.

Id. at 99 (footnote omitted).

[543] Metromedia Inc. v. San Diego, 453 U.S. 490 (1981).

[544] 111 S.W.3d at 99 (footnote omitted).

[545] 304 So. 2d 637 (Miss. 1974) (holding the Act to be constitutional).

[546] *Id.* at 638.

[547] *Id.* at 639. *See* Markham Adver. Co. v. State, 73 Wash. 2d 405, 439 P.2d 248 (1968); *Opinion of the Justices*, 103 N.H. 268, 169 A.2d 762 (1961); N.Y. State Thruway Auth. v. Ashley Motor Court, Inc., 10 N.Y.2d 151, 176 N.E.2d 566 (N.Y. 1961); Gen. Outdoor Adver. Co. v. Dep't of Pub. Works, 289 Mass. 149, 193 N.E. 799 (1935); Ghaster Props, Inc. v. Preston, 176 Ohio St. 425, 200 N.E.2d 328 (Ohio 1964).

[548] Action Outdoor Adver. JV, LLC, v. Town of Shalmar, Florida, 377 F. Supp. 2d 1178 (N.D. Fla. 2005) (finding that the third factor in the *Central Hudson Test*, as supported by *Metromedia*, was satisfied because the ordinance improved traffic safety and increased the town's esthetic beauty); Lamar Whiteco Outdoor Corp. v. City of West Chicago, 355 Ill. App. 3d 352, 823 N.E.2d 610 (Ill. App. 2d Dist. 2005) (First Amendment challenge to a city's ordinance seeking to ban all billboards).

[549] Action Outdoor Adver. JV, LLC, v. Town of Shalimar, Florida, 377 F. Supp. 2d 1178 (N.D. Fla. 2005); Adams Outdoor Adver., LP, v. Zoning Hearing Bd. of Smithfield, 909 A.2d 469 (Pa. Commw. Ct. 2006) (noting that *Cent. Hudson Gas & Elec. Corp., Pub. Service Comm'n*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) and its progeny addressed ordinances in which there was either a complete ban on commercial speech or a content-based restriction).

[550] N.Y. Times v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

[551] Ohralik v. Ohio Bar Ass'n, 436 U.S. 447, 456, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978).

[552] 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980).

[553] *See* Cent. Hudson Gas & Elec. Corp., 447 U.S. at 566, 100 S. Ct. at 2351, 65 L. Ed. 2d at 351 (describing the four-part analysis as follows:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest).

In an attempt to reconcile competing interests, the regulating authorities sometimes carve out exceptions in their regulations to permit certain outdoor advertising structures to remain. One such example is found in *Metromedia, Inc. v. San Diego,*[554] in which the city ordinance provided that off-site commercial sites, that is billboard advertising of products, services, or goods not sold on the premises, could be banned but that on-site commercial sites, that is billboard advertising of products, services, or goods sold on the premises, could be permitted without violating the First Amendment.[555]

As noted recently by a federal court in Florida,[556] the Court's decision in *Metromedia, Inc.,* is the leading decision in the field of billboard regulations.[557] Before the *Metromedia* case, the regulation of outdoor advertising was primarily a land-use or zoning issue. In *Metromedia*, the plurality opinion set forth "the standard for determining the constitutionality of governmental restrictions on commercial speech."[558]

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.[559]

As for whether government may impose a total ban on billboards, "the *Metromedia* plurality found the ordinance at issue to be unconstitutional due to an impermissible preference of commercial speech over noncommercial speech, [but] *seven justices agreed that a total prohibition of offsite commercial signs is constitutional*."[560]

In *Action Outdoor Advertising v. Town of Shalimar*, *supra*, the plaintiff argued in part that an "ordinance prohibiting offsite commercial signs, while permitting onsite commercial signs [did] not further the Town's stated interests in a direct and material manner."[561] However, the court held that regardless of "'whether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the stated objectives of safety and esthetics.'"[562]

Thus, the court in *Action Outdoor Advertising* upheld the town's ordinance prohibiting off-site billboards, because the ordinance did not restrict commercial speech unconstitutionally.[563] Furthermore, the court held that the ordinance did not discriminate unconstitutionally against noncommercial speech. Relying on Eleventh Circuit authority, the court agreed "that 'the definition of a billboard as an offsite advertising sign does not include noncommercial speech as such speech is always onsite.'"[564]

The court explained:

> As noted above, the Town's Sign Ordinance in the instant case defines "billboard or billboard sign" as meaning "any sign which provides information of any kind concerning any activity that takes place on property other than that where the sign is located." Section 82-316. The Court agrees that the phrase "information of any kind concerning any activity" tends to suggest that the Ordinance encompasses both commercial and noncommercial speech. But, especially given the Eleventh Circuit's clear instruction that *all noncommercial speech is inherently onsite*, the phrase further defining a billboard as providing information concerning any activity "that takes place on property other than that where the sign is located" eliminates noncommercial speech from the scope of the definition's reach—and thus the ban on billboards set forth in Section 82-352(4). *Thus, while the prohibition against billboards unquestionably encompasses commercial speech it does not implicate noncommercial speech. Plaintiff's argument that the Town's ban on billboards in effect is an impermissible proscription against all noncommercial speech therefore fails.*[565]

