A Proposal for Compensating Landowners for the Effects of Urban Redevelopment

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A PROPOSAL FOR COMPENSATING LANDOWNERS FOR THE EFFECTS OF URBAN REDEVELOPMENT

With the growth of urban areas in America has come a corresponding growth in urban decay. To revitalize and redevelop urban centers, government often relies on its power of eminent domain to appropriate land that is necessary to accommodate renewal plans. But the use of eminent domain power and the resulting condemnation proceedings affect the value of property owned not only by persons within but also those adjacent to areas being condemned. When property suffers a loss in value as a result of condemnation activities, the manner in which a court resolves the compensation question may have a significant impact on whether a landowner receives adequate compensation or, for that matter, any compensation at all. This Note reviews the past and present law in the area of compensating landowners for losses suffered as a result of governmental action and, finding the present Minnesota law to be inadequate, suggests a standard by which a more equitable resolution of the compensation question can be made.

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I. INTRODUCTION

In an effort to reverse the process of urban decay, government increasingly has exercised its power of eminent domain. But redevelopment projects are highly complicated and time-consuming endeavors. Between bureaucratic processing and unavoidable delay, substantial periods of time may elapse before the project results in land acquisitions. Often during that time knowledge of the imminence of the taking is widespread. The results of such knowledge typically include the mass exodus of tenants, reluctance of the owners of the buildings involved to make improvements or perform maintenance, and a decrease in police protection with a corresponding increase in crime. Additionally, property values may be reduced in both the area to be condemned and abutting areas.

1. See 72 COLUM. L. REV. 772, 773-74 (1972). As modern society became more industrialized, cities developed as the focal points of production and trade. Large populations shifted from a rural to an urban setting. These masses of people required an accelerated expansion of housing and similar municipal services, which could not be met by many city governments nor by private enterprise. As a result, many of these inhabitants were forced to live in substandard, unsanitary conditions, from which developed the slums that exist today. Urban renewal programs constitute one response by the government aimed at remedying this deterioration. Adams, Eminent Domain, Police Power and Urban Renewal: Compensation for Interim Depreciation in Land Values, 7 GA. L. REV. 226, 226 (1973).

2. See 4 J. SACKMAN, NICHOLS’ THE LAW OF EMINENT DOMAIN § 12.3151 (rev. 3d ed. 1977) [hereinafter cited as 4 Nichols] (“It rarely happens that proceedings for the condemnation of [land] for public use are instituted without months, years, and in some instances, decades of time spent in preliminary discussion and in the making of tentative plans.”); 72 COLUM. L. REV., supra note 1, at 774.


Varying lengths of time may elapse between the initial proposals and planning for land acquisition and the actual taking and appropriation. 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) (14 years); City of Detroit v. Cassese, 376 Mich. 311, 136 N.W.2d 896 (1965) (12 years between initial announcement and initiation of condemnation proceeding); City of Cleveland v. Hurwitz, 19 Ohio Misc. 184, 249 N.E.2d 562 (1969) (eight years before final approval of plan to acquire); A. Gettelman Brewing Co. v. City of Milwaukee, 245 Wis. 9, 13 N.W.2d 541 (1944) (31 years; proposals for street widening commenced in 1909 but property not acquired until 1940).

4. Kanner, supra note 3, at 767. Frequently, before such projects are commenced they are communicated to the public through official or unofficial announcements, including newspaper accounts, and by the spread of rumors. Note, The Condemnor’s Liability for Damages Arising Through Instituting, Litigating, or Abandoning Eminent Domain Proceedings, 1967 UTAH L. REV. 548, 549. In addition, the commencement of the condemnation procedure constitutes, by itself, an announcement of a proposed project. 8 P. ROHAN & M. RESKIN, NICHOLS’ THE LAW OF EMINENT DOMAIN § 14.02[1][a] (rev. 3d ed. 1978) [hereinafter cited as 8 Nichols].

5. See, e.g., 8 Nichols, supra note 4; Note, supra note 4, at 549. For example, in the case of In re City of New York 572 Warren St., 58 Misc. 2d 1073, 288 N.Y.S.2d 429 (Sup. Ct. 1968), the condemning authority sent a booklet to each of the tenants in an area...
This Note first reviews the theories that courts have used to determine whether government must pay compensation for loss in property value when that loss is caused by governmental action. Second, an overview of basic principles used to determine whether condemnation activity causes a compensable injury is presented, followed by a discussion of the present Minnesota law in this area. A standard by which losses caused by condemnation activities can be compensated then is proposed.

II. AN OVERVIEW OF EMINENT DOMAIN PRINCIPLES

Eminent domain refers to the state's power to appropriate private property for a public use. This power exists independently of a state's constitution as an inherent attribute of sovereignty. The eminent domain referring them that the subject property would be appropriated for a housing project and that they would be assisted in moving but that they did not have to move immediately. The result was described as follows:

Immediately after these letters and pamphlets were distributed throughout the house, tenants began to move out and the vacated apartments were promptly vandalized, with thefts of refrigerators, stoves, kitchen tubs, etc. Two months later . . . half of the tenants had moved and most of the others had refused to pay any rent . . . . When cooler weather came in, the landlord was getting practically no income whatsoever. None of the vacated apartments could be rented because of the vandalism and also because the impending condemnation had been noised throughout the area by the [condemning authority] employees. As a result, the landlord could not raise the necessary funds for repairs or fuel, and by November, about 75% of the tenants had vacated.

Id. at 1075-76, 298 N.Y.S.2d at 431-32.

6. See notes 10-65 infra and accompanying text. Although the eminent domain issues presented in this Note have been examined specifically in the context of urban renewal projects, the principles should apply to condemnation cases in general.

7. See notes 66-231 infra and accompanying text.

8. See notes 232-50 infra and accompanying text.

9. See notes 260-83 infra and accompanying text.

10. See State v. Bentley, 216 Minn. 146, 153, 12 N.W.2d 347, 352 (1943); cf. Davidson v. County Comm'rs, 18 Minn. 482 (Gil. 432) (1872) (financial aid to railroads from public taxes not an exercise of eminent domain).


12. United States v. Federal Land Bank, 127 F.2d 505, 508 (8th Cir. 1942); County of Freeborn v. Bryson, 297 Minn. 218, 225, 210 N.W.2d 290, 295 (1973); In re Burnquist, 220 Minn. 129, 132, 19 N.W.2d 77, 79 (1945); see Johnson v. City of Plymouth, 263 N.W.2d 603, 605 (Minn. 1978). The sovereign may exercise its power of eminent domain for authorized purposes; and when it does so, the landowner must submit. In re Burnquist, 220 Minn. at 132, 19 N.W.2d at 79. In this respect, the ownership of all land may be considered to be retained by the sovereign and possession can be resumed when a public need for that land arises, subject to constitutional limitations on the power. See, e.g., Daniels v. State Road Dep't, 170 So. 2d 846, 848 (Fla. 1964); In re Burnquist, 220 Minn. at 132, 19 N.W.2d at 79; State v. Flach, 213 Minn. 353, 356, 6 N.W.2d 805, 807 (1942).
domain power is subject, however, to a constitutional requirement in all states but one\textsuperscript{13} that a property owner be compensated justly for any taking.\textsuperscript{14} But, while a state’s constitution may require compensation for a taking, the government has a strong interest in exercising its full potential for the general welfare, unhandicapped by the financial drain that would result from compensating landowners for all potential adverse effects of public programs and activities.\textsuperscript{15} Therefore, a loss that results from governmental action that is not a taking is not compensable\textsuperscript{16} because “even the most affluent society cannot feasibly assume the costs of socializing all the private losses that flow from the activities of organized government.”\textsuperscript{17} Courts usually base their conclusion that compensation need not be paid on the premise that the government merely has exercised its police power,\textsuperscript{18} which is a power inherent in the sovereign to regulate private rights for the general welfare without compensating for such regulation.\textsuperscript{19}

13. See note 167 infra.

14. See, e.g., U.S. Const. amend. V (“nor shall private property be taken for public use, without just compensation”); N.Y. Const. art. 1, § 7(a) (“Private property shall not be taken for public use without just compensation.”). In Minnesota, the constitution places an additional limitation by requiring just compensation for any damage to property. See Minn. Const. art. 1, § 13 (“Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured.”). The differences in constitutional provisions will be the subject of further discussion in this Note. See notes 167-98 infra and accompanying text.

15. See Van Alstyne, Modernizing Inverse Condemnation: A Legislative Prospectus, 8 Santa Clara Law. 1, 26 (1967).

16. See, e.g., Orfield v. Housing & Redevel. Auth., 305 Minn. 336, 341, 232 N.W.2d 923, 927 (1975) (per curiam) (diminution in value resulting from precondemnation activities held not to constitute a taking; compensation denied).

Similarly, in states in which the constitutions prohibit uncompensated “damage” to property, a loss that does not constitute damage is not compensable. See Wolfram v. State, 246 Minn. 284, 287, 74 N.W.2d 510, 512 (1956) (not every diminution in property value caused by a public improvement compensable as “damage” to the property).

17. Van Alstyne, supra note 15, at 26-27. In Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), Justice Holmes stated: “Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law.” Id. at 413. Such a conclusion assumes either that some losses of values associated with property ownership inevitably go uncompensated and hence are justifiable costs of social progress, or that such losses will be offset by the net long-term benefits accruing to the entire community. Van Alstyne, supra note 15, at 27.

18. See Johnson v. City of Plymouth, 263 N.W.2d 603, 606 (Minn. 1978) (“If a governmental action has been found not to infringe the right of access, such action has been deemed a ‘reasonable’ assertion of the police power and therefore noncompensable.”).

19. See, e.g., Hendrickson v. State, 267 Minn. 436, 441, 127 N.W.2d 165, 170 (1964) (“All courts seem to agree that if the regulation or restriction falls within the state’s ‘police power,‘ no compensable loss has occurred.”). Individual rights are subject to the inherent police power of the sovereign. See Northwestern Tel. Exch. Co. v. City of Minneapolis, 81 Minn. 140, 147, 83 N.W. 527, 530 (1900), aff’d on rehearing, 81 Minn. 150, 86 N.W. 69 (1901). Generally, the police power is restricted to those situations involving public health,
For many years, this analysis appeared straightforward: takings were compensable and police power regulations were not. In 1922, however, Justice Holmes expanded on the analysis in a short statement that is now famous for the confused state in which it left this area of the law. In *Pennsylvania Coal Co. v. Mahon*, he stated "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." The problem with Holmes' statement, however, is that no precise formula can be utilized to determine when regulation ends and taking begins. Nevertheless, *Pennsylvania Coal* represents

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21. 260 U.S. 393 (1922). In that case, the plaintiff homeowner sued the defendant coal company to enjoin the mining of coal beneath the plaintiff's home. The defendant had previously deeded the property to the plaintiff, expressly reserving the right to remove all of the coal from beneath the surface. Subsequent to that transfer, the Pennsylvania Legislature enacted a statute prohibiting the mining of coal beneath anyone's home if the mining could cause the structure to collapse. The focal issue on appeal was whether the statute was unconstitutional as applied to the defendant, that is, whether prohibition of the defendant's right to remove the coal constituted a taking without just compensation. The Court concluded that the prohibition against mining constituted an appropriation of the defendant's property. See id. at 414.
22. Id. at 415.
23. See Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962); State ex rel. Lachtman v. Houghton, 134 Minn. 226, 230, 158 N.W. 1017, 1019 (1916) (dividing line between police power restrictions and compensable takings or damage has not and cannot be distinctly marked out). The United States Supreme Court has yet to establish a consistent rationale and "operates somewhat haphazardly, using any or all of the available, often conflicting theories without developing any clear approach to the constitutional problem." Sax, supra note 20, at 46; see State ex rel. Lachtman v. Houghton, 134 Minn. at 230, 158 N.W. at 1019 ("As different cases arise, the courts determine from the facts and circumstances of the particular case whether it falls upon one side or the other of the line [between police power restrictions and compensable takings or damage]."). The United States Supreme Court recently reiterated that it has been unable to develop a "set formula" for determining when compensation should be awarded for economic injuries resulting from public activities. See *Penn Central Transp. Co. v. City of New York*, 98 S. Ct. 2646, 2659 (1978). In *Penn Central*, the property owner challenged the validity of the regulation of historic landmarks, alleging the regulating constituted a taking absent compensation to property owners. See id. at 2657. In 1967 after the New York City Landmarks
sents a rejection of previous rationales in which the difference between a police power regulation and an eminent domain taking was one of kind, not of degree.\textsuperscript{24} Now, after \textit{Pennsylvania Coal}, the concepts of regulation and taking converge on a continuum along which police power at some point ends and eminent domain begins.\textsuperscript{25}

Such a continuum, however, is more useful as a description of the result of the government's action than as an actual test to be used in determining whether compensation is required.\textsuperscript{26} Therefore, several legal theories have been developed for determining whether the government's actions require compensation. The theories most commonly advocated by authorities in the field of condemnation law\textsuperscript{27} are physical invasion,\textsuperscript{28} noxious use,\textsuperscript{29} diminution in value,\textsuperscript{30} and balancing of interests.\textsuperscript{31}

Preservation Commission had designated the well-known Grand Central Station as a landmark, the owners unsuccessfully sought permission from the commission to construct an office tower more than 50 stories high above the terminal. \textit{See id.} at 2655-56 & n.16. The owner claimed that, because the city had taken the "air rights" above the terminal and diminished the value of the site, the designation imposed a greater burden on the owner than on other property owners, thereby warranting compensation. Rejecting this argument, the Court noted that legislation designed to promote the general welfare may impose a greater burden on some property owners than on others. \textit{See id.} at 2664. The Court held that the landmarks law benefited all New York citizens and buildings by providing both general economic benefits and an improved quality of life, \textit{id.} at 2665, without unreasonably interfering with the owner's beneficial use of the terminal. \textit{id.} at 2666.

