COMMENTS

CONDEMNATION BLIGHT: THE NEED FOR ADOPTION IN LOUISIANA

I. INTRODUCTION

In every state of the union, procedures are in place whereby the state can take private property for the development of public projects. Generally, the state announces its intention to engage in a certain project, and community hearings are held to determine impact and public perception. Often, in the course of a public development, the nature of the plans change, funding options are lost, or other circumstances arise that lead to excessive delays in actually expropriating private property. In the interim, the landowner is faced with the ultimate waiting game: he knows that his property will be taken but does not know when or for how much. In this provisional period, the landowner often loses tenants, defaults on mortgages, and must look on as his property declines in value. Condemnation blight refers to the detrimental conditions that a landowner must endure when his property suffers a loss in value from the time that the state announces the expropriation until its completion.[1] By allowing compensation for the loss in property value, courts can provide a legal solution to the problem of condemnation blight.

Some property owners who face the threat of expropriation also suffer from a decrease in property value because of delay or affirmative activities of the state in seeking the expropriation. The property owners who happen to reside in a state where condemnation blight is recognized may be able to seek

1. *See, e.g.*, 4 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 12.3151 (Rev. 3d ed., 1971) [hereinafter NICHOLS ON EMINENT DOMAIN]; Gideon Kanner, *Condemnation Blight: Just How Just is Just Compensation?*, 48 NOTRE DAME LAW. 765 (1973); Julius L. Sackman, *Condemnation Blight—A Problem in Compensability and Value*, 1973 INST. ON PLAN. ZONING & EMINENT DOMAIN 157 [hereinafter *Sackman I*]; Julius L. Sackman, *Condemnation Blight—Part II*, 1976 INST. ON PLAN. ZONING & EMINENT DOMAIN 283 [hereinafter *Sackman II*].

compensation for the decline in property value caused by the pending project. However, property owners situated in Louisiana—or any other state where condemnation blight has not been expressly addressed—may find it difficult to determine the actual contours of their remedy.

This Comment investigates the various applications of a theory of condemnation blight in state courts and explores the viability of such a principle under Louisiana law. Furthermore, this Comment proposes a legislative enactment that can guide the state to ensure that landowners are provided with just compensation, as guaranteed by the federal and Louisiana constitutions, in a way that does not undermine the state's ability to support public projects.

Section II of this Comment gives an overview of the law pertinent to an analysis and discussion of condemnation blight in Louisiana. This includes an explanation of the dualist concept of property, an analysis of the right to just compensation in the federal and Louisiana constitutions, and a survey of the law of condemnation blight as applied in sister states. Section III first discusses Louisiana cases that mention (yet do not expressly adopt) condemnation blight. Second, it looks to other areas of Louisiana law to determine the place for condemnation blight in the codal and legislative scheme of the state. Third, Section III proposes a statutory enactment to assist the legislature in expressly allowing condemnation blight in Louisiana. Section IV concludes with a brief summary of the jurisprudence and policies of condemnation blight.

II. THE CONSTITUTIONAL FOUNDATIONS AND THE LAW OF CONDEMNATION BLIGHT

Because expropriation is inherently linked to the federal and state constitutional requirements of just compensation, this Section explores the contours of the constitutional mandate and its relationship to the right to property. Additionally, this Section provides a general overview of condemnation blight law, including a discussion of the major decisions of other jurisdictions, a clarification of varying applications, and a glimpse into the expansion of condemnation blight.

A. GENERAL PRINCIPLES OF CONSTITUTIONAL LAW AND THE

CONCEPT OF PROPERTY

Both the state and federal constitutions provide protection to property owners from governmental usurpation of their rights. Specifically, under the United States Constitution, a landowner is protected against the governmental taking of private property for public use without just compensation.[2] In this context, just compensation does not simply refer to the value of the land; instead it denotes the value of loss to the landowner, making the constitutional right a personal one. Additionally, the Louisiana constitution guarantees a landowner just compensation for taken or damaged property.[3] Though both the state and federal constitutions entitle the landowner to just compensation, there are some differences between the constitutions and the extent of the remedies they afford.

1. FEDERAL CONSTITUTION

The founding fathers, at the inception of the United States, considered property to be a sacred right. John Adams stated, "[p]roperty is surely a right of mankind . . . . The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."[4] This natural right to property is considered so inherent that it is expressly included within the Constitution: no person shall "be deprived of life, liberty, or property, without due process of law."[5] Thus, because the right to property is a fundamental natural right, alongside the rights to liberty and life, it is held in the highest regard in the United States, and deprivation thereof will not be tolerated outside of the permissions of the Constitution.

The Constitution provides that "private property [shall not] be taken for public use, without just compensation."[6] The determination of what constitutes just compensation has been a

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2. *See* U.S. CONST. amend. V.

3. *See* LA. CONST. art. I, § 4.

4. John Adams, *Defence of the Constitutions of Government of the United States* (1787), *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch16s15.html.

5. U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV, § 1.

6. U.S. CONST. amend. V.

source of commentary and interpretation in the federal judiciary. In the most basic sense, "[t]he word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity.'"[7] Additionally, to determine what just compensation means in terms of the monetary reparation to the landowner, the Supreme Court has stated that "[the landowner] is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more."[8] Therefore, the Just Compensation Clause of the Fifth Amendment seeks to fairly and adequately compensate the landowner such that he is returned to the financial position he enjoyed before the taking.

Nevertheless, when computing just compensation, it is important not to simply reduce the determination to a mathematical calculation, but rather to determine each individual landowner's just entitlement based on his individual circumstances. The Supreme Court has warned that a simple formula, such as market value, may not be the best determination of just compensation in every case.[9] It is under this scheme, whereby each individual landowner is to be fairly and justly compensated for his pecuniary losses, that reimbursement and reparation for losses in addition to market value may be awarded.

Furthermore, the founding fathers intended to distribute the burden of public projects, which require takings, to the public, instead of requiring the individual landowners to bear the burden. "The 'Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"[10] Therefore, the policy behind the Fifth Amendment is to ensure that individuals are not forced to suffer

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7. United States v. Va. Elec. & Power, 365 U.S. 624, 631 (1961) (determining that the value of an easement "must exclude any depreciation in value caused by the prospective taking once the Government 'was committed' to the project").

8. Olson v. United States, 292 U.S. 246, 255 (1934).

9. *See* United States v. Cors, 337 U.S. 325 (1949). ("The Court in its construction of the constitutional provision has been careful not to reduce the concept of 'just compensation' to a formula . . . . The Court in an endeavor to find working rules that will do substantial justice has adopted practical standards, including that of market value . . . since that may not be the best measure of value in some cases.")

10. Penn Cent. Trans. Co. v. City of N.Y., 438 U.S. 104, 123 (1978) (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)) (alteration in original).

a loss that can be better distributed to the public. Consequently, to ensure full and adequate compensation and to uphold the policy of risk allocation, the government must compensate the landowner to the full extent of his financial losses, which may extend beyond the simple market value of his property.

2. CONCEPT OF PROPERTY

Discussing the constitutional right to just compensation for property begs the question: What exactly is "property"? In both the common law and civilian tradition, property is a dual concept, which can often lead to confusion.[11] In the most basic sense, property is the thing to which legal rights or the object of such rights may attach.[12] Houses, cars, and boats are all considered property in this sense. However, in most legal terminology, property refers to the legal relationship between the person and the thing.[13] Thus, the right of ownership, lease, and servitude are property in this respect. In essence, property is a "right[] conferring on a person a direct and immediate authority for the use and enjoyment of a thing that is susceptible of appropriation."[14] Under federal law, the term property, as used in the Fifth Amendment's Just Compensation Clause, "[has] been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it."[15] Furthermore, in the context of

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11. A. N. YIANNOPOULOS, 2 LA. CIV. L. TREATISE, *Property* § 1 (4th ed. 2001) (stating that "[i]n the United States, the word property is frequently used to denote indiscriminately either the objects of rights that have a pecuniary content or the rights that persons have with respect to things"); *see also* RESTATEMENT OF PROP., intro. note (1936) (stating that "[t]he word 'property' is used sometimes to denote the thing with respect to which legal relations between persons exist and sometimes to denote the legal relations"); State v. Chambers Inv. Co., 595 So. 2d 598, 601-02 (La. 1992) (explaining the confusion between using the word "property" to denote the right and the object in the context of both state and federal law); *see also* WILLIAM B. STOEBUCK, NONTRESPASSORY TAKINGS IN EMINENT DOMAIN 15-16 (Michie Co. 1977) (discussing the confusion between the two definitions of "property").

12. 2 YIANNOPOULOS, *supra* note 11, at § 1.

13. *Id.* ("Accurate analysis should reserve the use of the word property for the designation of rights that persons have with respect to things."); RESTATEMENT, PROPERTY, intro. note (1936) ("The word 'property' is used in this Restatement to denote legal relations between persons with respect to a thing.").

14. 2 YIANNOPOULOS, *supra* note 11, at § 3.

15. *See* U.S. CONST. amend. V.; see *infra* Part II.B.2, for a deeper explanation of the Fifth Amendment's guarantee to just compensation; *see also* United States v.

expropriation, Louisiana law provides that property denotes "immovable property, including servitudes and other rights in or to immovable property."[16]

3. LOUISIANA CONSTITUTION

In light of the federal Constitution's requirement of just compensation and the explanation of property as an individual right, it is appropriate that Louisiana's constitution take both into consideration. The Louisiana constitution mirrors the underlying policy of the federal Constitution—that the public is better equipped than the individual landowner to bear the burden of public improvements. However, Louisiana's constitution expands upon this idea, and upon the federal requirement of just compensation, by guarding against property being either taken or damaged. Additionally, the state recognized the personal aspect of property by ensuring a subjective application of the constitutional just compensation requirement to the individual landowner.

Prior to the adoption of the 1974 Louisiana constitution, the 1921 constitution contained a shorter and narrower provision on the rights to property; this provision almost exactly mirrored the federal Fifth Amendment guarantees. The 1921 adoption provided: "No person shall be deprived of life, liberty or property, except by due process of law. Except as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid."[17] After years of attempting to revise the 1921 constitution, Governor Edwin Edwards called a convention to revise and expand the rights granted by the state's constitution.[18]

Gen. Motors Corp., 323 U.S. 373, 377-78 (1945).

16. LA. REV. STAT. ANN. § 19:1 (2009). In Louisiana law, a servitude is a charge on an estate for the benefit of a person (personal servitude) or another estate (predial servitude). *See* LA. CIV. CODE ANN. art. 533 (2009) (explaining the existence of two types of servitudes); *see also* LA. CIV. CODE. ANN. art. 534 (2010) (defining personal servitude); *see also* LA. CIV. CODE ANN. art. 636 (2009) (defining predial servitude).

17. LA. CONST. art. I, § 2 (1921).

18. Wayne Parent & Jeremy Mhire, *CC 73 and the Birth of the Modern Louisiana Two-Party System*, 62 LA. L. REV. 37, 41 (2001) (stating that Governor Edwards, in his campaign platform, promised to call a constitutional convention to "replace the antiquated 1921 constitution" and did so once he took office).

Once the 1973 constitutional convention was called, the delegates sought to articulate certain individual guarantees, modeled after the federal Bill of Rights.[19] Article I of the 1974 Louisiana constitution, called the "Declaration of Rights," enumerates the specific rights afforded to Louisiana citizens.[20] More specifically, section IV of article I expressly recognizes an individual's right to property.[21] It presently reads in relevant part:

> (A) Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.
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> (B)(1) Property 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 . . . .
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> . . . (5) In every expropriation or action to take property pursuant to the provisions of this Section, a party has the right to trial by jury to determine whether the compensation is just, and *the owner shall be compensated to the full extent of his loss*. Except as otherwise provided in this Constitution, the full extent of loss shall include, but not be limited to, the appraised value of the property and all costs of relocation, inconvenience, and *any other damages actually incurred by the owner because of the expropriation*.[22]

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19. Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 1 (1974) ("[T]he Committee on the Bill of Rights and Elections worked from existing federal rights guarantees in drafting most of its proposals, and produced a document that has as its primary background the federal standards in the area.").

20. *See generally*, LA. CONST. art. I.

21. Article I was amended in 2006, yet it retains the basic structure set forth by the delegates at the 1973 constitutional convention. LA. CONST. art. I § 4. *Compare* LA. CONST. art. I, § 4 (1974), *with* LA. CONST. art. I, § 4.

22. LA. CONST. art. I § 4 (emphasis added). Section IV, as adopted by the constitutional convention, was much more concise than the current version, though the above quoted language was similarly contained in the original adopted version. For comparison, the 1974 version as adopted by the Convention reads as follows:

> Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory

During the convention, this section was adopted only after lengthy debate and subsequent modification.[23] The changes represent the goal of the constitutional delegates to expound upon the requirements of the 1921 constitution.[24]

In drafting the revised Section IV, the authors specifically intended that property refer to the rights that attach to certain things, as opposed to the narrower sense of an object to which rights attach.[25] In support of the expanded section, Representative Louis "Woody" Jenkins noted:

> "Every person has the right to acquire by voluntary means, to own, to control, to enjoy, to protect, and to dispose of private property." That means simply this. It does not mean that a person has a right with regard to any given piece of property; to dispose of it, or own it, or enjoy it. But that he has that general right, that the right, say, to own property cannot be a right which is taken away from him.[26]

From this, it is clear that the delegates intended for the idea of the right to property to reflect the traditional notion and that property is indeed a set of rights a person has with respect to a thing.[27] Thus, under the Constitution of the State of Louisiana,

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> restrictions and the reasonable exercise of the police power.
> Property 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. In every expropriation, a party has the right to trial by jury to determine compensation, and the owner shall be compensated to the full extent of his loss.

LA. CONST. art. I, § 4 (1974); *see also* Hargrave, *supra* note 19, at 10-11.

23. *See* Hargrave, *supra* note 19, at n.42 ("Initial adoption by one vote beyond the necessary 67 votes for adoption of a section followed consideration of 15 amendments and 10 roll call votes. The section was reconsidered and modified two weeks later.").

24. This particular section of the constitution was modeled after similar provisions in the constitutions of other states. 1 RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: CONVENTION TRANSCRIPTS, at 86 (citing the Arizona, California, Colorado, Illinois, Montana, Nevada and North Dakota constitutions) [hereinafter TRANSCRIPTS]; 6 TRANSCRIPTS, at 1033.

25. 7 TRANSCRIPTS, at 1240. "[T]he word . . . 'property' here, is intended to be used in its broadest sense, in other words, a leasehold interest in land is a property right[.]" *Id*.

26. 6 TRANSCRIPTS, at 1030. Louis "Woody" Jenkins was a delegate to the convention as a state representative from District 66. *See* 1 TRANSCRIPTS, at 2.

27. See *supra* at Part II.A.2 for Professor Yiannopoulos's explanation of property.

any taking or damaging of such a right results in a violation of the constitutional guarantee of property and the landowner is entitled to compensation.

One of the most significant changes between the 1921 constitution and the 1974 constitution was the expansion of the just compensation provision. The old language of "just and adequate compensation" was changed to "compensated to the full extent of his loss."[28] This revision was intended to provide for a more complete compensation to the landowner who suffered not only the loss of the value of his land, but also losses incurred by the taking.[29] The result was intentional, driven by the belief that compensations under the 1921 constitution were inadequate.[30]

Furthermore, the authors specially designed the provision to authorize compensation based on the losses of each particular property owner. By requiring that "the owner be compensated to the full extent of *his* loss,"[31] the authors mandated that "consideration be given to an owner's subjective intangible losses rather than only to objective determinations."[32] This expressly allows courts to compensate beyond the measure of a property's market value and to include relocation costs, business losses, attorney's fees, and the like.[33] Consequently, the more expansive compensation requirement of the 1974 constitution extends the range of recovery for each individual landowner to those losses which, when compensated, will place the owner in the financial position he enjoyed prior to the taking.

The Constitution of the United States, the Constitution of

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28. *See* Hargrave, *supra* note 19, at 15. *Compare* LA. CONST. art. I, § 2 (1921), *with* LA. CONST. art. I, § 4 (1974).

29. *See* 6 TRANSCRIPTS, *supra* note 24, at 1031 (explaining that the measure of just compensation is to compensate the landowner to the full extent of his loss); *see* 1 TRANSCRIPTS, at 86 ("The term 'full extent of the loss' is intended to permit the owner whose property has been taken to remain in equivalent financial circumstances after the taking."); *see* 7 TRANSCRIPTS, at 1240-41 ("'To the full extent of the loss' is intended to call things which, perhaps, in the past may have been considered damnum absque injuria, such as cost of removal and things like that . . . ."); *see* 7 TRANSCRIPTS, at 1241-42 (stating that the revisions are expansive and give more rights than the 1921 constitution allowed).

30. *See* Hargrave, *supra* note 19, at 15.

31. LA. CONST. art. I, § 4 (emphasis added).

32. *See* Hargrave, *supra* note19, at 15-16.

33. *Id.*

the State of Louisiana, and the concept of property each pave a small section on the road toward allowing recovery for condemnation blight. The federal Constitution's requirement of just compensation lays a solid foundation, ensuring that property rights cannot be deprived unless certain conditions are met. The Louisiana constitution's expansion of the just compensation provision builds upon this groundwork and allows compensation in more expansive circumstances. By recognizing the right to own property as one relative to the person, Louisiana cemented individual rights with that of just compensation, ensuring that each landowner is reimbursed to the extent of his personal losses. The state and federal constitutions, as well as the concept of property, provide the framework upon which the principles of condemnation blight may be built in Louisiana.

B. THE LAW OF CONDEMNATION BLIGHT

The history of condemnation blight spans from the 1960s to the present day, predating the 1974 Louisiana constitution. Despite at least fifty years of jurisprudence on the matter, many jurisdictions have not adopted condemnation blight. Over time, several jurisdictions struggled to determine exactly how condemnation blight should be applied. The states that have recognized condemnation blight as a viable theory of land valuation in eminent domain proceedings serve as a model to the remaining jurisdictions that have yet to specifically determine how to implement the policies behind condemnation blight. Furthermore, these cases show the underlying policies of condemnation blight and provide guidance to those seeking to understand the reasons for allowing this kind of recovery. Finally, the application of condemnation blight over the years has led to confusion as to whether the depreciation in value causes a de facto taking or should simply be considered in the valuation scheme.