If a billboard company, however, has satisfied all the legal requirements for permission to erect a billboard, and thereafter there is an alteration in the legal requirements before a permit is issued, it has been held that the company's application under those circumstances may not be denied. As one court held, it is necessary to "view the permitting process and the government action on [the] applications under the rules that were in effect on the date of those applications."[566]

As for whether billboards may be prohibited, although *Adams Outdoor Advertising v. Zoning Hearing*

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[554] 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981) (plurality opinion) (overturning a complex billboard ordinance that had been crafted over a period of 10 years).

[555] *Id.* at 512, 101 S. Ct. at 2885, 69 L. Ed. 2d at 806.

[556] Action Outdoor Adver. JV, L.L.C. v. Town of Shalimar, 377 F. Supp. 2d 1178 (N.D. Fla. 2005).

[557] *Id.* at 1186.

[558] *Id.* at 1189.

[559] Metromedia Inc. v. San Diego, 453 U.S. at 507, 101 S. Ct. at 2892, 69 L. Ed. 2d at 815 (*citing* Cent. Hudson Gas & Elec. Corp., 447 U.S. at 563–66, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980)).

[560] Action Outdoor Adver. v. Town of Shalimar, 377 F. Supp. 2d at 1189 (emphasis supplied). *See also* Harnish v. Manatee County, Fla., 783 F.2d 1535, 1540, n.7 (11th Cir. 1986) and Dills v. City of Marietta, Georgia, 674 F.2d 1377 (11th Cir. 1982).

[561] 377 F. Supp. 2d at 1190.

[562] *Id.* at 1191 (citation omitted) (emphasis supplied). In *Action Outdoor Advertising*, the plaintiff conceded the first and second criteria of the four-part *Central Hudson* test cited in *Metromedia*, *supra*. *See id.* at 1189.

[563] *Id.* at 1192.

[564] *Id.* at 1193 (*quoting* Southlake Prop. Ass'n v. City of Morrow, 112 F.3d 1114, 1119 (11th Cir. 1997)).

[565] *Id.* at 1193 (emphasis supplied) (footnote omitted).

[566] Lamar Adver. Co. v. Township of Elmira, 328 F. Supp. 2d 725, 732 (E.D. Mich. 2004) (holding that the township, in exercising discretion that the township did not have, "deprived Lamar of its First Amendment rights by denying Lamar a permit based on improper interpretation of the zoning ordinance").

Board of Smithfield Township[567] involved a dispute over a Zoning Hearing Board's decision requiring that two off-site premises' advertising billboards be removed, the court stated:

> Billboards are regarded as a legitimate business use of property in Pennsylvania and may be regulated but not excluded by a local zoning ordinance…. A municipality has the power to regulate signs, billboards or other advertising media provided such regulation is not unreasonable, arbitrary, or discriminatory, and there is a reasonable relationship to the safety, morals, health, or general welfare of the community.[568]

The court held that there was "a valid basis for the Township's distinction between off-premises advertising signs and other uses."[569] The ordinance itself stated that the purpose "was to reduce signs or advertising distractions and obstructions that may" undermine traffic safety.[570] Furthermore, the court stated: "[T]here is nothing novel or constitutionally infirm about the use of the on-site/off-site distinction."[571] The ordinance, moreover, was not "an impermissible regulation of protected commercial speech."[572] Finally, because the statute "require[d] removal of off-premises signs 'on a property proposing land development or alterations or enlargement of an existing use,'"[573] there was no *de facto* taking, because the "right to use the billboards ceased when the landowner actively pursued land development on the Subject Property."[574]

With respect to signs relating to a religious message or a church, owners may argue that the prohibition of signs violates the right of freedom of religion as well as of speech under the First Amendment. However, in *Corinth Baptist Church v. State Department of Transportation,*[575] involving an off-site sign, an individual permitted a church to erect a display on her property adjacent to a highway. An Alabama state court held that the sign did not conform to the HBA and that the controlling rule and regulations did not violate the church's freedom of speech and religion. Relying on the Supreme Court's decision in *Ladue v. Gilleo,* discussed below, the court held that the highway department's rule "merely regulates the manner in which churches may display signs that are not on the property on which the churches are located" and "does not attempt to regulate the views of the various churches."[576]

On the other hand, in prohibiting off-site signs a statute may be unconstitutional under the First Amendment if the statute is so under-inclusive that the law fails to meet the substantial governmental interest test. In *Eller Media Co. v. Montgomery County, Maryland,*[577] the court dealt with a challenge to a county ordinance that did not distinguish between commercial and noncommercial signs.[578] The court observed that "because Montgomery County's ordinance only bars signs that identify a site other than where the signs are located, much (perhaps most) off-site commercial and non-commercial advertising is allowed…."[579] However, on the record, the court had "no idea how many signs will be allowed and how many prohibited—and thus the factual situation here presented is a far cry from that presented in *Metromedia*…. [I]t is impossible to say whether the ordinance is so under-inclusive that the restrictions do not advance "a substantial governmental interest" to a "material degree."[580]

In sum, there is authority that government may lawfully regulate billboards and other signs even to the extent of prohibiting off-site signs, or even require their removal pursuant to legal requirements in effect at the time the signs were erected.