\textsuperscript{24} \textit{See} Mercer, \textsc{Regulation (Police Power) V. Taking (Eminent Domain)}, 6 N.C. CENTRAL L.J. 177, 182 (1975). An example of the previous rationale can be found in \textit{Mugler v. Kansas}, 123 U.S. 623 (1877). In that case Justice Harlan stated that the police power regulation of a public nuisance to protect public health differs from the taking of unoffending property. Thus, the Court held that the prohibition against the manufacture of liquor did not constitute a taking of plaintiff's brewery. For a general discussion of the distinction between the approaches taken by Justices Harlan and Holmes, see \textit{Sax, supra} note 20, at 38-46.

\textsuperscript{25} \textit{See} Van Alstyne, \textit{supra} note 15, at 27-28.

\textsuperscript{26} \textit{See} Johnson v. City of Plymouth, 263 N.W.2d 603, 606 (Minn. 1978); Hendrickson v. State, 267 Minn. 436, 441-42, 127 N.W.2d 165, 170 (1964); \textit{Van Alstyne, supra} note 15, at 28.

\textsuperscript{27} \textit{See generally} Haigler, McNerny & Rhodes, \textsc{The Legislature's Role in the Taking Issue}, 4 FLA. ST. U.L. REV. 1, 14-22 (1976); \textit{Mercer, supra} note 24, at 185-90; Michelman, \textsc{Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law}, 80 HARV. L. REV. 1165, 1183-1201 (1967); Olson, \textsc{The Role of "Fairness" in Establishing a Constitutional Theory of Taking}, 3 URB. LAW. 440, 442-49 (1971); \textit{Sax, supra} note 20, at 46-60; \textit{Van Alstyne, supra} note 15, at 13-25; Comment, \textsc{"Takings" Under the Police Power—The Development of Inverse Condemnation as a Method of Challenging Zoning Ordinances}, 30 SW. L.J. 723, 726-28 (1975); Comment, \textsc{De Facto Taking and Municipal Clearance Projects: City Plan or City Scheme?}, 9 URB. L. ANN. 317, 318-19 (1975) [hereinafter cited as Comment, \textsc{De Facto Taking}].

\textsuperscript{28} \textit{See} notes 32-38 \textit{infra} and accompanying text.

\textsuperscript{29} \textit{See} notes 39-47 \textit{infra} and accompanying text.

\textsuperscript{30} \textit{See} notes 48-56 \textit{infra} and accompanying text.

\textsuperscript{31} \textit{See} notes 57-65 \textit{infra} and accompanying text.
A. Physical Invasion Theory

Older cases restricted compensable takings to governmental action in which the claimant's land was physically used or occupied. According to the physical invasion theory, property loss was compensable only if the state physically encroached on or physically interfered with the private property. This theory was particularly adaptable to a simple society in which regulation of private property interests and economic activity was not extensive. As society became more complex, however, the accompanying social problems increased. As a consequence of governments' attempts to alleviate these social problems, the regulation of private property rights became more complex and modern regulations caused an impact on private property interests similar to that caused by physical intrusions. Hence, the validity of the physical invasion theory is questionable and, in American jurisprudence, generally is considered obsolete.


33. See, e.g., United States v. Central Eureka Mining Co., 357 U.S. 155, 165-66 (1958) (federal government closed gold mines to induce experienced miners to engage in war-related work; because the government "did not occupy, use or in any manner take physical possession of the gold mines," no taking occurred); Bedford v. United States, 192 U.S. 217, 225 (1904) (no taking occurred where construction of retaining wall by federal government may have contributed to flooding and erosion of claimant's land resulting primarily from natural causes; case distinguished from those cases in which actual invasion rather than consequential invasion occurs); Transportation Co. v. Chicago, 99 U.S. 635, 643 (1878) (when construction of tunnel did not result in physical invasion of claimant's property, compensation inappropriate); Michelman, supra note 27, at 1184; Van Alstyne, supra note 15, at 13-14.

34. See Mercer, supra note 24, at 185. Land often was undeveloped by owners when the government first used its powers of eminent domain. Consequently, the occurrence of incidental losses resulting from condemnation was rare. Little hardship was suffered by landowners because of the requirement that a physical invasion occur before awarding compensation. See Luber v. Milwaukee County, 47 Wis. 2d 271, 280, 177 N.W.2d 380, 384-86 (1970).


37. See Mercer, supra note 24, at 185; Sax, supra note 20, at 48; Van Alstyne, supra note 15, at 14-16.

38. See Sax, supra note 20, at 48; Van Alstyne, supra note 15, at 16. Although the physical invasion theory is outdated as a theory for determining when a taking occurs,
B. Noxious Use Theory

The noxious use theory has been referred to as the "private fault and public benefit" theory, the "harm prevention and benefit extraction" theory, and the "nuisance abatement" theory. Having its roots in nuisance law, the noxious use theory focuses on the purpose of the governmental action. If the limitation on land use is designed to prevent a nuisance-like activity detrimental to the community's welfare, the government action is noncompensable; if the limitation forces a landowner, whose property use is nondetrimental, to confer a public benefit on the community, compensation is compelled to allocate equitably the costs of the improvement among those who benefit.

Courts never deny compensation when a physical invasion does occur. See Michelman, supra note 27, at 1184. Recently, the United States Supreme Court acknowledged the relevance of the existence of a physical invasion to the determination as to whether or not a taking has occurred. See Penn Central Transp. Co. v. City of New York, 98 S. Ct. 2646, 2659 (1978). However, the Court expressly stated that it would not accept the proposition that a taking could not occur without a physical invasion. See id. at 2659 n.25. Therefore, although the existence of a physical invasion will mandate compensation, an absence of a physical invasion no longer conclusively precludes compensation.

The contemporary version of this theory analyzes the taking issue by means of a fault/no-fault analysis. The term "fault" indicates that the landowner's conduct is harmful to the general welfare. If the landowner is at "fault" in this sense, the restriction or destruction of the use does not warrant compensation because the prevention of the harm constitutes a benefit to the general public welfare. On the other hand, if no "fault" exists on the landowner's part, any benefit conferred on the public at the landowner's expense would be unjustified, and therefore the landowner should be compensated. See Olson, supra note 27, at 448.

Thus, the noxious use theory imposes a fault/no-fault analysis. The term "fault" indicates that the landowner's conduct is harmful to the general welfare. If the landowner is at "fault" in this sense, the restriction or destruction of the use does not warrant compensation because the prevention of the harm constitutes a benefit to the general public welfare. On the other hand, if no "fault" exists on the landowner's part, any benefit conferred on the public at the landowner's expense would be unjustified, and therefore the landowner should be compensated. See Olson, supra note 27, at 448.

The contemporary version of this theory analyzes the taking issue by means of a
The problem with the noxious use theory is that some benefit can be associated with all types of regulation. As a result, the concepts of "benefits derived" and "nuisance avoided" are viewed more properly not as descriptions of two distinct regulations but as indicators of whether the primary intent of a law is to restrict harmful activity or confer a public benefit. The noxious use theory, therefore, often fails to provide a workable, consistent test.

C. Diminution in Value Theory

The diminution in value theory was first enunciated in Pennsylvania Coal Co. v. Mahon. In announcing the Court’s decision, Justice Holmes stated: “One fact for consideration in determining [the limits of police power] is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.” This analysis evidenced the erosion of the physical invasion theory, under which the extent of pecuniary loss is irrelevant.

"creation of the harm" test: if a landowner’s use of his property creates harmful results, he cannot later complain when that use is regulated. See Mercer, supra note 24, at 186.

Generally, regulations designed to prevent nuisance-like activity are of a specific nature: a particular detrimental activity is controlled, leaving the landowner with a variety of profitable and nonharmful alternatives for which he can use his property. On the other hand, a regulation designed to confer a benefit on the general public tends to be more comprehensive, leaving the landowner only with the alternative of engaging in the activity conferring the benefit. Van Alstyne, supra note 15, at 20. Compare Hadacheck v. Sebastian, 239 U.S. 394 (1915) (ban on brick manufacture in residential area held reasonable exercise of police power) with Vernon Park Realty, Inc. v. City of Mount Vernon, 307 N.Y. 493, 121 N.E.2d 517 (1954) (zoning regulation easing traffic congestion by prohibiting any use of vacant lot other than for parking amounted to unconstitutional taking without just compensation).

The “noxious use” approach was recently acknowledged by the United States Supreme Court in Penn Central Transp. Co. v. City of New York, 98 S. Ct. 2646 (1978). In Penn Central, the Court examined various zoning cases that had precluded compensation despite the devastating economic injuries sustained by the landowners. See id. at 2660-61. The Court concluded that when such regulations are reasonably related to the promotion of the general welfare even severe diminutions in property values may be tolerated. See id. at 2663. The Court held that the designation of the plaintiff’s property as a landmark, which prevented plaintiff from building an office building on top of the property, was substantially related to the promotion of the general welfare and did not constitute a taking. See id. at 2666.

46. See id.
47. See id. Nevertheless, the harm-benefit distinction is useful for defining certain noncompensable losses imposed by regulatory measures. See id. at 21.
50. See Olson, supra note 27, at 445.
51. See notes 32-38 supra and accompanying text. Application of the physical invasion
Given the fact that property, by its nature, usually can be assigned a monetary value, a theory emphasizing the economic loss suffered by the landowner as the criteria for compensation seems fair and appealing. The utility of the theory, however, is impeded by the difficulty the courts have in defining a dividing line between compensable and non-compensable losses: by how much must a property's value decrease before a taking has occurred? Generally, the diminution in value theory requires a significant deprivation as a condition to compensation. Although "significant" is a vague term, it lends some assistance when determining whether compensation is required. Requiring a significant diminution is reasonable because governmental programs cannot be expected to absorb all losses in land values; claims for some losses must be dismissed as de minimis, too speculative, or unprovable.

Still, many ambiguous situations will exist in which the issue of whether the diminution is significant remains unclear. While loss usually can be ascertained with some certainty, the amount of loss not offset by a public benefit is more difficult to ascertain. Thus, the diminution in value theory seems most useful when the impact of the governmental activity is extremely large or extremely small.

D. Balancing of Interests Theory

According to the balancing theory, the judicial task required is one of identifying and comparing all competing interests involved in the governmental action. Theoretically, when the loss is greater than the benefit, a taking occurs. On the other hand, a claimant is not entitled to compensation for an injury to his property if the loss to the property is outweighed by the benefits accruing to society as a result of the governmental action. The factors relevant to this determination include: the...
extent of the restriction, the nature of the state's interest, the economic impact on the general community, and the status of the party responsible for creating a problem that necessitates governmental action.58

The balancing theory can work a severe injustice, however, if the application of the theory requires some members of society to sacrifice valuable property interests for the public welfare60 while other persons gratuitously receive a special benefit.60 In light of the fact that special benefits generally will be redistributed throughout society by devices such as increased taxes, however, the latter consequence is more tolerable.61

Perhaps the greatest shortcoming of this theory is the difficulty courts experience in delineating the precise societal and private interests involved and then striking some meaningful balance between such dissimilar interests.62 This process of ad hoc balancing lacks an objective rule by which a court's determination can be predicted.63 In spite of this shortcoming, the theory is particularly appealing for its reasonable, flexible, and not unfair approach to the problem.64 The balancing theory,

58. See Mercer, supra note 24, at 190.
59. See Van Alstyne, supra note 15, at 18. This theory circumvents the taking issue altogether by relying on relative "weights" of interests rather than on rules of appropriation. For example, in Miller v. Schoene, 276 U.S. 272 (1928), the plaintiff was ordered to cut down a large number of ornamental red cedar trees to prevent the spread of a plant disease to nearby apple orchards. The Court stated that the societal values of the apple growing industry was of higher weight than the ornamental or commercial value of the cedars to the plaintiff. Id. at 279. The opinion is void of any analysis in terms of whether a taking had occurred.
60. See Van Alstyne, supra note 15, at 18.
61. See id.
62. See id. at 18-19.
63. See id. at 19.
64. See id. The theory illuminates the extent to which property owners suffer grievous losses without some concomitant general public benefit deriving from the public project. In that regard, the theory has some utility in the determination of the efficiency of a project. See Michelman, supra note 27, at 1194, 1234-35. The determination that a particular project is efficient despite the imposition of some burden on various individuals lends an aura of legitimacy to the project. See id. at 1195. In a liberal democratic society, the comparison of private rights on the one hand with benefits to society on the other hand seems untenable because it suggests that some people in society are excluded from and "counterpoised against" societal benefits. In other words, a group of people exists whose interests are not included in "society's interests." Id. at 1194. Accordingly, the balancing theory would be more valid in awarding compensation when a certain individual's private losses are outweighed not by society's gains but by other peoples' gains. Id. at 1194.
however, is best suited to deal with cases in which the argument for or against compensation is obvious.\textsuperscript{65}

III. THE COMPENSABILITY OF THE EFFECTS OF CONDEMNATION ACTIVITIES

A. To Compensate or Not to Compensate

Courts have adopted various rationales in deciding to award or deny compensation for losses suffered by a landowner as a result of the condemnation activities of a public body.\textsuperscript{66} Because of the diverse approaches taken by the courts in this area,\textsuperscript{67} and because of the differing constitutional provisions that require compensation for certain of these activities although not for others,\textsuperscript{68} various arguments have been raised in opposition to awarding compensation to various classes of landowners who have felt the impact of the condemnation procedure.\textsuperscript{69} The proponents of more liberal compensation awards have attempted to respond to these arguments and at the same time have advanced arguments of their own as to why compensation should be granted.\textsuperscript{70}

Opponents of awarding compensation for losses suffered as a result of condemnation activities have advanced five arguments. First, opponents fear that an award of compensation will open the doors of the courtroom to a multitude of claims for losses only remotely connected with condemnation activities.\textsuperscript{71} The resulting increased litigation costs and the greater number of awards that will have to be paid by the condemning authority, according to the opponents, would render redevelopment projects so expensive that planning would have to be postponed until such time as the money was available for immediate condemnation of any property to be taken.\textsuperscript{72}

Second, opponents argue that the fear of such an increase in costs would deter public agencies from announcing sufficiently in advance any plans to condemn land for a public project or from releasing information about the public project itself.\textsuperscript{73} This "chilling effect" would

\textsuperscript{65} See Van Alstyne, supra note 15, at 19.
\textsuperscript{66} See notes 103-32 infra and accompanying text.
\textsuperscript{67} See notes 103-50 infra and accompanying text.
\textsuperscript{68} See notes 167-97 infra and accompanying text.
\textsuperscript{69} See notes 71-82 infra and accompanying text.
\textsuperscript{70} See notes 83-98 infra and accompanying text.