1. THE HISTORICAL ASPECT OF CONDEMNATION BLIGHT

In the 1960s, various states and eminent domain scholars recognized the importance of compensating a landowner for the loss of property value caused by the imminence of a project.[34]

34. *See*, *e.g.*, 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, 500 P.2d 1345 (Cal. 1972)

Because of this need, several states led the way in allowing a landowner to be compensated for such losses caused by a public project. This theory of condemnation blight seeks to remedy the pre-condemnation activities of the expropriating entity that cause a landowner to suffer from the decline in his property's value and other detrimental conditions.[35] In determining what constitutes such activities, Gideon Kanner, one of the most prominent commentators of condemnation blight, has noted that "the central issue . . . is the cumulative result of many things, each in itself that might not have been totally harmful, but when impacted together all have the full force of destruction of the property."[36]

Condemnation blight may arise due to widespread publication and knowledge of the threat of condemnation upon the property in question, or it may result from a protracted delay in the government's expropriation of the property.[37] In either case, the condemnee who suffers the effects of condemnation blight is entitled to compensation. He may either seek redress in the condemnation proceeding, as instituted by the state, or he may initiate an inverse condemnation action.[38] When the state

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(en banc); State Rd. Dep't. v. Chicone, 158 So. 2d 753 (Fla. 1963); *In re* Urban Renewal, Elmwood Park, 136 N.W.2d 896 (Mich. 1965); City of Buffalo v. J.W. Clement Co., 269 N.E.2d 895 (N.Y. 1971); City of Cleveland v. Carcione, 190 N.E.2d 52 (Ohio Ct. App. 1963); Luber v. Milwaukee Cnty., 177 N.W.2d 380 (Wis. 1970); *see generally* 8A NICHOLS ON EMINENT DOMAIN § G18, *supra* note 1; *see generally Sackman I*, *supra* note 1; *see generally Sackman II*, *supra* note 1.

35. *See generally* 8A NICHOLS ON EMINENT DOMAIN § G18, *supra* note 1.

36. *See* Kanner, *supra* note 1, at 770 (citing City of Cleveland v. Hurwitz, 249 N.E.2d 562, 567 (Ohio Prob. Ct. 1969)).

37. *See* 8A NICHOLS ON EMINENT DOMAIN § G18.01[1], *supra* note 1, at G18-5; *See also* Klopping v. City of Whittier, 500 P.2d 1345 (Cal. 1972) (en banc) (third party filing of a lawsuit caused delay); Johnson v. City of Minneapolis, 667 N.W.2d 109 (Minn. 2003) (finding, in an inverse condemnation action, that the city's ongoing negotiations with the development company from late 1987 onward substantially interfered with the appellant's property, which entitled him to compensation for diminished value); City of Buffalo v. J.W. Clement Co., 269 N.E.2d 895 (N.Y. 1971) (stating that the City extensively announced the project and induced the landowner to relocate over the course of ten years, only to drop the project after landowner completely relocated large printing business).

38. *See* 8A NICHOLS ON EMINENT DOMAIN § G18.01[1], *supra* note 1, at G18-3-4; *see also* United States v. Clarke, 445 U.S. 253, 257 (1980) ("[Inverse condemnation is] a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted."); Frank Maraist, 1A LA. CIV. L. TREATISE, *Expropriation* § 9:9 (2009); 27 AM. JUR. 2D *Eminent Domain* § 742 (2010).

has actually instituted expropriation proceedings against the landowner, he will simply have to allege that the valuation of the property should include condemnation blight damages. However, when the state has not instituted an action, the landowner must file an inverse condemnation action and prove a de facto taking in order to be compensated for condemnation blight.[39]

Many of the cases that recognize condemnation blight cite to the decisions of sister states, resulting in a web of interdependence among the states in allowing compensation for such losses. Two of the earliest and most cited cases recognizing the policy behind allowing condemnation blight damages are *State Road Department v. Chicone* and *Klopping v. City of Whittier*.[40]

In 1963, the Florida Supreme Court allowed condemnation blight damages to stand in *State Road Department v. Chicone*, relying on the constitutional right to just compensation.[41] The state filed a condemnation suit against Chicone to obtain his land for highway purposes.[42] Witness testimony affirmed that the value of the land was depressed by the pending condemnation; because the judge failed to instruct the jury to disregard the effect of the proposed taking on the value of the property, the district court granted a new trial.[43] The court of appeals found no abuse of discretion in granting a new trial, relying on the Florida case of *Sunday v. Louisville & Nashville Railway Co.*, which indicated that an increase in value may be taken into consideration when valuing land.[44]

The Florida Supreme Court differentiated the *Sunday* case

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39. *See infra* Part II.B.3.

40. *See* State Rd. Dep't. v. Chicone, 158 So. 2d 753 (Fla. 1963); Klopping v. City of Whittier, 500 P.2d 1345 (Cal. 1972) (en banc). Additionally, several New York opinions are highly cited and revered in the condemnation blight analysis and are discussed *infra* at Part II.B.3.

41. State Rd. Dep't. v. Chicone, 158 So. 2d 753 (Fla. 1963).

42. *Id.* at 755.

43. State Rd. Dep't. v. Chicone, 158 So. 2d 753, 754 (Fla. 1963).

44. *Id.* ("[The district court pointed out that [*Sunday v. Louisville & Nashville Ry. Co.*, 57 So. 351 (Fla. 1912)] did not hold that a *decrease* in market value occurring in anticipation of a proposed improvement could be considered in determining compensation to be paid for property being condemned, but had only held that an increase in value could be considered."); *see also* State Rd. Dep't. v. Chicone, 148 So. 2d 532 (Fla. Dist. Ct. App. 1963).

by noting that, in that case, anticipation of the completion of the project caused an *increase* in value, which the court allowed as one element for determining compensation.[45] However, in the *Chicone* dispute, the pending condemnation caused *depreciation* in value, and the property did not share in any of the benefits that typically flow from property located near a desirable project, as was the case in *Sunday*.[46] In clarifying this distinction, the court stated,

> But when land is definitely marked for condemnation, and this is the situation which confronts us here, it shares none of the beneficial effects which could flow from anticipation of the proposed improvement for it will not be available for private use when the project is completed. Once selected for condemnation the marketability, both sale and rental, and to some extent the use, of property is sterilized and its value, either as determined by market value or use by the owner, is decreased. This decrease no doubt is in proportion to the lapse of time between the announcement that the lands will be taken and the actual taking. It is difficult to conceive of a situation in which property will increase in value because of the prospect of condemnation. A tenant's use of such property can only be temporary, and a purchaser would buy only an undetermined award in a condemnation suit.[47]

This statement clearly articulates the problems caused by condemnation blight—the owner suffers loss of tenants and depreciation in value of his property because of the inevitable expropriation by the state, but he will not be able to recoup the loss suffered.

Despite this statement, the Florida Supreme Court declined to create an affirmative rule in favor of condemnation blight and instead simply stated that the lower courts were improper in their valuation schemes and correct in granting a new trial.[48] In doing so, the court noted, "it would be neither fair, equitable or just to compensate him for the value of his property as

45. *Chicone,* 158 So. 2d at 754.
46. *Id.* at 754-55.
47. State Rd. Dep't. v. Chicone, 158 So. 2d 753, 754 (Fla. 1963).
48. *Id.* at 758.

established by such limited and restricted use."[49] Therefore, the *Chicone* case created a strong policy in Florida in favor of condemnation blight damages and sparked a wave of jurisprudence in other states adopting a similar rule.

Almost ten years after *Chicone*, the California Supreme Court, in *Klopping v. City of Whittier*, clearly established a rule in favor of condemnation blight.[50] The city initiated condemnation proceedings against Klopping in late 1965 and abandoned the proceedings just over a year later.[51] The lower courts denied Klopping's request for damages because the city planned to later reinstitute the condemnation proceedings.[52] Klopping filed an inverse condemnation action, which was also denied, claiming that the market value depreciated due to the city's pursuit of condemnation.[53] The court consolidated the appeals into the present action.[54]

The court set forth an affirmative rule in allowing condemnation blight to stand in California. The rule contained multiple parts, providing that the condemnee must be allowed the opportunity to plead his case.[55] He must show either excessive delay or unreasonable conduct on part of the condemning authority and must also show the depreciation in market value caused by such actions.[56] To quiet concerns as to the speculative nature of value depreciation, the court specifically placed the burden on the condemnee to prove his damages.[57] Thus, the

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49. *Id.*

50. Klopping v. City of Whittier, 500 P.2d 1345 (Cal. 1972) (en banc).

51. *Id.* at 1348.

52. *Id.* The proceedings were dropped because of a pending lawsuit filed against the city. *Id.* While the suit was pending, the city filed a resolution allowing the dismissal of the condemnation proceedings again Klopping and others but stated a firm intention to reinstate if the lawsuit ended in favor of the city. *Id.*

53. Klopping v. City of Whittier, 500 P.2d 1345, 1350 (Cal. 1972) (en banc).

54. *Id.* at 1348.

55. Klopping v. City of Whittier, 500 P.2d 1345, 1355 (Cal. 1972) (en banc).

56. *Id.* ("[W]e hold 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.").

57. The court noted that previous instances of denying admission of depreciation evidence were because of the "speculative quality of the evidence." Klopping v. City of Whittier, 500 P.2d 1345, 1353 (Cal. 1972) (en banc). However, the court noted that

Klopping decision added another level to condemnation blight jurisprudence by providing express limitations that require undue delay or excessive conduct.

Not all significant condemnation blight decisions took place decades ago. One of the most noteworthy recent cases of condemnation blight is that of *Clay County Realty Co. v. City of Gladstone*.[58] Decided in June 2008, the case represents Missouri's adoption of condemnation blight as a compensable theory of recovery.[59] In the case, Clay County Realty owned a piece of commercial property that was slated for redevelopment by the city's initiative.[60] Almost two years after announcing the project, the city cancelled its agreement with the developer and sought to receive tax funding for the project.[61] The city took no further action to acquire the property, and Clay County Realty sued the city, alleging violation of the constitutional right to just compensation.[62] Specifically, Clay County Realty argued that the city delayed the redevelopment project and, as a consequence, retail tenants failed to renew their leases, causing the property values to decline.[63] The lower courts granted summary judgment to the city on the basis that the plaintiff's arguments did not state a claim for a constitutional taking.[64]

The Missouri Supreme Court viewed the claims of Clay County Realty in the context of the state constitution and the categorization of the alleged injuries as condemnation blight. First, the Missouri constitution, quite like the Louisiana constitution, guarantees that "private property shall not be taken

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other cases have allowed evidence of appreciation in value as caused by the project. *Id*. In support of allowing condemnation blight, the court stated that it is no more speculative in cases of depreciation than it would be for cases of appreciation. *Id.* Furthermore, speculation is minimized and categorical exclusion of evidence is avoided by placing the burden on the condemnee, requiring the proper foundation to be laid, and properly instructing the jury. *Id*.

58. Clay Cnty. Realty Co. v. City of Gladstone, 254 S.W.3d 859 (Mo. 2008) (en banc).

59. *Id*. at 869.

60. *Id.* at 861.

61. *Id*. at 861-62.

62. Clay Cnty. Realty Co. v. City of Gladstone, 254 S.W.3d 859, 862 (Mo. 2008) (en banc).

63. *Id*. at 862.

64. *Id*. at 863.

or damaged for public use without just compensation."[65] The court noted that actions short of actual acquisition or physical invasion of the property may still constitute a taking or damaging under the constitution.[66] Second, the court defined condemnation blight as "[t]he damages suffered when a 'cloud of condemnation' hangs over a property and an actual taking is never effectuated or is long delayed."[67] Furthermore, Missouri adopted a form of statutory relief for landowners suffering from condemnation blight, but only in the situation when the condemnor abandons the proceedings.[68]

In light of Missouri's recognition of condemnation blight and the constitutional prohibition against the taking or damaging of property without just compensation, the court determined that a claim for condemnation blight, which included the allegations of Clay County Realty, is permissive as an inverse condemnation action.[69] However, the court stated, "[b]ecause some delays relating to condemnation proceedings are natural and unavoidable, before the property owners have a viable cause of action for pre-condemnation damages, they must establish that there has been aggravated delay or untoward activity in instituting or continuing the condemnation proceedings at issue."[70] In creating such a limited cause of action, the court necessarily required the landowner to bear some delay; otherwise such a rule could create a cause of action for every condemnation case and impede future public projects.[71] Furthermore, the court

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65. *Id.*; *compare* MO. CONST. art. I, § 26 (1995) ("That private property shall not be taken or damaged for public use without just compensation."), *with* LA. CONST. art I, § 4 ("Property 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.").

66. Clay Cnty. Realty Co. v. City of Gladstone, 254 S.W.3d 859, 863 (Mo. 2008) (en banc).

67. *Id.* at 864. The court, in its opinion, heavily referenced the condemnation blight decisions of other jurisdictions. *See id.* and citations therein.

68. *Id.* at 867; *see also* MO. ANN. STAT. § 523.259 (West 2006); *see also* Dale A. Whitman, *Eminent Domain Reform in Missouri: A Legislative Memoir*, 71 MO. L. REV. 721, 756-59 (2006) (explaining Missouri's attempt to legislatively codify an action for condemnation blight).

69. Clay Cnty. Realty Co. v. City of Gladstone, 254 S.W.3d 859, 869 (Mo. 2008) (en banc).

70. *Id.*

71. *Id.*

required the landowners to prove that their injuries were caused by the condemnor's actions.[72] Thus, Missouri adopted a rule for condemnation blight that provides the injured landowner with a cause of action either brought in the expropriation proceeding or through an inverse condemnation action. To ensure the protection of the state's interests in furthering public development projects and judicial economy, the claim for condemnation blight was limited to situations in which the authority excessively delayed or otherwise aggravated activity and where the property owner can prove damages. Nevertheless, the 2008 *Clay County Realty* decision shows that condemnation blight remains a viable issue in some jurisdictions, especially those that have not adopted a cause of action legislatively or judicially.

2. THE POLICIES BEHIND CONDEMNATION BLIGHT

In light of these state supreme court decisions, the underlying policies of condemnation blight allow for further understanding of the principle. First, under the federal and various state constitutions, the requirement of just compensation contemplates more than market value. Second, because property refers to the rights of the landowner, the compensation granted to him should be subjective and reflect his personal losses. Third, the burden of public projects is best borne by the public, instead of the landowner, and as such the compensation given to the landowner should reflect this risk allocation. Fourth, and finally, condemnation blight seeks to prevent the state from taking advantage of depressed property values as caused by the state's own actions in seeking to delay the taking.

First, one of the strongest bases for allowing compensation for condemnation blight stems from the guarantee of compensation in the Fifth Amendment of the U.S. Constitution and analogous provisions in state constitutions.[73] Although the Supreme Court has not addressed condemnation blight,[74] the

72. *Id.*

73. *See* 8A NICHOLS ON EMINENT DOMAIN § G18, *supra* note 1, at G18-19 (stating that those courts which allow compensation for condemnation blight do so based on the Fifth Amendment).

74. Only ten federal cases mention either condemnation blight or the analogous term of planning blight, and when mentioned, it is in the context of state law and

constitutional requirement that the landowner receive just compensation for land taken may contemplate an award that includes depreciation in value. In 1934, the United States Supreme Court stated that the purpose of the just compensation provision of the Fifth Amendment is to "put [the owner] in as good a position pecuniarily as if his property had not been taken."[75] Drawing from this statement, compensation for the loss

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constitutions as opposed to federal. *See* Kohl Indus. Park Co. v. Rockland Cnty., 710 F.2d 895, 905 (2d Cir. 1983) (citing City of Buffalo v. J.W. Clement Co., 269 N.E.2d 895, 903 (1971)) ("'[C]ondemnation blight . . . allows an owner whose property is condemned to recover compensation based on the value of the property at the time of the taking, as if it had not been subjected to the debilitating effect of a threatened condemnation."); Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141, 1147 (9th Cir. 1983) (stating that genuine issues as to whether the condemning authority's actions, including the delay, were unreasonable enough to constitute planning blight); United States v. 320 Acres of Land, 605 F.2d 762, 787 n.32 (5th Cir. 1979) ("Compensation problems raised by depreciation in value attributable to governmental activities are frequently analyzed in terms of 'condemnation blight' or 'de facto takings . . . .'"); United States v. Tract J42-25, No. 2:08-cv-62-FtM-29DNF, 2009 WL 2181268, at *2 (M.D. Fla. July 22, 2009) (determining that "condemnation blight can occur where a taking causes surrounding per acre values to decrease . . . ."); U.S. v. 10.082 Acres of Land, No. CV05-00363-PHX-NVW, 2007 WL 962846, at *10-11 (D. Ariz. Mar. 27, 2007) (describing condemnation blight and explaining how it may be applicable to the case); W.J.F. Realty Corp. v. Town of Southampton, 351 F. Supp. 2d 18, 26 (E.D.N.Y. 2004) (analogizing condemnation blight, as adopted in the 1970s cases in New York, to the case); Broadway 41st St. Realty Corp. v. N.Y. State Urban Dev. Corp., 733 F. Supp. 735, 743-44 (S.D.N.Y. 1990) (explaining condemnation blight); Kaiser Dev. Co. v. Honolulu, 649 F. Supp. 926, 930-31 (D. Haw. 1986) (explaining the plaintiff's argument for condemnation blight); Barsky v. City of Wilmington, 578 F. Supp. 170, 173 n.4 (D. Del. 1983) (describing condemnation blight); Thompson v. Tualatin Hills Park & Recreation Dist., 496 F. Supp. 530, 542-50 (D.C. Or. 1980) (explaining how other cases have allowed condemnation blight damages in takings claims because of the "just compensation" required under the federal and state constitutions).

75. Olson v. United States, 292 U.S. 246, 255 (1934); *see also* Reichs Ford Rd. Joint Venture v. State Rds. Comm'n, 880 A.2d 307, 313 (Md. 2005) ("The general theory behind [the theory] of just compensation was that the individual property owner should be placed in as good a position financially as he or she would have been but for the establishment of the public project.") (citations omitted); Clay Cnty. Realty Co. v. City of Gladstone, 254 S.W.3d 859, 863 (Mo. 2008) (en banc) ("When a taking occurs, the owner is entitled to be put in as good a position pecuniarily as if his property had not been taken. This concept encompasses both direct takings, wherein the government formally takes land for public use via eminent domain, and inverse takings, where the government takes or damages land, sometimes unintentionally, without going through an official process.") (citations omitted); State v. Barsy, 941 P.2d 971, 975 (Nev. 1997) *overruled on other grounds by* GES, Inc. v. Corbitt, 21 P.3d 11, 13 n.6 (Nev. 2001) ("[J]ust compensation requires that the landowner 'be put in as good position pecuniarily as he would have been if his

in property value is designed to return the landowner to the monetary position he enjoyed before the value declined.[76] Recovery for condemnation blight is drawn not only from these constitutional guarantees but also from a public policy standpoint. Thus, condemnation blight damages have largely been allowed on the basis that the payment for depreciation in value caused by the pending expropriation is necessary to afford the landowner just compensation within the ambit of the Constitution.

The second consideration for condemnation blight serves as a corollary to the first. Whereas the first aspect related to the constitutional requirement to recompense the landowner for his losses, the second refers to the personal nature of the right to just compensation. The just compensation provision guarantees reparation to a personal right and not just a payment of the market value of the physical property. However, one of the strongest arguments against condemnation blight, as drawn from an 1893 Supreme Court decision interpreting the Fifth Amendment, states exactly the opposite. The Court stated that the Fifth Amendment deviates from other rights guaranteed in the Bill of Rights in that it is not a personal right, but rather "just compensation . . . is for the property, and not the owner."[77] This interpretation of the guarantee of just compensation for property taken construes the right as in rem, instead of in personam.