G.2.b. On-Site Signs

As stated, it has been held that "non-commercial speech is inherently onsite."[581] In *Ladue v. Gilleo,*[582] a city ordinance prohibited all signs except those that fell within 1 of 10 exemptions and that complied with stated limitations on size. The sign in question was on the homeowner's lawn and stated "For Peace in the Gulf." The U.S. Supreme Court affirmed an Eighth Circuit decision holding that the ordinance was a content-based regulation of speech and that the city's interest, although substantial, in enacting the new ordinance was not sufficiently compelling to support a content-based restriction. "[R]esidential signs have long been an important and distinct medium of expression."[583] The Court held that

> even regulations that do not foreclose an entire medium of expression, but merely shift the time, place, or manner of its use, must "leave open ample alternative channels for communication." In this case, we are not persuaded that adequate substitutes exist for the important medium of speech that Ladue has closed off.[584]

Without further clarification the Court stated that its "decision that Ladue's ban on almost all residential signs violates the First Amendment by no means leaves

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[567] 909 A.2d 469 (2006), *app. denied*, 2007 Pa. LEXIS 1055 (Pa. 2007).

[568] *Id.* at 477.

[569] *Id.* at 478.

[570] *Id.* (*quoting* WIS. STAT. § 504 of the Ordinance).

[571] *Id.* at 479.

[572] *Id.*

[573] *Id.* at 476 (*quoting* WIS. STAT. § 504 of the Ordinance).

[574] *Id.* at 480.

[575] 656 So. 2d 868 (Ala. Ct. Civ. App. 1995).

[576] *Id.* at 870.

[577] 143 Md. App. 562, 795 A.2d 728 (Md. Ct. Spec. App. 2002), *cert. denied*, 369 Md. 573, 801 A.2d 1033 (2002).

[578] *Id.* at 566, 795 A.2d at 731.

[579] *Id.* at 597, 795 A.2d at 749.

[580] *Id.* at 598, 795 A.2d at 749.

[581] Action Outdoor Adver. v. Zoning Hearing Bd., 377 F. Supp. 2d at 1193.

[582] 512 U.S. 43, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994).

[583] *Id.* at 54, 114 S. Ct. at 2045, 129 L. Ed. 2d at 47.

[584] *Id*. at 56, 114 S. Ct. at 2045, 129 L. Ed. 2d at 48 (*quoting* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984)).

the City powerless to address the ills that may be associated with residential signs."[585]

In the *Barber* case, *supra*, the court held that the Texas Act's "exemptions for signs relating to onsite activities likewise does not render the Act content based."[586] Because the Act was content neutral, the court, applying the test of "whether the Act is narrowly tailored to serve a substantial state interest,"[587] held that the law went "no further than to serve the significant state interests in "'preserving scenic beauty and promoting public safety along interstate and federally-funded state highways.'"[588]

G.2.c. Signs in Existence Prior to the Enactment of Legislation

Preexisting signs are another matter, as illustrated by *Eller Media, supra,* which involved 34 billboards affixed to 14 structures located in the county. Montgomery County wanted them removed without having to pay compensation. Various ordinances had been enacted and repealed, two of which had allowed lawfully erected nonconforming signs to stay in place for a period of time before having to be removed. A 1997 ordinance allowed signs "lawfully constructed, structurally altered or relocated after July 1986" to remain for 5 years from July 1992.

The court held:

> In the face of the legislative history surrounding article 25, section 122E, the language of the statute, and the straightforward statement by the *Revere* Court that Montgomery County "has no authority to ban pre-existing lawfully erected billboards without paying the fair market value of the billboards," we hold that the trial court erred when it held that the amortization provisions of the 1997 ordinance "trumped" the provisions of article 25, section 122E. *Fair compensation, as defined in article 25, section 122E(a), must be paid even if a reasonable amortization period was provided for in the ordinance.*[589]

G.3. Just Compensation

G.3.a. Compensable Interests

The vast majority of billboards are located pursuant to a lease on land owned by someone other than the billboard owner. When a sign and the land are commonly owned, the problem of value is less difficult than when there is separate ownership of a sign and the land. Regardless of which valuation approach is used, if there is common ownership there is no conflict between a lessee and a lessor; the sole question becomes one of the difference between the before and after value of the property taken. The interest of the sign-owner, when the sign-owner does not own the land on which the sign is located, is really two-fold: 1) a so-called "leasehold" interest in the land, and 2) a full ownership in the sign itself.

