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The Doctrine of Consequential Loss as Affected by Valuation Formulas

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THE DOCTRINE OF CONSEQUENTIAL LOSS AS AFFECTED BY VALUATION FORMULAS†

An important qualification to the obligation to give just compensation[1] upon the exercise of eminent domain[2] is the consequential loss doctrine. Broadly stated, the doctrine denies compensation for those losses suffered by the owner which are incidental to the taking itself. This incidental character of the concept has been expressed by the U.S. Supreme Court:

> The Fifth Amendment concerns itself solely with the "property," i.e., with the owner's relation as such to the physical thing and not with other collateral interests which may be incident to his ownership.[3]

Leaving aside for the moment the question of the difficulty of distinguishing between "the physical thing" and "collateral interests," the rationale for this denial of compensation has been "that the sovereign need only pay for what it actually takes rather than for all the owner has lost."[4]

Given an available category of non-compensable losses, the courts have applied the doctrine to such losses as the expenses incurred by moving to a new location,[5] profits lost because of business interruption[6] or inability to relocate,[7]

† This Comment should be read in conjunction with the student symposium appearing in the last issue of the LAND & WATER LAW REVIEW—*Eminent Domain: A Need for Policy Re-Consideration*, 4 LAND & WATER L. REV. 191 (1969).

1. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.
2. All states, with the exception of one, have constitutional provisions for compensation upon the exercise of eminent domain. In the one state that does not, North Carolina, this requirement has been read into the constitution by judicial interpretation. *See* Staton v. Norfolk & C.R.R., 111 N.C. 278, 16 S.E. 181 (1892). Mr. W. S. Perlroth has compiled a breakdown of the various provisions in state constitutions. It can be found in MCCORMICK, DAMAGES 536 n.1 (1935).
3. United States v. General Motors Corp., 323 U.S. 373, 378 (1945).
4. R. J. Widen Co. v. United States, 357 F.2d 988, 994 (Ct. Cl. 1966).
5. United States v. Petty Motor Co., 327 U.S. 372, 377-78 (1946); United States v. Westinghouse Elec. & Mfg. Co., 339 U.S. 261, 264 (1950); Highway Comm'n v. Superbilt Mfg. Co., 204 Ore. 393, 281 P.2d 707, 722 (1955). *See also* 1 ORGEL, VALUATION UNDER EMINENT DOMAIN § 69 (2d ed. 1953) (hereinafter cited as ORGEL). Some courts have disagreed, however, allowing compensation by including such expenses as an element of market value or by allowing them as a separate item of recovery. Harvey Textile Co. v. Hill, 135 Conn. 686, 67 A.2d 851 (1949) (included within market value); West Side Elevated R.R. v. Siegel, 161 Ill. 638, 44 N.E. 276 (1896) (separate item of recovery).
6. *See generally* 1 ORGEL § 72. But here again some courts have established exceptions. The Supreme Court of Texas has held that in the case of a partial taking, resulting injury to the business may be included as an element of market value. City of Dallas v. Priolo, 150 Tex. 423, 242 S.W.2d 176, 179 (1951).
7. For a detailed analysis of this element of loss, *see* 4 LAND & WATER L. REV. 193 (1969).

damage to or destruction of good will,[8] and costs of removing business property from the condemned premises.[9] The doctrine has been employed by the courts even though it is recognized to be both harsh on the owner of the property[10] and in derogation of the principle of just compensation.[11]

The misgivings felt by the courts in denying compensation are magnified when one considers the effect of the doctrine on land use policy in general. In a nation that is devoting increased attention to public involvement in transportation, housing, recreation, and education systems, a doctrine that authorizes non-compensable losses has serious implications for the proper allocation of land resources. Therefore, the purpose of this Comment is to examine the consequential loss doctrine in the context of present and future demands on limited land resources. To this end, the text will be divided into three areas of discussion: 1) Development of the Doctrine, 2) Evaluation, and 3) Proposed Method of Alteration.

I. DEVELOPMENT OF THE DOCTRINE

Three terms within the provisions of the federal and state constitutions have been used to determine the issue of compensability in eminent domain proceedings: a) Property, b) Taking, and c) Just Compensation. This section of the comment will treat each term separately in order to discover the extent to which they individually affect the scope of the consequential loss doctrine. In so doing, it will then be possible to isolate the primary determinant of the doctrine and thereby recommend alteration of the doctrine through analysis of that determinant. Without this sort of treatment, any recommendations for change would lack the focus necessary for intelligent analysis.