Almost a century later, the Supreme Court emerged at the opposite end of the spectrum, finding that the right to just compensation is a *personal* right. Specifically, in *Lynch v. Household Finance Corp.*, Justice Stewart noted:

> Property does not have rights. People have rights. The right

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property had not been taken.'") (citations omitted).

76. The depreciation in property value may be an incident of either the threat of compensation or an extended period of delay between the announcement and the taking.

77. Monongahela Nav. Co. v. United States, 148 U.S. 312, 326 (1893) ("[J]ust compensation, it will be noticed, is for the property, and not the owner. Every other clause in this Fifth Amendment is personal . . . . Instead of continuing that form of statement . . . the personal element is left out, and the 'just compensation' is to be a full equivalent for the property taken."); *see also* 8A NICHOLS ON EMINENT DOMAIN § G18.04[1][c], *supra* note 1, at G18-18–G18-19; *see also Sackman I*, *supra* note 1, at 181-82.

> to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.[78]

In reaching such a conclusion, the Court inherently recognized that property can constitute more than simply a thing—property may constitute the rights one has with respect to a thing.[79] Furthermore, the just compensation provision is couched among other personal rights in the Bill of Rights, which evinces that the right is, indeed, a personal one. Thus, the Fifth Amendment's guarantee that "private property [shall not] be taken for public use, without just compensation" refers to reparation of personal injuries with respect to property.[80] Condemnation blight damages recognize the personal right and allow the landowner, who suffers loss above and beyond the market value of his property, to obtain adequate and just compensation.[81]

Furthermore, many state decisions allowing condemnation blight specifically focus on the personal losses of the landowner instead of the market value. For example, the Florida Supreme Court recognized that the aim of just compensation is to ensure that the particular landowner is "compensated for the loss he sustains when his property is taken from him."[82] Additionally, the Maryland Supreme Court, when faced with the question of whether condemnation blight is compensable, stated "[t]he

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78. Lynch v. Household Fin. Corp., 405 U.S. 538, 551-52 (1972) (citations omitted).

79. See *supra* Part II.A.2 for a discussion of the concept of property in general. Outside of the two Supreme Court opinions, there is additional support that the Fifth Amendment's guarantee of compensation for property taken is a personal right. For example, this guarantee is couched in the Bill of Rights, which contains rights with respect to individuals.

80. This distinction is moot in states where the state constitution expressly provides that such a right is personal. This may be true in Louisiana, because of the constitutional requirement that the "owner shall be compensated to the full extent of *his* loss." LA. CONST. art. I § 4(B)(5)(emphasis added). See *infra* Section III.B.1 for an analysis of the implications of the constitutional language on the applicability of condemnation blight in Louisiana.

81. 8A NICHOLS ON EMINENT DOMAIN § G18.02, *supra* note 1, at G18-7-9.

82. State Rd. Dep't. v. Chicone, 158 So. 2d 753, 757 (Fla. 1963).

general theory behind [the requirements] of just compensation was that the individual property owner should be placed in as good a position financially as he or she would have been but for the establishment of the public project."[83] Thus, the two most prevalent reasons why other jurisdictions have adopted condemnation blight are rooted in the Constitution's mandate of just compensation: Compensation is intended to return the landowner to the pecuniary position he enjoyed prior to the taking, and the focus of such compensation is on the landowner, instead of on the individual parcel of land.

The third policy behind condemnation blight is the maintenance of proper risk allocation. The United States Supreme Court has stated that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[84] If a court denies recovery of condemnation blight damages, then the court effectively forces that individual landowner to bear the burden of public projects. In contrast, if the landowner is adequately compensated for the financial burdens and losses he has incurred, then the risk and cost of the project will shift back to the public, which is better equipped to bear such a burden. The Maryland Supreme Court relied on this policy consideration when it reiterated that "the economic impact of a public project should be borne by the public as a whole and not by a single property owner or a group of individual property owners."[85] Therefore, condemnation blight seeks to properly shift the burden of government projects to the public and to protect the individual from bearing unnecessary and onerous costs.

The final policy consideration that the courts articulate when applying condemnation blight principles is that the state should not be allowed to obtain an unjust benefit in depressing the property value. In denying condemnation blight, the state is allowed to profit from the detrimental conditions it causes by

83. Reichs Ford Rd. Joint Venture v. State Rds. Comm'n, 880 A.2d 307, 313 (Md. 2005).

84. Armstrong v. United States, 364 U.S. 40, 49 (1960).

85. Reichs Ford Rd. Joint Venture v. State Rds. Comm'n, 880 A.2d 307, 313 (Md. 2005).

paying the reduced market value at the time of the expropriation. The Supreme Court has noted that "it would be manifestly unjust to permit a public authority to depreciate property values by a threat . . . of the construction of a government project and then to take advantage of this depression in the price."[86] States that have recognized condemnation blight, such as Florida, expressly relied upon this policy: "[Determining compensation at the depressed value] would permit a condemnor to depreciate [the] property values by a threat of condemnation then take advantage of the depressed value which results by paying the landowner the depreciated value."[87]

However, not all policy considerations weigh in favor of condemnation blight. Some jurisdictions have either denied or limited the application of condemnation blight based on the potential adverse effect upon future public projects. For example, the Texas Supreme Court expressly denied recovery under condemnation blight based on the following consideration:

> 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, hindering public debate and increasing waste and inefficiency.[88]

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86. United States v. Va. Elec. & Power Co., 365 U.S. 624, 636 (1961) (quoting LEWIS ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 105 at 447 (2d ed. 1952)); *see also* Klopping v. City of Whittier, 500 P.2d 1345, 1350 n.1 (Cal. 1972) (en banc) ("[I]t would be manifestly unfair and violate the constitutional requirement of just compensation to allow a condemning agency to depress land values in a general geographical area prior to making its decision to take a particular parcel located in that area.").

87. State Rd. Dep't. v. Chicone, 158 So. 2d 753, 757 (Fla. 1963); City of Buffalo v. George Irish Paper Co., 31 A.D.2d 470 (N.Y. App. Div. 1969), *aff'd* 258 N.E.2d 100 (N.Y. 1970) ("The city should not be permitted upon completion of its condemnation plans to benefit from such loss it caused to defendant, by evaluating the property as of the trial date on the basis of its damaged, diminished value.").

88. Westgate, Ltd. v. State, 843 S.W.2d 448, 453 (Tex. 1992). In *Westgate*, the landowner argued that, in light of this consideration, the state should adopt a rule for condemnation blight applicable when the government unreasonably delays the actual acquisition. *Id.* at 454. The court declined to adopt the rule as adopted in other jurisdictions. *Id.*

Nevertheless, several states have applied condemnation blight by directly addressing such a concern. The Supreme Court of Missouri articulated that, without a limiting factor, any pre-condemnation activity may give rise to a cause of action.[89] Realizing that some delays in acquisition are inevitable, the court imposed a stringent standard that required the landowner to show "aggravated delay or untoward activity in instituting or continuing the condemnation proceedings at issue."[90] Thus, those jurisdictions concerned with an adverse effect can impose limitations on the rule they adopt to adequately tailor its application as well as safeguard and balance the requisite interests at hand.

The purposes behind condemnation blight and the policies it seeks to uphold are numerous. The Constitution mandates just compensation that restores the individual to his pecuniary position prior to the taking. Additionally, the law seeks to ensure that individuals are not forced to bear those burdens that should be borne by the public. Finally, denying condemnation blight allows the state to take advantage of the detrimental conditions caused by its own actions.

3. THE VARIOUS APPLICATIONS OF CONDEMNATION BLIGHT

Even though condemnation blight is a straightforward concept, the jurisprudence on the theory can be scattered and confusing. For example, some jurisdictions have struggled with determining whether condemnation blight affects the actual date of the taking. For a de facto taking, the court effectively resets the date of the condemnation to the point in time where the property owner was deprived of the substantial use and enjoyment of his property.[91] In such a case, the acts of the condemnor are so detrimental to the landowner's property rights that they constitute a de facto taking of his property prior to the formal institution of the condemnation proceedings. On the other hand, some jurisdictions choose to leave the date of the taking unaffected and to determine compensation in a way that

89. Clay Cnty. Realty Co. v. Gladstone, 254 S.W.3d 859, 869 (Mo. 2008).

90. *Id.*

91. Robert H. Freilich, *Condemnation Blight: Analysis and Suggested Solutions*, *in* CURRENT CONDEMNATION LAW: TAKINGS, COMPENSATION, AND BENEFITS 83, 94 (Alan T. Acherman & Darius W. Dynkowski, eds. 2006).

incorporates the condemnation blight damages.[92] In either case, the compensation for condemnation blight is recognized, yet the application of condemnation blight principles may lead the court either to recognize an earlier date of taking or to utilize the theory in determining compensation.[93] Regardless of the approach, the landowner is compensated for the losses sustained through decline in property value; however, some jurisdictions have grappled with determining which approach is more appropriate.

In the context of expropriation, a de facto taking is one where "an entity clothed with eminent-domain power substantially interferes with an owner's use, possession, or enjoyment of property."[94] Under this approach, the landowner alleges that the pre-condemnation actions of the expropriating entity sufficiently deteriorated his ability to derive the enjoyment, use, or possession of his property, such that the date of the taking should be moved forward to the factual taking that

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92. *Id*.

93. Recognizing an earlier de facto date of taking allows the landowner to seek not only the property value at the new date of taking (which will allow recovery for the loss in value) but also allows the award to carry interest from the new date. Using condemnation blight as a valuation scheme (because it does not affect the de jure date of the proceeding) simply allows evidence of loss in value and the interest carries from the date set by the actual taking.

94. BLACK'S LAW DICTIONARY 700 (3d ed. 2008).

> The term "de facto taking" was coined by Julius Sackman to differentiate between cases of diminution in value caused by the anticipation of condemnation (which is recoverable when the condemnation eventually comes and the property is valued without project influence), and cases where either because of the would-be condemnor's delay or unreasonable or coercive conduct, or by the market's severe economic reaction to the knowledge of the coming condemnation, the property becomes unusable, unrentable, or unsaleable, or the owner loses it by foreclosure or tax sale, typically when tenants move out and cannot be replaced with new ones, leaving the building owner with all burdens and liabilities of property ownership (e.g., taxes, maintenance and insurance premiums) but without the ability to derive revenue from the now empty building.

Gideon Kanner, *Condemnation Blight*, SH025 ALI-ABA 327, 329-30 (Sept. 26-28, 2002); *see also* 4 NICHOLS ON EMINENT DOMAIN § 12B.17[6], *supra* note 1, at 12B-179 ("A de facto taking of property occurs when an entity clothed with the power of eminent domain substantially deprives an owner of the use and enjoyment of his or her property."); *see also Sackman I*, *supra* note 1, at 159 ("[A] de facto taking requires a physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession, or enjoyment of the property, or a legal interference with the owner's power of disposition of the property.").

occurred before the legal, or de jure, taking.[95] To properly establish a claim for a de facto taking, the property owner bears a heavy burden of proving that the state substantially deprived him of the use and enjoyment of his property.[96]

In contrast to a de facto taking, condemnation blight more accurately refers to a tool used in eminent domain cases for seeking the property's proper valuation, possibly traceable to a time before the actual condemnation action was instituted.[97] Some jurisdictions refuse to allow compensation for loss of value based simply on valuation and absent an earlier takings date.[98] Nevertheless, other courts recognize the injustice in allowing a condemnor to benefit from the depressed value caused by the public project. Though both a valuation and a de facto taking approach seek to compensate the landowner for the lost value, confusion may remain regarding the application of the methods.

The best illustration of the disorder involved with applying condemnation blight principles can be found in New York jurisprudence. In 1969, the fourth division of New York's appellate courts decided *City of Buffalo v. George Irish Paper Co.*, which set a rule for condemnation blight under a de facto taking scheme that required proof of deprivation of substantial use and enjoyment of the landowner's property.[99] Shortly thereafter, in 1970, the Fourth Division was divided in *City of Buffalo v. J.W. Clement Co.*, with some justices requiring the *George Irish* rule and others content in using the actions of the state to find a *de facto* taking.[100] Finally, the highest court of New York, faced with

95. *See* 4 NICHOLS ON EMINENT DOMAIN §12B.17[6], *supra* note 1, at 12B-176.

96. *Id.* at 12B-179 (stating that the landowner must prove "exceptional circumstances that substantially deprive [him] of the use of his . . . property, and further, that his . . . deprivation is the direct and necessary consequence of the actions of the entity exercising the power of eminent domain.").

97. *Id.* at 12B-177.

98. *See* DUWA, Inc. v. City of Tempe, 52 P.3d 213 (Ariz. Ct. App. 2002) (refusing to recognize an inverse condemnation claim for depreciation in value and suggesting that, to recover such depreciation, the landowner must show a de facto taking); *see also* Danforth v. United States, 308 U.S. 271, 285 (1939) ("A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense.").

99. City of Buffalo v. George Irish Paper Co., 31 A.D.2d 470, (N.Y. App. Div. 1969), *aff'd*, 258 N.E.2d 100 (N.Y. 1970).

100. City of Buffalo v. J.W. Clement Co., 311 N.Y.S.2d 98 (N.Y. App. Div. 1970).

J.W. Clement on appeal, announced the differences between condemnation blight and *de facto* takings, and articulated the standard that persists in the state today.[101]

In *George Irish*, the landowner, who was deprived of the substantial use and enjoyment of his property, asserted a de facto taking.[102] The city of Buffalo began planning and publicizing a project in 1961 that required expropriation of George Irish's commercial property.[103] Additionally, the city began notifying the tenants in the defendant's building that the city would take the property for the project.[104] As a result of the publicity and the notices, as well as the city cutting off garbage pickup from the property, the defendant suffered the loss of his tenants and defaulted on his mortgage and taxes.[105] The court stated:

> In view of the "cloud of condemnation" which the city placed over this property for several years before initiating this proceeding . . . there resulted a "condemnation blight" and hence a de facto taking, not of possession of the property, of course, but a deprivation of the defendant of substantial use and benefit thereof.[106]

The court found a de facto taking based on the actions of the city, which deprived George Irish of the beneficial use of its property from the earlier date of 1961, even though the de jure proceedings began in 1968.[107] Thus, the method of condemnation blight compensation in New York was established through de facto taking, which required the landowner to prove that the acts of the condemnor deprived him of the substantial use and benefit of his property.[108]

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101. City of Buffalo v. J.W. Clement Co., 269 N.E.2d 895 (N.Y. 1971).

102. *Id.*; *see also Sackman I*, *supra* note 1, at 161-62.

103. City of Buffalo v. George Irish Paper Co., 31 A.D.2d 470, 472-73 (N.Y. App. Div. 1969), *aff'd,* 258 N.E.2d 100 (N.Y. 1970).

104. City of Buffalo v. George Irish Paper Co., 31 A.D.2d 470, 472-73 (N.Y. App. Div. 1969), *aff'd,* 258 N.E.2d 100 (N.Y. 1970).

105. *Id.* at 473.

106. *Id.* at 475-76.

107. *Id.* The court agreed with the Florida decision in *Chicone* and held that "[c]ompensation shall be based on value of the property as it would be at the time of the taking if it had not been subjected to the debilitating threat of condemnation and was not being taken." *Id.* at 476 (quoting State Rd. Dep't. v. Chicone, 158 So. 2d 753, 758 (Fla. 1963)).

108. The court's opinion is confusing because it discusses the acts of the condemnor

Then, in *J.W. Clement*,[109] the Court of Appeals of New York clarified the confusion between condemnation blight and de facto takings.[110] J.W. Clement, one of the world's largest printing companies, owned property in the footprint of a redevelopment project sought by the city of Buffalo.[111] Clement received initial notice of the pending project in late 1954; the notice was subsequently followed by numerous other notices stating the potential dates of the takings.[112] In reliance on these representations, J.W. Clement made plans for the construction of and relocation to a new printing facility.[113] The relocation was complete by April 1963; however, the attempts to find a tenant for the property proved fruitless, and Clement was unable to sell or rent the property.[114]

As a result, the trial court found that there had been a de facto taking of the property as of the date on which Clement was forced to relocate its business.[115] The court reasoned that the city's acts and delay rendered the property unfit for its intended

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in the context of a de facto taking, but then refers to the value of the property. The court did not expressly change the date of the taking to the earlier date, but instead valued the property to account for the lost rental and income. City of Buffalo v. George Irish Paper Co., 31 A.D.2d 470, 476 (N.Y. App. Div. 1969), *aff'd*, 258 N.E.2d 100 (N.Y. 1970). This confusion was later cleared in *City of Buffalo v. J.W. Clement Co*., 269 N.E.2d 895 (N.Y. 1971). Nonetheless, the principle—that acts which deprive the owner of the substantial use and enjoyment of his property—is a viable rule for establishing a de facto taking.

109. City of Buffalo v. J.W. Clement Co., 269 N.E.2d 895 (N.Y. 1971); *see also* 4 NICHOLS ON EMINENT DOMAIN § 12B.17[6], *supra* note 1, at 12B-181; *see also Sackman I*, *supra* note 1, at 163-71.

110. City of Buffalo v. J.W. Clement Co., 269 N.E.2d 895, 899 (N.Y. 1971)

111. *Id.*

112. *Id.*

113. *Id.* at 899-901.

114. *Id.* at 900.

115. City of Buffalo v. J.W. Clement Co., 269 N.E.2d 895, 901-02 (N.Y. 1971) ("The trial court fround [sic] that the acts of the city, including its protracted delay, had 'destroyed the value of the property to the defendant and made the property no longer fit to be used as the defendant had been using it and had planned to use it in the future.' In addition, it found that the city, by its threat of condemnation, had forced the Clement Company to move its business operation and that in view of the nature of its business Clement 'waited to do this until the last possible moment that a prudent businessman could wait.' On the basis of these findings, the trial court held that there was a De facto taking of Clement's property as of April 1, 1963, and that its value should be determined as of the year 1962.").

use and destroyed the value thereof.[116] The intermediate appellate court, however, was divided on whether the condemnor's actions constituted a de facto taking.[117] The majority determined that there had been a de facto taking "inasmuch as the City's acts forced Clement to move from its property at that time, rendering the property not only unsalable but unrentable and yielding no income whatever."[118] The two dissenting appellate judges, on the other hand, argued that nothing in the record indicated that the state's actions deprived the owner of the substantial use and enjoyment of his property or that interference destroyed the essential elements of ownership.[119] Furthermore, they asserted finding a de facto taking in this case, where there was not enough evidence of the state's value-depressing acts, would "result in the imposition of an oppressive and unwarranted burden upon any condemning authority" by creating a penalty for giving advance notice of a public project.[120] Finally, they stated that a new trial should be

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116. *Id.* at 901.