A preliminary issue, however, is whether there is a lease. Whenever the advertising lease is for a definite term and indicates the intent of the parties that it should not be revocable at the will of the landowner, the lease should be deemed to create an easement rather than a license.[590] In *Commissioner of Transportation v. Rocky Mountain, LLC*, *supra*, the court discussed a leasehold interest asserted by a billboard owner and noted that the definition "refer[s] to an interest in real property created by the existence of a lease."[591] In *Santa Fe Trail Neighborhood Redevelopment Corporation v. W.F. Coen & Company,*[592] the court distinguished between a lease and a license, emphasizing that a leaseholder possesses an interest in property that requires compensation in condemnation whereas a licensee does not.[593]

If there is a lease, the condemnor is entitled to make use of the terms of the lease even though the condemnor is not a party to the lease. For example, in an eminent domain proceeding the proprietor (Guttha) of a business had a leasehold interest in the condemned property.[594] Guttha's lease provided that Guttha could not participate independently in any condemnation proceedings affecting the property. Although the Pennsylvania Department of Transportation (PennDOT) was not a party to the lease, the court held that

> PennDOT cannot be liable to a person who has contractually abrogated its rights to condemnation damages by the terms of the written agreement that created the leasehold interest.
>
> In sum, we hold that PennDOT appropriately used the Lease to determine how the condemnation award for the taking of Parcel No. 65 is to be divided.[595]

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[585] *Id.* at 58, 114 S. Ct. at 2045, 129 L. Ed. 2d at 49.

[586] Texas DOT v. Barber, 111 S.W.3d at 100–01.

[587] *Id.* at 103–04.

[588] *Id.* at 104 (footnote omitted).

[589] Eller Media Co. v. Montgomery County, 143 Md. App. at 580, 795 A.2d at 739.

[590] *See* Comm'n of Transp. v. Rocky Mountain, LLC, 277 Conn. at 700, n.4, 894 A.2d at 265 n.4 (2006) (stating that the party's description of his interest in billboards as a leasehold interest "denote[s] a real property interest generated by personal property located on an easement may be inconsistent with our prior usage"). The court also noted that it "placed quotation marks around the phrase to indicate that we do not adopt Viacom's usage as our own." *Id.*

[591] *Id.* (*citing* Celentano v. Oaks Condo. Ass'n, 265 Conn. 579, 830 A.2d 164 (Conn. 2003); Canterbury Realty Co. v. Ives, 153 Conn. 377, 216 A.2d 426 (1966)); *see also* Adams Outdoor Adver., LP v. Zoning Hearing Bd. of Smithfield, 909 A.2d 469 (Pa. Commw. Ct. 2006).

[592] 154 S.W.3d 432 (Mo. App. W. Dist. 2005).

[593] Santa Fe Trail Neighborhood Redevelopment Corp. v. W.F. Coen & Co., 154 S.W.3d at 439 (*citing* St. Louis Sw. Ry. Co. v. State Tax Comm'n, 319 S.W.2d 559, 564 (Mo. 1959), (*quoting* 51 C.J.S. *Landlord & Tenant,* § 202e(2)); State *ex rel.* State Highway Comm'n v. Johnson, 592 S.W.2d 854, 857 (Mo. App., E. Dist. 1979))).

[594] *In Re: Condemnation by the Dep't of Transportation*, 871 A.2d 896 (Commw. Ct. Pa. 2005).

[595] *Id.* at 901–02 (footnote omitted).

Assuming there is a valid lease, there are two principal interests for which compensation may be required—the interest in the lease to the land on which the billboard is erected and the interest in the billboard itself. "[A] lease is a valuable interest in land…."[596] The "[d]etermination of the value of a leasehold…[is] the difference between the reasonable rental value…and the actual rental required…."[597] Furthermore,

> "[i]n sharing the condemnation award, a lessee of such property is entitled to the market value of the right to use the property for the unexpired term over and above the amount of rent he is obligated to pay under the provisions of his lease….
>
> 'In evaluating the leasehold interest, it is proper to consider the rental the lessee is required to pay, the reasonable value of the use of the realty for the unexpired term of the lease, any premium paid by the lessee for the lease in addition to the subsequent rental, and any increase or decrease in the market value of the realty during the term of the lease.'"[598]

Thus, in *Zimmerman*, in calculating the billboard advertising company's share, the court allowed the value of the leasehold interest plus the loss of income for the remainder of the term.[599] However, the court also held that under the lease the billboards were personal property that had to be removed by the advertising company.[600]