8. *In re* Jeffries Homes Housing Project, 306 Mich. 638, 11 N.W.2d 272 (1943).
9. 1 ORGEL § 70. In refusing to follow the rule some courts have entirely rejected the market value standard of compensation when dealing with this item of loss. *See* West Side Elevated R.R. v. Siegel, 161 Ill. 638, 44 N.E. 276 (1896).
10. "[T]he consequences often are harsh. For these whatever remedy may exist lies with Congress." United States v. General Motors Corp., 323 U.S. 373, 382 (1945).
11. "No doubt, therefore, if the owner is to be made whole for the loss consequent on the sovereign's seizure of his property, these elements [consequential losses] should properly be considered. But the courts have generally held that they are not to be reckoned as part of the compensation for the fee taken by the Government." United States v. General Motors Corp., 323 U.S. 373, 379 (1945).

In determining the scope of the doctrine, the three terms have had an inverse and interrelated effect. The relationship between the terms and the doctrine of consequential loss is inverse in the sense that as the definitions of the terms become more restrictive, the scope of the doctrine increases to embrace additional instances of incidental loss. This relationship can best be understood by analogizing it to the mathematical concept of an inverse proportion: as the *determinative* factor (the three terms) become smaller, the *determined* factor (the doctrine) becomes greater. But in addition to having an inverse effect, the terms have also been interrelated in the sense that a change in the consequential loss doctrine has required a change in the definition of all three terms.

An analysis of the separate terms demonstrates both the inverse and interrelated effect. In the process it can be shown that valuation formulas which have been designed to effectuate the principles of the third term—just compensation—account for the present breadth of the doctrine. The other two are either largely irrelevant as a determinant or are so broadly defined that if the terms did not have an interrelated nature, affecting the doctrine in tandem rather than individually, the scope of the doctrine would be greatly restricted. Thus, valuation formulas will be isolated as the primary determinant of the consequential loss doctrine, and, thus, present themselves as the proper focus for altering the scope of the doctrine.

a) *Property*: Although property was originally thought of in physical terms, stressing its "specific, fixed, and tangible nature,"[12] the term now implies a right which may or may not be recognized in a particular instance. Thus, property has been given a relative nature in which its existence for a certain purpose is dependent upon whether the court will recognize the right. The Supreme Court referred most clearly to this relative nature of the property concept in *United States v. Willow River Power Co.*:[13]

> But not all economic interests are "property rights;" only those economic advantages are "rights" which have the law back of them, and only when they are so

12. Commissioners of Homochitto River v. Withers, 29 Miss. 21 (1855).
13. 324 U.S. 499 (1945).

> recognized may courts compel others to forbear from interfering with them or to compensate for their invasion.[14]

As a result of this method of defining property, courts have been influenced to decide the property issue by reference to other terms. In so doing, they can then determine whether a particular interest is legally protected, and is, thus, property for purposes of eminent domain. This process imparts to the property concept a relative nature, a nature that takes its content from the meaning given to it by the other two terms—taking and just compensation. Thus, what would appear to be a property interest under commonly understood definitions of that term might not be considered property for purposes of compensation in eminent domain proceedings because the interest was not "taken" or because the interest was outside the scope of a particular valuation formula. At the very least, it could be said that the property concept affects the scope of the consequential loss doctrine only indirectly. Consequently, the use of the term "property" as a method of determining the scope of the consequential loss doctrine was superseded by the use of the terms "taking" and "just compensation." If it takes its meaning from other terms, the search for the relevant determinants of the doctrine's scope should pass to those other terms.

b) *Taking*: The taking concept has progressed through three stages, each representing a broadening of the term to include more instances of incidental loss. The first stage interpreted taking in terms of an actual physical appropriation. This restrictive concept was weakened by developments within Supreme Court decisions and by revisions of state constitutions, thereby leading to the second stage. This stage emphasized the directness of a particular interference. Recent decisions, however, show the outlines of a third stage which gives emphasis to an interference with the use of property. The broadness of this approach would allow many incidental losses to be compensated if it were the sole determinant of the scope of the consequential loss doctrine.

As first used in connection with incidental losses, courts interpreted "taking" in a strict physical sense. Reasoning

14. *Id.* at 502.

that the government need only pay for what it takes, courts felt that taking a physical appropriation of tangible interests.[15] Since most condemnation actions involved realty, the obligation to compensate was applied to the land itself, but not to intangible interests.

The physical approach was weakened, however, by two separate developments. First, the Supreme Court held in *Pumpelly v. Green Bay Co.* that a physical appropriation was not required; rather, a taking could be found when the land was flooded due to a back-up of water from a dam.[16] Second, many states revised their constitutions to include the word "damaged" in conjunction with the word "taken." Under such constitutions it became necessary only to show an injury directly attributable to government action.[17] In combination the effect of these two developments was to supplant the physical approach with a test that considered the directness or indirectness of the particular interference.[18]

The major effect of the direct-indirect test was to classify as a consequential loss those interests in property that were considered remote and those interests in property other than the property actually condemned. However, there is some indication that the term "taking" is broadening even further. Thus, courts have found proper damage elements for flooded land,[19] for the effect of a taking on non-contiguous land,[20] for the disturbance caused by low flying airplanes,[21] for the "taking" of trade routes even though the government

15. *See* Callender v. Marsh, 1 Pick. 418, 430 (Mass. 1823) in which the court refers to "property actually taken and appropriated by the government."