117. City of Buffalo v. J.W. Clement Co., 311 N.Y.S.2d 98 (N.Y. App. Div. 1970). The majority attempted to differentiate between a de facto taking and condemnation blight by stating:

> There is to be noted a marked distinction between (1) those cases which by reason of the cloud of condemnation, resulting in so called condemnation blight, permit the claimant to establish his true damage for the *De jure* taking by proving its value at an earlier time before the debilitating threat of condemnation has depressed its value and (2) those cases which go to the extent of declaring that the acts of the condemnor constitute a *De facto* taking long before the *De jure* taking. The application of such principles must depend not only upon the acts of the condemnor but upon the effect upon the condemnee, and the court must be guided by the further principle that its object is to achieve substantial justice between the condemning public and the private owner.

City of Buffalo v. J.W. Clement Co., 311 N.Y.S.2d 98, 107 (N.Y. App. Div. 1970) (internal citations omitted).

118. *Id.* at 106.

119. *Id.* at 112 (Gabrielli, J., dissenting).

120. *Id.* at 114 (Garbielli, J., dissenting). In support of this contention, the dissent stated:

> Because of the mere scope of present day redevelopment projects, advance notice of areas or properties scheduled for condemnation will occur in almost every case. The application of the theories advanced by the majority to cases involving facts similar to those presented here could well throttle the right of a sovereign to prepare and make public, plans for the good of the community. To put it another way, adoption of the result reached by the majority effectively penalizes the sovereign for providing appropriate advance notice to a property owner, thus denying him adequate time to make proper plans.

City of Buffalo v. J.W. Clement Co., 311 N.Y.S.2d 98, 114 (N.Y. App. Div. 1970) (Garbielli, J., dissenting).

ordered because of the lack of valuation evidence.[121]

The New York Court of Appeals, faced with these conflicting opinions, cleared the confusion between de facto takings and condemnation blight.[122] The Court resolved the problem with an oft-quoted assertion:

> Despite this obvious confusion, it is clear that a De facto taking requires a physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession or enjoyment of the property or a legal interference with the owner's power of disposition of the property. On the other hand, "condemnation blight" relates to the impact of certain acts upon the value of the subject property. It in no way imports a Taking in the constitutional sense, but merely permits of a more realistic valuation of the condemned property in the subsequent De jure proceeding. In such a case, compensation shall be based on the value of the property at the time of the taking, as if it had not been subjected to the debilitating effect of a threatened condemnation.[123]

Essentially, the court agreed with the majority of the intermediate appellate court in finding that condemnation blight existed, but also agreed with the dissenters that such a condition does not constitute a de facto taking.[124] According to the court, there could be no de facto taking because there was no substantial interference with one of the constituent elements of ownership.[125]

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121. In contrasting de facto takings with condemnation blight, the court stated:

> It is important to bear in mind that a De facto taking is caused by acts which result in no less than an appropriation of property, thereby requiring the owner to be justly compensated. On the other hand, condemnation blight results from affirmative value-depressing acts on the part of the municipality requiring that evidence be received of value before such acts occurred, in order to arrive at just compensation. Thus, De facto taking involves the rules of Appropriation while condemnation blight involves the rules of Evidence.

Id.

122. City of Buffalo v. J.W. Clement Co., 269 N.E.2d 895, 902-03 (N.Y. 1971).

123. City of Buffalo v. J.W. Clement Co., 269 N.E.2d 895, 903 (N.Y. 1971); *see also* City of Northglenn v. Grynberg, 846 P.2d 175, 178-79 (Colo. 1993) (en banc); *In re* De Facto Condemnation and Taking of Lands of WBF Assocs., L.P., 903 A.2d 1192, 1212-23 (Pa. 2006); *Sackman I*, *supra* note 1, at 169.

124. *J.W. Clement Co.*, 269 N.E.2d at 902-03; *See Sackman I*, *supra* note 1, at 167.

125. *J.W. Clement Co.*, 269 N.E.2d at 903-05 (finding that announcement of the

However, this finding simply denied recovery of damages prior to the de jure taking.[126] The court stated that the landowner is not without a remedy for severely depreciated property value caused by the condemning authority because "where true condemnation blight is present, the claimant may introduce evidence of value prior to the onslaught of the 'affirmative value-depressing acts.'"[127] Thus, even where the court does not find a de facto taking, the landowner may still be compensated under a valuation scheme by using the de jure date of the taking. Accordingly, regardless of the approach, a landowner is entitled to compensation for the value lost by reason of the pending condemnation.[128]

This line of cases from New York highlights the confusion underlying condemnation blight and the determination of whether the depreciation in value should be compensated under a *de facto* taking approach or a simple valuation scheme. However, under either method, the landowner is compensated for the loss in value due to acts of the condemnor.[129] The difference is that the damages awarded under a finding of a de facto taking will carry interest from the new, earlier date because the date of expropriation is changed to a date that is earlier than the de jure taking.[130] In contrast, the date remains unchanged under a theory of condemnation blight.[131] Instead, the landowner is simply compensated for the loss of value, which commenced at the earlier date.[132] "Under either rationale, the owner is protected against depreciation in value by reason of the condemnor's action"; however, under the theory of a de facto taking, the landowner may be able to collect a higher amount

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project, meetings of planning officials, and delay did not evidence an "exercise of dominion and control by the condemning authority").

126. *Id.* at 905.

127. City of Buffalo v. J.W. Clement Co., 269 N.E.2d 895, 905 (N.Y. 1971) (quoting City of Buffalo v. George Irish Paper Co., 31 A.D.2d 470, 475-76 (N.Y. App. Div. 1969)).

128. *See Sackman I*, *supra* note 1, at 171.

129. *Id.*

130. *See Sackman I*, *supra* note 1, at 171-72.

131. *See id.* at 169.

132. *See* 4 NICHOLS ON EMINENT DOMAIN § 12B.17[6], *supra* note 1, at 12B-187; *see also Sackman I*, *supra* note 1, at 171-72.

because the interest may be higher.[133] Furthermore, absent an actual expropriation, using condemnation blight as a valuation tool is ineffective, and the landowner must specifically allege a de facto taking to be compensated for any loss.[134] The tradeoff, of course, is that the landowner usually faces a much higher burden in proving a de facto taking allegation, as he must prove physical ouster, invasion, or legal interference of rights by the condemnor.[135]

4. RECOVERY FOR INCIDENTAL LOSSES, SUCH AS LOSS OF RENT AND MOVING EXPENSES

When a landowner suffers from condemnation blight damages, he often faces more than just the depreciation of his property value. When a public project is announced, tenants will vacate the property and decline to renew their leases because of the pending project.[136] Because of the loss of rental income, the landowner will have to cover the costs of his property, including mortgage, insurance, and maintenance, in the absence of income.[137] Furthermore, the landowner may act in reliance upon the condemnor's assertion and incur costs of relocation.[138] The Supreme Court has articulated that, despite the fact that such incidental damages are usually not awarded by courts in determining the market value, they are inevitably contemplated by the owner when he would sell his land under normal circumstances.[139]

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133. *See* 4 NICHOLS ON EMINENT DOMAIN § 12B.17[6], *supra* note 1, at 12B-187.

134. *See generally Sackman II*, *supra* note 1.

135. *See* 4 NICHOLS ON EMINENT DOMAIN § 12B.17[6], *supra* note 1, at 12B-177.

136. *See Sackman I*, *supra* note 1, at 172.

137. *Id.*

138. *See, e.g.*, City of Buffalo v. J.W. Clement Co., 269 N.E.2d 895, 905 (N.Y. 1971).

139. Specifically, the Supreme Court articulated:

> The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign. No doubt all these elements would be considered by an owner in determining whether, and at what price, to sell. 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.

United States v. Gen. Motors Corp., 323 U.S. 373, 379 (1945) (internal citations

For example, the Wisconsin Supreme Court in *Luber v. Milwaukee County* found that loss in rental damages were incidental damages within the just compensation requirement of the state constitution.[140] In this case, the state acquired Luber's commercial property in 1967; however, Luber suffered loss in rental income since 1964.[141] The commercial lease expired in 1964, and the lessee, an alcohol distiller and distributor, declined to renew because of the imminent condemnation and federal licensing rules that required the lessee to keep a long-term tenancy.[142] Luber contested the amount of damages and demanded the loss of rental income incurred because of the lessee's option not to renew.[143]

The Wisconsin Supreme Court determined that rental losses are collectable under the just compensation provision of the state's constitution.[144] In reaching this conclusion, the court recognized that aspects of modern society, such as the need for redevelopment, high-density populations, and the size of the administrative state, have changed the face of condemnation law since its inception.[145] Additionally, the court noted that many states have changed their constitutions to allow compensation for

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omitted).

140. Luber v. Milwaukee Cnty., 177 N.W.2d 380 (Wis. 1970); *see also* 4 NICHOLS ON EMINENT DOMAIN § 12B.17[6], *supra* note 1, at 12B-192-94; *see also Sackman II*, *supra* note 1, at 285.

141. Luber v. Milwaukee Cnty., 177 N.W.2d 380, 381 (Wis. 1970)

142. *Id*. at 381.

143. *Id.*

144. *Id*. at 386.

145. In support of this contention, the court stated:

> The importance of allowing recovery for incidental losses has increased significantly since condemnation powers were initially exercised in this country. During the early use of such power, land was usually undeveloped and takings seldom created incidental losses. Thus the former interpretation of the "just compensation" provision of our constitution seldom resulted in the infliction of incidental losses. The rule allowing fair market value for only the physical property actually taken created no great hardship. In modern society, however, ever, [sic] condemnation proceedings are necessitated by numerous needs of society and are initiated by numerous authorized bodies. Due to the fact people are often congregated in given areas and that we have reached a state wherein re-development is necessary, commercial and industrial property is often taken in condemnation proceedings. When such property is taken, incidental damages are very apt to occur and in some cases exceed the fair market value of the actual physical property taken.

Id. at 384-85.

land taken or damaged.[146] Furthermore, the court looked at the allowance for severance damages, which are granted in relation to the declined value of the remainder property when only a portion of land is taken, as proof of rejecting a pure market value approach to compensation.[147] Finally, the court stated that the rule treating incidental damages as losses not compensable due to a lack of wrongful action, or *damnum absque injuria*, is rejected under the state's modern constitution.[148] Thus, the *Luber* case represents a clear example of a court delving into the policies of the law to allow compensation beyond the simple market value of the property.

A more recent example can be found in the 1997 decision of *State v. Barsy*, where the Nevada Supreme Court recognized that a claim for lost rental income may suffice as a claim for condemnation blight.[149] In 1988, the state sought to improve a portion of the interstate and contacted Barsy's tenants to inform them of the imminence of the project.[150] Barsy's tenants did not renew their leases because of the uncertain timeframe of the project, and Barsy was also unable to attract new tenants.[151] By 1991, the state had not acquired adequate federal funding to acquire Barsy's property, and he requested that the state expedite the process due to hardship.[152] The delay was not caused by the state's bad faith; in fact, the state made several attempts to acquire proper funding, and Barsy's government contact was aware of the financial difficulties faced by Barsy and similar landowners.[153] Finally, in 1992, the state initiated the

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146. *Id.* at 385.

147. Luber v. Milwaukee Cnty., 177 N.W.2d 380, 385 (Wis. 1970); see *infra* at Part III.B.3 for an explanation of severance damages in the context of Louisiana law.

148. Luber v. Milwaukee Cnty., 177 N.W.2d 380, 386 (Wis. 1970); see *infra* note 237 for definition of *damnum absque injuria* and the direct rejection of such in the Louisiana constitution.

149. State v. Barsy, 941 P.2d 971 (Nev. 1997), *overruled on other grounds by* GES, Inc. v. Corbitt, 21 P.3d 11, 13 n.6 (Nev. 2001).

150. *Id.* at 973.

151. *Id.* at 973-74.

152. *Id.* at 974.

153. *Barsy*, 941 P.2d at 974. The Department of Transportation attempted three times from 1989 to 1991 to obtain federal funding for the acquisition, but was unsuccessful. *Id.* In late 1991, the Director of the Department of Transportation, Barsy's contact, decided to devote state highway improvement funds for the acquisition because he understood the negative impact of the delay on Barsy. *Id.* To

condemnation proceedings, and Barsy requested lost rental income caused by the delay.[154] The lower court granted the state's motion for summary judgment on Barsy's counterclaim for lost rental income.[155]

Relying in part on the constitutional guarantee of just compensation, the court decided to adopt the California rule, as articulated in *Klopping v. City of Whittier*.[156] The rule requires the landowner to demonstrate unreasonable delay or other excessive conduct in the pre-condemnation period that caused the decrease in property value. The court noted that the standard is stringent to prevent an overly permissive cause of action, but that the standard can apply to those claims for loss of income due to pre-condemnation activity.[157] Thus, the *Barsy* case, involving a claim based solely on lost rental income in the period between announcement of the project and actual condemnation, served as the basis for adopting condemnation blight as a viable cause of action in Nevada.

The jurisprudence on the law of condemnation blight is complex and involves various policies and themes and, at times, conflicting applications. Nevertheless, the consensus that can be gleaned from decades of jurisprudence and scholarly commentary is clear: condemnation blight damages are compensable in connection with expropriated property. Regardless of whether the landowner alleges a de facto taking or simply uses condemnation blight as a valuation tool, and despite the several policy bases for awarding condemnation blight damages, the landowner is entitled to the depreciation in the value of his property as caused by the pending expropriation.

III. THE ARGUMENT FOR ADOPTION OF CONDEMNATION BLIGHT IN LOUISIANA

Although several states have addressed condemnation

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speed up the process, the Department sought appraisal of Barsy's property before approval of the federal government, in contravention with established procedure. *Id.*

154. *Id.*

155. State v. Barsy, 941 P.2d 971, 974 (Nev. 1997)

156. State v. Barsy, 941 P.2d 971, 976 (Nev. 1997), *overruled on other grounds by* GES, Inc. v. Corbitt, 21 P.3d 11, 13 n.6 (Nev. 2001) (citing Klopping v. City of Whittier, 500 P.2d 1345 (Cal. 1972)).

157. *Barsy*, 941 P.2d at 976.

blight, Louisiana has not directly confronted the issue. This Section begins by analyzing the few cases that mention condemnation blight. Next, this Section analyzes various areas of Louisiana law to determine their compatibility with condemnation blight. In doing so, first, the state constitution's guarantee of just compensation is examined. Second, various articles of the Louisiana Civil Code pertaining to private law, such as the obligations of neighborhood and provisions of leases, are studied in the context of condemnation blight. Third, a similar methodology is applied to provisions within the Louisiana Revised Statutes that relate to expropriation law to devise a policy upon which condemnation blight may rest. Finally, this Section proposes a legislative enactment to guide Louisiana in allowing compensation to the landowner for lost property value.

A. EVIDENCE OF CONDEMNATION BLIGHT IN LOUISIANA JURISPRUDENCE

The law in Louisiana is unsettled as to whether the condemnee is entitled to condemnation blight damages, represented by the loss in value caused by the proposed improvement. This is largely because neither the legislature nor the Louisiana Supreme Court has expressly adopted or resolved this issue. However, condemnation blight does have a place within Louisiana law, as the concept can be easily meshed with Louisiana's constitutional and codal principles. Two cases have expressly mentioned condemnation blight yet declined to adopt it as a viable scheme of recovery. Nevertheless, the underlying policies in these two cases represent a jurisprudential basis upon which condemnation blight may be predicated in Louisiana.

The earliest case in Louisiana to address the concept of condemnation blight, or planning blight, was *State v. Bitterwolf*.[158] In *Bitterwolf*, the State sought to expropriate a portion of the defendant's land in order to expand a public road.[159] The State announced the highway expansion project in 1968, and, as a result, property values in the area depressed.[160] Bitterwolf, who purchased his land in 1973, sought compensation

158. State v. Bitterwolf, 415 So. 2d 196 (La. 1982).
159. *Id.* at 198.
160. *Id.*

for the depressed value of the property, which included the value lost prior to his period of ownership.[161] The Louisiana Supreme Court determined that depreciation in property value can only be used to adjust compensation when such loss is incurred during the condemnee's period of ownership.[162]

The court commented that the condition that causes property values to depreciate in the wake of a project announcement is called condemnation blight.[163] However, the court did not rely on condemnation blight jurisprudence from other states in deciding the case.[164] Rather, the court turned to the highway quick-takings statute, which states "[t]he measure of compensation for the property expropriated is determined as of the time the estimated compensation was deposited into the registry of the court, without considering any change in value caused by the proposed improvement for which the property is taken."[165] Though under the statute it seems as though any change in value, whether in loss or gain, should be disregarded when compensating the landowner,[166] the Louisiana Supreme Court stated, "we think it was intended that the courts should disregard only the changes in value caused by the proposed improvement, which occurred subsequent to the expropriatee's purchase of the property."[167] Thus, the court determined that because the loss in value occurred before Bitterwolf owned the subject property, he was not entitled to an adjustment in value to compensate for such losses.[168]

Justice Marcus wrote the lone dissent, arguing that the highway quick-takings statute should have been strictly

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161. *Id*. at 198-99.

162. State v. Bitterwolf, 415 So. 2d 196, 203 (La. 1982).

163. *Bitterwolf*, 415 So. 2d at 198 n.1.

164. *See generally*, State v. Bitterwolf, 415 So. 2d 196 (La. 1982).

165. *Id*. at 201; *see also* LA. REV. STAT. ANN. § 48:453(A) (1974); *see infra* Section condemnation blight recovery in Louisiana.

166. In support of this proposition, the court stated "[u]nder La. R.S. 48:453(A), expropriation-induced changes in value, whether upwards or downwards, are excluded from consideration so that neither party will be adversely affected by market abnormalities caused by the prospect of the expropriation." State v. Bitterwolf, 415 So. 2d 196, 202 (La. 1982).

167. *Id*.

168. *Bitterwolf*, 415 So. 2d at 202-04.

construed.[169] He stated:

> [I]n the instant case, Bitterwolf, as the owner of the property at the time of the taking, should be compensated without regard to the decrease in value of the property caused by the proposed improvement. The converse would likewise be true in the event that the property had increased in value, that is, compensation should be paid without regard to any increase caused by a change in value resulting from the proposed improvement.[170]

Thus, under his approach, no change in value should ever be considered in valuing the property, instead the value of the land should be fixed at the market value.[171]

Almost ten years after the *Bitterwolf* case, condemnation blight was discussed in greater detail in the Louisiana Third Circuit Court of Appeal's decision of *State v. Brookhollow of Alexandria, Inc.*[172] In *Brookhollow*, the State sought to expropriate land for the construction of an interstate highway.[173] Brookhollow learned of the project in 1978, and realizing that it would result in the expropriation of a portion of its property, Brookhollow asked the State to expedite the process.[174] Nevertheless, the State did not initiate the condemnation proceedings until 1987, almost ten years after the defendant originally became aware of the project.[175] The jury awarded compensation to include the delay damages, which resulted in an

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169. *Id.* at 204-05 (Marcus, J., dissenting).