\textsuperscript{72} See 2A Nichols, supra note 71, § 6.441[1], at 6-156.

interfere with the public's right of and interest in advance disclosure, impeding public input into the plans being designed for the proposed project.74

A third reason offered in opposition to the award of compensation is that awarding compensation will interfere with legislative decision-making.75 According to this argument, permitting owners of condemned property to obtain compensation for losses suffered as a result of condemnation activities would shift, in part, the decision to condemn a particular parcel of property from the legislature to the citizen, hence usurping the legislative function.76 This is true, according to the opponents, because the compensation award would broaden the scope of the condemnation proceeding beyond that envisioned by the original planners.77

A fourth reason offered for denying compensation is that an award to landowners constitutes an unjust and arbitrary discrimination against public land development in favor of private development.78 The proponents of this argument view as perverse the fact that the availability of damages turns on whether the taking was public or private;79 a landowner whose property was "taken" by way of a public hospital being built next door, for example, would be entitled to compensation while a landowner whose property was taken to the same extent by the building of a private hospital would not.80 The result, therefore, is discrimination against public developers in the form of costs of development higher


The public has an interest in keeping apprised of impending governmental action. To that end, the press and government are granted untold liberty of expression and reporting under the First Amendment of the United States Constitution. This public interest must take precedence over the possible and speculative injury to property rights resulting from the freedom of expression and the press. In a day when the right of government to suppress and classify information which it deems vital to the nation's security is being seriously argued and challenged, the plaintiff's alleged incidental damages pale into insignificance.

Id. at 361-62, 291 A.2d at 593 (citation omitted). The court held that allegations founded on the publicity and announcements concerning the proposed site of a sports arena failed to state a claim upon which relief could be granted. See id.

75. See Berman v. Parker, 348 U.S. 26, 33 (1954) (constitutionally authorized legislation not for Court to reappraise); Woodland Mkt. Realty Co. v. City of Cleveland, 426 F.2d 955, 958-59 (6th Cir. 1970) (citing Berman); Howell Plaza, Inc. v. State Highway Comm'n, 66 Wis. 2d 720, 728-29, 226 N.W.2d 185, 189 (1975) (allowing damages in inverse condemnation action would preempt legislative function).


77. See id.

78. 2A Nichols, supra note 71, § 6.441[1], at 6-156 to -157.

79. Id.

80. See id.
than those experienced by private developers.

Finally, the opponents rely on tradition; in the past, courts consistently have denied recovery to landowners of uncondemned property for loss due to the effects of condemnation activity, considering such effects to be *damnum absque injuria*.

Proponents of compensation for the effects of condemnation activities have identified several pitfalls in the opponents' arguments. First, the argument that awarding compensation will result in exorbitant costs for redevelopment projects presupposes that a denial of compensation avoids costs. In truth, the costs still exist; when compensation is denied, the costs are reallocated to the landowner whose property has diminished in value as a result of condemnation activities.

Second, the fear that the threat of increased costs will deny the public's right to know is unwarranted. Most public agencies are required to seek public input prior to reaching a final decision about a condemnation plan. At least theoretically, awarding compensation may force public agencies to reach more cautious, realistic decisions about public projects so as to avoid unnecessary condemnation costs.

In response to the argument that awarding compensation may shift the legislative function, advocates of compensation emphasize that a legislature does not have unbridled discretion in planning development projects. Proponents of this position also point out that the decision-

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81. See id. § 6.441, at 6-152 to -153; Spies & McCoid, *supra* note 71, at 449-50; cf. Luber v. Milwaukee County, 47 Wis. 2d 271, 278, 177 N.W.2d 380, 384 (1970) (rule of no recovery for incidental or consequential damages in condemnation cases always prevailed in this country).

82. See Luber v. Milwaukee County, 47 Wis. 2d 271, 282-83, 177 N.W.2d 380, 386 (1970); 2A Nichols, *supra* note 71, § 6.4432[1]. The term *damnum absque injuria* refers to those damages for which no legal redress exists. *See* 47 Wis. 2d at 276-77, 177 N.W.2d at 383. The Luber court concluded that, "[t]he rule making consequential damages *damnum absque injuria* is, under modern constitutional interpretation, discarded . . . ."

*Id.* at 283, 177 N.W.2d at 386.


84. See note 83 supra.

85. In Minnesota, for example, whenever a redevelopment project is to be undertaken, the governing body must conduct a public hearing before the project can be approved. *See Minn. Stat. § 462.52(1) (1976).*

86. Governmental units should have broad discretion in allocating social benefits and burdens. *See Note, *supra* note 76, at 602. In Minnesota, for example, the Legislature has provided generous grants of condemnation power to public authorities for housing and redevelopment in Minn. Stat. § 462.445(1) (1976), which states:

An authority shall be a public body . . . and shall have all the powers necessary or convenient to carry out the purposes of [the housing and redevelopment laws] including the following powers in addition to others granted in these sections:

(6) Within its area of operation to acquire real or personal property or any
making body must consider the property interests of persons affected by a decision reached by the body, and if the decision making body fails to do so, the courts must rectify the failure. Furthermore, nuisance laws provide protection for the private landowner from a private development's unjustifiable interference with the landowner's property rights.

The tradition argument has merit only when condemnation is viewed in an historical context. When the condemnation procedure was first utilized, the United States was largely agrarian and the impact of condemnation activities seldom extended beyond the boundaries of the particular parcel being condemned. In today's modern, industrial urban centers, however, condemnation seldom takes place without having some impact on neighboring parcels.

Beyond pointing out the weaknesses in the opponents' arguments, the proponents offer two arguments supporting the grant of compensation for losses from condemnation activities. The proponents' primary argument stresses the concept that no individual should be forced to bear a disproportionate burden of the costs of public improvements. The central interest therein by the exercise of the power of eminent domain, to acquire real property which it may deem necessary for its purposes under these sections, is to provide adequate housing.

(7) Within its area of operation, and without the adoption of an urban renewal plan, to acquire, by all means as set forth in clause (6) of this subdivision, including by the exercise of the power of eminent domain, real property, and to demolish, remove, rehabilitate or reconstruct the buildings and improvements or construct new buildings and improvements thereon; provided that, real property with buildings or improvements thereon shall only be acquired when the buildings or improvements thereon shall be substandard; and provided further that the exercise of the power of eminent domain under this clause shall be limited to real property which contains buildings and improvements which are vacated and substandard.

Id. In exercising its discretion, the government must take into consideration the protections of individual liberty against arbitrary governmental action, as provided by the federal and state constitutions. See Note, supra note 76, at 602.

87. The United States Supreme Court emphasized the importance of securing adequate protection for private property rights as follows: "In any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government." Monongahela Navigation Co. v. United States, 148 U.S. 312, 324 (1893). Allowing recovery for the effects of governmental action provides assurance to the landowner that such protection will be afforded.

89. See Spies & McCoid, supra note 71, at 449-50.
90. See id. at 450.
91. Id. at 451; Van Alstyne, supra note 15, at 32; see 72 Colum. L. Rev., supra note 1, at 773. The extent to which a burden on an individual may be defined as fair is usually taken to mean that people should pay for public improvements according to their ability to pay, as with an income tax, or that all people should pay the same amount, as with a sales tax, or that each person should pay only to the extent to which he benefits from an improvement, as with a toll booth. Note, supra note 83, at 800.
The central thesis behind decisions awarding compensation is that just as the physical taking of property without compensation would be inherently unfair so would be the denial of compensation to a landowner of uncompensated property that has been damaged but not taken when that landowner has sustained substantial and often times greater losses than an owner of condemned property. These losses, according to the proponents, should be shared equally by the general public who benefit from the resulting improvements.

Second, the proponents argue that requiring compensation would prevent the blatant injustice that would exist were the courts to permit a governmental agency to depreciate the market value of private property by threats of commencing a redevelopment project and then to take advantage of the lower value of the property when it is ultimately condemned. According to the proponents, requiring compensation would render useless a deliberate pattern of conduct by the public agency that was designed to depreciate property values in order to acquire the property for less than a fair value. In the past, such tactics have varied from blatant harassment to more subtle schemes such as denial of building permits and oppressive zoning.

92. See Spies & McCoid, supra note 71, at 438-39. In this same vein, the California Supreme Court stated in Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943):

An improvement may be a great convenience to the public generally, but the properties of the abutting owners ought not be sacrificed in order to secure it. The tendency under our system is too often to sacrifice the individual to the community; and it seems very difficult in reason to show why the State should not pay for property which it destroys or impairs the value, as well as for what it physically takes.

Id. at 351, 144 P.2d at 823 (citations omitted).


95. See 8 Nichols, supra note 4, § 14.02[3][a], at 14-13.

96. See Foster v. City of Detroit, 254 F. Supp. 655, 662 (E.D. Mich. 1966) (city informed landowners that no compensation would be received for improvements, required special conditions for issuance of building permits, and kept lis pendens on property longer than necessary), aff'd, 405 F.2d 138 (6th Cir. 1968); notes 223-26 infra and accompanying text.

97. See, e.g., City of Detroit v. Cassese, 376 Mich. 311, 316-17, 136 N.W.2d 896, 900 (1965) (condemning authority allegedly sent letters to tenants, filed lis pendens, conducted intense building inspections and issued citations for building code violations, and refused to permit a long-established business to continue).

98. See, e.g., Long v. City of Highland Park, 329 Mich. 146, 154, 45 N.W.2d 10, 13 (1950). While this argument strongly supports moving the valuation date back in condemnation proceedings to reflect the date of the de facto taking, it furnishes less support to
Basically, the compensability of the effects of condemnation proceedings is an issue in three situations. The most common situation occurs when the condemning authority actually has acquired the property through condemnation. In those situations, the court's focus is upon the date to be used in determining the property's value, that is, whether the property should be valued as of the date of the actual taking or at some prior date. The two remaining situations both arise when the condemning authority has not formally exercised its powers of condemnation and therefore has not acquired the property. In one category are situations in which the property was scheduled to be taken but the urban renewal project was abandoned before the acquisition had taken place. The other category is comprised of cases in which the property was never scheduled to be taken but the property abuts the area undergoing redevelopment and, as a result, has diminished in value. The extent to which the landowners in these three situations are compensated for losses caused by the urban renewal projects will be examined.

B. Property Acquired by the State

Courts have reached differing conclusions on the issue of the extent

the landowner whose property is not yet condemned, and even less support for abutting landowners whose property was never scheduled to be taken. It would be economically unreasonable and inefficient to force the condemning authority to acquire property it does not want or need, or, in the case of abutting property, land it never intended to take. This assumes the public authority abandons the project in good faith and thus does not avail itself of the benefits of a lower condemnation price obtained for the property. On the other hand, an interference with property rights is not measured by the value accruing to the public agency but by the extent of the loss sustained by the property owner. See Luber v. Milwaukee County, 47 Wis. 2d 271, 279, 177 N.W.2d 380, 384 (1970). The mere fact that the project was abandoned should not automatically insulate the condemning authority from liability for the effects of its activities. See Washington Mkt. Enterprises, Inc. v. City of Trenton, 68 N.J. 107, 115-16, 343 A.2d 408, 412 (1975). Awarding such damages for condemned property is inconsistent with denying recovery for uncondemned property. See id. at 120-21, 343 A.2d at 415; Note, supra note 76, at 601.


100. See, e.g., City of Cleveland v. Carcione, 118 Ohio App. 525, 533, 190 N.E.2d 52, 57 (1963).


of compensation to be awarded for the effects of precondemnation activity when the property is actually condemned by a governmental authority. Some courts preclude any recovery for such losses; some grant recovery under a condemnation blight theory; others award compensation based on a de facto taking analysis.