16. 13 Wall. 166 (1871).

17. "Under this provision property is damaged when it is made less valuable, less useful, or less desirable, and it is immaterial whether such damage occurs by reason of the construction or the maintenance of the project, so long as it is directly attributable to such causative factor and irrespective of whether or not there has been an actual physical taking of any part of such property." 2 NICHOLS, EMINENT DOMAIN 512-13 (rev. 3d ed., 1963). *See also* Mississippi State Hwy. Comm'n v. Colonial Inn, Inc., 246 Miss. 422, 149 So.2d 851 (1963).

18. "The decisive factor in each of these cases, and in others which follow the same principle, is that the personal property or other rights had been directly appropriated or destroyed by actions of agents or officials of the government. The losses of property involved in these cases were not merely incidental or indirect consequences of a taking of other property; rather, they were the direct products of the actual invasion or taking of the property involved." R. J. Widen Co. v. United States, 357 F.2d 988, 993 (Ct. Cl. 1966).

19. United States v. Lynah, 188 U.S. 445 (1903).

20. United States v. Evans, 380 F.2d 761, 764 (10th Cir. 1967).

21. United States v. Causby, 328 U.S. 256 (1946).

was not going to take advantage of them,[22] and for the interference with the enjoyment of property caused by traffic noise.[23] Moreover, it has been generally held that the consequential loss doctrine is not applicable to some elements of damage caused by a partial taking.[24]

When the recent cases are compared to the taking concept evidenced by earlier cases such as *Callender v. Marsh*,[25] the conclusion is apparent that courts have significantly developed the taking concept. From an emphasis on actual physical appropriation, courts in recent cases seem to be moving toward a concept of taking which emphasizes interference with the use or enjoyment of property. This deduction is especially appropriate in connection with the airport and traffic noise decisions.

The taking concept has, therefore, significantly evolved from the nascent stage in which a taking would be found only in the case of a direct physical appropriation of tangible property. With the present emphasis on the use value of property, a taking could be found for intangibles such as certain contracts, good will, and possibly removal and relocation costs. Yet, even with the inclusive definition of taking that is emerging from recent decisions, such intangibles are still generally considered to be non-compensable.

The reason for this continuing application of the consequential loss doctrine to intangibles which are within the definition of the taking concept lies in the inverse relationship between the three terms—property, taking, and just compensation—and the doctrine. Each term, of course, has a separate, individual meaning, but an expansion of that mean-

22. Kimball Laundry Co. v. United States, 338 U.S. 1 (1949).

23. Dennison v. State, 22 N.Y.2d 409, 239 N.E.2d 708 (1968). *See also* State Hwy. Dep't v. Augusta Dist. of N. Georgia Conference of Methodist Churches, 155 Ga. App. 162, 154 S.E.2d 29 (1967).

24. Kimball Laundry Co. v. United States, 338 U.S. 1 (1949). The liberalization of result under the partial taking rule can be seen in a recent New York decision. In Casamassima v. State, 53 Misc.2d 680, 279 N.Y.S.2d 618 (Ct. Cl. 1967) the court held that where a condemner's partial taking had the effect of making it appear that the landowner could not offer passing motorists parking space while they patronized his soft ice cream stand, the landowner should be awarded consequential damages even though the measurement of the remainder showed that the same number of cars that could be accommodated was nearly the same before and after the taking. The court noted that the success of the landowner's business in passing motorists was significantly linked to the apparent parking space.

25. *Supra*, note 15.

ing affects the scope of the doctrine only if there has been an expansion in meaning of the other two terms. Thus, if the scope of the consequential loss doctrine is to decrease, the definition of each term must be broadened to include a wider scope of incidental losses.

This joint expansion has not occurred; rather, the meaning of two of the terms has expanded, while that of the third—just compensation— has remained relatively static. The property concept, because the determination as to whether a particular interest is legally protected is dependent upon the other two terms, has become largely irrelevant to the scope of the consequential loss doctrine. The taking concept has, on the other hand, broadened to the point that many losses which are presently considered to be non-compensable are within its scope. Consequently, one term is irrelevant as a determinant of the scope of the doctrine; another is broadly enough defined that if it were the sole determinant of the doctrine's scope, the consequential loss doctrine would have a very restricted application. The remaining term—just compensation—must, therefore, be considered the primary determinant of the present scope of the doctrine of consequential loss. If the valuation formulas which have developed from the principles of just compensation would be broadened or altered to include incidental losses, this expansion when combined with the development of the other two terms would yield a corresponding decrease in the scope of the doctrine. Thus, analysis must focus on the valuation formulas which have been designed to effectuate the principles of just compensation.

c) *Just Compensation*: Courts have defined this term in one of two distinct ways. The first requires compensation to be an equivalent to that which was taken while the second emphasizes a placement of the condemnee in the same position as occupied before the taking. These different conceptions of the term are not as important, however, as the valuation formulas that have developed to effectuate the different conceptions. It is here, in valuation formulas, that the consequential loss doctrine is given its primary support.