170. State v. Bitterwolf, 415 So. 2d 196, 205 (La. 1982) (Marcus, J., dissenting).

171. The idea of condemnation blight was later considered by a Louisiana court of appeal in *Prentice Oil & Gas Co. v. State*, 421 So. 2d 937 (La. Ct. App. 1982). In *Prentice*, the State filed an expropriation proceeding against Prentice, and Prentice obtained a summary judgment in its favor on the basis that the state failed to properly follow the highway quick-takings statute procedures. *Id.* at 938. Prentice filed a later suit alleging various tort claims, including an assertion of compensation for condemnation blight. *Id.* Though the claim was in part for condemnation blight, the question before the court was simply whether the funds deposited in the registry were to be released to satisfy the judgment in favor of Prentice, and the court determined that Prentice was entitled to the funds. *Id.* at 940-41.

172. State v. Brookhollow of Alexandria, Inc., 578 So. 2d 558 (La. Ct. App. 1991), *writ. denied*, 581 So. 2d 709 (La. Jun 21, 1991).

173. *Id.* at 560.

174. *Id.*

175. *Id.* at 560-61.

award above the amount deposited into the registry by the state.[176] The State appealed and Brookhollow answered, alleging that the trial court erred in not awarding additional damages for condemnation blight.[177]

Brookhollow's claim for condemnation blight arose from the State's delay in initiating the condemnation proceedings.[178] The appellate court denied recovery for condemnation blight damages on the basis that they were too speculative, stating, "[j]ust because other comparable property, not under threat of expropriation, was developed and this property, which was under threat of expropriation, was not developed does not necessarily mean that the threatened expropriation kept this property from being developed."[179] Thus, under this decision, a party seeking to prove condemnation blight must prove, beyond a preponderance of the evidence, that such a condition is not speculative.[180]

Additionally, the *Brookhollow* decision reiterated the constitutional framework for allowing a landowner to be compensated beyond the simple market value of his property.[181] The third circuit articulated that the landowner must be compensated for damages caused by loss of use or delay in connection with the expropriation.[182] Furthermore, the court

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176. *Id.* at 561. Delay damages are "compensable damages for property taken out of commerce for an unreasonable length of time pending expropriation or completion of a project." State v. August Christina & Bros., Inc., 97-CA-244, p. 15 (La. Ct. App. 5 Cir. 2/11/98); 716 So. 2d 372, 379 (citing Dept. Of Transp. & Dev. v. Stone, 96-672 (La. Ct. App. 5 Cir. 3/25/97); 692 So. 2d 1241). While delay damages do not provide the same remedy as condemnation blight because they only compensate for the loss of use of remainder property from expropriation until completion of the public project, the rationale for awarding delay damages is rooted in the Louisiana constitution's just compensation requirement. State v. Brookhollow of Alexandria, Inc., 578 So. 2d 558, 561-62 (La. Ct. App. 1991), *writ. denied*, 581 So. 2d 709 (La. 1991).

177. *Brookhollow*, 578 So. 2d at 561. Brookhollow alleged three assignments of error: (1) failure to include condemnation blight damages; (2) an erroneous award of only $150,000 in loss of use damages when expert testimony valued such damage at $653,639; and (3) failure to award sufficient attorneys fees. *Id.*

178. *Id.* at 563. The claim for condemnation blight was for the period from 1978, when the defendant first obtained knowledge, to 1987, when the expropriation action was finally instituted. *Id.*

179. *Id.*

180. *Id.*

181. State v. Brookhollow of Alexandria, Inc., 578 So. 2d 558 (La. Ct. App. 1991).

182. *Id.* at 561-62 ("If a property owner establishes damages resulting from loss of

held "that the damages suffered by [Brookhollow] from the loss of use of its property which were caused by being taken out of commerce for an unreasonable length of time, due to plaintiff's delay in completion of the highway, are recoverable."[183] This statement shows that condemnation blight damages, due to a delay on the part of the State in expropriating the property, may be compensable.

In deciding this case, the third circuit denied condemnation blight based on the belief that such damages are too speculative, but nonetheless awarded the defendant landowner compensation for delay damages.[184] The court noted that delay damages are granted for the loss of use of property from the time of expropriation until the completion of the project,[185] whereas condemnation blight damages are for the delay on part of the State in initiating the actual expropriation proceeding.[186] Condemnation blight damages are intended to reflect the loss in property value, which affects the landowner's ability to sell or lease the property. Thus, the court was willing to compensate the landowner for the loss of one of the constituent elements of ownership, the ability to use and enjoy one's property, but not for another, the ability to dispose of one's property.[187] The court's acknowledgement of condemnation blight's existence, together with the court's willingness to compensate for impaired use, creates a strong presumption that Louisiana courts will allow condemnation blight damages as a viable element of recovery.

If the third circuit would have borrowed condemnation blight analysis from other jurisdictions, Brookhollow's claim may have been allowed. For example, almost thirty years earlier, the Florida Supreme Court stated that "the threat of condemnational [sic] restricts the owner's economic use of property in the interim

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use or delay, he may be compensated for the loss.").

183. State v. Brookhollow of Alexandria, Inc., 578 So. 2d 558, 562 (La. Ct. App. 1991).

184. *Id.* at 558.

185. *Id.* at 561.

186. *Id.* at 563.

187. LA. CIV. CODE. ANN. art. 477 (1996) ("Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law.").

leading to the actual taking . . . . [Therefore, i]t would be neither fair, equitable or just to compensate him for value of his property as established by such limited and restricted use."[188] Furthermore, the *Brookhollow* court's argument that condemnation blight damages are too speculative has been discounted by other courts. For instance, the California Supreme Court, almost twenty years prior to *Brookhollow*, concluded that the categorical exclusion of condemnation blight was unnecessary.[189] The court stated that concerns regarding the speculative nature of such claims are minimized by requiring the landowner to prove condemnation blight damages and by properly instructing the jury.[190] However, the *Brookhollow* court did not categorically exclude condemnation blight damages; but rather it denied them based on the failure of the landowner to meet the requisite burden.[191] Thus, while the principles of condemnation blight have not been expressly excluded from Louisiana, the most recent case dealing with the issue did not engage in a full analysis of the doctrine and its possible application in Louisiana. Because Louisiana jurisprudence has yet to directly address and apply condemnation blight, guidance must be drawn from other areas of Louisiana law.

B. APPLICABILITY OF CONDEMNATION BLIGHT PRINCIPLES IN THE CONTEXT OF PRESENT LOUISIANA LAW

In light of the sparse jurisprudence pertaining to condemnation blight in Louisiana, such a rule must be gleaned from other aspects of Louisiana law. First, the changes to the constitution make it clear that damages beyond the market value of the property are within the contemplation of just compensation. Second, the obligations of neighborhood and law of leases highlight the policy of loss allocation in Louisiana. Finally, selected provisions within the Revised Statutes indicate that condemnation blight damages are consistent with the current law of expropriation.

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188. State Rd. Dep't v. Chicone, 158 So. 2d 753, 758 (Fla. 1963).

189. Klopping v. City of Whittier, 500 P.2d 1345, 1352 (Cal. 1972) (overruling previous decisions that disallowed testimony on a depreciation in market value due to precondemnation announcements of the condemnor).

190. *Id.*

191. State v. Brookhollow of Alexandria, Inc., 578 So. 2d 558, 563 (La. Ct. App. 1991).

1. CONSTITUTIONAL APPLICATION

Prior to the changes in the 1974 constitution, Louisiana courts were reluctant to grant the landowner compensation for losses not represented by the market value of the expropriated property.[192] Physical, objective losses were those deemed to be compensable, and subjective, personal losses (e.g., moving costs, loss of rent, and depreciation in property value) were considered outside the scope of constitutional compensation.[193] Once the 1974 constitution was adopted, the subjective approach to compensation was embraced to help compensate the landowner "to the full extent of his loss."[194] The Louisiana Supreme Court, in *State v. Constant*, clearly articulated that, to satisfy this constitutional mandate, the circumstances will sometimes require more than market value to effectuate just compensation.[195] This subjective compensation requirement lays the constitutional foundation for a landowner's recovery under condemnation blight. Furthermore, the obligation of the state to compensate for land damaged, as a separate and additional remedy for land taken, provides yet another basis for condemnation blight compensation, represented by the loss of market value. Finally, current allowances for compensation of business losses and moving expenses show that recovery of condemnation blight would be viable in Louisiana.

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192. Tracey Lee Howard, *Compensating an Owner to the Full Extent of His Loss: A Reevaluation of Compensable Damages in Louisiana Expropriation Cases*, 51 LA. L. REV. 821, 822 (1991) ("[Under the 1921 constitution] courts routinely interpreted 'just and adequate compensation' as being the 'fair market value' of the property taken."); *see also* Allen Crigler, Note, *Expropriation: Compensating the Landowner to the Full Extent of His Loss*, 40 LA. L. REV. 817, 818-19 (1979).

193. Howard, *supra* note 192, at 823-24.

194. *Id.* at 826.

195. In so articulating, the Louisiana Supreme Court specifically stated:

> In view of the constitutional requirement that they be compensated to the full extent of their loss, it is not constitutionally significant that the award to them will exceed the market value of the property used in their business operations. The very purpose of the constitutional language was to compensate an owner for any loss he sustained by reason of the taking, not restricted (as under the former constitution), to the market value of the property taken and the loss of market value of the remainder, sometimes including the cost to cure such damage i.e., where (formerly) the award was based solely upon the physical value of the property and the economic injury to the property itself, but not including injuries to a business or the cost of moving it due to the taking.

State v. Constant, 369 So. 2d 699, 702 (La. 1979) (internal citations omitted).

a. Express Constitutional Requirements of Just Compensation to the Full Extent of the Owner's Loss

The Louisiana constitution provides compensation for the taking or damaging of property.[196] Because the concept of property encompasses the legal relationship between a person and an object, damage is not physical damage to the object but rather damage to the legal relationship. Thus, damaging or taking is of a legal right and not necessarily of a physical piece of property, such as land. Accordingly, whenever a landowner is impaired in the use and enjoyment of his physical property, his property rights are damaged such that he is due just compensation under the constitution. Furthermore, Louisiana has determined that "property is considered 'damaged' when the actions of the public authority results [sic] in the diminution of the value of the property."[197]

Consistent with this approach, the 1974 constitution expanded the amount of "just compensation," which must be paid to a landowner who suffers an expropriation or damaging, to a broader level than existed under the 1921 constitution.[198] One Louisiana legal scholar commentated that "it is clear that the level of expropriation awards must be expanded to include moving expenses, business losses because of change of location, and compensation for some intangible losses not covered under prior law."[199] Thus, land is damaged when an action of the government results in a loss of property value, and to compensate the owner to "the full extent of his loss," the state must reimburse the landowner for such diminution.

Traditionally, Louisiana courts were quick to simply award the market value of the property, which was deemed to be "the

196. *See* LA. CONST. art 1, § 4.

197. Columbia Gulf Transmission Co. v. Hoyt, 215 So. 2d 114, 120 (La. 1968); *see also* Avenal v. State, 2003-C-3521, p. 28-29 (La. 10/19/04); 886 So. 2d 1085, 1105 (explaining the distinction made in *Hoyt* between taking and damaging of property).

198. See *supra* at Part II.A.3 for a discussion of the 1974 constitution. Article I, section IV currently states "the owner shall be compensated to the full extent of his loss . . . [which] shall include, but not be limited to, the appraised value of the property and all costs of relocation, inconvenience, and any other damages actually incurred by the owner because of the expropriation." LA. CONST. art. I, § 4.

199. *See* Hargrave, *supra* note 19, at 16; *see* Columbia Gulf Transmission Co. v. Hoyt, 215 So. 2d 114, 120 (La. 1968).

price which would be agreed upon at a voluntary sale between a willing seller and a willing purchaser under usual and ordinary circumstances."[200] However, jurisprudence since the adoption of the 1974 constitution allows for the expansive compensation beyond simple market value.

One of the first instances where a Louisiana court recognized the changes inherent in the new constitution was the third circuit's decision in *State v. Champagne*.[201] In *Champagne*, pursuant to a highway quick-takings statute, the State expropriated a portion of the defendant's property,[202] stating, "[a] landowner whose property has been expropriated for public purpose is entitled to just and adequate compensation in an amount sufficient to place him in as good a position pecuniarily as he would have been had his property not been taken."[203]

The court's interpretation of the just compensation provision, as entitling the landowner to be returned to the same pecuniary position that he enjoyed prior to the expropriation, is consistent with the theory of condemnation blight as a valuation tool.[204]

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200. Parish of Iberia v. Cook, 116 So. 2d 491 (La. 1959); *see also* Exxon Pipeline Co. v. Hill, 00-C-2535, p. 8 (La. 5/15/01); 788 So. 2d 1154, 1160 ("Fair market value has consistently been defined as the price a buyer is willing to pay after considering all of the uses that the property may be put to where such uses are not speculative, remote or contrary to law."); *see also* MELVIN G. DAKIN & MICHAEL R. KLEIN, EMINENT DOMAIN IN LOUISIANA 161 (1970).

201. State v. Champagne, 356 So. 2d 1136 (La. Ct. App. 1977).

202. The land needed by the state overlapped with a portion of the property on which a building was constructed. *Id*. at 1137. The state argued that because the expropriation only required the taking of the porch, it need not compensate the landowner for the full value of the building. *Id*. The court determined that, because the order of expropriation specifically stated that the taking included any constructions partially or wholly in the area of expropriation, the landowner was entitled to compensation for the full value of the building and not just that of the porch. *Id*. at 1140-41.

203. State v. Champagne, 356 So. 2d 1136, 1140 (La. Ct. App. 1977).

204. *See* Clay Cnty. Realty Co. v. City of Gladstone, 254 S.W.3d 859, 863 (Mo. 2008) (en banc) ("When a taking occurs, the owner is entitled to be put in as good a position pecuniarily as if his property had not been taken.") (internal quotations omitted); Reichs Ford Joint Venture v. State Rds. Comm'n, 880 A.2d 307, 313 (Md. 2005) ("[T]he individual property owner should be placed in as good a position financially as he or she would have been but for the establishment of the public project."); Lange v. State, 547 P.2d 282, 285 (Wash. 1976) ("[T]he condemnee is entitled to be put in the same position monetarily as he would have occupied had his property not been taken.") (internal citations omitted).

Because condemnation blight refers "to the detrimental conditions that affect land between the time such land is first considered for public acquisition and the actual date of actual taking,"[205] it is appropriate to award such damages to a landowner to return him to his pre-condemnation financial position.

Other states have interpreted the just compensation provision in an identical manner and have used such an interpretation as footing for recognition of condemnation blight as a proper cause of action. In particular, both the Nevada and Missouri Supreme Courts have recognized that the just compensation provision requires the state to return the landowner to the pecuniary position he enjoyed before the taking.[206] In light of this interpretation, and following condemnation blight decisions from other jurisdictions,[207] both courts set forth a cause of action for condemnation blight, which "give[s] a condemnee the right to recover for damages caused by precondemnation activity when extraordinary delay or oppressive conduct by the condemnor has been shown."[208] Though this condemnation blight standard is stringent, the courts nonetheless used the interpretation of just compensation as a reason for

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205. 8A NICHOLS ON EMINENT DOMAIN § G18.01[1], *supra* note 1, at G18-4; *see also* 4 NICHOLS ON EMINENT DOMAIN § 12B.17[6], *supra* note 1, at 12B-176 ("The term 'condemnation blight' is used to denote the debilitating effect on the value of a threatened, imminent, or potential condemnation.").

206. Clay Cnty. Realty Co. v. City of Gladstone, 254 S.W.3d 859, 863 (Mo. 2008) ("When a taking occurs, the owner is entitled to be put in as good a position pecuniarily as if his property had not been."); State v. Barsy, 941 P.2d 971, 975 (Nev. 1997), *overruled on other grounds by* GES, Inc. v. Corbitt, 21 P.3d 11, 13 n.6 (Nev. 2001) ("[J]ust compensation requires that the landowner be put in as good position pecuniarily as he would have been if his property had not been taken.").

207. The Nevada Supreme Court followed *Klopping v. City of Whittier*, 500 P.2d 1345, 1355 (Cal. 1972). *Barsy*, 941 P.2d at 976. The Missouri Supreme Court followed a number of decisions, including both *Klopping* and *Barsy*. *Clay Cnty. Realty Co.*, 254 S.W.3d at 864-65 (and citations therein).

208. State v. Barsy, 941 P.2d 971, 976 (Nev. 1997), *overruled on other grounds by* GES, Inc. v. Corbitt, 21 P.3d 11, 13 n.6 (Nev. 2001); *see* Clay Cnty. Realty Co. v. City of Gladstone, 254 S.W.3d 859, 869 (Mo. 2008) ("Considering the constitutional prohibition against takings without just compensation, this Court holds that actions for condemnation blight are inverse condemnation claims that property owners may advance in order to recover consequential precondemnation damages . . . . [T]hey must establish that there has been aggravated delay or untoward activity in instituting or continuing the condemnation proceedings at issue.").

adopting the new rule.[209]

b. Constitutional Right to Compensation for Property Damaged

In addition to the express requirement of a subjective determination of just compensation, the Louisiana constitution allows compensation beyond a taking of the property. The articulation in article I, section IV of the Louisiana constitution, which requires just compensation for property either taken or damaged, lays a strong foundation for a theory of condemnation blight.[210] Property is damaged within the contemplation of the Louisiana constitution "when the action of the public authority results in the diminution of the value of the property."[211] On the other hand, "property is 'taken' when the public authority acquires the right of ownership or one of its recognized dismemberments."[212] Louisiana has long recognized the constitutional requirement of paying just compensation in both situations.[213]

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209. *Barsy*, 941 P.2d at 976 ("Without the reasonably stringent standard we adopt today, every condemnation case would give birth to a separate cause of action based on precondemnation activity.").

210. Louisiana is not alone in requiring compensation for both takings and damages to private property. In fact, each of the fifty states has a provision within its state constitution that requires just compensation for public takings of private property. Twenty-five states include "damage" as reason for compensability in their constitutions. The list of states includes Alabama, Arizona, Arkansas, California, Colorado, Georgia, Illinois, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming. *See* 2 NICHOLS ON EMINENT DOMAIN § 6.4e, *supra* note 1. Some of these states, including California, Missouri, and Pennsylvania, have expressly adopted condemnation blight as a theory of compensation in eminent domain proceedings. *See*, *e.g.*, Klopping v. City of Whittier, 500 P.2d 1345 (Cal. 1972); Clay Cnty. Realty Co. v. City of Gladstone, 254 S.W.3d 859 (Mo. 2008); In re De Facto Condemnation and Taking of Lands of WBF Assocs., 903 A.2d 1192, 1212-18 (Pa. 2006). Additionally, several states have adopted condemnation blight, despite their constitutions' lack of a similar damaging provision. These states include Florida, Michigan, New York, and Ohio. *See, e.g.,* State Rd. Dep't. v. Chicone, 158 So. 2d 753 (Fla. 1963); *In re* Elmwood Park, 136 N.W.2d 896 (Mich. 1965); City of Buffalo v. J.W. Clement Co., 269 N.E.2d 895 (N.Y. 1971); City of Cleveland v. Carcione, 190 N.E.2d 52 (Ohio Ct. App. 1963).

