

# Eminent Domain: Compensation for Leasehold Interest Where No Provision in Lease

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## EMINENT DOMAIN: COMPENSATION FOR LEASEHOLD INTEREST WHERE NO PROVISION IN LEASE

### I. INTRODUCTION

When a state or the federal government exercises its power of eminent domain, it must compensate the person whose property is taken or damaged. Compensation must not only be made to the land owner, but to every person with an interest in the condemned property. Among those persons with a compensable interest is the lessee. In many cases, the lease itself will provide for the amount or method of compensation to be paid the tenant when his leasehold is taken. This article will discuss the methods of compensation where there is no such provision in the lease.

Eminent domain is the inherent right of the sovereign to take or authorize the taking of private property for public use.<sup>1</sup> It is an inalienable power,<sup>2</sup> vested in the governing body, to take private property without the owner's consent,<sup>3</sup> and use it for the public benefit.<sup>4</sup> The power does not emanate from constitution or statute, but is limited and conditioned thereby.<sup>5</sup> The limits generally placed upon the power are that the taking must be for public use and that compensation must be made. The fifth amendment to the United States Constitution requires "just compensation" when the power of eminent domain is exercised by the federal government,<sup>6</sup> and this same requirement has been carried over into the constitutions of all of the states.<sup>7</sup> Private property cannot be taken for public use without just and adequate compensation therefor.<sup>8</sup>

### II. THE INTERESTS INVOLVED AND THE DETERMINATION OF JUST COMPENSATION

In considering the application of these constitutional provisions, we must first determine what the word "property" encompasses and what constitutes a "taking" within the meaning of the fifth amendment and the various state constitutions. Under the fifth amendment to the federal constitution, the word "property" denotes a group of rights inhering in the citizen's relation to a physical thing, such as the right to possess, use, and dispose thereof. This constitutional provision is addressed to

<sup>1</sup> *Glover v. State Highway Comm'n*, 147 Kan. 279, 77 P. 2d 189 (1938); *Highway Comm. v. Guist*, 235 Wis. 18, 292 N.W. 226 (1940).

<sup>2</sup> *Muscoda Bridge Co. v. Worden-Allen Co.*, 196 Wis. 76, 219 N.W. 428 (1928).

<sup>3</sup> *Western Union Tel. Co. v. Louisville & N. R. R.*, 270 Ill. 399, 110 N.E. 583, 589 (1915).

<sup>4</sup> *Filbin Corp. v. United States*, 265 Fed. 354, (E.D. S.C. 1920).

<sup>5</sup> *Muscoda Bridge Co. v. Worden-Allen Co.*, *supra* note 2. See also *United States v. Parcel of Land*, 100 F. Supp. 498 (D.D.C. 1951).

<sup>6</sup> U.S. CONST. amend. V.

<sup>7</sup> WIS. CONST. art. I, § 3: "The property of no person shall be taken without just compensation therefor."

<sup>8</sup> *Sioux City v. Tott*, 244 Iowa 1285, 60 N.W. 510 (1953); *Scorsune v. State*, 224 La. 1031, 71 So. 2d 557 (1954).

every sort of interest the citizen may possess.<sup>9</sup> Originally, the term "property" was limited to the tangible thing itself,<sup>10</sup> but now it is generally held to include all essential elements of ownership;<sup>11</sup> *i.e.*, leaseholds, easements, etc.<sup>12</sup> It has been said that a "taking" by condemnation under the right of eminent domain includes every interference with ownership, possession, enjoyment, or value of private property.<sup>13</sup> The taking occurs when the entity clothed with the power of eminent domain substantially deprives the owner of the beneficial use and enjoyment of the property.<sup>14</sup> An actual, physical taking is not required, only an interference with an individual's property rights.<sup>15</sup>

As mentioned above, the fifth amendment to the federal constitution and the constitutions of the various states require "just compensation" wherever the interest of a person is taken under the power of eminent domain. Among the many interests which must be compensated for when taken is that of the tenant under a lease. This includes subtenants<sup>17</sup> and assignees of the lease.<sup>18</sup> Just compensation must be provided for a leasehold interest taken under eminent domain.<sup>19</sup> One of the objects of this article is to discuss what the tenant must be compensated for, in order that the compensation be considered just and adequate.

#### A. The "Market Value" Test

There are no hard and fast rules when it comes to determining the amount of compensation to be paid for property that is taken or damaged. The compensation, in order to be considered "just," must be a fair and full indemnification for the loss sustained by the owner.<sup>20</sup> Such compensation should be determined on equitable principles, and should be such as to put the person from whom the interest is taken in as good a position financially as he would have been if the property had not been taken.<sup>21</sup> The amount awarded should be measured by the owner's loss and not by what the taker has gained.<sup>22</sup> Generally, the measure of

<sup>9</sup> *United States v. Finn*, 127 F. Supp. 158 (S.D. Cal. 1954).