It is possible to isolate three formulas which have been used to compute the condemnation award: (i) Value to taker,

(ii) Value to owner, and (iii) Transfer value based on general demand. Of the three, the first two are generally rejected by present courts, although at times a court will employ one of the two when either there is no ascertainable demand or there is a partial taking.

(i) *Value to taker*: It is well established that courts will not consider value to the taker as the standard of awarding compensation upon the exercise of eminent domain.[26] This general rule is qualified, however, by one exception. If the use to which the condemning authority is to put the land could be available or adaptable to other parties, the value to the taker is representative of a general value, and consequently can be considered in determining just compensation.[27] Thus, a proper statement of the general rule would be that "values in a market created solely by the need of the taker for the property taken are not fair market values to measure constitutionally guaranteed just compensation."[28]

The most frequent reason advanced for denying compensation computed by the value-to-taker formula is that exaggerated awards would result from its use.[29] Because the condemnor would have to pay almost any price, the cost of public improvement would be too high. The feared consequence is that the government would not then be capable of employing its power of eminent domain to provide for public improvements.[30]

(ii) *Value to owner*: It is equally well established that a formula based on value to the owner will not be accepted as the standard of compensation.[31] By refusing to apply such a formula, the courts make clear that the principle of indem-

26. Olson v. United States, 292 U.S. 246, 256 (1934); United States *ex rel* T.V.A. v. Powelson, 319 U.S. 266, 281 (1943); J. A. Tobin Constr. Co. v. United States, 343 F.2d 422, 423 (10th Cir. 1965).
27. Mississippi & Rum River Co. v. Patterson, 98 U.S. 403 (1878).
28. J. A. Tobin Constr. Co. v. United States, 343 F.2d 422, 423 (10th Cir. 1965).
29. *See* JAHR, LAW OF EMINENT DOMAIN 95 (1957) (hereinafter cited as JAHR).
30. The refusal by the courts to consider value to the taker as a factor in assessing compensation has been criticized in a recent article. The authors argue that it should be irrelevant as a standard only when the taker exercises an "extraordinary demand". Recognizing that the determination of what constitutes an extarordinary demand would be difficult, they feel "the law should not retreat whenever problems cannot be disposed of by simple, hard-and-fast rules." Sengstock & McAuliffe, *What is the Price of Eminent Domain? An Introduction to the Problems of Valuation in Eminent Domain Proceedings*, 44 J. OF URBAN LAW 185 at 189 (1966).
31. Mitchell v. United States, 267 U.S. 341, 345 (1925); United States v. General Motors Corp., 323 U.S. 373, 379 (1945).

nification does not control compensation in eminent domain. This rule is qualified, however, by two exceptions which will be discussed later, namely when there is no ascertainable market value and when there is a partial taking.

In rejecting this formula, it is recognized that the condemnation process does not reflect the value determinants which an owner would consider in a true market situation. Consequently, the "full and perfect equivalent" language used to define just compensation is not met by the valuation process. The conflict between the two statements was noted by the Supreme Court in *United States v. General Motors Corp.*:

> No doubt, therefore, if the owner is to be made whole for the loss consequent on the sovereign's seizure of his property, these elements should properly be considered. But, the courts have generally held that they are not to be reckoned as part of the compensation for the fee taken by the Government.[32]

Thus, it can be seen that the refusal to accept this valuation formula reflects the general attitude of American courts to deny compensation for those losses which can be classified as consequential.[33]

(iii) *Transfer value based on general demand*: Rather than value to the taker or value to the owner, American courts have accepted transfer value based on general demand as the formula for determining just compensation. "Most things . . . have a general demand which gives them a value transferable from one owner to another. As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use".[34]

The measurement of general demand is expressed in terms of market value formulas. As the market value concept

32. 323 U.S. 373, 379 (1945).
33. *See generally*, JAHR § 69.
34. Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949).

normally entails both a willing buyer and a willing seller,[35] market value formulas include such language, but in addition four other principles are generally appended to that core definition: The property is valued at the time of taking;[36] to the extent that it influences market value, the property can be appraised at its "highest and best use";[37] remote or speculative losses will not be considered in valuation estimates;[38] in valuing a tract of land sustaining multiple interests[39] courts will treat the fee as if it were unencumbered or undivided, and then allocate awards from that larger sum for the separate interests.[40]