211. Columbia Gulf Transmission Co. v. Hoyt, 215 So. 2d 114, 120 (La. 1968); Culotta v. Police Jury of Ascension Parish, 316 So. 2d 463, 465 (La. Ct. App. 1974).

212. *Hoyt*, 215 So. 2d at 120.

213. Both the 1921 and 1974 constitutions required just compensation for taking or damaging of private property. *See* LA. CONST. art. I, § 2 (1921); LA. CONST. art. I, § 4

Because *damage* relates to the diminution in value caused by the state, it is a direct parallel to the underlying principle of condemnation blight—that a landowner should be compensated for the value-depreciating activities of the state. In some situations, damage occurs without an actual taking and the state must compensate the landowner solely for the damage.[214] However, in some cases, the state may cause the damage (or the depreciation in value) not in lieu of a taking, but rather prior to the actual taking of the property. In such a case, the constitution, in protecting against damage, specifically requires the state to pay for the diminution in property value by giving the landowner just compensation.[215] Using this constitutional mandate, a landowner who has suffered a diminution in value caused by the state's pre-condemnation activities may prevail in a claim for condemnation blight.

c. Louisiana Courts Currently Compensate Losses Beyond Market Value

Because the 1974 constitution expressly expanded the scope of just compensation to allow a landowner to recover losses beyond the simple market value of his property, Louisiana courts have included other damages, such as business losses and relocation expenses. The Louisiana Supreme Court first allowed compensation beyond market value in *State v. Constant* by awarding additional replacement costs.[216] Later, in *State v.*

(1974).

214. *See* Avenal v. State, 03-C-3521 (La. 10/19/04); 886 So. 2d 1085. The court determined that the state's water diversion project damaged oyster lessees's property right, but no taking actually occurred. *Id.* Compensation was denied on the basis of prescription. *Id.*; *see also* John J. Costonis, Avenal v. State: *Takings and Damagings in Louisiana*, 65 LA. L. REV. 1015 (2005) (explaining that, in many cases, the damaging occurs when the state engages in actions on one parcel that reduce the value of a neighboring parcel).

215. *See* Columbia Gulf Transmission Co. v. Hoyt, 215 So. 2d 114, 120 (La. 1968) ("Property is considered 'damaged' when the action of the public authority results in the diminution of the value of the property."); 4 YIANNOPOULOS, *supra* note 11, § 51 ("Physical damage to immovable property is recoverable in Louisiana by a variety of actions, including actions for inverse condemnation brought under Article 1, Sections 2 and 4, of the Constitution of 1974 and actions under Articles 667, 669, and 2315 of the Civil Code.").

216. State v. Constant, 369 So. 2d 699 (La. 1979); *See also* LEE HARGRAVE, THE LOUISIANA STATE CONSTITUTION: A REFERENCE GUIDE 28 (1991) ("The supreme court in *State v. Constant* (1979) required compensation for business losses resulting

Dietrich, the Louisiana Supreme Court further reiterated the subjective nature of constitutional just compensation by allowing an award of business losses.[217] These cases indicate how Louisiana has applied the expanded, subjective scope of just compensation in allowing for more than the mere market value of the property and provide a justification for the adoption of condemnation blight principles.

In *State v. Constant*, the primary issue was whether the constitutional mandate that the owner be "compensated to the full extent of his loss" contemplated an award that exceeded the market value of the property taken when that award returned the business's operations to the condition they were in prior to the taking.[218] In *Constant*, the State expropriated the parking lot and loading dock of a marina owned and operated by Constant.[219] This seizure affected the ability of the marina to conduct business.[220] The trial court granted Constant an award, which included the cost to replace the parking lot and loading dock.[221] The Louisiana First Circuit Court of Appeal recognized that the changes to the constitutional language now require more than simple market valuation—mandating that the "owner be put in as good a position pecuniarily as he would have been had his property not been taken."[222] Despite this statement, the court of appeal refused to award more than market value, finding that it "would constitute economic waste."[223]

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from the taking of land where a boat landing business was conducted even though the amount of those losses was greater than the market value of the expropriated land.").

217. State v. Dietrich, 555 So. 2d 1355 (La. 1990).

218. State v. Constant, 369 So. 2d 699, 701 (La. 1979).

219. *Id.*

220. *Id.* at 703-04.

221. *Id.* at 669. The trial judge recognized that the new constitutional provisions required that the landowner "be made whole and absolved from any economic loss whatever. This, according to the trial judge, obligates the Department to restore the marina." State v. Constant, 359 So. 2d 666, 669 (La. Ct. App. 1978); *see also* State v. Constant, 369 So. 2d 699, 702 (La. 1979).

222. *Constant*, 369 So. 2d at 701 ("[T]he new constitutional language 'broadened the measure of damages in expropriation cases by requiring that an owner not only be paid the market value of property taken and severance damages to his remainder, but also that such an owner be put in as good a position pecuniarily as he would have been had his property not been taken.'") (quoting State v. Constant, 359 So. 2d 666, 670 (La. Ct. App. 1978)).

223. State v. Constant, 369 So. 2d 699, 702 (La. 1979).

The Louisiana Supreme Court reversed and clearly articulated a rule expressing that, under the Louisiana constitution, the landowner is entitled to compensation for any economic loss sustained, including the cost of replacing his business facilities.[224] Once the State expropriated the loading dock and parking lot of the marina, the business was left without comparable facilities and suffered pecuniary losses.[225] The court, therefore, granted Constant an award that included not only the value of the property, but also the replacement costs of constructing a new loading dock and parking area.[226]

In *State v. Dietrich*, the Louisiana Supreme Court further reiterated the rule promulgated in *Constant*.[227] The court stated that "Article I, Section 4, provides that the landowner should be compensated for 'his loss' not merely the loss of the land."[228] In *Dietrich*, the Dietrichs raised cattle and operated a slaughterhouse.[229] The State expropriated a strip of the Dietrichs' land running diagonally across the property to construct an interstate highway.[230] Because the Dietrichs lost access and use of the other side of their property, they were forced to sell many of their cattle; furthermore, this severe reduction in useable land caused the cattle-raising business to become unsustainable.[231] The Louisiana Supreme Court, citing *Constant*, articulated that "a landowner's business facilities [must be restored] to the condition which existed before the taking."[232] Hence, the court determined that an award to the Dietrichs' cattle-raising and slaughterhouse operations for the economic

224. *Id.* at 702-03; *see also*, Note, *Expropriation: Compensating the Landowner to the Full Extent of His Loss*, 40 LA. L. REV. 817 (1979).

225. State v. Constant, 369 So. 2d 699, 704 (La. 1979) ("This uncontradicted evidence shows that the loss through the taking of the loading area caused substantial pecuniary business damage to the defendant landowners. It virtually destroyed the commercial usefulness to them of their boat slip . . . and parking area . . . .").

226. State v. Constant, 369 So. 2d 699, 702 (La. 1979).

227. State v. Dietrich, 555 So. 2d 1355 (La. 1990).

228. *Id.* at 1358.

229. *Id.* at 1356-57.

230. *Id.* at 1357.

231. State v. Dietrich, 555 So. 2d 1355, 1357 (La. 1990). The Dietrichs were technically still able to operate their slaughterhouse, but it became unprofitable to raise their own cattle to support the slaughterhouse portion of their operations. *Id.*

232. *Dietrich*, 555 So. 2d at 1358-59.

damages sustained by the expropriation was necessary to achieve this result.[233]

In light of both *Constant* and *Dietrich*, it is clear that Louisiana law allows compensation beyond the market value of the property, which includes incidental losses such as business expenses. A claim for condemnation blight would provide similar relief: the landowner would seek compensation for damages not represented by the market value of the property at the time of the expropriation. If Louisiana law grants compensation for costs of rebuilding structures taken, business expenses, and relocation expenses, allowance for condemnation blight damages should certainly qualify. Thus, using these cases as a springboard, a landowner may potentially show that an expropriation by the state caused depreciation in value, which must be taken into consideration to fully compensate him to the extent of his loss.

2. THE PRIVATE SECTOR: CURRENT CIVIL CODE ARTICLES THAT SHOW APPLICABILITY OF CONDEMNATION BLIGHT IN LOUISIANA

To better understand how the principles of condemnation blight may be applied in Louisiana, even in light of the strong preference given by the state's constitution, areas of the Civil Code may be examined for further insight. The "obligations of neighborhood" serve as the first point of comparison, showing that the landowner may have a cause of action against a neighbor who interferes with the use and enjoyment of his property. A central policy is drawn from the law of leases, particularly from the articles on off-premises liability, which shows that the policy of the law is in favor of protecting the individual and imposing burdens on those who are most capable of bearing them, such as society.

a. The Obligations of Neighborhood

The obligations of neighborhood may provide some guidance in determining how the principles of condemnation blight fit with Louisiana jurisprudence. The obligations of neighborhood are a set of Louisiana Civil Code articles situated in the book on predial

233. *Id.* at 1359 (determining that such an award is limited to a reasonable time period, instead of the remainder of the landowner's life).

servitudes and serve as limitations placed on ownership.[234] The first of the codal provisions, article 667, states "[a]lthough a proprietor may do with his estate whatever he pleases, still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him."[235] The article places a limitation on the landowner's ability to engage in certain activities, which may deprive his neighbor of the ability to enjoy his property or cause him damages. Article 668 further clarifies this limitation by stating "[a]lthough one be not at liberty to make any work by which his neighbor's buildings may be damaged, yet every one has the liberty of doing on his own ground whatsoever he pleases, although it should occasion some inconvenience to his neighbor."[236] Thus, reading the two code articles together, the neighbor must tolerate mere inconveniences on his property, but any activity that rises to the level of actual damage or injury to the neighbor's ability to enjoy his property is compensable under Louisiana law.

Although these articles are most often used in the context of litigation between private parties, they remain relevant when discussing expropriation. The limitations imposed by requiring that one man's activities do not cause loss of enjoyment or actual damage to his neighbor evokes the constitutional guarantee for just compensation when land is taken or damaged. The expansion of article I, section IV, requiring the landowner to be compensated to "the full extent of his loss," is intended to give the landowner compensation for things previously considered *damnum absque injuria* (e.g., cost of removal), which were not afforded compensation before the 1974 constitution.[237] This expansion is specifically tailored to recompense the landowner for the injuries sustained through violations of the obligations of neighborhood.

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234. Article 646 defines a predial servitude as "a charge on a servient estate for the benefit of a dominant estate." LA. CIV. CODE ANN. art. 646 (1977).

235. LA. CIV. CODE ANN. art. 667 (1996).

236. LA. CIV. CODE ANN. art. 668 (1996).

237. *See* 7 TRANSCRIPTS, *supra* note 24, at 1240-41 ("'To the full extent of [his] loss' is intended to call things which, perhaps, in the past may have been considered damnum absque injuria[.]"). *Damnum absque injuria* is "[l]oss or harm that is incurred from something other than a wrongful act and occasions no legal remedy." BLACK'S LAW DICTIONARY 1996 (3d ed. 2008).

Prior to the 1974 constitution, however, the Louisiana Supreme Court was unwilling to compensate a landowner for lost property value under the obligations of neighborhood. For instance, in *Reymond v. State*, the landowner alleged damage to her property in the form of increased noise, structural damage, restricted access, and loss in property value due to the State's construction of Interstate 10 near her property.[238] The court stated:

> Even when, as in the instant case, an actual diminution in market value of the property is found to exist . . . this diminution is not compensable. Damages which cause discomfort, disturbance, inconvenience, and even sometimes financial loss as an ordinary and general consequence of public improvements are not compensable, and are considered *damnum absque injuria*.[239]

Thus, the court in *Reymond* restricted compensation to actual physical damage to the owner's property and denied compensation for nonphysical, incorporeal damage to Reymond's ownership rights.[240] Shortly after, however, a commentator suggested that "[i]ntangible property rights should be recognized . . . even under the [*Reymond*] court's questionable requirement of physical damage . . .[because] losses due to the exercise of eminent domain would be more evenly distributed among the public, the beneficiaries of public improvements."[241]

The adoption of the 1974 constitution invalidates the *Reymond* court's assertion that non-physical, financial losses are incompensable. As previously stated, the redactors of the constitution specifically intended to rid the law of the archaic and unjust denial of damages previously considered *damnum absque*

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238. Reymond v. State, 231 So. 2d 375, 378 (La. 1971).

239. *Id.* at 384.

240. *Id.* at 384-85 ("The damage which a property owner may claim against one exercising the power of eminent domain would exclude non-physical damage . . . "). The court denied compensation for "diminution in value caused by impaired accessibility, discomfort, and disturbance" and allowed compensation for "diminution in market value of plaintiff's residence by reason of structural damage attributable to vibration from pile driving activity . . . " *Id.* at 385.

241. Cynthia A. Samuel, Note, *Eminent Domain Versus Louisiana Civil Code Article 667—Measure of Recovery Where Damage is Caused by Activity on Neighboring Land*, 45 TUL. L. REV. 416, 423 (1971) (internal citations omitted).

injuria because such a denial did not represent the full extent of the owner's losses. Thus, under the current constitution, the reasoning of *Reymond* is diluted. Instead, the proposition that incorporeal property rights should be compensated is reflected in the new constitution and lends support to the argument that financial losses, such as diminution in market value, may be compensated under today's law.

This interpretation was later identified in *State v. Chambers Investment Co.*, where the Louisiana Supreme Court hinted that nonphysical, incorporeal damages might be compensable under certain circumstances.[242] Chambers sought to develop his tract of land into a subdivision but halted his plans when he discovered that the proposed path of an interstate highway fell across his property.[243] Chambers claimed damages for loss of profits drawn from the five-year time frame during which the highway was under construction and the development of the property into a residential subdivision would have been imprudent.[244]

The court, in determining whether the landowner was entitled to the compensation, set forth a three-prong analysis.[245] First, the court must determine whether the claimant has a recognizable legal right to the thing or, more specifically, if there exists "a recognized species of private property right that has been affected."[246] Second, if there is a property right, the court must decide "whether the property, either a right or a thing, has been taken or damaged, in a constitutional sense."[247] Finally, the taking or damaging must be for a public purpose.[248]

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242. State v. Chambers Inv. Co., 595 So. 2d 598 (La. 1992).

243. *Id.* at 600.

244. *Id.* at 600-01 ("[Testimony showed] that it would take approximately five years to complete the construction of the interstate and that during that time it would be economically imprudent to develop the remainder property while construction was underway. Because the property effectively would be removed from development during the construction period, Cope testified, Chambers would suffer a loss of profits in the sum of $548,680.00 from delay in development.").

245. *Id.* at 603. This test is drawn from Professor Stoebuck's three questions, which must be asked when determining whether a person is entitled to eminent domain compensation. WILLIAM B. STOEBUCK, NONTRESPASSORY TAKINGS IN EMINENT DOMAIN 19 (Michie Co. 1977).

246. *Chambers*, 595 So. 2d at 603.

247. *Id.*

248. *Id.*

The discussion of the obligations of neighborhood arose in the context of the second prong.[249] The court stated that the right of ownership is subject to the obligations of neighborhood, which are limitations on the use of property that aid in determining whether the property was taken or damaged.[250] To satisfy the second prong, the court had to decide whether the alleged activities were mere inconveniences, which must be borne by the landowner, or rose to the level of actual damage, which rendered them compensable.[251] Ultimately, the court determined that Chambers failed to properly show how the State's activities constituted actual damage; thus, the court did not allow payment compensation for that particular portion of the claim.[252]

Though the landowner was not compensated under the obligations of neighborhood, *Chambers* lays the foundation for determining whether a landowner can be compensated for activities of the state that cause a depreciation in property value. Specifically, the court noted that when "there is no allegation or evidence of personal injury or physical damage to property, it is consistent with the principles of the Civil Code and our jurisprudence to require proof of the presence of some type of *excessive* or *abusive conduct* to hold a landowner responsible under Article 667."[253] In this statement, the *Chambers* court set forth the basis for a potential claim in condemnation blight through the obligations of neighborhood, as long as the state has engaged in excessive or abusive conduct. Extensive public announcements or delays in attempting to actually expropriate the subject property constitute such excessive or abusive conduct. Thus, if the landowner can show that the depreciation in value caused by the state's excessive activities damaged his ownership right, such as the ability to dispose of or alienate the parcel, then the obligations of neighborhood may entitle him to compensation.

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249. The court determined that both the first and the third prongs of the test were fulfilled because ownership is a property right, which satisfies the first requirement, and the parties stipulated that the taking or damaging was for a public purpose, which satisfies the third requirement. State v. Chambers Inv. Co., 595 So. 2d 598, 603-04 (La. 1992).

250. State v. Chambers Inv. Co., 595 So. 2d 598, 604 (La. 1992) (emphasis added).

251. *Id.*

252. *Id.* at 605-06.

253. State v. Chambers Inv. Co., 595 So. 2d 598, 600, 605 (La. 1992) (emphasis added).

Under the three-step test articulated in *Chambers*, a claim for condemnation blight may be sustained in Louisiana. The first prong requires that a recognizable property interest be involved.[254] A condemnee, as the landowner, certainly has a recognized property right of ownership. The constituent elements of ownership—*usus*, *fructus*, and *abusus*—correspond respectively to the ability of the landowner to use, enjoy, and dispose of his property.[255] The second prong requires that the property right be either damaged or taken.[256] Louisiana courts have found that "a diminution in property value affects the ability of a landowner to dispose of his property," which affects one of the inherent qualities of ownership.[257] Thus, whenever the state causes depreciation in a property's value, the state has inherently affected the *abusus* element of ownership. The obligations of neighborhood further support this premise in that they prohibit both interfering with a landowner's ability to enjoy his property and causing actual damage to him. With regard to the second prong, as to whether such a diminution in value is a mere inconvenience or actual damage, Louisiana has recognized that loss of value of property constitutes damage.[258] Finally, assuming that the third prong is met (i.e., the taking is for a public purpose), a condemnation blight claim will likely stand.

Thus, when the state engages in activity that either hinders one of the constituent elements of ownership or damages the property right, the landowner may be able to utilize this test to seek compensation for diminution in his property value, despite the limitations placed on ownership by the obligations of neighborhood. Because condemnation blight is premised on the reduction in property value caused by a public project, this three-prong test provides a solid basis for condemnation blight.

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254. STOEBUCK, *supra* note 245.

255. *See* LA. CIV. CODE ANN. art. 477 (1980) ("Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law.").