<sup>10</sup> McQUILLIN, MUNICIPAL CORPORATIONS, *Eminent Domain* § 32.13 (3d Ed. 1950).

<sup>11</sup> *Moss v. South Carolina State Highway Dep't*, 223 S.C. 252, 75 S.E. 2d 462 (1953).

<sup>12</sup> *Comstock v. Iowa State Highway Comm'n*, 121 N.W. 2d 205 (Iowa 1963); *Orton v. Daigler*, 133 Cal. App. 112, 23 P. 2d 831 (1933).

<sup>13</sup> *Burger v. City of St. Paul*, 241 Minn. 285, 64 N.W. 2d 73 (1954).

<sup>14</sup> *Griggs v. County of Allegheny*, 402 Pa. 411, 168 A. 2d 123 (1961); *cf. Horn v. City of Chicago*, 403 Ill. 549, 87 N.E. 2d 642 (1949).

<sup>15</sup> *Lage v. Pottowattamie County*, 232 Iowa 944, 5 N.W. 2d 161 (1942).

<sup>16</sup> U. S. CONSR. amend. V; WIS. CONSR. art. I, § 3: "The property of no person shall be taken without just compensation therefor."

<sup>17</sup> *Behrer Holding Corp. v. State*, 26 Misc. 2d 388, 209 N.Y.S. 2d 899 (1961).

<sup>18</sup> *Putney Bros. Co. v. Milwaukee Light, Heat & Traction Co.*, 134 Wis. 379, 114 N.W. 809 (1908).

<sup>19</sup> *Des Moines Wet Wash Laundry v. City of Des Moines*, 197 Iowa 1082, 198 N.W. 486 (1924).

<sup>20</sup> *Jacobs v. United States*, 290 U.S. 13 (1933).

<sup>21</sup> *City of Chicago v. Koff*, 341 Ill. 520, 173 N.E. 666 (1930); *In re Gratiot Avenue*, 294 Mich. 569, 293 N.W. 755 (1940).

<sup>22</sup> *In re Widening of Michigan Ave.*, 298 Mich. 614, 299 N.W. 736 (1941).

compensation in condemnation cases is the fair market value of the premises taken.

The market value of property has been defined as "the price it will bring when offered for sale by one who desires, but is not required, to sell, and is sought by one who desires, but is not required, to buy, after due consideration of all the elements reasonably affecting value."<sup>23</sup> When a leasehold interest is taken, the lessee is entitled to a sum which compensates him for the loss consequent to the taking or injury.<sup>24</sup> This sum is generally said to be the "fair market value"<sup>25</sup> or the "fair rental value"<sup>26</sup> of the unexpired term of the lease, less any rent agreed to be paid by the lessee.<sup>27</sup> Stated another way, the lessee's compensation is the "rental value over the rent reserved."<sup>28</sup> Under this method of determining compensation, the problem of whether a loss has been suffered by the lessee depends upon whether the rental value of the leasehold estate exceeds the rent reserved for the balance of the term.<sup>29</sup>

In most jurisdictions, the taking of the entire property in condemnation proceedings releases the tenant from liability for subsequently accruing rent.<sup>30</sup> This means that if the lessee had made a "bad bargain" and the fair rental value of the premises was less than the rent reserved, he would be released from his obligation to pay the rent and the lessor would have no recourse against him. If he had made a "good bargain," the lessee sustains damage and must be compensated therefor.<sup>31</sup> For example, if the rental value or market value for the remainder of the lease term was determined to be \$5,000 at the time of the condemnation, and the rental obligation was \$4,500, and the total obligation was eliminated, the lessee's compensation would amount to \$500. The "market value" approach will compensate for any appreciation in the value of a leasehold which is covered by a long-term lease providing for a specified amount of rent.

The above rule applies whether there is a total or a partial taking. The formula in either case is the difference in market value before and

<sup>23</sup> 29 C. J. S. *Eminent Domain* § 137 (1941). See also *Onego Corp. v. United States*, 295 F. 2d 461 (N.D. Okl. 1961).

<sup>24</sup> *Department of Public Works v. Bohne*, 415 Ill. 253, 113 N.E. 2d 319 (1953).

<sup>25</sup> *Commercial Delivery Serv. v. Medema*, 7 Ill. App. 2d 419, 129 N.E. 2d 579 (1955); *United States v. Advertising Checking Bureau*, 204 F. 2d 770 (N.D. Ill. 1953).