Traditionally, compensation for condemned property has been awarded based on the property’s market value on the date of the actual taking. This method of valuation ignores any effect that the government’s project has had on the value of the property. Courts that apply date-of-taking valuation rely on the physical invasion theory of compensation. In determining just compensation for condemned land, these courts consistently have excluded recovery for diminution in property value caused by the precondemnation activities of the condemning au-


106. See, e.g., Danforth v. United States, 308 U.S. 271, 283-84 (1939); Housing & Redevel. Auth. v. Greenman, 255 Minn. 396, 410, 96 N.W.2d 673, 683 (1959); Minneapolis-St. Paul Sanitary Dist. v. Fitzpatrick, 201 Minn. 442, 449, 277 N.W. 394, 398 (1937) (quoting from Olson v. United States, 292 U.S. 246, 255 (1934)); 4 Nichols, supra note 2, at § 12.23. This traditional view, that property values are to be determined as of the date of the taking—that is, the date suit was commenced or possession or control was taken, whichever came first—prevailed until 1943. See 8 Nichols, supra note 4, § 14.02[4]. In 1943 the United States Supreme Court announced a new policy in the landmark decision of United States v. Miller, 317 U.S. 369 (1943). For a discussion of Miller, see note 114 infra.

107. The rationale for this method of valuation was announced by the United States Supreme Court in Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893), in which the Court stated that compensation accounts only for those expenses reflected in the market value of the property at the time of the taking. Id. at 341.

108. See notes 32-38 supra and accompanying text.
COMPENSATION FOR LANDOWNERS

... the condemnor's activities being considered as only one of the "myriad influences" on market values. But serious inequities can be associated with compensating landowners only to the extent of property values that have diminished as a result of the renewal project. Accordingly, the majority of courts today no longer ignore the negative impact of the condemnation on the market values of condemned property in determining what is just compensation to be paid to the landowner.

The loss of property value caused by precondemnation activities of the condemning authority often is referred to as condemnation blight, while precondemnation activity that results in an increase in property values is referred to as project enhancement. Addressing the issue of...
whether condemnation activity should be a factor in determining just compensation, the United States Supreme Court has stated that neither the condemnor nor the property owner should benefit from the effects of condemnation. The condemnor should not be allowed to avail itself of lower property values resulting from its own activities, and the property owner should not be permitted to benefit from an increase in property values from project enhancement. Most courts, including those in Minnesota, maintain similar philosophies, permitting the landowner whose property is condemned to establish the property's value as of the time of the actual taking but as if the debilitating effects of the "cloud of condemnation" had not occurred. Thus, when a landowner's prop-

of adjoining property). The former situation results in project enhancement whereas the latter situation results in project blight. If a strict "taking" approach were applied, the landowner whose property has depreciated in value could receive only the depreciated amount because that would be the present value at the time of the taking. However, if a strict taking approach is to be applied consistently, the landowner whose property value has appreciated from project enhancement would be compensated according to that higher value, that is, the present value at the time of the taking. Obviously, the government would not be disposed to bear the added burden of such windfall recoveries. Accordingly, in Miller the Court held that the landowner whose property had appreciated in value during the pendency of the condemnation proceedings was not entitled to be compensated for the enhanced value of his property; rather, he was entitled to be compensated only for the value of his property at the time the government finalized the project plans. See United States v. Miller, 317 U.S. 369, 377 (1943). The result in Miller is reasonable in light of the potential for intense land speculation resulting in onerous property value increases that must be absorbed by the government. See id. at 377. The United States Supreme Court, however, was slow to see the opposite side of the coin: if a landowner is not allowed to reap the benefits from the positive effects a project has on his property, the government should not be allowed to benefit from the negative effects on the property's value. The Court ultimately came to that conclusion, but not until nearly eighteen years after Miller, in United States v. Virginia Elec. & Power Co., 365 U.S. 624, 635-36 (1961). See note 115 infra and accompanying text.

115. Compare United States v. Miller, 317 U.S. 369, 377 (1943) (enhancement in value excluded from condemnation award) with United States v. Virginia Elec. & Power Co., 365 U.S. 624, 636 (1961) (award "must exclude any depreciation in value caused by the prospective taking once the Government 'was committed' to the project").

116. See note 115 supra.

117. See City of Detroit v. Cassese, 376 Mich. 311, 318, 136 N.W.2d 896, 900 (1965) (neither condemnor nor landowner should benefit from effects of condemnation); State v. Anderson, 293 Minn. 455, 458-59, 197 N.W.2d 237, 240 (1972) (increase in property value excluded from compensation); Housing & Redevel. Auth. v. Minneapolis Metro. Co., 273 Minn. 256, 262-63, 141 N.W.2d 130, 136 (1966) (any increase or decrease in property value from public improvement not to be considered in determining property value of condemned land); City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 257-58, 269 N.E.2d 895, 905, 321 N.Y.S.2d 345, 359 (1971) (where true condemnation blight exists, landowner entitled to show value of condemned property prior to onset of blight); In re Bunner, 28 Ohio Misc. 165, 171, 276 N.E.2d 677, 681 (P. Ct. 1971) ("The property is to be valued independent of any effect related to the proposed project.") (emphasis in original). But see United States v. 3.66 Acres of Land, 426 F. Supp. 533, 537 (N.D. Cal. 1977) (just compensation restricted to value of defendant's property on date of trial); Housing Auth. v. Schroeder, 222 Ga. 417, 419, 151 S.E.2d 226, 227 (1966) (jury cannot consider date for
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Property is condemned, just compensation should be awarded as if the property had not been subject to the condemnation activity,\textsuperscript{118} regardless of whether the condemnation activity resulted in a decreased or increased property value.

An alternative approach to the valuation of condemned land utilized by a few courts has given rise to the concept of de facto taking.\textsuperscript{119} This concept is premised on the idea that prior to the transfer of legal title and taking of possession by the government, the property owner is "stripped of the incidents of ownership,"\textsuperscript{120} being left with property that cannot be sold, leased, or used.\textsuperscript{121} A de facto taking creates in the condemning authority an interest in property equivalent to that accomplished by the transfer of title in a condemnation proceeding.\textsuperscript{122} In condemnation proceedings, this concept may be used to alter the date for determining the compensation award.\textsuperscript{123} For both the condemnation compensation other than date of taking); Chicago Hous. Auth. v. Lamar, 21 Ill. 2d 362, 368-69, 172 N.E.2d 790, 793-94 (1961) (date of taking may not be prior to filing petition for condemnation); St. Louis Hous. Auth. v. Barnes, 375 S.W.2d 144, 148 (Mo. 1964) (damages caused by condemning authority not included in damage award).


120. 72 COLUM. L. REV., supra note 1, at 774.

121. Id. "At some point in this stripping process a taking occurs, and compensation is then due." Id. A rationale for the concept of de facto taking was stated by the Minnesota Supreme Court as follows:

When the government interferes with a person's right to possession and enjoyment of his property to such an extent so as to create a 'taking' in the constitutional sense, a right to compensation vests in the person owning the property at the time of such interference. This right has the status of property . . . . The theory is that where the government interferes with a person's property to such a substantial extent, the owner has lost a part of his interest in the real property.

Substituted for the property loss is the right to compensation.


123. See, e.g., Madison Realty Co. v. City of Detroit, 315 F. Supp. 367 (E.D. Mich. 1970) (date altered from 1965 to 1962); Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966), aff'd, 405 F.2d 138, 147 (6th Cir. 1968) (damages for lost rents between onset of condemnation blight and the formal taking not permitted; valuation date altered from date of de jure condemnation in 1963 to date condemning authority's actions had a "substantial effect" on the property in 1954); City of Detroit v. Cassese, 376 Mich. 311, 317-20, 136 N.W.2d 896, 900-01 (1965) (remand for the jury to determine when the taking occurred); City of Cleveland v. Carcione, 118 Ohio App. 525, 533, 190 N.E.2d 52, 57 (1963) (date of valuation is date immediately before the city "took active steps . . . which to any extent depreciated the value of the property.").

The use of the de facto taking approach is well illustrated in Foster v. City of Detroit,
blight and the de facto taking approaches, the desired result is to secure full compensation for the owner. The former approach, however, in-

254 F. Supp. 655 (E.D. Mich. 1966), aff’d, 405 F.2d 138 (6th Cir. 1968). In Foster, the court focused on the adverse effect on the landowner's property of the precondemnation activities of various city officials. See 254 F. Supp. at 662. These actions of the city officials included:

[I]nforming the plaintiffs that they would receive no compensation for improvements and that they were only to keep the roof on and the water running, requiring the signing of a [waiver of any claim to the increased value of the property] as a condition precedent to the issuance of a building permit... actually completing the condemnation and clearance of several blocks in the area, requiring the razing of many vandalized buildings, and keeping [a] lis pendens in effect for five years after the Public Hearing Administration had issued a stop order on the project, all the while telling those who inquired that the property would be condemned soon.

Id. The court also noted that the lis pendens, itself, impaired property sales, thus reducing sales prices and values. Id. Although the condemning authority commenced condemnation proceedings in 1950, the proceedings were discontinued in 1955 pursuant to a stop order issued by the federal government. Plans for another development project were approved in 1961, and, subsequently, the plaintiff's property was acquired. See id. at 659. When the initial proceedings were commenced, the plaintiff's property was fully rented. See id. at 660. After 1954, when several blocks adjacent to plaintiff's property were condemned and razed, the plaintiff suffered a loss of tenants; only one of the plaintiff's four apartments was rented, and that one at a much lower rental. Id. at 666. In addition, as the exodus of people within the area continued, vandalism increased to such an extent that the police refused to investigate. The plaintiff could no longer obtain insurance on the property. At the same time, the city demanded that the owner either put the buildings in safe condition or demolish them at the owner's expense. See id. at 660.

The Foster court found that the actions of the city officials and the ensuing protracted delay in condemning the property at least “substantially contributed to, hastened and aggravated the deterioration and decline in value of the area in general and of plaintiff's property in particular.” Id. at 662. The court concluded that the city's actions constituted a taking of the plaintiff's property as of 1954, when the plaintiff could no longer rent most of his property, although the actual condemnation did not occur until 1961. See id. Thus, because the condemning authority was forced to purchase the property at the property's market value as of 1954, that is, before the authority's activities depressed the property's value. Therefore, the condemning authority was not permitted to take advantage of the depressed property values that had been caused by its own activities. See id.

While a finding of a de facto taking results in altering the date for the determination of the value of condemned property, when the property has not been condemned, a finding of a de facto taking results in the forced acquisition of the landowner's property by the government. See, e.g., Richmond Elks Hall Ass'n v. Richmond Redevelop Agency, 561 F.2d 1327, 1330-31 (9th Cir. 1977) (agency's interference with landowner's property caused substantial reduction in market value of property such that agency's interference effected a compensable taking under the fifth and fourteenth amendments); Lincoln Loan Co. v. State Highway Comm'n, 274 Or. 49, 56-57, 546 P.2d 105, 109 (1976) (activity of defendant over 10-year period that substantially interfered with plaintiff's use and enjoyment of property constituted valid cause of action in inverse condemnation).

In the past, courts have required a formalized transfer before compensation is ordered, whereas in recent years, courts have expanded on the theory of constructive taking, that is, de facto taking. 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); City of Detroit v. Cassese, 376 Mich. 311, 136 N.W.2d 896 (1965); Hazelton Redevelop. Auth. v. Hudock, 2 Pa. Commw. Ct. 670, 674-75, 281 A.2d 914, 917 (1971). This trend has given rise to a cause of action labeled ‘inverse condemna-
volves the rules of appropriation, whereas the latter approach uses the rules of evidence.¹²⁴

The de facto taking approach bears some resemblance to the condemnation blight approach.¹²⁵ In recent years courts have considered whether, in certain situations, a condemning authority's conduct constitutes a de facto taking or condemnation blight.¹²⁶ The de facto taking approach maintains that at some date prior to the actual transfer of ownership,¹²⁷ the condemnor's activity substantially interfered with the landowner's enjoyment of his property;¹²⁸ the date of valuation therefore is moved back to reflect the date of the constructive taking.¹²⁹ The condemnation blight approach, on the other hand, retains the date of the actual taking as the date of valuation but allows compensation to the landowner for loss that is traceable to serious value-depressive activity by the condemning authority.¹³⁰ Although both avenues of relief offer protection to the landowner against depreciation in value resulting from the condemnor's actions, condemnation blight only accounts for decreases in the fair market value of property, whereas a de facto taking also accounts for rental losses and causes interest on the condemnation award, payable by the condemnor, to accrue from a date prior to the actual taking.¹³¹ Thus, while the condemnation blight approach only accounts for loss in value, the de facto taking approach also accounts

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¹²¹ which is brought against a governmental agency to recover the value of property "taken" by the agency, although the agency has not formally commenced eminent domain proceedings against the property owner. For a description of the term "inverse condemnation," see Alevizos v. Metropolitan Airports Comm'n, 298 Minn. 471, 477, 216 N.W.2d 651, 657 (1974); Lincoln Loan Co. v. State Highway Comm'n, 274 Or. 49, 51 n.1, 545 P.2d 105, 106 n.1 (1976). The reason the action is "inverse" is that the proceedings are initiated by the property owner rather than the governmental agency. See Feder & Wieland, Inverse Condemnation—A Viable Alternative, 51 DEN. L.J. 529, 529 (1974).

¹²² See 4 NICHOLS, supra note 2, § 12.3151[5]. Both concepts are concerned with valuation and dates for valuation, and are aimed at altering some process in the condemnation procedure in order to account for the effects of condemnation. The de facto taking approach alters the date of the taking whereas the condemnation blight approach alters the date for valuation. See id. at 12-476.