If the evidence shows that it was the intent of the parties that the billboard is personal property and not a fixture, then the billboard must be removed. However, whether a billboard is personal property or a fixture is a question of fact.[601] As the court stated in *Commissioner of Transportation v. Rocky Mountain, LLC, supra*, a "condemnee is not entitled to compensation for personal property on condemned land unless the trial court finds that it constitutes a fixture."[602] In *Commissioner of Transportation v. Burkhart,*[603] the court determined that based on the evidence the billboard was personal property for which the lessee was not entitled to compensation; post-condemnation the lessee had no right to be on the property and, thus, was ordered to remove the billboard.[604]

If the billboard is determined to be a fixture, then the billboard and the leasehold interest are valued as one. "[A] lessee is entitled to be compensated for the market value of the leasehold and the building or fixture as a unit;"[605] that is, "'what a buyer would be willing to pay for them as a unit and not the sum of the values of each considered separately.'"[606] Furthermore,

> "[t]he value of the leasehold should be determined from the testimony of qualified expert witnesses as that value which a buyer under no compulsion to purchase the tenancy would pay to a seller under no compulsion to sell, taking into consideration the period of the lease yet to run, including the unexercised right of renewal, the favorable and unfavorable factors of the leasehold estate, the location, type and construction of the building, the business of the tenant, comparable properties in similar neighborhoods, present market conditions and future market trends, and all other material factors that would enter into the determination of the reasonable market value of the property. The bonus value, sometimes referred to as the leasehold savings or profit, is the difference between the economic rental and the contract rental. The economic rental is the actual market value of the use and occupancy."[607]

In the *Eller Media* case, noted previously, Eller Media also contended that the trial court, which had calculated the fair market value of the billboards at $470,000, "erred in failing to award damages for the fair market value of its leasehold interest in the sites where the billboards are located."[608] The court agreed and held that Eller Media was entitled to the fair market value of its leasehold interest.[609]

It may be noted that Guttha had "contractually preserved his right to claim damages for his loss of goodwill…generally understood to signify the value of an on-going business that was operated on the condemned property." The court held that

> Article VI-A of the Eminent Domain Code establishes a right to special damages where a condemnation leads to displacement of a business. 26 P.S. §§ 1-601A–1-606A. A displaced person is defined as any condemnee or other person who moves from real property or moves his personal property from real property due to a condemnation. 26 P.S. § 1-201(8). A tenant who is not entitled to general damages may be entitled to special damages for displacement.

Id. at 903. The court remanded for further proceedings. *Id.*

[596] City of Cleveland v. Zimmerman, 22 Ohio Misc. 19, 22, 253 N.E.2d 327, 330 (Ohio Ct. Common Pleas 1969) (involving the apportionment of part of a landowner's appropriation award to a lessee with respect to two billboards belonging to the billboard company on the property).

[597] *Id.* at 23, 253 N.E.2d at 330.

[598] *Id.* (*quoting* syllabus in In re Appropriation for Highway Purposes A. K. A. Frownfelter v. Graham, 169 Ohio St. 309, 159 N.E.2d 456 (1959)).

[599] 22 Ohio Misc. at 26, 253 N.E.2d at 332.

[600] *Id.*

[601] *See* Comm'r of Transp. v. Burkhart, 2003 Conn. Super. LEXIS 3166, at **7–8 (denying compensation because it was the parties' intent that the billboard was personal property, not a fixture).

[602] *Rocky Mountain, LLC,* 277 Conn. 696, 730, 894 A.2d at 282.

[603] 2003 Conn. Super. LEXIS 3166, at *1 (Conn. Super. Ct. 2003) (Unrept).

[604] *Id.* at *15.

[605] State *ex. rel.* Mo. Highway & Transp. Comm'n v. Quiko, 923 S.W.2d 489, 493 (Mo. App. S. Dist. 1996).

[606] *Id.* at 493 (citation omitted).

[607] *Id.* at 494 (*quoting* Land Clearance for Redevelopment Corp. v. Doernhoefer, 389 S.W.2d 780, 784 (Mo. 1965)).

[608] Eller Media Co. v. Montgomery County, Md., 143 Md. App. 2d at 583, 795 A.2d at 741.

[609] *Id.* A DOT document entitled, "Reproduction Cost Index for Outdoor Advertising Signs," explained that

> The value of the site is to be accounted for in the appraisal of the land except when doing the valuation for the Highway Beautification Program. Under this program, some signs are considered legal non-conforming use signs and the lease value of the remaining economic life of these signs will determine the site value.

When the sign is located on land not owned by the advertising company, it must be determined how much of the damages go to the advertising company and how much to the landowner.[610] In a situation in which an outdoor advertising structure is located on property subject to a lease, the majority rule appears to be that the land and the structure are to be valued as a unit, not separately.[611] The owner of the outdoor advertising structure is entitled to be compensated for the structure and bonus value of its lease, if any, and the owner of the land is entitled to all remaining damages.