<sup>26</sup> *In re Cross-Bronx Expressway*, 195 Misc. 842, 82 N.Y.S. 2d 55 (1948).

<sup>27</sup> *Minsk v. Fulton County*, 83 Ga. App. 520, 64 S.E. 2d 336 (1951). See also notes 25 & 26 *supra*.

<sup>28</sup> *Riebs v. Milwaukee County Park Comm'n*, 252 Wis. 144, 31 N.W. 2d 190 (1948); *Fiorini v. City of Kenosha*, 208 Wis. 496, 243 N.W. 761 (1932).

<sup>29</sup> Note 26 *supra*.

<sup>30</sup> "The general rule is that the taking of the entire demised property in condemnation proceedings releases the tenant from liability for subsequently accruing rent, but the taking of only a part of the leased property does not affect the tenant's liability to pay rent. Notwithstanding the proceedings in eminent domain, the tenant remains liable for rent until actual eviction." 52 C. J. S. *Landlord and Tenant* § 483 (1941).

<sup>31</sup> *Kafka v. Davidson*, 135 Minn. 389, 160 N.W. 1021 (1917).

after the taking, reduced to the extent that the tenant is relieved of the obligation to pay rent on the lease. The obligation to pay rent is an important factor where there is only a partial taking, due to the fact that many jurisdictions hold the tenant liable for the entire rent,<sup>32</sup> although some courts have required a reduction in rent proportionate to the interest condemned.<sup>33</sup> Where the tenant is still obliged to pay rent, some allowance is generally made for this continued obligation. Where only a part of the leasehold is taken, the measure of damages is said to be "the difference between the fair market value of the entire leasehold estate and the fair market value of the portion thereof not taken."<sup>34</sup>

### B. *The "Intrinsic Value" Test*

The majority of jurisdictions continue to apply the "market value" test as the measure of damages for the taking of a leasehold. There have, however, been a few instances where it was noted that this test might not apply to all leaseholds—a recognition of the fact that all leaseholds do not have a "market value" as the term is commonly defined.<sup>35</sup> The United States Supreme Court in the case of *United States v. Petty Motor Company*<sup>36</sup> admitted that the market value test was often unsatisfactory:

The Constitution and the Statutes do not define the meaning of just compensation. But it has come to be recognized that just compensation is the value of the interest taken. This is not the value of the owner for his particular purposes or to the condemnor for some specific use but a so called 'market value.' It is recognized that the owner often receives less than the value of the property to him but experience has shown that the rule is reasonably satisfactory. Since 'market value' does not fluctuate with the needs of the condemnor or condemnee but with the general demand for the property, evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings.

Although the *Petty* case<sup>37</sup> involved the taking of a fee, the inadequacy of the market value test is found more frequently where leaseholds are condemned. Leaseholds are not ordinarily the subject of sale on the market and they vary so much in the length of term, rent, and other particulars, including the use to which the property is put by a particular lessee, that the market value is often an unsatisfactory test of the value to a tenant of a leasehold interest. Standing alone, it is no test at all, as some leaseholds may have no market value at all.<sup>38</sup> Where

<sup>32</sup> Note 30 *supra*.

<sup>33</sup> 51 C. J. S. *Landlord and Tenant* § 98 (1941).

<sup>34</sup> *Kafka v. Davidson*, *supra* note 31. See also *Fiorini v. Kenosha*, *supra* note 28.

<sup>35</sup> Note 23 *supra*.

<sup>36</sup> *United States v. Petty Motor Co.*, 327 U.S. 372 (1946).

<sup>37</sup> *Ibid.*

<sup>38</sup> *Des Moines Wet Wash Laundry v. City of Des Moines*, *supra* note 19.

a lease has no market value that can be proved under the usual methods of proving market value, it is proper and necessary to prove every factor and element showing the actual or "intrinsic value" of the leasehold.<sup>39</sup> Where the property condemned has no market value, the "intrinsic value" test has been applied.<sup>40</sup> In view of the many peculiarities of the leasehold interest, which makes it difficult to establish a market value, it would seem to be a reasonable view that the actual or "intrinsic value" is the best available test to determine damages to the lessee.

### III. PARTICULAR ITEMS OR ELEMENTS OF DAMAGE

There are many items or elements of damage which are considered when arriving at the amount of compensation. These items are often peculiar to a given set of facts, and it would be inappropriate to discuss them in general terms. There are some items or elements, however, which are considered in most of the cases involving the condemnation of leaseholds, and these will be discussed here. Most of the factors considered below are only considered as evidence bearing on the value of the leasehold, but some are awarded as items of substantive damage, separate and distinct from the market value.