Utilizing these four principles as appendages to the core concept of market value, the market value formula can be stated in the following manner: Market value is that amount which would be paid on the date of taking under normal circumstances on the free and open market, in the usual course of dealings, by a willing buyer not forced to buy and which amount would be acceptable to a willing seller not forced to sell. The property may be appraised at its highest and best

35. PATTERN INSTRUCTIONS FOR KANSAS § 11.05 (1966) (hereinafter cited as PIK).

36. "The decisions are uniform in holding that the value at the time of the taking is the measure of compensation to which the landowner is entitled when property is taken by the Federal government in eminent domain proceedings." Miller v. United States, 125 F.2d 75, 80 (9th Cir. 1942). *See also* MATHES & DEVITT, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 83.13 (1965); PIK § 11.03.

37. The Supreme Court has defined the principle in the following manner: "Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held." Olson v. United States, 292 U.S. 246, 255 (1934).

38. Brooklyn E. Dist. Terminal v. New York, 139 F.2d 1007, 1012 (2d Cir. 1944); Wilson v. United States, 350 F.2d 901, 908-909 (10th Cir. 1965); Comstock v. Iowa State Hwy. Comm'n, 254 Iowa 1301, 121 N.W.2d 205, 210 (1963).

39. In many cases the question arises whether one actually has an interest in the property. Normally, courts will apply a standard to the claimed interest that is similar to the remote or speculative principle of the market value formula: "The interest which, under the constitutions and statutes, entitles a person to compensation for injury must have a direct and actual concrete connection with the specific land attempted to be taken." Deepe v. United States, 103 Colo. 294, 86 P.2d 242, 243 (1938). It has, thus, been held that many contractual rights are noncompensable because their connection to the res is not sufficiently direct. *See generally*, 4 NICHOLS, EMINENT DOMAIN § 13.33 (4th ed., 1964).

40. Eagle Lake Improvement Co. v. United States, 160 F.2d 182, 184 (5th Cir. 1947); Cuyahoga County v. United States, 294 F.2d 775, 777 (Ct. Cl. 1961).

use, but remote or speculative uses or interests shall not be considered. If the property supports multiple interests, it shall be valued in a hypothetically unencumbered condition.[41]

The market value formula is conditioned by three recognized exceptions. First, if there is no ascertainable market for the property, courts will revert to other measures, usually value to the owner.[42] Second, value to the owner is an allowable formula for some losses occasioned by a partial taking.[43] Third, the market value test has been discarded or held inapplicable when valuation is made at unique times[44] or the property has special uses.[45]

In contrast to the property concept, the utilization of which is dependent on the other two terms, and the taking concept, which is now sufficiently broad to include most forms of consequential loss, the market value formula, a formula designed to effectuate the principle of just compensation, has been employed by the courts to deny compensation to those forms of loss classified as consequential. Within this classification, the four following categories represent

41. The austerity of this statement of the formula should be compared to one of the less burdensome instructions which have been proposed for use within a particular jurisdiction: "By *fair market value* is meant the amount for which the property could be sold in the market on a sale by an owner willing, but not compelled, to sell, and to a purchaser willing and able, but not obliged, to buy. This phrase does not mean what could be obtained for the property at a forced sale or at a sale made under unusual or extraordinary circumstances, or what might be obtained from a particular individual who might be willing to pay an excessive price for his special purpose. Sentimental value to the owner or his unwillingness to part with the property can have no consideration in determining the market value.

"In answering both of these questions of the special verdict, it is proper to take into consideration, as shown by the evidence, the use to which the property was put by the owner, or any other use to which it is reasonably adaptable, and you may base your determination on the most advantageous use thus shown to exist, either at the time in question or within a reasonable time in the near future. The future uses considered, if any, must be so reasonably probable as to affect present market value. They must not be possible uses based upon mere fancy, speculation, theory, or conjecture. Everything that gave this parcel of real estate intrinsic value, as shown by the evidence, is proper for your consideration." WISCONSIN JURY INSTRUCTIONS—CIVIL § 8100 (1960). This instruction has been approved by the Supreme Court of Wisconsin in Kreuscher v. Wisconsin Elec. Power Co., 27 Wis.2d 351, 134 N.W.2d 487 (1965).

42. In Comstock v. Iowa State Hwy. Comm'n, 254 Iowa 1301, 121 N.W.2d 205, 210 (1963) the court could find no evidence of the market value of real estate comprising part of a leasehold. Consequently, they allowed evidence of "intrinsic or actual value." *See also* PIK § 11.06.

43. *See* Pima County v. De Concini, 79 Ariz. 154, 285 P.2d 609 (1955); American Louisiana Pipe Line Co. v. Kennerk, 103 Ohio App. 133, 144 N.E.2d 660 (1957).