In *United States v. Petty Motor Corporation,*[612] in which the Supreme Court dealt with compensation for tenants in condemnation proceedings, the Court held that the value of a leasehold interest may be determined by calculating the difference between what the premises would rent for in the market and the rent actually paid pursuant to the lease based on the remaining term of the lease. The difference, if any, is the bonus value and measures the benefit of the bargain to the tenant. Using this rule of thumb as to the value of the lease, it is only necessary to determine the value of the structures.[613]

G.3.b. Valuation

In determining the value of the interests taken, there are four approaches to valuation proposed by parties depending on their particular point of view. Although these methods are discussed in more detail in Section 7 of the report, they are discussed briefly in this subsection in relation to control of outdoor advertising. The first three approaches are the traditional valuation techniques of the 1) market data or sales comparison approach; 2) income approach; and 3) cost-less-depreciation approach.[614] The fourth and most controversial method is the gross income multiplier approach.[615]

The market data or comparable sales method is complicated as billboards generally are not sold individually; such an approach usually has been rejected by the courts.[616] Although the income approach is difficult to apply, the method has been used in billboard cases.[617] Most courts will accept such testimony if properly prepared, but there is difficulty in doing so. The information necessary to prepare maintenance and management costs is controlled by the billboard companies, which generally object for reasons of privacy to providing such information. If the income approach is used, it is not necessary to establish the value of the leasehold separately as it is included in the income approach. The cost approach is accepted by many courts as a proper one but not necessarily as the only method.[618]

In *Burkhart, supra,* the lessee's expert's opinion on the market value of a sign relied on the "recognized appraisal approaches: the income approach, the sales comparison approach, and the cost approach."[619]

Id.

[610] *See* Santa Fe Trail Neighborhood Redevelopment Corp. v. W.F. Coen & Co., 154 S.W.3d at 440 (finding a landlord-tenant relationship rather than a revocable license and apportioning condemnation damages between the landlord and tenant); Guttha v. Commw. of Pa., Dep't of Transp., 871 A.2d 896 (Pa. Commw. Ct. 2005) (involving a similar factual situation and result).

[611] *See* Comm'r of Transp. v. Rocky Mountain, LLC, 277 Conn. at 734, 894 A.2d at 284 (discussing the method of valuation and factors to consider); Comm'r of Transp. v. Patrick & Helen Corp., 2004 Conn. Super. LEXIS 1650 (Conn. Super. Ct. 2004) (Unrept.) (considering the market value of a partial taking of property).

[612] 327 U.S. 372, 66 S. Ct. 596, 90 L. Ed. 2d 729 (1946).

[613] *See* City of Oakbrook Terrace v. Suburban Bank & Trust Co., 364 Ill. App. 3d 506, at 518, 845 N.E.2d 1000, at 1010–11 (rejecting the Department of Transportation's assertion that the defendant was entitled to only the bonus value as just compensation in lieu of the fair market value of the property at its highest and best use on the date the property is condemned) (*citing* Dep't of Transp. v. Drury Displays, Inc., 327 Ill. App. 3d 881, 764 N.E.2d 166 (Ill App. 5th Dist. 2002)). *See Santa Fe Trail Neighborhood Redevelopment Corp.,* 154 S.W.3d at 444 (holding that the "proper measure of damages for condemnation of lessee's interest in real property is the bonus value of the unexpired term of the lease as measured by the difference between the market rental and the contract rental for the use and occupancy of the affected leasehold") (*citing* Land Clearance for Redevelopment Corp. v. Dornhoefer, 389 S.W.2d 780, 784 (Mo. 1965)); *Guttha,* 871 A.2d at 900 (Pa. Commw. Ct. 2005).

[614] Norman v. United States, 63 Fed. Cl. 231, 271 (2004), *aff'd,* 2005 U.S. App. LEXIS 24826 (Fed. Cir. 2005); *Burkhart*, 2003 Conn. Super. LEXIS 3166, at *6-7; *Rocky Mountain, LLC,* 277 Conn. at 727, n.26, 894 A.2d at 280, n.26 (recognizing that the three common methodologies for valuing real property interests are income capitalization, the replacement cost, and the comparable sales approach) (*citing* Ne. Conn. Econ. Alliance, Inc. v. ATC P'ship, 272 Conn. at 14, 22, n.10, 861 A.2d at 473, 480, n.10 (2004)); United Techs Corp. v. East Windsor, 262 Conn. 11, 18–20, 807 A.2d 955 (2002)); Comm'r of Transp. v. Patrick & Helen Corp., 2004 Conn. Super. LEXIS 1650 (Conn. Super. Ct. 2004) (Unrept.) (applying the comparable sales method to determine the fair market value of taken property).

[615] *See* State *ex rel*. Mo. Highway and Transp. Comm'n v. Quiko, 923 S.W.2d 489 (Mo. Ct. App. 1996).

[616] *See id. But see Norman*, 63 Fed. Cl. at 270–71 (stating that the comparable sales method is "generally accepted metric for determining economic impact").