#### A. *The Option to Purchase*

Generally an option to purchase does not give the lessee an interest which entitles him to compensation.<sup>41</sup> There are, however, some cases which hold that the lessee should be compensated for the value of the option. The value of the option is stated to be the difference between the condemnation award and the price stated in the option.<sup>42</sup> If the option is exercised before condemnation, there is no doubt that the condemnation award goes to the lessee purchaser; but where the option is exercised *after* the condemnation, some cases allow the holder the damages awarded, less the purchase price.<sup>43</sup> In other cases, the option is just an item to be considered in determining the market value of the lease.<sup>44</sup>

#### B. *Option to Renew Lease*

The value of the right to renew is considered by most jurisdictions in determining the market value of the interest taken by eminent domain.<sup>45</sup> The option to renew, in effect, extends the remaining term of the lease.<sup>46</sup> For example, where a tenant has a lease with an option to

<sup>39</sup> *Korf v. Fleming*, 239 Iowa 501, 32 N.W. 2d 85 (1948).

<sup>40</sup> *Graceland Park Cemetery Co. v. City of Omaha*, 173 Neb. 608, 114 N.W. 2d 29 (1962).

<sup>41</sup> *In re Water Front*, 246 N.Y. 1, 157 N.E. 911 (1927). See also *In re Cross-Bronx Expressway*, *supra* note 26.

<sup>42</sup> *In re Water Front*, 219 App. Div. 387, 220 N.Y.S. 23 (1927).

<sup>43</sup> *Nicholson v. Weaver*, 194 F. 2d 804 (9th Cir. 1952). See also 23 Tracts of Land v. United States, 177 F. 2d 967 (6th Cir. 1949).

<sup>44</sup> *Tinnerholm v. State*, 15 Misc. 2d 311, 179 N.Y.S. 2d 582 (1958).

<sup>45</sup> *United States v. 425031 Square Feet of Land*, 187 F. 2d 798 (3d Cir. 1951).

<sup>46</sup> *Department of Public Works v. Bohne*, *supra* note 24.

renew for another ten years, the ten years will be added to the remainder of the lease in determining the market value of the lease. In and of itself, the option to renew has no compensable value. It is only when considered as an extension of the term of the lease that the option to renew has a compensable value to the lessee, and then only to the extent that it increases the market value of the lease.

### C. *Fixtures and Improvements*

The right of a lessee to compensation for fixtures or improvements taken or damaged is dependent upon the terms of the lease and the law in his particular jurisdiction. If a tenant has the right to remove fixtures at the end of the lease, he is entitled to compensation when the fixtures are taken.<sup>47</sup> The tenant also is entitled to compensation under an agreement with the landlord whereby the landlord purchases the improvements upon termination of the lease.<sup>48</sup> A fixture or improvement, to be compensable, must be such as would become part of the real estate if affixed thereto without any agreement as to removal.<sup>49</sup> An item is not necessarily a fixture merely because attached to the realty. An item is generally considered personalty unless it is so attached that its removal will cause substantial damage to the realty or to the thing itself. Mere personalty, even though used in conjunction with the realty, is generally not compensable at all.<sup>50</sup> Trade fixtures are considered improvements to the realty, and a tenant is entitled to payment for his trade fixtures on condemned land.<sup>51</sup> In most cases where the fixtures and improvements are valued together with the land as a whole, they are considered to the extent that they enhance the value of the land to which they are affixed.<sup>52</sup> The tenant is not entitled to recover the cost or diminution in value of the fixture or improvement. His damages are measured in terms of the increased market value of his realty.<sup>53</sup> While most jurisdictions consider the entire appropriation (fixtures, improvements and the realty itself) as a single entity in determining the market value or rental value of the leasehold interest, some jurisdictions have allowed the fixtures and improvements to be valued apart from the realty in determining the rental value.<sup>54</sup> In at

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<sup>47</sup> *Ibid.*

<sup>48</sup> *United States v. 15.3 Acres of Land*, 154 F. Supp. 770 (N.D. Pa. 1957).

<sup>49</sup> *Brazos River Conserv. & Reclam. Dist. v. Adkisson*, 173 S.W. 2d 294 (Tex. Civ. App. 1943).

<sup>50</sup> *Marraro v. State*, 12 N.Y. 2d 285, 239 N.Y.S. 2d 105, 189 N.E. 2d 606 (1963). *Cf. Estelle v. Iowa State Highway Comm'n*, *infra* note 58, where tenant was compensated for items of personalty made useless because the condemnation put tenants out of business.

<sup>51</sup> *United States v. Certain Parcels of Land*, 102 F. Supp. 854 (S.D. N.Y. 1952).