¹²⁴ A de jure or actual transfer refers to a formalized acquisition by the condemning authority. See 72 COLUM. L. REV., supra note 1, at 774.

¹²⁵ For a discussion of substantial interference with the landowner's enjoyment, see Alevizos v. Metropolitan Airports Comm'n, 298 Minn. 471, 487, 216 N.W.2d 651, 662 (1974); notes 238-50 infra and accompanying text.

¹²⁶ See, e.g., 4 NICHOLS, supra note 2, § 12.3151[5], at 12-475; 1973 URB. L. ANN. 343, 344; cases cited in note 123 supra.


¹²⁸ See 4 NICHOLS, supra note 2, § 12.3151[5], at 12-500.
for loss of use.\textsuperscript{132}

Confusion over what should constitute a de facto taking and what should be considered condemnation blight has created controversy in eminent domain proceedings.\textsuperscript{133} In \textit{City of Buffalo v. J.W. Clement Co.},\textsuperscript{134} the New York Court of Appeals determined when a condemning authority's conduct results in a de facto taking. The actual condemnation of the property occurred in 1966.\textsuperscript{135} In \textit{Clement}, the trial court found that the conduct by the condemning authority, including its protracted delay,\textsuperscript{136} destroyed the value of the property to Clement Co.,\textsuperscript{137} that the property was no longer of any utility,\textsuperscript{138} and that the company had been forced, by the threat of condemnation, to move its printing operation to a new location.\textsuperscript{139} The trial court concluded that the condemning authority's actions constituted a de facto taking of Clement Co.'s property as of April 1, 1963.\textsuperscript{140} The New York Court of Appeals modified the award, finding no de facto taking.\textsuperscript{141} The court emphasized that the city did not, by its actions or communications, interfere with or seek to gain any control over the property. The city merely had manifested an intention to condemn.\textsuperscript{142} The court held that "the mere announcement of impending condemnations, coupled as it may well be with substantial delay and damage, does not, in the absence of other acts which may be translated into an exercise of dominion and control by the condemning authority, constitute a \textit{taking} so as to warrant awarding compensation."\textsuperscript{143} Therefore, under the court's construction, "a de facto taking


\textsuperscript{133} See generally \textit{4 Nichols, supra} note 2, § 12.315(5).


\textsuperscript{135} See id. at 251-52, 269 N.E.2d at 901, 321 N.Y.S.2d at 354.

\textsuperscript{136} A span of approximately nine years passed between the time the city first informed Clement about the condemnation until the actual condemnation proceedings were brought. See id. at 248-51, 269 N.E.2d at 899-901, 321 N.Y.S.2d at 351-54.

\textsuperscript{137} See id. at 252, 269 N.E.2d at 901, 321 N.Y.S.2d at 354-55. Publicity of the contemplated condemnation was widespread. Vacancies and conditions of disrepair were common throughout the subject area, and property values decreased drastically by reason of the threat of condemnation. See id. at 249, 269 N.E.2d at 900, 321 N.Y.S.2d at 352.

\textsuperscript{138} After 1963, Clement Co. could not sell the property nor rent it, even for a short-term lease. Meanwhile, Clement Co. continued to pay taxes and insurance on the property. \textit{Id.}.

\textsuperscript{139} Throughout the 10-year period during which Clement Co.'s property was under a threat of condemnation, Clement Co. received several official communications confirming the eventual condemnation of its property, and was advised by the city to relocate its facilities. See \textit{Id.} at 248-49, 269 N.E.2d at 899, 321 N.Y.S.2d at 351-52. The company completed its move to a new plant by April, 1963. \textit{Id.} at 249, 269 N.E.2d at 899, 321 N.Y.S.2d at 352.

\textsuperscript{140} Id. at 252, 269 N.E.2d at 901-02, 321 N.Y.S.2d at 355.

\textsuperscript{141} \textit{See id.} at 255, 269 N.E.2d at 903, 321 N.Y.S.2d at 357.

\textsuperscript{142} \textit{See id.}

\textsuperscript{143} \textit{Id.} at 257, 269 N.E.2d at 904, 321 N.Y.S.2d at 359 (emphasis in original).
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."

Clement Co. was not deserted totally by the court, however. The court acknowledged that a property owner might receive severely diminished compensation because of decreased market values resulting from condemnation blight. To alleviate this inequity, the court suggested that the owner introduce evidence of the market value of the condemned land before "the onslaught of the 'affirmative value-depressive acts'" of the city. The Clement analysis, therefore, accounts for the effects of condemnation blight by adjusting the amount of compensation to be awarded to the landowner pursuant to the condemnation proceedings. The landowner receives the same amount for the condemned property as would have been received had condemnation blight not occurred prior to the actual taking. Clement clearly refuses to alter the taking date of condemned property absent some direct legal restraint or physical invasion. This position echoes that taken by the United States Supreme Court, which has stated: "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.""
Determining compensation for the injurious impact of precondemnation activities on condemned land by means of a de facto taking as opposed to a condemnation blight analysis affects only the amount of compensation. A de facto taking analysis considers certain losses that a condemnation blight analysis ignores, such as interest and loss of rent. Moreover, when the property ultimately is not condemned and yet suffers diminution in value from the condemning authority’s activities, the distinction between condemnation blight and de facto taking gives rise to an even more serious result; the manner in which a particular court resolves the dichotomy may determine whether a landowner receives “just” compensation or no compensation at all.

C. Property Not Acquired by the State

Two increasingly common situations exist in which landowners of uncondemned property suffer the impact of condemnation activity. In one situation, the property never is condemned because the project itself is abandoned. In the other situation, the property is not condemned because it never was included within the area to be condemned, although it abuts the area. Thus, the question arises as to what extent the losses suffered by the property owners in these two categories are compensable.

1. When the Project is Abandoned

Redevelopment projects are abandoned for a number of reasons. The most obvious barrier to the completion of a project is inadequate financing. Often, the condemnation procedure is drawn out over a period of several years while properties in a selected area are condemned on a piecemeal basis as funds become available. As a result, the pro-

149. See note 131 supra and accompanying text.
150. See notes 151-66 infra and accompanying text.
151. The right of a condemning authority to abandon condemnation proceedings generally is recognized. See 8 Nichols, supra note 4, § 14.02[1][b]. The right is often conferred by statute. See, e.g., Pa. Stat. Ann. tit. 26, § 1-408 (Purdon Cum. Supp. 1978); Wis. Stat. Ann. § 32.06(9) (West 1973), as amended by Act of June 6, 1978, ch. 438, § 9, 1977-1978 Wis. Legis. Serv. 2519 (West), as amended by Act of June 6, 1978, ch. 440, § 6, 1977-1978 Wis. Legis. Serv. 2524 (West). In other jurisdictions, including Minnesota, the right to abandon is allowed under the common law. See, e.g., State v. Myhra G.M.C. Truck & Equip. Co., 254 Minn. 17, 18-19, 93 N.W.2d 204, 205 (1958). The common law right to abandon is based on the theory that the condemning authority has no right to possession and the landowner has no right to compensation until the entry of judgment. See, e.g., County of Hennepin v. Mikulay, 292 Minn. 200, 212-13, 194 N.W.2d 259, 266-67 (1972) (impermissible to abandon after landowner surrendered possession, condemning authority accepted possession, and landowner accepted amount condemning deposited with clerk).
153. See, e.g., Orfield v. Housing & Redeve. Auth., 305 Minn. 336, 337-38, 232 N.W.2d
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ject's financing frequently runs out before the last parcels of land can be appropriated. A landowner therefore may be left with property that is worthless or that has diminished in value. In other situations, after an extended period of public announcements and other planning activities, the public authority alters the location of its project, abandoning the previous site. Again, the remaining uncondemned parcels may suffer diminution in value.

2. Property Abutting Redevelopment Projects

The effects of condemnation activities do not stop at the boundaries of the redevelopment area. Property abutting the area undergoing redevelopment may suffer many of the same losses sustained by property within the project's boundaries. Losses may result from the initial planning procedure: the project's specific perimeters may be vague and the precise amount of land to be taken may be unknown. Such uncertainty can depress the land values of many parcels that ultimately will not be scheduled for condemnation; when condemnation is imminent, property may have less value to the buying public. Once the area to be condemned is specifically defined, the effects of condemnation may spread throughout the neighborhood and spill over onto abutting property.

Commentators, as well as courts, have focused on the issue of compensation for loss to property that was originally slated for appropriation. The same principles that apply in those situations, however, also

923, 924-25 (1975) (per curiam); Washington Mkt. Enterprises, Inc. v. City of Trenton, 68 N.J. 107, 111-12, 343 A.2d 408, 409-10 (1975).

154. See, e.g., Richmond Elks Hall Ass'n v. Richmond Redeve. Agency, 561 F.2d 1327, 1330 (9th Cir. 1977).


156. See, e.g., Sayre v. City of Cleveland, 493 F.2d 64, 69 (6th Cir.) (redevelopment project caused decrease in value of nearby property), cert. denied, 419 U.S. 837 (1974); Foster v. Herley, 491 F.2d 174, 176 (6th Cir. 1974) (per curiam) (public project resulted in loss of congregation and lowered property value of church); Woodland Mkt. Realty Co. v. City of Cleveland, 426 F.2d 955, 957 (6th Cir. 1970) (condemnation and razing of adjacent property lowered market value of property and caused commercial tenants to leave); Note, supra note 76, at 583.

157. See 4 NICHOLS, supra note 2, § 12.3151[2]; Note, supra note 76.

158. See Note, supra note 76, at 584.

159. See id. at 584-85.

160. See id.

161. See, e.g., Richmond Elks Hall Ass'n v. Richmond Redeve. Agency, 561 F.2d 1327 (9th Cir. 1977); Orfield v. Housing & Redeve. Auth., 305 Minn. 336, 322 N.W.2d 923 (1975) (per curiam); Washington Mkt. Enterprises, Inc. v. City of Trenton, 68 N.J. 107, 343 A.2d 408 (1975); Reingold v. Urban Redeve. Auth., 20 Pa. Commw. Ct. 266, 341 A.2d 915 (1975); Adams, supra note 1; Kanner, supra note 3; Note, supra note 94. But see Note, supra note 76.
should apply to abutting property.\textsuperscript{162} Jurisdictions that deny compensation to landowners whose property sustained loss resulting from an abandoned project would most likely deny compensation to abutting property owners; the decisions awarding compensation in the former category would be more likely to support recovery in the latter category.\textsuperscript{163} Courts have distinguished situations in which property abuts condemned property from those in which the loss accrues to a parcel of land from which a segment was taken.\textsuperscript{164} In the latter category, any loss of utility to the remaining parcel resulting from the partial taking must be compensated.\textsuperscript{165} When the property suffers a loss in value merely because of its proximity to condemned property, however, the landowner will not be compensated unless he can prove that his property sustained some form of injury more significant than that suffered by the general public.\textsuperscript{166}

\textbf{D. Constitutional Protections}

Every state constitution, with one exception, provides individuals with some form of protection against the uncompensated taking of private property for a public use.\textsuperscript{167} In addition, the constitutions in many

\begin{itemize}
\item \textsuperscript{162} In Minnesota, the courts have acknowledged that property abutting a public project may suffer damages within the meaning of the Minnesota Constitution, entitling the owner to compensation. For example, in City of Crookston v. Erickson, 244 Minn. 321, 69 N.W.2d 909 (1955), the city condemned a portion of the plaintiff's property for a main sewer line and a portion of another tract of plaintiff's land adjacent to a proposed sewage disposal site. The plaintiff brought an action for damages to remaining portions of both tracts, claiming that the proximity to the sewage disposal plant caused a reduction in the market value of the remaining uncondemned portions. The court stated that when the taking and use of adjoining property causes damage to an owner's land and those damages are peculiar to that adjoining landowner, that is, different from the type of injury suffered by the general public, then those damages are compensable. \textit{See id.} at 326, 69 N.W.2d at 912.

\item \textsuperscript{163} The causation factor regarding diminution in value of abutting property is more tenuous than that of property in an abandoned project. Abutting property suffers more of an indirect form of damage because the condemnation activities were supposedly aimed at other property. Consequently, if a court fails to hold a condemnor liable for damages to property it once may have intended to take, that same court would not be apt to award damages for property the condemnor never intended to take.

\item \textsuperscript{164} \textit{See, e.g.,} City of Crookston v. Erickson, 244 Minn. 321, 325, 69 N.W.2d 909, 912-13 (1955) (dictum).

\item \textsuperscript{165} \textit{See id.}

\item \textsuperscript{166} \textit{See id.}

\item \textsuperscript{167} \textit{See, e.g.,} IOWA CONST. art. 1, § 18; MICH. CONST. art. 10, § 2; N.J. CONST. art. 1, § 20; N.Y. CONST. art. 1, § 7; OHIO CONST. art. 1, § 19; PA. CONST. art. 1, § 10; WIS. CONST. art. 1, § 13; 2 J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 6.1[3] (rev. 3d ed. 1976) [hereinafter cited as 2 NICHOLS]. The one exception is North Carolina. In that state the constitution does not have an explicit constitutional prohibition against uncompensated takings for public use. The constitution does have an equal protection clause, \textit{see} N.C. CONST. art. 1, § 19, that has been interpreted by the North Carolina courts as requiring compensation for takings. \textit{See De Bruhl v. State Highway & Pub. Works Comm'n}, 247 N.C. 671, 675-76, 102 S.E.2d 229, 232-33 (1958).
\end{itemize}
states also provide protection against the uncompensated damaging of private property.\textsuperscript{168} The specific constitutional provision in a particular jurisdiction helps to establish the perimeters within which landowners can expect to be compensated.\textsuperscript{169}


In jurisdictions that have constitutional provisions that protect landowners only against uncompensated takings of private property, a court must find a taking before awarding compensation.\textsuperscript{170} Therefore, when property has not been acquired by the condemning authority, courts are forced to find that the equivalent of a "taking" has occurred.\textsuperscript{171} In other words, an action to recover the property's diminished

\textsuperscript{168} See, e.g., \textit{Cal. Const.} art. 1, § 19; \textit{Ill. Const.} art. 1, § 15; \textit{Minn. Const.} art. 1, § 13; \textit{N.D. Const.} art. 1, § 14.