256. STOEBUCK, *supra* note 245.

257. Arnold v. Town of Ball, 94-972, p. 6 (La. Ct. App. 3 Cir. 2/1/95); 651 So. 2d 313, 318.

258. *See supra* at Part III.B.1.b.

b. Law of Leases and Off-Premises Liability

Other aspects of the Civil Code may provide additional guidance for applying condemnation blight principles in Louisiana. Within the Civil Code title on leases, there are two articles that highlight the state's desire to allocate risk and cost, in certain circumstances, to the party who can more easily bear the burden. By providing an example of this policy initiative, the relevant lease articles indicate that Louisiana's scheme of risk allocation provides the requisite context for adoption of condemnation blight principles.

The pertinent articles on leases allow a lessee to be excused from the remainder of the lease when an off-premises event occurs. First, article 2714 says, "[i]f the leased thing is lost or totally destroyed, without the fault of either party, or if it is expropriated, the lease terminates and neither party owes damages to the other."[259] This article provides for dissolution of the lease when the thing rented is totally lost or destroyed when neither the lessee nor lessor is at fault. Second, article 2715 allows dissolution of the lease whenever the thing is impaired due to off-premises activity, stating,

> If, without the fault of the lessee, the thing is partially destroyed, lost, or expropriated, or its use is otherwise substantially impaired, the lessee may, according to the circumstances of both parties, obtain a diminution of the rent or dissolution of the lease, whichever is more appropriate under the circumstances. If the lessor was at fault, the lessee may also demand damages. If the impairment of the use of the leased thing was caused by circumstances external to the leased thing, the lessee is entitled to a dissolution of the lease, but is not entitled to diminution of the rent.[260]

These articles provide that certain off-premises activities allow for the dissolution of the lease or the diminution in rent, depending on the nature of the activities. These rules, however, are suppletive in that the parties can contract around these codal provisions because the contract of the lease serves as the law

259. LA. CIV. CODE ANN. art. 2714 (2004).
260. LA. CIV. CODE ANN. art. 2715 (2004).

between the parties.[261] Nevertheless, if the parties fail to incorporate a provision within the lease covering such circumstances, articles 2714 and 2715 provide the law to the extent that the lease is silent.[262]

Many of the modern cases, however, fail to provide guidance as to the specific application of these articles because the lease specifically governs the situation and the gap-filling articles do not apply.[263] Nevertheless, the articles indicate that, at the very least, condemnation blight should not be excluded as a viable theory in Louisiana. This conclusion is drawn from the fact that article 2715 recognizes actions external to the property that affect it. Article 2715 allows for dissolution of the lease when activities, occurring separate from and external to the leased property, impair the use of the thing.[264] Comment (c) to article 2715 gives an example: "a zoning or other governmental regulation that results in or imposes substantial restrictions on the use of the leased thing."[265] This is analogous to the off-premises activity of the state's announcement and publication of a future expropriation or denial of building permits in the planned project area. Thus, the off-premises liability provision indicates not that condemnation blight should be expressly adopted, but rather that it should not be expressly denied.

Additionally, the articles highlight the risk allocation, which underlies the policy of Louisiana. When the use of the thing is substantially impaired, the law, through article 2715, requires

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261. *See* LA. CIV. CODE ANN. art. 2714 cmt. (e) (2004) ("The jurisprudence has held that the parties may prevent such termination by inserting appropriate clauses in the lease contract."); *see also* LA. CIV. CODE ANN. art. 2668 cmt (e) (2005) ("If the contract is one of lease, then the rules of this Title become applicable for filling any gaps in the parties' agreement and for determining its overall validity and effectiveness.").

262. *See* LA. CIV. CODE ANN. art. 2714 cmt. e (2004); *see also* Schwegmann Family Trust No. 2 v. KFC Nat'l Mgmt. Co., Nos. 06-2447 & 06-2530, 2007 WL 60971 at *3 (E.D. La. Jan 5, 2007) (holding that if the provisions of the lease address the damages caused by Hurricane Katrina, then articles 2714 and 2715 do not apply).

263. *See* Schwegmann Family Trust No. 2 v. John Hancock Life Ins. Co., 345 F. App'x 13 (5th Cir. 2009); *see also* Schwegmann Family Trust No. 2 v. Toys "R" Us, Inc., No. 06-2478, 2008 WL 732696 (E.D. La. Mar. 17, 2008); *see also* Schwegmann Family Trust No. 2 v. KFC Nat'l Mgmt. Co., Nos. 06-2447 & 06-2530, 2007 WL 60971 (E.D. La. Jan 05, 2007).

264. LA. CIV. CODE ANN. art. 2715 (2004).

265. LA. CIV. CODE ANN. art. 2715 cmt. c (2004).

the lessor to bear the loss instead of the lessee, and the lessee can demand dissolution of the lease. In these articles, the risk is shifted away from the individual and toward the party better suited for absorption of such risk. Similarly, the policy of expropriation is to shift the burden of public projects away from the individual landowner and toward the general public by requiring just compensation. However, whenever condemnation blight is present, the state may obtain the benefit of the decreased market value, shifting the burden back to the landowner. Thus, to ensure that the public bears the burden of public projects, the adoption of condemnation blight principles shifts the risk back upon the state to adequately and justly compensate the landowner to the full extent of his loss.

In viewing the off-premises liability articles in the lease title in conjunction with the obligations of neighborhood, it is clear that certain provisions within the Civil Code currently indicate a policy in Louisiana that recognizes that circumstances external to the property may affect its value. The obligations of neighborhood, which prohibit a landowner from engaging in an activity that adversely affects his neighbor, provide a context for a claim of condemnation blight. Furthermore, the off-premises lease provisions imply that a claim for condemnation blight may be viable in Louisiana because of the article's specific allowance of lease dissolution for adverse off-premises activities and the clear indication of risk allocation policy. Therefore, in the context of these private law provisions, condemnation blight appears to be readily applicable in Louisiana.

3. THE PUBLIC SECTOR: CURRENT EXPROPRIATION PRINCIPLES THAT SHOW APPLICABILITY OF CONDEMNATION BLIGHT IN LOUISIANA

In addition to provisions of the Civil Code, areas of the Louisiana Revised Statutes provide guidance in determining how condemnation blight may be implemented in conjunction with current law. Severance damages are a clear example in Louisiana where depreciation in property value is compensable. Furthermore, the general provisions on expropriation and the statutes particular to quick-taking procedures both leave room for condemnation blight damages to be expressly adopted.

a. Severance Damages

At times, the state only needs to expropriate a portion of the landowner's property. Though the landowner is left with a remainder portion, it is inevitably adjacent to the state's newly acquired property, which oftentimes becomes an interstate or some other value depreciating structure. As a result, the remainder portion of the property usually decreases in value, which entitles the landowner to compensation in the form of severance damages.

Even before the adoption of the 1974 constitution, Louisiana courts were willing to award the landowner severance damages, defined as "those compensable injuries which flow from the partial expropriation of a parcel."[266] These represent the depreciation in value for the portion of the landowner's property that was not taken.[267] Severance damages are ordinarily calculated as the difference between the market value of the remaining property immediately before and immediately after the taking.[268] Although this "before and after" test has been jurisprudentially recognized, the test was codified in the Louisiana Revised Statutes, which state that "[t]he measure of damages, if any, to the defendant's remaining property is determined on a basis of immediately before and immediately after the taking, taking into consideration the effects of the completion of the project in the manner proposed or planned."[269]

To determine exactly how the remainder tract suffered a depreciation in value, Louisiana courts have considered a variety of factors, including loss of aesthetics,[270] loss of visibility, loss of

266. *See* DAKIN & KLEIN, *supra* note 200, at 67.

267. Howard, *supra* note 192, at 822.

268. Columbia Gulf Transmission Co. v. Hoyt, 215 So. 2d 114 (La. 1968).

269. LA. REV. STAT. ANN. § 48:453(B) (1988). Title 48 of the Revised Statutes applies specifically to roads, bridges, and ferries. *See id.* § 48:1, Refs. & Annos. (2010). This particular provision is with respect to expropriations by the Department of Transportation and Development for the construction of the aforementioned projects. *See id.* § 48:453 (1988).

270. Bd. of Comm'rs of Tensas Basin Levee Dist. v. Crawford, 98-1605 & 98-1606, p. 8 (La. Ct. App. 3 Cir. 4/21/99); 731 So. 2d 508, 515 ("This Court has found where the loss of aesthetic considerations serves to reduce the market value of the remainder of the property, they certainly may be considered in determining the amount of severance damages awarded.") (internal citations omitted); *see also* State Dept. of Highways v. Moresi, 189 So. 2d 292 (La. Ct. App. 1966) (including loss of

direct access, and impaired access.[271] On the other hand, the courts have found that subsequent appreciation in surrounding properties should not be considered.[272] Thus, under a scheme of severance damages, Louisiana has long recognized the need to compensate the landowner for a loss in property value, with respect to the remainder portion of his land.

The allowance for severance damages represents a scheme in Louisiana whereby the landowner is compensated beyond the market value of the land actually expropriated. Though severance damages are granted in relation to the portion *not* taken, they provide a basis for awarding loss in value for the portion *actually* taken. An award of severance damages recognizes the personal losses sustained by the landowner that are outside of the simple market value of the expropriated land. These personal losses, namely the loss of value in the remaining land, are caused by the state's expropriating activity. Likewise, condemnation blight damages recognize personal losses sustained by the landowner due to the state's expropriation activities, as represented through a depreciation in property value. The only difference is that the compensation under severance damages is for the land remaining instead of for the land expropriated. Though the landowner may be compensated for the change in value of the remainder, compensation for the loss in value of the tract expropriated is the crux of a claim for condemnation blight. This award of severance damages presents the proper context for granting the landowner an award that represents the complete measure of his loss: depreciation in value of both the tract expropriated and the remainder.

If it is the policy of Louisiana to expand the scope of allowable compensation and the mandate of the constitution to

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trees and other foliage in the computation for severance damages).

271. State v. Schwegmann Westside Expressway, Inc., 95-C-1261 (La. 3/1/96); 669 So. 2d 1172, 1176 (finding that the jury's award of severance damages, based on loss of direct access and visibility, was proper); State v. Hoyt, 284 So. 2d 763 (La. 1973) (finding that the expropriation and creation of a ditch between the service station and the main road restricted the access of the service station's primary customers, large trucks, and thus severance damages based on the restricted access was proper).

272. State v. Wells, 308 So. 2d 774, 776 (La. 1975) ("[T]he landowner's severance damages caused by the taking should not be diminished by a general appreciation of all property in the vicinity. . . [because] severance damages should be determined as of the date of the trial.").

provide just compensation, which recompenses the landowner to the full extent of his loss, then the principles of severance damages provide a solid basis for recovery of condemnation blight. By awarding loss in value for the remainder tract, severance damages seek to restore the landowner to the pecuniary position he would have been in had the property not been expropriated. However, because the restitution granted with severance damages is only with respect to the remainder tract, the landowner remains uncompensated for the loss in value of the portion actually expropriated. To fully restore the landowner to his pre-taking position, damages must include the depreciation in value of the portion taken by the state. Therefore, severance damages represent only a portion of the requisite compensation that must be given to the landowner; full compensation would be composed of an award of both severance and condemnation blight damages.

b. Louisiana Revised Statutes: Conflicting Valuation Methods

Though severance damages provide an example in Louisiana law that allows compensation for depreciation in value, condemnation blight principles must still comport with the statutes regarding expropriation. The general rules lay the outer framework for determining compensation, stating that the value is to be computed before the proposed improvement and without deducting an increase in value. The more specific quick-taking statutes for highway and levee purposes only allow valuation based on funds deposited into the court without accounting for changes in value. Thus, in light of these provisions, the underlying policies must be extracted to determine whether condemnation blight can fit within current Louisiana laws.

i. *The General Rules: Louisiana Revised Statutes §§ 9:3183 and 19:9*

Within the Revised Statutes, there are two provisions that aid in determining how Louisiana presently calculates the compensation due to the landowner in an expropriation case.[273] Both provisions contain similar language and allow the

273. LA. REV. STAT. ANN. §§ 9:3183 (2009) & 19:9 (1983).

landowner to benefit from (or be compensated for) an increase in value caused by the proposed project.[274] Furthermore, though the jurisprudence interpreting the statutes is sparse, the statutes remain instructive as to how condemnation blight principles may apply in Louisiana. Finally, in looking at other jurisdictions, it is clear that rules similar to these statutes have lead to the adoption of condemnation blight in other states and thus provide guidance for adoption in Louisiana.

The first is Louisiana Revised Statutes § 9:3183, found in the Civil Code Ancillaries.[275] The other pertinent provision, Louisiana Revised Statutes § 19:9(A), is found in the title on expropriation. Both §§ 9:3183 and 19:9(A) provide: "In estimating the value of the property to be expropriated, the basis of assessment shall be the value which the property possessed before the contemplated improvement was proposed, without deducting therefrom any amount for the benefit derived by the owner from the contemplated improvement or work."[276] From this, it is clear that when the court is determining the amount of compensation, the value of the property *before* the proposed improvement plus any *benefit* is to be the measure of compensation. However, commentators noted that despite this language, which indicates that the property's value is to be calculated at the time the project is proposed, Louisiana courts have consistently determined that the time of valuation is the time the expropriation suit was filed.[277] Therefore, despite this express language, the courts have been unwilling to effectuate

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274. *Id.*

275. Originally, the statute was designated as Civil Code article 2633, but with the revision to the sales title in 1993, the article was redesignated. *See id.* § 9:3183 (2009). Former Louisiana Civil Code article 2633 read, "[i]n estimating the value of the property to be expropriated, the basis of assessment shall be the true value which the land possessed before the contemplated improvement was proposed, and without deducting therefrom any amount for the benefit derived by the owner from the contemplated improvement or work." *See* DAKIN & KLEIN, *supra* note 200, at 158.

276. LA. REV. STAT. ANN. § 19:9(A) (1983). Section 9:3183 is identical in substance but contains slightly different text: "In estimating the value of the property to be expropriated, the basis of assessment shall be the *true* value which the *land* possessed before the contemplated improvement was proposed, and without deducting therefrom any amount for the benefit derived by the owner from the contemplated improvement or work." LA. REV. STAT. ANN. § 9:3183 (1995) (emphasis added).

277. *See* DAKIN & KLEIN, *supra* note 200, at 161.

these statutes.[278]

To further the interpretation, § 19:9 contains two separate provisions. Subsection (A), as quoted above, allows the measure of compensation to include the increased value or benefit caused by the improvement in addition to the market value prior to the proposed project.[279] Subsection (B), in contrast with § 9:3183, mirrors the constitutional requirements of just compensation, stating in part "[t]he owner shall be compensated to the full extent of his loss."[280] Thus, the general rule under expropriation law is that the court must not only consider the market value before the project plus any benefit derived therefrom, but such a determination must also comport with the constitutional requirement of compensating the landowner to the full extent of his loss.

The policy behind these provisions may be ascertained by looking to the jurisprudence on the matter, which is admittedly sparse. The Louisiana Supreme Court has interpreted former Civil Code article 2633, which in turn provides an explanation of both §§ 9:3183 and 19:9. In *Shreveport Traction Co. v. Svara*,[281] the court stated:

> [W]e take the meaning [of article 2633] to be that the owner is to be paid the true value of his land, as of the moment that it is legally demanded for a proposed public improvement, without including in such value the increment which may have resulted from the fact that the improvement has been proposed, and, on the other hand, without deducting therefrom the increment which may have resulted from the fact that the improvement has been in contemplation, or from any other cause, save that the improvement has been

278. It should be noted that the commentators, Dakin and Klein, published their opinion prior to the changes made in the 1974 constitution, allowing more expansive compensation. Furthermore, a survey of the decisions relating to both §§ 9:3183 (former Civil Code Art. 2633) and 19:9 show that most cases occurred before the 1974 constitution. Thus, lack of jurisprudence on these provisions after the adoption of the 1974 constitution do not provide guidance in determining how the provisions can be applied to condemnation blight.

279. LA. REV. STAT. ANN. § 19:9(A) (1983).

280. *Id.* § 19:9(B).

281. Shreveport Traction Co. v. Svara, 63 So. 396 (La. 1913).

proposed.[282]

Thus, the court established that the starting point for determining compensation is the true value of the land at the moment it is legally demanded. Any increase in value during the time in which the project is in completion (i.e., speculative and uncertain) is compensable because it reflects the changes in market value.[283] However, once the project is certain and proposed, the increase in value is not to be included, because at that point the landowner would be permitted to benefit from the increase in value caused only by the imminence of a beneficial project.[284] Therefore, under this statute, the state must pay for the increase in value of property, which accrues because of the beneficial nature of the project, if the land is expropriated before the project is certain.

The Louisiana Fourth Circuit Court of Appeal, in *Board of Commissioners v. Missouri Pacific Railroad Co.*, had the opportunity to decide whether an increase in property value was compensable in expropriation law and at which date the compensation must be calculated.[285] In *Missouri Pacific*, the Board of Commissioners of the New Orleans Exhibition Hall Authority (NOEHA) expropriated a large tract of property on the Mississippi River for the development of a convention center.[286] The New Orleans 2000 Partnership (the Partnership) purchased the property from the Missouri Pacific Railroad Co. just before the expropriation for $11 million.[287] The NOEHA asserted that

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282. *Id*. at 398 (emphasis in original).

283. *Id.* ("[T]he possibility or probability, that *some* improvement affecting particular property will, or will not, be made, and, if made, when, and with what effect, are commonplace factors, which, with others, determine, from time to time, the market value of such property.").

284. The Louisiana Supreme Court explained,

> When, however, the period of uncertainty—of mere hope, speculation, anticipation, or contemplation—is past, and the time arrives when the property is demanded for the purposes of an improvement actually proposed, the state, having the right to take it, upon first making just and adequate compensation, should not be required to pay, in addition to its true value, a further amount, merely because of the purpose for which it is to be used, inasmuch as that purpose is to promote the welfare of the entire community.

Shreveport Traction Co. v. Svara, 63 So. 396, 398-99 (La. 1913).

285. Bd. of Comm'rs v. Mo. Pac. R.R. Co., 625 So. 2d 1070 (La. Ct. App. 1993).

286. *Id.* at 1072-73.

287. *Id*. at 1073. The two parties had executed a purchase agreement three months prior to this date and were engaging in negotiations before the expropriation suit was

the purchase of the property with knowledge of the expropriation was in bad faith, and as such, the Partnership was not entitled to any more than its purchase price.[288] The court refused to find bad faith based solely on knowledge of pending expropriation at the time of purchase.[289]

Additionally, the court addressed whether the improved value may be considered in determining the amount of compensation.[290] The problem with the valuation was that, from the time the suit was filed until the date of trial, the value of the property had increased significantly.[291] The court stated that "[b]oth the statutory law and the state constitution provide that the owner whose property is expropriated must be compensated 'to the full extent of his loss.'"[292] Relying on a United States Supreme Court decision, the fourth circuit determined that because the taking is deemed to occur on the date that compensation is paid, if the value of the property changes significantly between the date of valuation and the date of the taking, then the Constitution requires modification of the award.[293] Under this decision, the court determined that federal constitutional guarantees required compensation for the increase in value.[294]

Furthermore, the court noted that since the adoption of the 1974 constitution, Louisiana courts have been willing to expand the realm of compensation for landowners in light of the constitutional mandate for just compensation to the full extent of the owner's loss.[295] However, there had been no jurisprudence

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filed. *Id.*

288. *Id.* at 1076.