<sup>52</sup> *In re Civic Center*, 335 Mich. 528, 56 N.W. 2d 375 (1953). See also *In re Condemnation of Lands*, 341 Mich. 412, 67 N.W. 2d 49 (1954).

<sup>53</sup> *State ex rel Willey v. Chun*, 91 Ariz. 317, 372 P. 2d 324 (1962).

<sup>54</sup> *Minneapolis - St. Paul Metro. Airports Comm. v. Hedberg - Friedheim Co.*, 226 Minn. 282, 32 N.W. 2d 569 (1948).

least one case, the value of the fixtures and improvements was added to the rental value in determining the lessee's damages.<sup>55</sup>

#### D. *Cost of Relocation*

In determining the lessee's compensation in condemnation cases, the courts have distinguished between two kinds of "moving costs." Generally, the cost to a tenant of removing personalty, as distinguished from fixtures, is not to be considered in determining a tenant's compensation.<sup>56</sup> The cost of removing personalty is not awarded as an item of substantive damage, nor is it considered as evidence bearing upon the market value of the leasehold. There have, however, been some exceptions. A Missouri case has hinted that the condemnor should pay the cost of removing personalty from a right of way.<sup>57</sup> The Iowa Supreme Court "made allowance" for personal property that was rendered useless to the lessee when his business property was taken,<sup>58</sup> and some cases even award moving costs as substantive damages.<sup>59</sup> The general rule as to personalty is aptly expressed by Nichols in his treatise on eminent domain:<sup>60</sup>

In general the Lessee's cost of removing his personal property from the condemned land is not an element meriting consideration whether such item is considered as a separate, substantive element of damages or whether it is considered insofar as its effect upon the market value of the leasehold is concerned. It has been said that the 'just compensation' to which a lessee is entitled is measured by the market value of his leasehold. He is not entitled to more than that because his expenses are increased in consequence of moving his business to another place.

The reasons for not allowing compensation for moving personalty are that the tenant has to move anyhow, that it is not a "taking" so as to be compensable under the Constitution, and that the verdict would otherwise be based on mere conjecture.<sup>61</sup> For these same reasons, courts will sometimes deny the cost of removing and relocating fixtures and machinery.<sup>62</sup> Such costs have also been excluded as merely a "consequential loss" and hence *damnum absque injuria*.<sup>63</sup> Generally, however, a lessee is entitled to recover the cost of removing and relocating fix-

<sup>55</sup> *Gafney Press v. State*, 206 Misc. 1070, 135 N.Y.S. 2d 512 (1954).

<sup>56</sup> *Marraro v. State*, *supra* note 50. See also *Fiorini v. City of Kenosha*, *supra* note 28.

<sup>57</sup> *St. Louis v. St. Louis, I. M. & S. Ry.*, 266 Mo. 694, 182 S.W. 750 (1916).

<sup>58</sup> *Estelle v. Iowa State Highway Comm'n*, 119 N.W. 2d 900 (Iowa 1963).

<sup>59</sup> *Richmond v. Williams*, 114 Va. 698, 77 S.E. 492 (1916).

<sup>60</sup> 4 NICHOLS, EMINENT DOMAIN § 14.2471 (2), at 667.

<sup>61</sup> *Ibid.* See also *Springfield S.W. Ry. v. Schweitzer*, 173 Mo. App. 650, 158 S.W. 1058 (1913).

<sup>62</sup> *Kafka v. Davidson*, *supra* note 31. See also *United States v. Meyers*, 190 Fed. 688 (D.C. Conn. 1911).

<sup>63</sup> *United States v. 27.7 Acres of Land*, 214 F. Supp. 707 (W.D. Ark. 1963). *But see United States v. 425031 Square Feet of Land*, *supra* note 45, where lessee was forced to reoccupy the premises for the remainder of the unexpired term after the condemnor moved out.

tures.<sup>64</sup> Since the value of the fixtures as severed will be decreased to the extent of the cost of detaching and reattaching them elsewhere, the cost of such removal is to be considered in awarding damages.<sup>65</sup> To be entitled to compensation for moving costs, a lessee must have a right to remove fixtures.<sup>66</sup> Where the courts uphold the tenant's right to compensation for moving costs, the rule favored is that the award should not be made as an item of substantive damages, but the costs should be considered in determining the market value of the leasehold as enhanced by the fixtures.<sup>67</sup> Under the favored method, rental value is determined with the fixtures attached, and the cost of relocation, because it diminishes the value of the fixture, lowers the rental value of the leasehold.