[617] *See* Comm'r of Transp. v. Rocky Mountain, LLC, 277 Conn. at 735, 894 A.2d at 284 (upholding the use of the capitalization of income approach to valuation of billboards); Comm'r of Transp. v. Burkhart, 2003 Conn. Super. LEXIS 3166, at **6–7. S*ee also* City of Cleveland v. Zimmerman, 22 Ohio Misc. 19, 253 N.E.2d 327, 330 (Ohio Ct. Common Pleas 1969) (court treating the claim as one for the leasehold and awarding anticipated income from the rental, minus expenses for ground rent, maintenance, and management for the leasehold period).

[618] *See* Comm'r of Transp. v. Burkhart, 2003 Conn. Super. LEXIS 3166, at **6–7; Comm'r of Transp. v. Rocky Mountain, LLC, 277 Conn. at 735, 894 A.2d at 284 (upholding the use of the capitalization of income approach to value billboards).

[619] *Burkhart,* 2003 Conn. Super. LEXIS 3166, at *6.

> [T]he income approach…considers the leasing history of the billboard in comparison to comparable properties to estimate its net operating income as standardized occupancy. The sales comparison approach analyzes the sales of comparable properties with adjustments made for differences. This analysis is based upon the Principle of Substitution which holds that a prudent purchaser will pay no more for a property than the cost of producing a substitute property with the same utility as the subject. The cost approach regards the construction quality of the sign structure, its physical condition, and its depreciation from all causes. The cost approach is also based upon the Principle of Substitution.[620]

The gross income multiplier approach is a controversial method and has apparently been rejected by many courts, at least in condemnation of billboards. *Missouri, ex rel. Missouri Highway and Transportation Commission v. Quiko*[621] involved condemnation actions and the apportionment of awards between landowners and a lessee that maintained advertising billboards on the properties. The billboard company complained that the trial court used the depreciated replacement cost of the structure to determine the lessee's compensation.[622] The lessees argued for an approach using comparable sales data, i.e., sales of other advertising structures "from which the [lessee's] witness…derived percentages expressed as multiples of gross advertising revenues" that the lessee sought "to apply…in arriving at the market value of the structures."[623]

In *Quiko*, the lessee's expert used comparable sales and then

> arrived at a "gross income multiplier" by referring to the number of structures sold, the gross revenue from the structures involved in each case, and the sale price. [The expert] concluded that those sales were for amounts ranging from 3½ to 4½ times the gross revenue of the structures sold."[624]

Included among the expert's assumptions, however, was the assumption that the leases would be renewed. Although the leases were automatically renewable for 5-year terms, the leases could be terminated by a lessor on 30-days' notice prior to the end of the term. In ruling against the lessee, the court cited authorities from other states that had rejected the gross income multiplier approach in deciding the amount of just compensation for billboards.[625]

Another problem in the *Quiko* case was that "using a multiple of gross income in arriving at a value for the structures effectively incorporates a factor for lost business income. Missouri has generally not permitted consideration of lost business profits in valuing property taken by condemnation."[626] The court did note that exceptions to the rule had been recognized when "there was a total taking of the land and the business was inextricably related and connected with the land so that an appropriation of the land constituted an appropriation of the business."[627] The court held, however, that the structures were not "inextricably connected with this land" and that there was no showing that other land was not available for the structures; hence, even assuming that there was a total taking, it was not appropriate to consider business revenues via the gross income multiplier approach.[628]

G.3.c. Amortization

Amortization or abatement is a method of removing billboards that do not conform to a statute, ordinance, or regulation without the governing authority having to compensate the owner. The method is to take the in-place value of the sign and then based on that value allow the structure to remain in place for a period of time, so that it depreciates to a zero value at which time the sign must be removed.[629] The practice of amortization may be prohibited, however, by statute.[630] Of course, as seen, under the HBA amortization may not be substituted for just compensation.

The question of whether an amortization schedule is legal depends on the consideration of at least three issues: does the state require that just compensation be paid; if not, is the period of amortization fair; and does the law comply with the four-prong test of *Central Hudson*?[631]

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[620] *Id.*

[621] 923 S.W.2d 489 (Mo. Ct. App. 1996).

[622] *Id.* at 493.

[623] *Id.*

[624] *Id.* at 494–95.

[625] *Id.* at 495 (*citing* Whiteco Indus., Inc. v. City of Tucson, 168 Ariz. 257, 812 P.2d 1075, 1079 (1990) (stating that evidence of the value of billboards established by proving "four times gross income without any regard for the existence, length or terms of the leases, was incompetent and legally insufficient…."); State Dep't of Transp. & Dev. v. Chachere, 574 So. 2d 1306, 1311 (La. App. 3d Cir. 1991) (rejecting the use of a gross income multiplier in valuing billboards even though it may be an accepted approach within the advertising industry)).