\textsuperscript{169} See, e.g., \textit{City of Buffalo v. J.W. Clement Co.}, 28 N.Y.2d 241, 252-53, 269 N.E.2d 895, 902, 321 N.Y.S.2d 345, 355 (1971) ("Both the Federal and State Constitutions provide in sum, that private property shall not be taken for public use without just compensation. This, of course, marks only the beginning of the inquiry, as the nicer questions relating to precisely what constitutes a taking, as well as just compensation in the constitutional sense remain to be determined.").

\textsuperscript{170} The language found in the various constitutions prohibiting "takings" of private property without just compensation implicitly requires such compensation only where a taking has occurred, as opposed to the existence of some lesser injury. See, e.g., \textit{Mich. Const.} art. 10, § 2. Accordingly, in such jurisdictions, where a landowner suffers an injury less than a "taking" of his property, he has no redress under the constitution.

\textsuperscript{171} See \textit{City of Buffalo v. J.W. Clement Co.}, 28 N.Y.2d 241, 253, 269 N.E.2d 895, 902, 321 N.Y.S.2d 345, 355 (1971). In \textit{Clement}, because the court found that no de facto taking had occurred prior to the de jure taking, the damages from the condemnation blight by themselves were not compensable. See \textit{id. at} 253, 269 N.E.2d at 902, 321 N.Y.S.2d at 356. If the property had not been condemned, Clement Co. would not have been entitled to compensation for those damages. Cf. \textit{id. at} 256-57, 269 N.E.2d at 904, 321 N.Y.S.2d at 358-59 (some federal and other jurisdictions do recognize a de facto taking absent physical invasion or direct legal restraint). Because the property had been condemned, however, the damages could be based on market value at the de jure taking plus value denied the owner because of "affirmative value-depressing acts" of the condemnor. See \textit{id. at} 258, 269 N.E.2d at 905, 321 N.Y.S.2d at 258.

In \textit{Washington Mkt. Enterprises, Inc. v. City of Trenton}, 68 N.J. 107, 343 A.2d 408 (1975), the court held that when the threat of condemnation destroys the beneficial use that a landowner has made of his property, a taking has occurred. See \textit{id. at} 122, 343 A.2d at 416. In comparison, the California Supreme Court, in the case of \textit{Klopping v. City of Whittier}, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972), held that a property owner can obtain compensation for a measurable diminution in market value caused by the unreasonable acts, including unreasonable delays, of the condemning authority. See \textit{id. at} 51-52, 500 P.2d at 1355, 104 Cal. Rptr. at 11. The \textit{Washington Market} court concluded that its holding was more narrow than the \textit{Klopping} court's holding because the New Jersey Constitution only prohibited takings without compensation, whereas the California Constitution provided for just compensation when property has been "taken or damaged." See \textit{Washington Mkt. Enterprises, Inc. v. City of Trenton}, 68 N.J. at 122 & n.9, 343 A.2d at 416 & n.9. The California court could compensate a measurable diminution whereas the New Jersey court required a destruction of the property's beneficial use.
market value will not succeed unless the activities of the condemning authority amount to a de facto taking.

Judicial interpretation of just compensation provisions has given rise to an expanded construction of the concepts of "property" and "taking." The term "property" connotes more than a mere physical entity. It "involves the group of rights inhering in a citizen's relation to the physical thing. Traditionally, that group of rights has included the rights to possess, use and dispose of property." Clearly, not all economic, social, or other interests are property rights requiring compensation. Accordingly, judicial decisions vary in terms of the circumstances under which such interests are compensable.

Courts also have developed a less strict construction of the term "taking" than was used before the advent of urban renewal. Today, a taking of private property within the meaning of the just compensation provision may occur without a formal divestment of the landowner's title to the property. In deciding to invoke constitutional protections, courts look to the substance of the condemning authority's conduct rather than the form; the public authority cannot avoid liability for its conduct by leaving the landowner with legal title in the property while depriving him of the beneficial use of the property. Unfortunately, the judicial resolution of how severe the interference with the landowner's beneficial use must be to constitute a taking has failed to

172. Alevizos v. Metropolitan Airports Comm'n, 298 Minn. 471, 485, 216 N.W.2d 651, 661 (1974); see United States v. Welch, 217 U.S. 333, 338-39 (1910) (recovery permitted for decrease in value of property caused by destruction of access to road); Johnson v. City of Plymouth, 263 N.W.2d 603, 605-06 (Minn. 1978) (dictum) (right of access is a compensable property right); Burger v. City of St. Paul, 241 Minn. 285, 291-92, 64 N.W.2d 73, 77 (1954) (dictum) (different types of easements are compensable property rights).

173. Alevizos v. Metropolitan Airports Comm'n, 298 Minn. 471, 485, 216 N.W.2d 651, 661 (1974). Thus, under the modern view, the taking issue in inverse condemnation is concerned as much with the landowner's rights as with the property itself. See Lincoln Loan Co. v. State, 274 Or. 49, 545 P.2d 105 (1976).

174. Alevizos v. Metropolitan Airports Comm'n, 298 Minn. 471, 485, 216 N.W.2d 651, 661 (1974). See United States v. Willow River Power Co., 324 U.S. 499, 502-03, 511 (1945) (interest of hydroelectric plant in water level not a legally protected property right; reduction in generating capacity from rise in water level caused by navigation improvement held not compensable). The courts have adhered to a vague, useless statement that only the economic advantages "with the law back of them" are property rights. Id. at 502; Alevizos v. Metropolitan Airports Comm'n, 298 Minn. at 485, 216 N.W.2d at 661.

175. Compare, e.g., Luber v. Milwaukee County, 47 Wis. 2d 271, 279, 177 N.W.2d 380, 384 (1970) (loss of rental income found to be a property right protected by state constitution) with, e.g., Klopping v. City of Whittier, 8 Cal. 3d 39, 53, 500 P.2d 1345, 1356, 104 Cal. Rptr. 1, 12 (1972) (dictum) (rental loss caused by general decline in property value prior to date of taking not compensable).

176. For a discussion of the breadth of the concept of a "taking," see 2 Nichols, supra note 167, § 6.1[1].

177. See id.

178. See id. at 6-14.

179. See id.
produce a concise rule applicable to all situations.¹⁸⁰

Despite the state of discord as to what does or does not constitute a taking, most courts agree with two general propositions. First, a legal interference short of a physical intrusion can constitute a taking.¹⁸¹ Second, the mere planning of a proposed redevelopment project, absent the statutory filing of condemnation proceedings and without physical taking, does not constitute a taking.¹⁸² Thus, something more than a declaration of intention to condemn but less than a physical invasion would appear to be necessary to constitute a taking.

Traditionally, absent a physical invasion, a taking required that the condemning authority impose some direct legal restraint on the owner's property rights.¹⁸³ Although decisions such as Clement provide for compensation for losses resulting from condemnation activities,¹⁸⁴ that compensation is reflected only in an award for condemned property.¹⁸⁵ Because, according to Clement, the effects of condemnation activity generally cannot constitute a de facto taking,¹⁸⁶ a landowner of uncompensated property suffering losses from condemnation activity is not entitled to compensation. No taking has occurred. Such a result illustrates one of the problems that landowners face in jurisdictions in which only uncompensated "taking" as opposed to uncompensated "damaging" is prohibited. Despite the trend towards giving broader constructions to "property" and "taking," the terms can be stretched only so far to accommodate the landowner who has felt the impact of a public project when the only injury is a lower market value of the property.¹⁸⁷

¹⁸⁰. See id. at 6-14 to -15.
¹⁸⁴. See notes 145-46 supra and accompanying text.
¹⁸⁵. See note 146 supra and accompanying text.
¹⁸⁶. See notes 143-44 supra and accompanying text.
¹⁸⁷. The failure to recognize a de facto taking implies an obligation on the landowner to continue using his property until a de jure transfer occurs. See 72 COLUM. L. REV., supra note 1, at 779. That obligation results in a substantial hardship on many landowners of commercial property. The health of a business enterprise depends in part on its uninte-
2. "Taking or Damaging" Provisions

In Minnesota, as in several other states, the state constitution provides a broader scope of protection for property owners by requiring that just compensation be afforded when property is "taken, destroyed, or damaged." In jurisdictions requiring compensation for damage to property, landowners are not necessarily precluded from recovery in the absence of a de facto taking. If the effects of condemnation activities are held to constitute a damage to, rather than a taking of, property, compensation must be awarded.

Thus, courts applying "damaging" provisions must determine the meaning of the term "damage." Originally, "damage" was narrowly construed to mean a direct physical injury. Because the provision affording compensation for damage was designed to be remedial, however, this strict construction of the language has been uniformly rejected. Adopted in its place was a definition of damage that required an injury that would be actionable at common law. That definition

rupted operation. Relocation can require significant planning. Waiting to relocate until the actual de jure transfer may not be feasible. Yet, when the landowner relocates ahead of the de jure transfer, no compensation will be awarded for the loss of use of the vacated property. The landowner either must stay or sacrifice the use of his capital for an early relocation. See id. The obligation to remain also can dramatically impact noncommercial, low- and middle-income property owners. Often, those homeowners have a substantial portion, if not all, of their capital tied up in their property. With the threat of condemnation hanging like a "sword of Damocles" over the homeowner's head, he will want to locate a new residence. Before the de jure taking of their property occurs, however, many homeowners would have inadequate resources to finance new residences. By purchasing ahead of the taking, the homeowner would have to absorb the interest costs in obtaining financing even if the principal for a loan were covered by the amount of the award. Considering the possibility of uncompensated decreases in value, the principal amount may not be covered. Thus, the threat of condemnation can freeze the capital of both commercial and noncommercial landowners by obligating them to remain on their properties. See id. at 779-80.

188. See, e.g., CAL. CONST. art. 1, § 19; ILL. CONST. art. 1, § 15; MINN. CONST. art. 1, § 13; N.D. CONST. art. 1, § 14.
189. For example, in Minnesota, the constitution requires compensation not only for " takings" of private property, but also for "damage" to private property. See MINN. CONST. art. 1, § 13. Thus, either a taking or a damaging will warrant compensation. If an injury is not sufficient to constitute a de facto taking, it may still constitute a damaging and thus require compensation.
190. See 2A Nichols, supra note 71, § 6.441.
192. See In re Hull, 163 Minn. 439, 451-53, 204 N.W. 534, 539 (1925), appeal dismissed sub nom. Breen v. Hull, 275 U.S. 491 (1927) (per curiam); Stuhl v. Great N. Ry., 136 Minn. 158, 161, 161 N.W. 501, 502 (1917). According to Stuhl, the amendment was enacted not to enlarge the scope of the term "damage" but to make the law of damages uniform so that property owners could recover from condemning authorities under the same circumstances that they could recover against a private person not having the power of eminent domain. Id.
also proved unsatisfactory because it often foreclosed recovery for the specific form of injustice that the provision was designed to prevent.\textsuperscript{183}

Although common law liability is a strong indication of damage, a lack of such liability should not be conclusive as to the absence of damage within the meaning of the constitution.\textsuperscript{184} One commentator observed: "\textit{[M]any of the injuries from public improvements which cause the greatest hardship to individuals would not be actionable at common law.}"\textsuperscript{185} Therefore, the term "damage" has been expanded to encompass most situations in which the landowner has suffered some disturbance of a valuable property right.\textsuperscript{186} Whichever definition of damage is used, the Minnesota court has specifically cautioned that not every diminution in the value of property caused by a public improvement can be recovered by the owner.\textsuperscript{187} Unfortunately, the Minnesota court has yet to develop a meaningful standard by which landowners whose properties have suffered the impact of condemnation activity can recover damages.\textsuperscript{188}

3. Establishing a Taking—Relevant Factors

Judicial decisions in the area of condemnation law have not lent themselves to a concise formula that can be used to determine when the effects of condemnation proceedings on uncondemned property constitute a taking. Certain factors that may be utilized by the practitioner to evaluate the possibilities for recovery in a given situation can be extracted from the decisions, however. The four most prominent factors are: (1) the imminence of condemnation; (2) the extent of diminution in the property's value; (3) the existence of abusive conduct by the condemning authority; and (4) the extent of causation on the part of the condemning authority.