#### E. *Loss of Profits*

Compensation is not made for loss of profits connected with a business conducted on land taken. Such loss is considered merely consequential and hence noncompensable.<sup>68</sup> This is true even though the loss is directly attributable to the taking.<sup>69</sup> In order for a tenant to receive compensation for loss of profits due to interruption of business, the business itself would have to be taken by eminent domain.<sup>70</sup> A few cases have allowed damages for loss of profits due to interruption of business,<sup>71</sup> but these cases make up only a small minority. Some jurisdictions will adjust the market value award to reflect loss of profits on the theory that the volume of business is directly connected with the market value.<sup>72</sup> Recovery is never allowed for loss of future or anticipated profits.<sup>73</sup>

#### IV: DIVISION OF COMPENSATION BETWEEN LESSOR AND LESSEE

When a leasehold is taken under eminent domain, the lessee is entitled to his proportionate share.<sup>74</sup> The compensation is apportioned between the lessor and lessee according to their respective interests.<sup>75</sup>

<sup>64</sup> *Des Moines Wet Wash Laundry v. City of Des Moines*, *supra* note 19. See also *In re Civic Center*, *supra* note 52.

<sup>65</sup> *In re Gratiot Avenue*, *supra* note 21.

<sup>66</sup> *In the Matter of the City of New York*, 274 N.Y. 581, 10 N.E. 2d 561 (1937).

<sup>67</sup> *Shipley v. Pittsburgh, C. & W. R. R.*, 216 Pa. 512, 65 Atl. 1094 (1907). See also *Riebs v. Milwaukee County Park Comm'n. and Fiorini v. City of Kenosha*, *supra* note 28.

<sup>68</sup> *United States v. 25.4 Acres of Land*, 71 F. Supp. 255 (1947), *aff'd*, *United States v. City of New York*, 168 F. 2d 387 (2d Cir. 1948).

<sup>69</sup> *In re Condemnation of Lands*, *supra* note 52. See also *Fiorini v. City of Kenosha*, *supra* note 28.

<sup>70</sup> *Katonah Lumber, Coal & Feed Co. v. State*, 194 Misc. 311, 86 N.Y.S. 2d 696 (1949).

<sup>71</sup> *Pieratt v. City of La Grange*, 171 S.W. 2d 377 (Tex. Civ. App. 1943).

<sup>72</sup> *Phillips Petroleum Co. v. City of Omaha*, 171 Neb. 457, 106 N.W. 2d 727 (1960).

<sup>73</sup> *In re Slum Clearance*, 332 Mich. 485, 52 N.W. 2d 195 (1952). See also *Cudahy Brothers Co. v. United States*, 155 F. 2d 905 (7th Cir. 1946).

<sup>74</sup> *Skaff v. Sioux City*, 120 N.W. 2d 439 (Iowa 1963).

<sup>75</sup> *Hockman v. Lindgren*, 212 Minn. 321, 3 N.W. 2d 492 (1942). See also *Rossi v. State*, 31 Misc. 2d 205, 223 N.Y.S. 2d 139 (1961).

The tenant is entitled to compensation for the taking of his leasehold interest and the landlord for the taking of his reversion.<sup>76</sup> The total compensation awarded must cover both the interest of the lessor and the interest of the lessee.<sup>77</sup> Under the rule of law applied in most jurisdictions, the total award, including the compensation paid to both the lessor and lessee, cannot exceed the fair market value of the property taken.<sup>78</sup>

#### V. COMPENSATION IN WISCONSIN

Prior to the enactment of section 32.19 of the Wisconsin statutes,<sup>79</sup> the state of Wisconsin followed the "market value" approach in determining just compensation for the taking of property and interests in property under the power of eminent domain.<sup>80</sup> With the enactment of section 32.19<sup>81</sup> in 1961, and the revision of section 32.09,<sup>82</sup> the strict market value approach was supplemented by the consideration of other damages and expenses which the land owner or other interested party sustained as a result of the taking. The market value, however, is still the basic test in determining the amount of the award. Where there is a total taking, the condemnor pays the fair market value.<sup>83</sup> Where there is only a partial taking, the compensation is measured by the difference in the fair market value of the property before and after the taking.<sup>84</sup> In determining the fair market value, consideration is given to fixtures and improvements actually taken,<sup>85</sup> damages resulting from actual severance of land, including damages to improvements and fixtures resulting from the severance,<sup>86</sup> and other items of damages not discussed in this article.<sup>87</sup> In determining its market value, the property is considered on the basis of its most advantageous use.<sup>88</sup> In addition to compensating for the market value of the interest taken, Wisconsin also compensates for certain other items of expense or damage where they are shown to exist.<sup>89</sup> This additional compensation is made as an item of substantive damages above and beyond the market or rental value of the property.<sup>90</sup> These additional items are:

<sup>76</sup> Pierson v. H. R. Leonard Furniture Co., 268 Mich. 507, 256 N.W. 529 (1934).