[626] *Id.* (*citing* City of St. Louis v. Union Quarry & Constr. Co., 394 S.W.2d 300, 306 (Mo. 1965); State *ex rel.* Highway & Transp. Comm'n v. Musterman, 856 S.W.2d 121, 123 (Mo. App. E.D. 1993); Land Clearance for Redevelopment Auth. v. W.F. Coen and Co., 773 S.W.2d at 467–68.

[627] *Id.* at 495–96.

[628] *Id.* at 496.

[629] An example of such an amortization or abatement schedule was included in the city ordinance that was the basis for the *Metromedia* case.

[630] *See* S.D. CODIFIED LAWS § 31-29-75 (1977), which provides that

> No outdoor advertising sign, display, or device may be removed by an amortization schedule, nor may its value be so determined, and the owners thereof and the owners of the real property on which the same are situated shall be guaranteed just compensation, including through condemnation procedures, as provided in §§ 31-29-61 to 31-29-83, inclusive.

[631] *See* Village of Skokie v. Walton on Dempster, Inc., 119 Ill. App. 3d 299, 456 N.E.2d 293, 305 (Ill. App. Ct. 1st Dist. 1983) (upholding a 7-year amortization period as reasonable), *but see* Eller Media Co. v. Montgomery County, Md., 143 Md. App. 2d 562, 795 A.2d 728 (Md. 2002) (requiring just compensation to

In a 2006 case, an Illinois appellate court held that a 2-year amortization period was not just compensation. The city sought to enforce an ordinance regulating off-premises, freestanding, outdoor advertising signs against various defendants that owned or leased either legal, nonconforming signs, or the property on which signs were located. Thereafter, the city enacted a new ordinance that permitted such signs and included a 2-year amortization period for conforming signs. The city "argue[d] that its use of amortization as just compensation has no impact on judicial procedures and that its ordinance places no undue burden on the courts."[632]

However, the court held

> "Amortization" has nothing to do with fair market value of the property at its highest and best use on the date the property is deemed condemned. The City's claim, that amortization *is* just compensation, fails.
>
> To the extent, then, that the City is arguing that its amortization schedule in its ordinance is the only remedy available to defendants, the ordinance burdens the state judiciary, because it prevents the state judiciary from awarding "just compensation" pursuant to the Act….
>
> As a result, the City's attempt to replace "just compensation" with amortization as the only remedy available to a sign owner required to remove or alter its sign to comply with the City's ordinance infringes on the state judiciary and is an impermissible exercise of its home rule authority.[633]

In *Eller Media Co. v. Montgomery County, Maryland, supra*, the county attempted to amortize signs made nonconforming by its ordinance in spite of a state statute very similar to 23 U.S.C. § 131(g) requiring just compensation be paid to the owners. The court in interpreting the statute held that "Montgomery County has no authority to ban pre-existing lawfully erected billboards without paying the fair market value of the billboards."[634]

An issue has arisen regarding whether a taking occurred at the time of the enactment of an ordinance providing for amortization or at the time of the expiration of the amortization period. In *Lamar Whiteco Outdoor Corporation v. City of West Chicago,*[635] the court held that the date of the taking occurred after the expiration of the amortization period. A municipal ordinance had provided for a 7-year amortization period for removing existing nonconforming structures without providing for compensation of one losing the right to display a sign. The plaintiffs did not challenge the ordinance until the 7-year amortization period expired and the city began issuing citations. The principal issue in the case was whether the statute of limitations had expired, but the court held that the plaintiffs' § 1983 and eminent domain claims accrued when the city issued the citations, not when the ordinance was enacted. Thus, the action was timely filed.[636] The court further held that under Section 701 of the state's Eminent Domain Act, the plaintiffs were entitled to just compensation[637] and the issuance of the citations, not the enactment of the ordinance, was the date of the taking.[638]

be paid even if a reasonable amortization period was provided pursuant to Maryland statute).

[632] City of Oakbrook Terrace v. Surburban Bank & Trust Co., 364 Ill. App. 3d at 515, 845 N.E.2d at 1008.

[633] *Id.* at 518, 845 N.E.2d at 1011.

[634] Eller Media Co. v. Montgomery County, Md. 143 Md. App. 2d at 579, 795 A. 2d at 739.

[635] 355 Ill. App. 3d 352, 823 N.E.2d 610 (Ill. Ct. App. 2d Dist. 2005).

[636] *Id.* at 354–55, 823 N.E.2d at 613.

[637] *Id.* at 368, 823 N.E.2d at 623. Section 7-101 states that:

> the right to just compensation as provided in this Article applies to the owner or owners of any lawfully erected off-premises outdoor advertising sign that is compelled to be altered or removed under this Article or any other statute, or under any ordinance or regulation of any municipality or other unit of local government, and also applies to the owner or owners of the property on which that sign is erected.

735 ILL. COMP. STAT. 5/7-101 (West 2002).

[638] *Id.* at 369, 823 N.E.2d at 624.