The imminence of condemnation is a relevant factor.\textsuperscript{193} When the

\begin{itemize}
  \item \textsuperscript{193} See 2A NICHOLS, supra note 71, § 6.441[2].
  \item \textsuperscript{194} See id.
  \item \textsuperscript{195} Id. at 6-159.
  \item \textsuperscript{196} See, e.g., Holtz v. Superior Court, 3 Cal. 3d 296, 306, 475 P.2d 441, 447, 90 Cal. Rptr. 345, 351 (1970). In Holtz, the court affirmed the general rule that the just compensation provisions impose liability on government for damages proximately caused by government acts absent a showing of negligence. Id. at 305, 475 P.2d at 451, 90 Cal. Rptr. at 355.
  \item \textsuperscript{197} See Wolfram v. State, 246 Minn. 264, 267, 74 N.W.2d 510, 512 (1956); McCarthy v. City of Minneapolis, 203 Minn. 427, 431, 281 N.W. 759, 761 (1938).
  \item \textsuperscript{198} See notes 232-50 infra and accompanying text.
  \item \textsuperscript{199} See Richmond Elks Hall Ass’n v. Richmond Redev. Agency, 561 F.2d 1327, 1330-31 (9th Cir. 1977) (announcement of urban renewal and designation of area for condemnation constituted a taking); Sayre v. City of Cleveland, 493 F.2d 64, 68-69 (6th Cir.) (property specifically designated for acquisition; ramifications of such designation resulted in a taking), \textit{cert. denied}, 419 U.S. 837 (1974); Textron, Inc. v. Wood, 167 Conn. 334, 348, 355 A.2d 307, 315-16 (1974) (fixed and irreversible intent must exist to establish a taking); \textit{In re Cornell Indust. Elec., Inc.}, 19 Pa. Commw. Ct. 599, 604, 338 A.2d 752,
eventual condemnation of a landowner’s property appears certain, the landowner may have a more difficult time selling or leasing the property than a landowner whose property is merely under a potential threat of condemnation. For example, in Conroy-Prugh Glass Co. v. Commonwealth, the condemning authority submitted seven alternative plans for the extension of a proposed highway, each alternative requiring a complete taking of Conroy-Prugh’s property. Because condemnation appeared to be inevitable, the court found that a de facto taking had occurred. On the other hand, in Orfield v. Housing & Redevelopment Authority, the petitioner’s property was assigned a low priority in an acquisition system that was established because the condemning authority was not assured of obtaining sufficient federal funds to acquire all of the desired properties. Therefore, although condemnation of the petitioner’s property was possible, it was not certain. The court thus found that a de facto taking of the petitioner’s property had not occurred.

Further, when condemnation is imminent, a landowner is more apt to take action in reliance that condemnation will occur. For example, an owner may purchase or lease new property and move to a different location. Although a landowner’s voluntary changes to his property in

755 (1975) (advice of condemning authority and imminence of acquisition were factors in finding a taking).

200. See Washington Mkt. Enterprises, Inc. v. City of Trenton, 68 N.J. 107, 120, 343 A.2d 408, 414-15 (1975) (“From the time it becomes generally known that an area has been selected as the site of an urban renewal project . . . there ceases to be a ready market for premises in the area . . . [i]t becomes difficult to find tenants and impossible to enter into long-term leases . . . [and] the value of the property tends constantly to diminish.”). Compare Foster v. City of Detroit, 254 F. Supp. 655, 659-60 (E.D. Mich. 1966) (condemnation imminent; tenants vacated and replacement tenants difficult to find), aff’d, 405 F.2d 138 (6th Cir. 1968) and Drakes Bay Land Co. v. United States, 424 F.2d 574, 586 (Ct. Cl. 1970) (landowner left without market for land because of threat of eventual condemnation) with Elias v. Commonwealth, 25 Pa. Commw. Ct. 605, 608-09, 362 A.2d 459, 461 (1976) (condemnation not yet imminent; present use of property not disturbed).

202. See id. at 386, 321 A.2d at 599.
203. See id. at 392-93, 321 A.2d at 602.
204. 305 Minn. 336, 232 N.W.2d 923 (1975) (per curiam).
205. See id. at 340, 232 N.W.2d at 926 (building never scheduled or approved for acquisition; eminent domain proceedings against building never authorized).
206. See id. at 342, 232 N.W.2d at 927. But see Washington Mkt. Enterprises, Inc. v. City of Trenton, 68 N.J. 107, 122, 343 A.2d 408, 416 (1975) (de facto taking not limited to situation in which condemnation imminent).

207. See, e.g., Richmond Elks Hall Ass’n v. Richmond Redevel. Agency, 561 F.2d 1327, 1329 (9th Cir. 1977) (landowner “reasonably and justifiably” understood that property would be acquired and therefore refused to offer tenancies in excess of month-to-month).
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anticipation of a public improvement generally are noncompensable, 209 some courts have been willing to apply an "estoppel" theory when the landowner has relied on the completion of the condemnation proceedings and injustice would occur if the property was not condemned. 210 Courts applying the estoppel theory interpret the condemning authority's actions as amounting to a "promise" to condemn.211

The extent of diminution in the property's value is a second factor considered by the courts, particularly when dealing with commercial property.212 Although no test exists that conclusively establishes how much property values must diminish before a taking occurs, a landowner stands a better chance of recovering in an inverse condemnation suit when the loss is so burdensome that the property stands to be lost for a failure to pay expenses, such as taxes. For example, in Conroy-Prugh, in which the court found a de facto taking, the property's rental income had diminished severely; Conroy-Prugh could pay neither the operating expenses nor the taxes on the property. 213 Eventually the property was scheduled to be sold because of Conroy-Prugh's failure to pay the property taxes. 214

If a landowner proves that no profitable income can be produced from

(1971) (landowner moved entire printing plant to new location).

209. See 4 Nichols, supra note 2, § 13.14. This might depend on the good faith of the landowner: if he erects a structure on land that he knows will be condemned to enhance his compensation award, he probably will not recover his extra loss from erecting the building. See id. On the other hand, if his building was near completion at the time condemnation proceedings were commenced, and if he completes the building before the actual land transfer to the condemnor, he probably will be entitled to recover his expenses for the improvements. See id.


211. See id. ("promise" to purchase subject parcels).


213. 456 Pa. at 266-69, 321 A.2d at 599.

214. See id. The case of Reingold v. Urban Redevel. Auth., 20 Pa. Commw. Ct. 266, 341 A.2d 915 (1975) is another example of precondemnation activity that resulted in diminution of the value of a parcel of property such that the property became unable to generate enough income to pay the taxes attributable to it.
the property, the court may determine that the beneficial use of the property has been destroyed, thus finding a compensable taking. In *Washington Market Enterprises, Inc. v. City of Trenton,*215 the subject property’s rental income plummeted from $160,000 in 1963 when the condemnation proceedings were commenced to $6,300 in 1973.216 The court held that “where the threat of condemnation has had such a substantial effect as to destroy the beneficial use that a landowner has made of his property, then there had been a taking of property within the meaning of the Constitution,”217 and remanded the case for findings of fact on the issues of de facto taking and damages.218

A finding of abusive conduct on the part of the condemning authority is a third factor that weighs heavily in favor of the landowner.219 The conduct must be more than mere project planning to be abusive, but it

215. 68 N.J. 107, 343 A.2d 408 (1975).

216. Id. at 112, 343 A.2d at 410. At the same time, the annual insurance premium on the property was $9,500 and the annual property taxes amounted to $30,000. Eventually, the property was sold at a tax sale. Id. at 112 n.3, 343 A.2d at 410 n.3.

217. Id. at 122, 343 A.2d at 416 (footnote omitted).

218. See id. at 123-24, 343 A.2d at 416-17. By this holding, the court concluded that an order granting inverse condemnation of the plaintiff’s property, as requested by the plaintiff, was inappropriate; rather, damages were the only available remedy in this case. See id. at 123, 343 A.2d at 416.

The California Supreme Court has gone a step further in granting compensation for diminution in value. In *Klopping v. City of Whittier,* 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972), the California court determined that when the unreasonable activity of a condemning authority causes diminution in the market value of a landowner’s property, the landowner is entitled to compensation even though the activity would not have constituted a de facto taking of the property. See id. at 51-52, 500 P.2d at 1354-55, 104 Cal. Rptr. at 10-11. See note 171 supra for a comparison of the *Klopping* decision with the *Washington Market* decision as they relate to the specific constitutional provisions in effect in their respective jurisdictions. For a discussion of the current Minnesota standard, see notes 232-50 infra and accompanying text.


http://open.mitchellhamline.edu/wmlr/vol5/iss1/3
need not constitute a legal interference with the landowner's rights.\textsuperscript{220} This governmental mens rea may be evidenced by unwarranted, protracted delays in the condemnation procedure,\textsuperscript{221} along with affirmative activity by the condemning agency in causing neighborhood deterioration.\textsuperscript{222} For example, in \textit{Amen v. City of Dearborn},\textsuperscript{223} the activities about which the landowner complained included encouraging people to sell their property by denying building permits, fixing maximum prices to be paid by the city for acquired property, maintaining city-owned lots in a state of disrepair, selling property to businesses that produced substantial air pollution, and allowing acquired land to remain vacant and unprotected to induce neighbors to sell.\textsuperscript{224} In addition, the agency had posted the following signs: "Whoever wishes to sell to the City of Dearborn, call City Attorney"; "Sold to the City of Dearborn"; "Free at your own risk, take any part of the house. First come, first served. Hurry"; and "Cash for your house. The city will pay a good fair price for any house in this block. See City Attorney, City Hall."\textsuperscript{225} The court concluded that although none of the above activities could constitute a taking by themselves, the combination of activities was sufficient.\textsuperscript{226}

Likewise, in \textit{Orfield v. Housing & Redevelopment Authority}, the court

\textsuperscript{220} \textit{Compare} Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 119, 514 P.2d 111, 116, 109 Cal. Rptr. 799, 804 (1973) (enactment of general plan for future development cannot, by itself, give rise to inverse condemnation action) and Howell Plaza, Inc. v. State Highway Comm'n, 66 Wis. 2d 720, 729, 226 N.W.2d 185, 189-90 (1975) (mere initiation of a plan should not give rise to compensation) with Madison Realty Co. v. City of Detroit, 315 F. Supp. 367, 371 (E.D. Mich. 1970) (denial of building permits, denial of reassessment of property for tax purposes, continued publication of renewal plans, denial of many city services, and other acts of the city held to constitute a taking) and Drakes Bay Land Co. v. United States, 424 F.2d 574, 586 (Cl. Ct. 1970) (abusive manner in which condemning authority dealt with developer warranted finding a taking).


\textsuperscript{222} See, e.g., Foster v. City of Detroit, 254 F. Supp. 655, 662 (E.D. Mich. 1966) (defendant's actions substantial cause, if not only cause, of decline in value of plaintiff's property; evidence that defendant actually encouraged deterioration), \textit{aff'd}, 405 F.2d 138 (6th Cir. 1968); Drakes Bay Land Co. v. United States, 424 F.2d 574, 584 (Cl. Ct. 1970) (officials ignored established means of preventing economic harm); City of Detroit v. Cassese, 376 Mich. 311, 317, 136 N.W.2d 896, 900 (1965) (sending letters to tenants, filing lis pendens, intense building inspections with citations for code violations, and refusal to permit long-established business to continue).


\textsuperscript{224} See id. at 1272-73.

\textsuperscript{225} See id. at 1273-74.

\textsuperscript{226} See id. at 1277-78.
acknowledged that an abuse of the eminent domain power specifically directed against a particular parcel could constitute a de facto taking. In contrast to the Amen case, however, in Orfield the city's conduct was held to constitute the good faith exercise of "normal" activities associated with condemnation and urban renewal.

A fourth factor that may be considered by the courts is the extent of causation by the public agency of the landowner's losses. Neighborhoods develop, expand, deteriorate, die, and redevelop on their own. Therefore, courts are not inclined to find a taking based solely on the public agency's activities absent proof of causation. For example, in Orfield the court noted that much of the deterioration of Orfield's neighborhood occurred independently of the redevelopment project and, in fact, might have progressed at an accelerated rate had the renewal project not commenced. When a landowner can prove that his property would not have deteriorated had the public project not occurred, however, the landowner stands a better chance for recovery.