<sup>77</sup> Fiorini v. City of Kenosha, *supra* note 28.

<sup>78</sup> *Ibid.*

<sup>79</sup> WIS. STAT. § 32.19 (1961).

<sup>80</sup> WIS. STAT. § 32.09 (1959). See also Fiorini v. City of Kenosha and Riebs v. Milwaukee County Park Comm'n, *supra* note 28.

<sup>81</sup> WIS. STAT. § 32.19 (1961).

<sup>82</sup> WIS. STAT. § 32.09 (1961).

<sup>83</sup> WIS. STAT. § 32.09(5) (1961).

<sup>84</sup> WIS. STAT. § 32.09(6) (1961). See also Arrowhead Farms, Inc. v. Dodge County, 21 Wis. 2d 647, 124 N.W. 2d 631 (1963).

<sup>85</sup> WIS. STAT. § 32.09(6) (a) (1961).

<sup>86</sup> WIS. STAT. § 32.09(6) (e) (1961).

<sup>87</sup> WIS. STAT. § 32.09(6) (b) (1961), loss of access to highway; WIS. STAT. § 32.09(6) (c) (1961), loss of air rights, etc.

<sup>88</sup> WIS. STAT. § 32.09(2) (1961).

<sup>89</sup> WIS. STAT. § 32.19 (1961).

<sup>90</sup> WIS. STAT. § 32.09(5), (7) (1961).

- (1) The cost of realigning *personal property* on the same site.<sup>91</sup>
- (2) The cost of moving *personal property* to another site.<sup>92</sup>
- (3) All costs incurred by the owner to finance the purchase of other property substantially similar to the property taken.<sup>93</sup>
- (4) The net rental losses in the year prior to the taking of the property, where such losses were caused by the proposed acquisition of the property involved.<sup>94</sup>
- (5) The expense of plans and specifications designed for the property taken, which are rendered unusable because of the taking.<sup>95</sup>

Wisconsin still refuses to compensate for loss of profits.<sup>96</sup>

The effect of the Wisconsin statutes on a tenant whose leasehold interest is condemned would seem to be that his share of the total award is based on the "rental value" of his leasehold interest, determined as explained in this article.<sup>97</sup> The tenant also appears to have a right to receive his moving costs<sup>98</sup> or the costs of realigning his personalty, where there is only a partial taking.<sup>99</sup> These last two items of damage would be awarded as items of substantive damages. It is believed that moving costs would include the tenant's own labor.<sup>100</sup> In order to qualify for compensation for his moving costs, the lessee must be under an unexpired written lease with a term of at least three years.

## VI. COMMENTARY

It is the author's opinion that the only just compensation for the taking of a leasehold interest is the actual loss suffered by the lessee as a direct result of the taking. The fair market value or rental value test compensates the lessee for any appreciation in the rental value of the leased property, but this compensation is too often insignificant when compared to the loss the lessee incurs as a result of moving expenses and, in the case of the commercial lessee, the loss of profits due to interruption of business.

The argument against compensation for moving expenses is that the tenant would have to move anyhow and he should not expect to be reimbursed for this expense when he places personal property on leased

<sup>91</sup> WIS. STAT. § 32.19(1) (1961).

<sup>92</sup> WIS. STAT. § 32.19(2) (1961). A tenant, to receive compensation, must have a written lease with a term of at least three years. This item of compensation has a ceiling of \$150 for the cost of moving from a family residence and \$2,000 for the cost of moving from a farm or other non-residential site.

<sup>93</sup> WIS. STAT. § 32.19(3) (1961). Property taken must have been subject to a bona fide mortgage or be under a bona fide land contract.

<sup>94</sup> WIS. STAT. § 32.19(4) (1961).

<sup>95</sup> WIS. STAT. § 32.19(5) (1961).

<sup>96</sup> *Dusevich v. Wisconsin Power & Light Co.*, 260 Wis. 641, 51 N.W. 2d 732 (1952); *Stefan Auto Body v. State Highway Comm'n*, 21 Wis. 2d 363, 124 N.W. 2d 319 (1963).

<sup>97</sup> *Kafka v. Davidson*, *supra* note 31.

<sup>98</sup> WIS. STAT. § 32.19(2) (1961).

<sup>99</sup> WIS. STAT. § 32.19(1) (1961).