289. *Id.* at 1078 ("Although there is a line of cases denying compensation for improvements built in 'bad faith', the term 'bad faith' is not clearly defined. However, certain cases . . . make it clear that 'bad faith' must be more than mere knowledge of a pending expropriation.").

290. Bd. of Comm'rs v. Mo. Pac. R.R. Co., 625 So. 2d 1070, 1078-80 (La. Ct. App. 1993).

291. *Id.* at 1078.

292. Bd. of Comm'rs v. Mo. Pac. R.R. Co., 625 So. 2d 1070, 1075 (La. Ct. App. 1993) (internal citations omitted).

293. *Id.* at 1079 (citing Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 15-17 (1984)).

294. *Id.*

295. *Id.*

dealing with the precise issue before the court.[296] Thus, the fourth circuit expounded the idea:

> [B]oth the Louisiana constitution and Fifth Amendment to the United States Constitution demand that, if the property has increased (or decreased) in value between the time the expropriation suit was filed and the time of the taking, the property owner is entitled to receive the fair market value of the property at the time of the taking.[297]

Thus, the court allowed the jury's valuation, reflecting the increase in property value, to stand.

Although the *Missouri Pacific* decision was decided on the basis of an increase in market value from the date of the filing to the date of the suit, it directly supports a claim for condemnation blight damages in Louisiana. Even though condemnation blight generally refers to the decrease in value, which occurs before the state attempts to expropriate the parcel, *Missouri Pacific*, in stating the policy behind allowing appreciation, also suggests that some depreciation may be compensable.[298] The decision illustrates that it is against public policy to allow a state to delay in compensating the landowner in order to take advantage of fiscally beneficial circumstances.

A state's delay presents two scenarios. First, for example, in *Missouri Pacific*, the State filed the suit and by the time trial began, the value of the property had increased, but the State sought to compensate the landowner for the earlier valuation, before the increase.[299] Second, in the case of a landowner who alleges condemnation blight, the State announces its intention to condemn the property but delays (either in good or bad faith) actual expropriation of the property. During the interim between the announcement and expropriation, the land suffers a decline in value, due to lost tenants, diminished police protection, or the public's disapproval of the pending project. In such a case, the State would attempt to assess the property at the diminished

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296. *Mo. Pac.*, 625 So. 2d at 1079.

297. Bd. of Comm'rs v. Mo. Pac. R.R. Co., 625 So. 2d 1070, 1080 (La. Ct. App. 1993).

298. *See* Bd. of Comm'rs v. Mo. Pac. R.R. Co., 625 So. 2d 1070, 1080 (La. Ct. App. 1993).

299. *Id.* at 1078.

value, which the State's activities caused. Thus, under both scenarios, the State attempts to benefit from a change in value by alleging the lesser of the market values as the proper determination of compensation. Because the Louisiana Fourth Circuit Court of Appeal, in *Missouri Pacific*, allowed constitutional just compensation for appreciation in value, Louisiana may more readily allow for the depreciation in value as well by adopting condemnation blight principles.

Although there is little jurisprudential guidance to interpret §§ 9:3813 and 19:9, these statutes provide a basis for adopting condemnation blight in Louisiana. Both provisions state that the value of compensation shall be fixed at the market value before the proposed improvement, without deducting a benefit resulting from the project.[300] Furthermore, by allowing the increased value to be included in the compensation, these provisions leave open the possibility that the decrease in value may also be compensable.

ii. *The Exceptions: Louisiana Revised Statutes §§ 48:453(A) and 38:387*

While the general rule of §§ 9:3183 and 19:9 provide a basis for condemnation blight in Louisiana, other provisions within the Revised Statutes may potentially bar a claim for condemnation blight. The general rule of valuation in the aforementioned provisions is met with exceptions in §§ 48:453(A) and 38:387, the quick-taking statutes for highway and levee purposes, which do not allow for consideration of any change in value.[301]

Quick-taking statutes are special procedural provisions within the Louisiana Revised Statutes that allow state departments to circumvent the traditional procedures of the expropriation title and obtain the necessary property for specific purposes in an expedited manner.[302] The levee and highway quick-takings statutes mirror each other in form and substance. Subsection (A) of each statute is virtually identical, stating "[t]he measure of compensation for the property expropriated is determined as of the time the estimated compensation was

300. LA. REV. STAT. ANN. §§ 9:3183 (2009) & 19:9 (1983).

301. *See* LA. REV. STAT. ANN. § 38:387 (1985); LA. REV. STAT. ANN. § 48:453 (1975).

302. *See* DAKIN & KLEIN, *supra* note 200, at 294-95.

deposited into the registry of the court, without considering any change in value caused by the proposed improvement for which the property is taken."[303] Thus, under the quick-taking statutes, the method of determining compensation is the market value of the property on the date in which the state deposited the estimated compensation into the registry of the court.

Because of the similarities between these two statutes, the analysis with respect to one is easily applied to the other. The highway quick-taking statute has been interpreted in *State v. Bitterwolf*, where the Louisiana Supreme Court looked to the legislative intent and policies underlying the statute to determine the applicability of § 48:453(A).[304] In turning to the legislative history, the court noted that the statute was not intended to serve as a mandatory rule but instead "requir[ed] adjustments when the actual market value at the time of taking does not reflect an owner's actual loss or gain due to the effects of the proposed improvement."[305] This consideration appears to signify a solid basis for condemnation blight, because incorporation of condemnation blight into the valuation scheme would compensate the owner to the full extent of his loss and would reflect the loss due to the proposed improvement. However, on further review, the court stated that the denial of either a gain or loss in value is one method by which the legislature intended to ensure that "neither party will be adversely affected by market abnormalities caused by the prospect of the expropriation."[306] Thus, the policy of the state is to ensure that each condemnee is compensated to the full extent of his loss, and the verbiage of § 48:453 is intended

303. LA. REV. STAT. ANN. § 48:453 (1975); LA. REV. STAT. ANN. § 38:387 (1985). The quoted language is taken directly from the highway quick-taking statute, Louisiana Revised Statute § 48:453. The levee quick-taking statute only differs in the last word; instead of "taken," it reads "expropriated." *Compare* LA. REV. STAT. ANN. § 48:453 (1975) *with* LA. REV. STAT. ANN. § 38:387 (1985).

304. State v. Bitterwolf, 415 So. 2d 196, 201-02 (La. 1982). The case was discussed *supra* at Part III.A., as one instance in which condemnation blight was expressly mentioned by a Louisiana Court. In footnote one of the case, the court stated that the depreciation in property value after the announcement of a project is considered condemnation blight or planning blight. *Id.* at 198 n.1; *see also* W. Jefferson Levee Dist. v. Coast Quality Constr. Corp., 93-C-1718 (La. 5/23/94); 640 So. 2d 1258 (applying the *Bitterwolf* analysis to the levee quick-taking statute, LA. REV. STAT. ANN. § 38:387).

305. State v. Bitterwolf, 415 So. 2d 196, 202 (La. 1982).

306. *Id.*

to compensate for those cases in which the landowner may obtain an unintended benefit, or loss, due to the circumstances.

The *Bitterwolf* court, however, further interpreted the statute as creating an implicit rule regarding those landowners who purchase the property after the depreciation has occurred.[307] The court required that the statute apply "only to changes in value which occur during an expropriatee's ownership of the property . . . ."[308] Mr. Bitterwolf purchased the subject property after the announcement of the highway project and at a depressed market value.[309] The trial and appellate courts awarded compensation in an amount greater than his purchase price because of the statute's mandate that no "change in value caused by the proposed improvement for which the property is taken" be considered.[310] The Louisiana Supreme Court articulated that the lower courts erred by allowing Mr. Bitterwolf to be compensated for the changes occurring prior to his ownership.[311] The court recognized that by allowing compensation for pre-ownership depreciation, the lower courts granted Mr. Bitterwolf the windfall that § 48:453 was intended to prevent.[312] The Louisiana Supreme Court instead interpreted § 48:453 to include only those changes that occurred during the condemnee's phase of ownership.[313] Thus, if the property had already suffered a diminution in value at the time the condemnee purchased the tract, any depreciation prior to his ownership is not compensable, because the sale price of the property likely reflected the change in market value, giving the purchaser (condemnee) a discount.

Each of the aforementioned statutes—both the general rules and the exceptions—may serve as a basis for arguing condemnation blight in Louisiana. First, the general rules expressly provide that compensation is measured based on the value the property had before the proposed improvement.

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307. *Id.* at 202-03.

308. *Id.* at 202.

309. *Id.* at 198.

310. State v. Bitterwolf, 415 So. 2d 196, 198-99 (La. 1982); *see also* Melvin G. Dakin, *Expropriation*, 43 LA. L. REV. 439, 443-44 (1982).

311. State v. Bitterwolf, 415 So. 2d 196, 203 (La. 1982).

312. *Id.* at 202-03.

313. State v. Bitterwolf, 415 So. 2d 196, 202 (La. 1982).

Additionally, from this amount, any benefit or increase in value, which accrued during the pre-condemnation stage, is not to be deducted from the award. Thus, if the court allows a landowner compensation for an increase in value, the alternative of loss in value should also be compensable. Second, because the quick-taking statutes require that changes in value caused by the project be disregarded in valuation, they effectively recognize the underlying theories of condemnation blight. However, under the quick-taking statutes, the condemnee is only compensated for any condemnation blight that occurs since the state deposited the money in the registry of the court.[314] Nevertheless, the statutes and jurisprudence reflect that the policy of Louisiana's quick-taking statutes is to protect the landowner against depreciation in value caused by the project. Thus, using the aforementioned statutes and cases to support the policy of the law, a claim for condemnation blight proves to be viable in Louisiana.

C. PROPOSED LEGISLATIVE ENACTMENT

In Louisiana, the hierarchy of laws includes legislation, custom, and equity.[315] Legislation takes preference and cannot be substituted for another source of law. In the absence of legislation, custom, which is a "practice repeated for a long time and generally accepted as having acquired the force of law[,]" takes effect.[316] In the absence of either legislation or custom, courts are instructed to proceed in equity, which requires considerations of "justice, reason, and prevailing usages."[317] As this Comment has already mentioned, there is no legislation in Louisiana that squarely addresses condemnation blight. Furthermore, the jurisprudence of the state has not formulated a practice pertaining to condemnation blight. Thus, in the absence of both legislation and custom, Louisiana courts faced with the issue of condemnation blight in the future will be bound to proceed in equity and may draw on the aforementioned policies and cases from other jurisdictions in determining how to develop condemnation blight.

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314. *See* LA. REV. STAT. ANN. § 48:453 (1988).

315. LA. CIV. CODE ANN. art. 1 (1988); LA. CIV. CODE ANN. art. 2 (1988); LA. CIV. CODE ANN. art. 4 (1988).

316. LA. CIV. CODE ANN. art. 3 (1988).

317. LA. CIV. CODE ANN. art. 4 (1988).

However, because legislation takes the highest preference in Louisiana, and in the absence of express jurisprudence in Louisiana to provide guidance to condemnees and courts, a rule for condemnation blight should be legislatively enacted to clearly outline the contours of the right. Other jurisdictions have found that "without legislation, one of the most perplexing problems . . . has been to determine the time of onset of condemnation blight, that is, the time after which a housing authority may be held to have waited an unreasonable period of time to proceed with the actual taking of the target property."[318] In light of this, it is important for the legislature to statutorily define and delineate the extent of condemnation blight to be applied in Louisiana.

To better achieve this end, this Comment has thus far provided the law from other jurisdictions, including their reasoning and policies behind adoption of this doctrine. Furthermore, the potential problems, such as the confusion between valuation and de facto taking, have been exposed. To minimize the difficulties faced in other jurisdictions and to properly implement the constitutional provisions and public policies of Louisiana, this Comment suggests that the following legislative provision serve as an example for the legislature in crafting the proper statute:

> ***Condemnation Blight: Definition; Amount of Compensation; Procedure***
>
> A. Condemnation blight is the depressing effect of a contemplated public project on the value of property designated for expropriation.
>
> B. If the landowner can show, by a preponderance of the evidence, that the expropriating authority unreasonably delayed the acquisition of the subject property or engaged in excessive conduct, which caused depreciation in the market value of his property, the loss in value shall be considered in determining the amount of compensation to be awarded to the landowner.
>
> C. If the expropriating authority does not formally take the

318. Pearsall v. Richmond Redev. & Hous. Auth., 242 S.E.2d 228, 235 (Va. 1978) (internal citations omitted).

> property and the activities of the expropriating authority are so egregious, as to interfere with the landowner's ability to enjoy, use, or dispose of his property, the landowner is entitled to compensation as a de facto taking and the property shall be valued as of the date of the de facto taking.
>
> D. A claim for condemnation blight under paragraph B shall be brought in the condemnation proceedings. A claim for condemnation blight under paragraph C may be brought during the condemnation proceedings or in an inverse condemnation claim. If a claim for condemnation blight is not raised in the condemnation proceedings, a later claim for condemnation blight is precluded.

The first paragraph provides a clear definition for condemnation blight and articulates the two ways in which it may be applied. This statutory suggestion incorporates both the de facto taking aspect and the valuation aspect of condemnation blight. Paragraph B provides a basis for establishing true condemnation blight in the form of evidence used to prove the value of the property. This provision incorporates the limiting rule used by other states, which requires excessive conduct, such as inducing the landowner to relocate or denying the property access to police protection or waste pickup.[319] Additionally, unreasonable delay can be shown to prove condemnation blight, either in the form of bad faith attempts of the state to drive down the price of the property to be expropriated or as good faith delay that creates an unreasonably long waiting period.[320] Paragraph C provides the basis for asserting a de facto taking, which mirrors the constitutional guarantee against taking of private property. That section states that if any of the constituent elements of ownership are destroyed, the landowner may be able to allege a de facto taking of his property, thus moving the date of taking to when the interference occurred, instead of the date when the state institutes the expropriation action.

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319. *See, e.g.,* Klopping v. City of Whittier, 500 P.2d 1345 (Cal. 1972) (en banc); Clay Cnty. Realty Co. v. City of Gladstone, 254 S.W.3d 859 (Mo. 2008) (en banc).

320. *See, e.g.*, City of Buffalo v. J.W. Clement Co., 269 N.E.2d 895 (N.Y. 1971) (Landowner relocated large business based on representations of the city); State v. Barsy, 941 P.2d 971 (Nev. 1997), *overruled on other grounds by* GES, Inc. v. Corbitt, 21 P.3d 11, 13 n.6 (Nev. 2001) (State's delays were not in bad faith but unreasonably long).

Paragraph D indicates that the context for a claim of condemnation blight may arise either in the condemnation proceedings or as a claim in inverse condemnation. The Louisiana Supreme Court clearly articulated the place of inverse condemnation in our jurisprudence:

> Although the legislature has not provided a procedure whereby an owner can seek damages for an uncompensated taking or damaging, this court has recognized the action for inverse condemnation arises out of the self-executing nature of the constitutional command to pay just compensation. The action for inverse condemnation provides a procedural remedy to a property owner seeking compensation for land already taken or damaged against a governmental or private entity having the powers of eminent domain where no expropriation has commenced.[321]

In this context, an action in inverse condemnation for condemnation blight is only appropriate where the state has not initiated condemnation proceedings. A claim for condemnation blight under paragraph B would only be allowed under a traditional condemnation action brought by the state because the landowner is only seeking additional compensation under that provision. However, when the landowner's property has not been formally expropriated, he must initiate an inverse condemnation action and must properly allege a de facto taking under paragraph C to receive any compensation. The primary reason for inclusion of paragraph D is to indicate how the claims for condemnation blight, as a valuation or as a de facto taking, can be brought in Louisiana. Furthermore, if such proceedings are initiated and a claim for condemnation blight is not raised, in the interests of judicial economy, the claim for condemnation blight will be barred.[322] The inclusion of paragraph D is intended to articulate these procedural rules and to give clear guidance to courts and litigants.

By including legislative provisions to this effect, courts are given clear guidance as how to treat claims for condemnation

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321. State v. Chambers Inv. Co., 595 So. 2d 598, 602 (La. 1993) (internal citations omitted).

322. *See* Klopping v. City of Whittier, 500 P.2d 1345 (Cal. 1972); Redev. Agency of Pomona v. Heller, 200 Cal. App. 3d 517 (Cal. Ct. App. 1988).

blight, especially in light of the lack of jurisprudence in Louisiana on the matter and the abundance of commentary resonating from other states. Some may argue that by adopting such a statute, public works projects may be impeded and may encourage the government to remain silent on proposed projects until absolutely necessary.[323] However, this proposed legislation does not encourage the state to remain silent on potential takings but rather incentivizes the state to adequately notify landowners and seek timely and efficient expropriations. Still others may dissent on the basis that condemnation blight is too speculative or that creating legislation to this effect will result in a flood of litigation. Both of these concerns are minimized through the legislation proposed above. The speculation is reduced by including only those actions that qualify as egregious, or delays that qualify as excessive and unreasonable. Furthermore, allowing such an action to stand will not result in a flood of litigation because of issue preclusion, which occurs if the landowner does not bring a claim in the expropriation proceeding or on his own initiative in inverse condemnation.

Not only does the proposed legislation seek to minimize the concerns opponents may have, but it also seeks to achieve many goals. First, adopting condemnation blight further promotes the policy of the Louisiana constitution in ensuring that the landowner is compensated to the full extent of his loss. Second, the risk of loss is shifted back to the state and the general public—as opposed to the individual landowner—who are better equipped to bear the burden of public projects. Third, allowing condemnation blight damages prevents the state from benefiting from the depressed market values that are caused by its own activities. Finally, adopting such legislation creates a disincentive for the state and other expropriating authorities from continually changing public projects and creating circumstances that do nothing more than injure the landowner between announcement and expropriation.

IV. CONCLUSION

Over the course of the past fifty years, other states have

323. *See* Westgate v. State, 843 S.W.2d 448 (Tex. 1992) (declining to adopt condemnation blight).

discovered and developed condemnation blight. However, Louisiana has neither applied nor explored the doctrine in any great detail. Even though the policies, current laws, and jurisprudence lend support for adoption of condemnation blight, Louisiana has not yet done so. Should Louisiana decide to develop condemnation blight into a viable claim of expropriation damages, the goals of the constitution and Civil Code will be reflected in the underlying policies of condemnation blight. The depreciation in value suffered by the landowner when his property is planned for expropriation in many cases is unavoidable due to the nature and size of today's administrative state. However, by providing a remedy to the landowner when the state's delay is excessive or actions are extreme, condemnation blight damages seek to balance the scales so that the individual is justly compensated.

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