44. Howell v. State Hwy. Dep't, 167 So. Car. 217, 166 S.E. 129 (1932).

45. Housing Authority of Shreveport v. Green, 200 La. 463, 8 So.2d 295, 298 (1942); Newton Girl Scout Council v. Massachusetts Turnpike Authority, 335 Mass. 189, 138 N.E.2d 769 (1956).

some of the more frequently recurring losses: lost profits, injury to or destruction of good will, moving expenses, and certain contractual interests in or arising from the ownership of the property.

Within these four categories, courts generally refuse to compensate on the basis of the loss being consequential. Thus, lost profits, good will, moving expenses, and certain contractual interests—losses which could broadly be termed business losses—are elements of value which are noncompensable primarily because they do not, in the opinion of most courts, come within the scope of the market value formula. The condemnee is, therefore, required to assume a significant cost of public improvements, the property for which is acquired through eminent domain proceedings.

The market value formula which has arisen from the principles of just compensation can, thus, be seen as the primary determinant of the presently large scope of the consequential loss doctrine. Because the other two terms that have historically affected the scope of the doctrine are now either irrelevant as a determinant or so broad that they embrace many forms of incidental loss, the interrelated nature of the three terms demands that valuation formulas be liberalized if the inverse relationship between the terms and the doctrine is to operate so as to decrease the scope of the consequential loss doctrine. Valuation formulas are, therefore, the focus of analysis. But before liberalization is proposed, it must first be established that the doctrine of consequential loss should have a more restricted scope.

II. EVALUATION

Historically, denial of incidental losses in eminent domain was both understandable and equitable. Even when government taking moved from the stage of causing few such losses and entered the stage of condemning in an industrializing society, denial of such losses was justified on the basis that national development necessitated a liberal application of the public use concept. However, in recent years two developments—the broadened scope of the public use concept and the increased acreage acquired through eminent domain proceed-

ings—enhance the salience of examining the consequential loss doctrine, and questioning the present-day validity of denying compensation for incidental losses.

The fifth amendment qualifies the power of eminent domain by requiring the taking be for a "public use."[46] This concept has been so broadened, however, that the qualification has little practical relevance. Thus, in *Berman v. Parker* the Supreme Court held that the government may condemn private property simply to improve the aesthetic appearance of a community.[47] It is, therefore, an obvious conclusion that the power of the government to condemn land has been enhanced.

Combined with the enhanced *power* to condemn is an increased *tendency* to do so. In the period from December, 1963, to December, 1967, 4,090 acres of land were acquired by condemnation for urban renewal purposes alone.[48] Although the percentage of acquisitions by condemnation should decrease in relation to acquisitions by means such as negotiation,[49] in absolute terms acquisitions by condemnation should increase.

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46. *Supra*, note 1.

47. "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . . If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way." 348 U.S. 26, 33 (1954).

48. The Office of the General Counsel of the Department of Housing and Urban Development has stated in a personal letter to the author that 17,391 acres of land were acquired for urban renewal purposes from December, 1963, to December, 1967. The total acreage was acquired during that period by the following methods:

Land acquired by Condemnation		
Quick take with no determined price	336	acres
Price determined by court decision	2,443	
Price determined by agreement	1,310	
Total	4,090	acres
Land acquired by Negotiation	11,196	acres
Land acquired by Donation	441	acres
Streets, alleys, public rights-of-way acquired by vacation	1,665	acres
Total	17,391	acres*
Total not yet acquired	11,215	acres

*Represents a round figure

49. The Housing and Urban Development Act of 1965 provides that as a condition of eligibility for Federal assistance "the applicant shall make every reasonable effort to acquire the real property by negotiated purchase." 42 U.S.C. § 3072 (Supp. II 1964).

Moreover, takings presently affected under the expanded public use concept generally involve concentrated and contiguous urban areas and result in magnified incidental damages. These changing circumstances accentuate the deficiencies in condemnation compensation and militate in favor of effecting a more equitable balance between the principles of public improvement and private improvement.

Traditional criticism of the doctrine of consequential loss has centered on two aspects of what has been termed "the fundamental unfairness" of the doctrine. First, the doctrine has been criticized because it discriminates between those on whom loss from eminent domain falls. Those who have a valid, but remote, interest in land receives no compensation while the fee holder is not subjected to the doctrine. The second criticism has been that "it requires those who suffer uncompensated injuries to bear directly and in undue proportion the economic expense of projects designed to benefit the public."[50]

Although these criticisms are valid, they do little more than demonstrate the fact, acknowledged by both scholars and courts, that the doctrine is inequitable. An important fact to recall, however is that even though the court in *United States v. General Motors Corp.* could refer to the doctrine as "harsh" and in derogation of the principle of indemnification, the consequential loss doctrine was, nevertheless, applied.[51] This recognition can be understood when it is explained that many courts have interpreted the word "just" in the phrase "just compensation" to require an economic fairness to *both* condemnee and condemnor.[52] Thus, in awarding compensation in eminent domain proceedings, courts move between two conflicting policies: a) Indemnification of the condemnee, and b) Making the cost of exercise of the power of eminent domain not so burdensome on the public purse as to discourage, or economically forbid, public improvements. Hence,

50. Spies & McCoid, *Recovery of Consequential Damages in Eminent Domain*, 48 VA. L. REV. 437, 455 (1962).

51. *See* notes 13 and 14 *supra*.