<sup>100</sup> OPS. WIS. ATT'Y GEN. 166 (1962).

premises.<sup>101</sup> This argument overlooks the fact that most leases are renegotiated at the end of the term, and it is the exception, rather than the rule, that the commercial tenant is forced to move when his lease expires. It argues nothing to say that the removal would be necessary at the end of the lease and therefore there is no damage to the lessee.<sup>102</sup> It is pure speculation to say that the tenant will not be able to renew his lease for another term. Wisconsin has recognized this situation and provides compensation for the expenses incurred in removing fixtures<sup>103</sup> and personalty.<sup>104</sup> In Wisconsin, compensation for the cost of removing personalty is not available to a tenant with less than a three-year lease, but this would seem reasonable. In this situation, no compensation will be made for tenants with a month-to-month tenancy, a tenancy at will, or a tenancy for a period of less than three years. This means that while there is no compensation available for the individual under the standard home or apartment lease, the commercial tenant will be compensated. It is the commercial tenant who is most seriously damaged through moving costs, and it is also he to whom the argument that the cost is an encumbrance of leasing has its weakest application.

The second argument against moving costs is that they are an item not compensable within the language of the Constitution.<sup>105</sup> It is the author's belief that moving expenses incurred as a direct result of the condemnation of the leasehold are as much a taking or damaging of the property of the tenant as if the sovereign seized the property directly. The object of an award is to compensate the owner for what he has lost.<sup>106</sup> By reason of the fact that the lessee incurred moving expenses due to the taking, he has sustained a loss above and beyond the "rental value" of his leasehold.

Another argument advanced against the awarding of moving costs is that any award would be based on conjecture.<sup>107</sup> The fear is that the cost of removal will vary greatly, depending upon the distance of the move. Wisconsin has placed a ceiling on moving costs, thus eliminating the expense of moves over great distances.<sup>108</sup> It is the author's contention that the limit should be placed upon the distance moved and not upon the cost. Compensation should be made for all reasonable and necessary moving expenses caused by condemnation. By setting a ceiling on the amount paid, the state can predict its maximum liability, but the person who is forced to move may be compensated for only a frac-

<sup>101</sup> Note 61 *supra*.

<sup>102</sup> *Des Moines Wet Wash Laundry v. City of Des Moines*, *supra* note 19.

<sup>103</sup> WIS. STAT. § 32.09(6)(e) (1961).

<sup>104</sup> WIS. STAT. § 32.19(2) (1961).

<sup>105</sup> Note 61 *supra*.

<sup>106</sup> *United States v. Certain Parcels of Land*, 90 F. Supp. 27 (W.D. Va. 1949).

<sup>107</sup> Note 61 *supra*.

<sup>108</sup> Note 92 *supra*.

tion of his actual cost of relocation. Wisconsin has set a ceiling of \$2000 for moving expenses incurred in connection with the condemnation of commercial property. Many commercial lessees could not begin to relocate for \$2000. It is suggested that by restricting compensation to *reasonable* expenses for moves within a *reasonable* area, a person will receive "just compensation" for the moving expenses that he incurs as a result of a taking by eminent domain. By providing for compensation after the move is made, the condemnor would be able to object to any expense he deemed unreasonable and adjust the award accordingly. The interpretation of what is a reasonable expense or distance would ultimately be for the courts to decide, if a contest evolved.

The loss of profits suffered by a commercial tenant is still treated by the courts as an item of damage too speculative to warrant compensation. This writer believes that there are certain losses of profit due to the taking of the leasehold that are not at all speculative and deserve compensation. Financial losses due to the interruption of business caused by the relocation are the profits for which compensation should be made. This would include the cost of wages paid during the period of removal and relocation and the provable loss of business during the period. Injury to the volume of business or to future profits is definitely too speculative to warrant compensation. However, where a business is forced to cease operation for a period of time due to the taking of its leasehold interest, it should be awarded its average profit for that period. Any loss of profit which is directly attributable to the condemnation of the tenant's business location should be compensated as an element of substantive damage.

## VII. CONCLUSION

The compensation suggested here cannot be called the "intrinsic value" of the leasehold interest. It would be impossible to set a price on the intrinsic value to the lessee. The market or rental value is still the basic test. But market value alone too often does not justly compensate for what is taken. "Nothing can be fairly termed 'just compensation' which does not put the party injured in as good a condition as he would have been if the injury had not occurred."<sup>109</sup> The public as a whole should bear the entire loss or damage due to the exercise of the power of eminent domain. No one individual should be expected to suffer for the benefit of the public and not be compensated.

DAVID J. MACDOUGALL

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<sup>109</sup> *In re Widening of Bagley Avenue*, 248 Mich. 1, 226 N.W. 688 (1929).