52. "When we speak of just compensation, we have in mind a figure that will be fair and just, not only to the property owner, but also to the condemning authority. The word 'just' intensifies the meaning of the word 'compensation', conveying the idea that the equivalent to be paid for the property taken shall be real, substantial, full, and ample." Port of New York Authority v. Howell, 59 N.J. Super. 343, 157 A.2d 731, 734 (1960).

the consequential loss doctrine can be seen as being deliberately sustained by the American judiciary because it provides a compromise between the conflicting policies. Incidental losses are absorbed, therefore, by the condemnee so as to free the government to make public improvements. Although this is admittedly unjust and inequitable, many are persuaded that the doctrine is wise because it resolves the conflict.

Moreover, with the increased emphasis on acquisition and subsequent transformation of land for urban needs by both state and federal governments, the policy of considering the governments' ability to afford public improvements is placed in a more favorable light. Consequently, the argument that rests primarily on equitable grounds should have decreasing persuasive force with legislatures and courts. What must be demonstrated, therefore, is that the consequential loss doctrine is unwise, a statement that is not established merely by showing a particular practice to be inequitable. Courts and legislatures must be persuaded that by denying incidental losses they encourage a policy of land use allocation which lacks wisdom for a nation facing increased demands on its land resources.

It must first be recognized that land takes its value from the uses to which it is put. This is true even for one who puts his land to no apparent use by escaping the city, building a home on a large tract of land that commands a country horizon, and merely enjoying the rural simplicity of his life. For that person, the use value is constituted by the fact that the land is put to no apparent use; its usefulness to that person stems from its wildness. The more obvious example, however, is land that supports business and other interests. Here, then, the uses would be multiple—a factory, public utility easements, leases, executory contracts related to the business, and future interests.

When land is considered in terms of use value, two obvious implications are created for eminent domain. First, an interference with a use constitutes an impairment of value. Therefore, when one's property is so affected as to constitute an interference with a use, the action, if a governmental action, should be classified either within the police power or within

the power of eminent domain.[53] If it falls within the scope of the latter, compensation is due. Thus, the recent cases construing the meaning of "taking," especially those involving traffic and airplane noise,[54] stress the use value of property.

The second implication is that when the government takes land, there has occurred a substitution of uses. Whether intended or not the most basic form of land use decision has, thereby, been made. The taking process, therefore, should be seen as an allocation of uses which constitutes a part of the nation's overall land use policy. It is, simply, a determinant of land use allocation.

This factor gains added relevance when one considers the demands being made on available land resources. In this regard, certain statistics are important. It has been estimated that by the year 2000: a) total population will increase to 350 million; b) of this population, three-fourths will live in metropolitan areas; c) the average work week will drop to 32 hours; d) disposable income will rise from $706 billion in 1976 to $1,437 billion in 2000; e) great advances in individual mobility will have culminated.[55] From these statistics several conclusions can be drawn. First, the increase in population with its urban focus will require a definite expansion of the industrial base in and around urban centers. Second, the increase in leisure time will require an expansion of service and entertainment related facilities. Third, the mobility advances will enhance the need for a more viable transportation system. Fourth, the rise in disposable income will allow individuals to take advantage of the expanded, deepened environment. Thus, the demands on land will be varied, intense, and initiated by both the private and governmental sectors. This

53. It is the obligation of compensation that constitutes the chief practical distinction between eminent domain and the police power to regulate. The concepts, however, tend to merge in certain situations such as a permanent injunction against a business due to its non-compliance with air pollution statutes. In such cases the test proposed by Professor Joseph Sax is helpful. He has characterized a compensable loss resulting from the exercise of eminent domain as a "government enhancement of its resource position in its enterprise capacity." Sax, *Takings and the Police Power*, 74 YALE L. J. 36, 63 (1964).

54. *See* notes 31-35 *supra* and accompanying text.

55. These figures were projected in a study conducted by the Outdoor Recreation Resources Review Commission. BARLOWE, LAND FOR RECREATION IN LAND USE POLICY AND PROBLEMS IN THE UNITED STATES 272 (H. Ottoson ed. 1963).

situation creates a severely elastic demand curve for urban land uses in which both public and private groups compete, in contrast to the relatively inelastic demand curve for agricultural land uses.

Given a general elasticity of demand for land, and a specifically high elasticity for urban land uses, it is important to consider the effect that a particular practice, either public or private, has on land use allocation. In short, the determinants of that allocation should be examined for their wisdom, for if the development of land uses within the next three decades is haphazard, and lacking in rational control, the pattern of allocation could be totally inappropriate for the needs of the nation in the year 2000. To provide efficient resource use, land use conflicts must be rationally resolved.

It has been suggested that the resolution of land use conflict be seen in terms of rationing and bargaining transactions.[56] The first of these involves the establishment and enforcement of working rules by the collective superior against the citizen inferior. Bargaining transactions, on the other hand, are those that resolve conflicts between citizens as equals. Rationing transactions, a classification of which eminent domain is a part, have the dual effect, therefore, of making allocation of land uses as well as establishing the limits within which land use decision-making will be left to legal equals.

Furthermore, within each transaction, whether a rationing or a bargaining transaction, market bidding for the land resources should avoid dissociation of the incidence of benefits and costs, a dissociation characterized by the consequential loss doctrine:

> If benefits and costs are dissociated, the production of benefits unconnected with costs will be pushed to marginal products of zero value, whereas unavoidable costs incurred without off-setting benefits cannot be curtailed to equilibrate with resultant marginal value product. Hence, "too many" inputs will be committed to the production of "uncosted" benefits or to the imposition of "unbenefited costs."

56. Kelso, *Resolving Land Use Conflicts* in LAND USE POLICY AND PROBLEMS IN THE UNITED STATES 282-303 (H. Ottoson ed. 1963).

> Dissociation conflicts result in distorted land use and development.[57]

The consequential loss doctrine has the failing of dissociating the incidence of benefits and costs. In supporting a doctrine that denies compensation to the owner and interest holders of a parcel of land, the American judiciary allows the condemning authority to receive the benefits of title without equilibriating costs. The dissociation caused by this encouragement of "uncosted benefits" improperly and unwisely allocates land to a particular use. Because of this lack of wisdom rather than any inequities caused by the doctrine, courts and legislatures should consider alteration of the doctrine, thereby providing for a rational resolution of land use conflicts.

III. PROPOSED METHOD OF ALTERATION

If alteration of the consequential loss doctrine is to be considered, attention must be given to the determinants of the doctrine. It has been shown that three terms—property, taking, and just compensation—inversely affect the content of the doctrine, is scope decreasing as the definitions of the three terms broaden. But upon analysis of each, only one—just compensation—plays a significant role in sustaining the presently broad scope of the doctrine.

The property concept is dependent upon whether a legally protected interest can be found. To that issue, therefore, the other two terms must be used. Hence, the property concept affects the doctrine only through the meaning given to it by the other terms. Analysis must, thus, pass to the other concepts.

The taking concept appears to be at a threshold stage. Recent cases, by equating an interference with the use value of property with a taking, have broadly construed the term. Hence, if the trend continues, the inverse relationship between the term and the doctrine would allow the doctrine to be significantly limited in scope. Thus, if one is interested in diminishing the doctrine, analysis should pass to a term that sustains its broad scope.

57. *Id.* at 292-93.

The concept of just compensation, effectuated through valuation formulas must, therefore, be the focus of analysis. The property concept is largely irrelevant; the taking concept is now sufficiently broad so that if it alone were the determinant of the consequential loss doctrine, the scope of the doctrine would be indeed limited. Thus, whether change be initiated by the courts or by the legislatures, valuation formulas should be considered as the method of change.

If the market value formula is discarded and a new valuation formula substituted, it is suggested that the new formula explicitly be designed to protect three interests. First, the *reliance interest* should be protected. This would give compensation not only to the fee interest but also to less complete interests such as leases, easements, and future interests. Second, the *expectation interest* should be protected. Thus, if an interest holder had an investment in the property (such as a contract for the removal of gravel) or an investment that arises from his ownership but which has no relationship to the actual property (such as a supply contract between a shoe factory located on the property and the Department of Defense for military boots) and that investment is lost due to the condemnation, the interest holders should receive compensation for the expected net return on that investment. Third, the *reproduction interest* should be protected. Thus, if as a consequence of the eminent domain proceedings one suffered a loss to a thing not reproducable, compensation should be given. This interest would protect one from the loss of good will and the loss occasioned by the inability to relocate.

By designing valuation formulas around these three interests, it is asserted that benefits from a taking will be equilibriated with costs, thereby preventing the dissociation that leads to distorted resolution of land use conflicts. However, this alteration of the present market value formulas is so substantial that it is believed that alteration is not the function of the courts. Therefore, legislatures should consider the task, realizing when they do that they have not embarked on a mission of equity adjustment, but rather that they are finally discarding a doctrine which is at odds with intelligent land use planning.

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