E. The Minnesota Standard of Compensability

Orfield v. Housing & Redevelopment Authority presented the Minnesota Supreme Court with its first and only opportunity to confront the issue of compensating for the effects of condemnation activities. Unfortunately, the court gave the question only a cursory examination. No distinction was drawn between cases involving condemned property, in which the focal issue is the date of valuation, and cases involving uncondemned property, in which the focal issue is whether compensation is due. Furthermore, the court drew no distinction between abutting property and nonabutting property. Instead, in addressing the compensability question, the Orfield court referred to a standard designed

227. See 305 Minn. at 342, 232 N.W.2d at 927.
228. See id.
229. See id. at 341, 232 N.W.2d at 927 (decline not a result of urban renewal project); Conroy-Prugh Glass Co. v. Commonwealth, 456 Pa. 384, 392-93, 321 A.2d 598, 602 (1974) (when hearings and publicity cause property owner sufficient loss, compensation warranted); Reingold v. Urban Redevel. Auth., 20 Pa. Commw. Ct. 266, 268-69, 341 A.2d 915, 916 (1975) (property was taken when agency activities caused loss of all rental income from property).
230. See 305 Minn. at 341, 232 N.W.2d at 927.
232. 305 Minn. 336, 232 N.W.2d 923 (1975) (per curiam). For a brief discussion of Orfield, see notes 204-06 supra and accompanying text.
233. See notes 103-50 supra and accompanying text.
234. See notes 151-231 supra and accompanying text.
to apply to inverse condemnation actions in general, under which relief will be given "to any property owner who can show a direct and substantial invasion of his property rights of such magnitude he is deprived of the practical enjoyment of the property and that such invasion results in a definite and measurable diminution of the market value of the property." To apply this standard, a court must determine what constitutes a substantial invasion. Although some courts have required a near total destruction of the property's utility, the Minnesota court has been more liberal in its determination of the meaning of "substantial invasion." In Alevizos v. Metropolitan Airports Commission the court held that the use and enjoyment of property, free from unduly irritating noise, vibrations, and gaseous fumes, constitutes a property right that is entitled to constitutional protection. In reaching this conclusion, the Alevizos court alluded to a discussion of the meaning of substantial interference by the Washington Supreme Court in Martin v. Port of Seattle. According to Martin, the determination of whether an interference is substantial requires a balancing of private and public interests. Balancing is required because the individual landowner must not be viewed in a vacuum. Although all individuals are expected to endure a certain degree of inconvenience in their daily living in exchange for the benefits received from living in a modern, progressive society, individuals who sustain greater injury than that suffered by the general public should not be forced to bear the burden of that additional loss. According to Martin, therefore, when a landowner's property diminishes in value as a result of an action that is otherwise in the public benefit

235. See 305 Minn. at 340, 232 N.W.2d at 926.
236. Id. (quoting Alevizos v. Metropolitan Airports Comm’n, 298 Minn. 471, 487, 216 N.W.2d 651, 662 (1974)).
237. See Note, supra note 76, at 594.
238. 298 Minn. 471, 216 N.W.2d 651 (1974).
239. See id. at 486-87, 216 N.W.2d at 662.
241. See id. at 318, 391 P.2d at 546-47. A balancing of specific interests, however, needs to be drawn only in a tort action in which the landowner sues for personal suffering. See id. Therefore, in an inverse condemnation proceeding, in which a landowner is compensated only for a decrease in the desirability of his land to a "ready, able, and willing buyer," such balancing may be general, rather than specific. Id.; cf. Minn. Stat. § 462.445(3) (1976) ("An award of compensation shall not be increased by reason of any increase in the value of the real property caused by the assembly, clearance or reconstruction . . . of the real property in an area.") According to the Minnesota Supreme Court, subdivision 3 of section 462.445 implicitly precludes decreasing an award of compensation resulting from a decrease in property values in the surrounding area that results from a public project. See Housing & Redevel. Auth. v. Minneapolis Metro. Co., 273 Minn. 256, 262, 141 N.W.2d 130, 136 (1966).
243. Id.
and when that loss is greater than the loss sustained by the surrounding community of landowners, the landowner should be compensated for any excess loss.\textsuperscript{244}

If the rationale of \textit{Martin} was in fact adopted by the Minnesota court in \textit{Alevizos}, a substantial invasion will exist when the loss suffered by an individual landowner exceeds the level of interference sustained by the general public.\textsuperscript{245} A reference by the \textit{Orfield} court to the New York Court of Appeal's decision in \textit{City of Buffalo v. J.W. Clement Co.}\textsuperscript{246} suggests, however, that the Minnesota court is in fact taking a more conservative approach than the \textit{Martin} court,\textsuperscript{247} because \textit{Clement} restricted compensation to those situations in which the condemning authority caused a physical invasion of or placed a legal restraint on the use of the landowner's property.

The adoption of a conservative approach, such as the one taken by the \textit{Clement} court and referred to in \textit{Orfield}, fails to take into consideration many types of injuries to property that should be compensated if government is to comply with the dictates of the Minnesota Constitution. Compensation under the constitution is due not only for takings of property but also for damage to property.\textsuperscript{248} A requirement that the substantial invasion must deprive the landowner of the "practical enjoyment" of his property before compensation is due, however, does not necessarily account for injuries that do not rise to the level of a taking. Furthermore, even if damage under the constitution is defined as a deprivation of the "practical enjoyment" of property, Minnesota has a statutory provision that requires compensation for "every interference . . . with the possession, enjoyment, or value of private property."\textsuperscript{249} Because not every interference with the value of private property constitutes a deprivation of a landowner's practical enjoyment of the property,

\textsuperscript{244} See 64 Wash. 2d at 319, 391 P.2d at 546-47. The whole idea behind the "just compensation" provision is that no individual should have to bear an unfair burden of a public improvement that should be borne by the general public. See Armstrong v. United States, 364 U.S. 40, 49 (1960); 72 COLUM. L. REV., supra note 1, at 773.

\textsuperscript{245} See Alevizos v. Metropolitan Airports Comm'n, 298 Minn. 471, 486-87, 216 N.W.2d 651, 662 (1974).


\textsuperscript{247} The \textit{Orfield} court referred to the findings of the trial court that no physical invasion of the landowner's property had been committed by the condemning authority and that the authority had not placed any legal restraints on the landowner's use of the subject property. See 305 Minn. at 340-41, 232 N.W.2d at 926. Therefore, the Minnesota standard formulated in \textit{Alevizos} was inapplicable to those facts. \textit{Id. at} 340, 232 N.W.2d at 926. Diminution in value resulting from condemnation activity was insufficient to warrant compensation in the absence of a physical invasion, legal interference, or abusive conduct on the part of the condemning authority. See \textit{id. at} 341-42, 232 N.W.2d at 927.

\textsuperscript{248} See notes 143-44 supra and accompanying text.

\textsuperscript{249} See MINN. CONST. art. 1, § 13.

\textsuperscript{250} MINN. STAT. § 117.025(2) (1976).
the statutory mandate is not complied with either. Yet, a deprivation of practical enjoyment must be shown before compensation will be granted under the present Minnesota standard.

F. Summary

The effects of condemnation activity have been examined in terms of the resulting impact on property that has been condemned as well as on property that has not been condemned. When property has been condemned, the focal issue is the amount of compensation to be awarded to the landowner. When the effects of condemnation activity cause the market value of a piece of condemned property to diminish, that loss in value usually will be accounted for in the condemnation award. Oftentimes this is accomplished by means of a "condemnation blight" approach, in which the date of valuation is adjusted to reflect the date that the condemnation activity first affected the property's market value. As an alternative approach, the loss in value caused by the impact of the condemnation activity may be viewed as constituting a de facto taking, and the date of the taking altered to reflect that impact. Although the specific approach applied may determine whether such expenses as interest and loss of rent will be included in the award, both concepts will account adequately for the basic loss in value sustained by condemned property as a result of the condemnation activity.

The effects of condemnation activity on uncondemned property have been examined both with respect to property that was originally scheduled for condemnation but was not condemned because the project was abandoned and to property that never was scheduled for condemnation but abutted the project area undergoing condemnation. Because no physical taking occurs with either of these two types of property, the judicial interpretation of the relevant "just compensation" provision of a state constitution will determine whether the injured landowner is to receive any compensation at all for the loss that has been suffered. When the state constitution prohibits only uncompensated "taking" of property, a de facto taking must be found or the landowner will receive no compensation whatsoever. When the state constitution prohibits uncompensated damage to, as well as uncompensated taking of, property, injuries to property that do not rise to a taking may require compensat-

251. See notes 103-50 supra and accompanying text.
252. See notes 151-66 supra and accompanying text.
253. See notes 125-32 supra and accompanying text.
254. See notes 146-47 supra and accompanying text.
255. See notes 113-18 supra and accompanying text.
256. See notes 119-24 supra and accompanying text.
257. See notes 151-55 supra and accompanying text.
258. See notes 156-66 supra and accompanying text.
ing the landowner. 259

In Minnesota, a jurisdiction with a "damaging" provision as well as a "taking" provision in its constitution, the courts have not analyzed extensively the issue of the compensability of the effects of condemnation activities. The standard currently in force in the Minnesota courts requires a "substantial invasion" that deprives a landowner of the "practical enjoyment" of his property. Apparently, the Minnesota court has interpreted the standard conservatively, thus precluding recovery for many injuries that do not constitute a "substantial invasion" or a deprivation of the "practical enjoyment" of property but may constitute "damage" under the constitution.

IV. A SUGGESTED STANDARD OF COMPENSABILITY

In cases involving condemned property, a court's choice between a de facto taking analysis and a condemnation blight analysis will not affect the outcome significantly, aside from determining whether losses such as interest on the condemnation award and lost rent are to be included in the award, because both approaches account for the effects of precondemnation activity on the condemned property. 260 When property has not been condemned, however, the court's approach has a more profound effect. A court that consistently applies a condemnation blight analysis will not award any compensation when no taking has occurred because a condemnation blight analysis presupposes the existence of a taking. Therefore, a landowner of condemned property that suffers from the effects of precondemnation activity will be compensated for those effects in the award that is received, whereas a landowner of uncondemned property suffering the same effects will not be compensated, simply because the property was not condemned. The de facto taking approach, on the other hand, permits the court to find a taking even though the property has not been condemned, although this approach also is unsatisfactory because, at present, no standard has been developed that can be utilized consistently to determine when the condemnor will be required to appropriate the property. More importantly, neither the condemnation blight analysis nor the de facto taking analysis results in a compensation award to the owner of property that has been damaged but not taken.

To treat owners of both condemned and uncondemned property affected by condemnation activities equally, a concise, flexible standard must be developed that can be applied to all of the situations that have been discussed in the preceding sections of this Note. Such a standard should identify factors to be utilized in the determination of whether, in fact, a particular parcel of property has been "taken" or "damaged."

259. See notes 188-98 supra and accompanying text.
260. See notes 125-32 supra and accompanying text.
The standard should resolve the question of whether compensation should be awarded, answer the question of how much compensation should be granted, and speak to the fears of those opposed to awarding compensation to landowners whose property has not been condemned or whose property has been condemned only after a substantial decline in value. The standard should be flexible enough to deal equitably with all situations that arise while injecting some predictability into this developing area of the law. The remainder of this Note attempts to assist in the development of an acceptable standard that speaks to the above problems and that will serve as a vehicle for practitioners and the courts to use in resolving the compensation question.

Clearly, strong fundamental policy arguments exist on both sides of the compensation issue. Courts in the past have tended to emphasize the arguments against compensation. The central thesis of this Note, on the other hand, maintains that landowners should be compensated for losses resulting from condemnation activities to an extent greater than most courts have allowed in the past. The above discussion therefore has examined the arguments against compensation in an attempt to develop a more liberal standard for awarding compensation. Because the arguments against compensation cannot be dismissed summarily, however, they must be accounted for in a standard of compensation if that standard is to serve as an effective guide in determining whether compensation should be awarded in a given situation. Although the standard suggested below will result in a greater number of landowners receiving compensation than are presently receiving compensation, the standard does take into consideration the arguments of the opponents. Furthermore, the standard attempts to afford the courts enough flexibility to produce a just result in a variety of circumstances.

The proposed standard is applied to a given fact situation through the use of a two-step process. First, whether the loss is compensable must be determined. Then, if the loss is determined to be compensable, an appropriate remedy for the loss must be selected.

A. Determining a Compensable Loss

Under the proposed standard, a loss suffered by a landowner is compensable if the loss is (1) proximately caused by the actions of the condemning authority, (2) pecuniary, and (3) clearly demonstrable.

The loss claimed must be proximately caused by the condemning authority's activities. When the loss would have resulted from the

262. See notes 71-82 supra and accompanying text.
natural deterioration of the neighborhood, the landowner should not be compensated merely because the urban renewal project happened to coincide with the neighborhood's deterioration. This requirement is consistent with current Minnesota law, which prohibits recovery when the landowner fails to prove a causal relationship between the condemning authority's activities and the landowner's loss. The requirement of a sufficient nexus between the activities and the loss should provide the courts with additional safeguards from tenuous claims that otherwise might further burden already congested court calendars.

Second, for a loss to be pecuniary it must be neither speculative nor conjectural and must be greater than that suffered by the surrounding community. This requirement is compatible with the current Minnesota standard, which requires an individual to suffer a "substantial invasion," that is, a level of interference greater than the level sustained by the general public. Requiring the loss to be pecuniary also is consistent with Minnesota case law, which continuously has precluded recovery for damages that are speculative or conjectural. Furthermore, requiring landowners to allege significant loss would prevent a floodgate of litigation based on spurious claims.

Under the proposed standard, a landowner still is faced with the question of exactly how much the property must diminish in value to constitute a sufficient loss to warrant recovery. In considering this issue, transaction cost (the actual expenses incurred in determining who was damaged and to what extent) should be compared to project cost (the diminution in market value caused by the condemning authority's conduct). If the project cost exceeds the transaction cost, the landowner will have suffered sufficient loss to warrant seeking compensation.

265. See, e.g., id.; notes 229-31 supra and accompanying text.
267. See Alevizos v. Metropolitan Airports Comm'n, 298 Minn. 471, 487, 216 N.W.2d 651, 662 (1974) (court required "substantial invasion"); City of Crookston v. Erickson, 244 Minn. 321, 325, 69 N.W.2d 909, 912-13 (1955) (to recover compensation for damage to property, owner must have sustained special damage with respect to his property different in kind from that sustained by the public generally); Wolfram v. State, 246 Minn. 264, 267, 74 N.W.2d 510, 512 (1956); notes 241-45 supra and accompanying text.
270. See Note, supra note 83, at 797-98.
271. See id. at 798. For example, when a landowner has suffered approximately $500 in damages, but would have to expend $1,000 to establish his precise legal injury, bringing an action for damages would be inefficient and, hence, unwarranted. Although the landowner in that situation would not receive compensation for losses suffered, it would be inefficient resource distribution to reach a different result.
Finally, the loss must be clearly demonstrable by clear and convincing evidence rather than by the lesser standard of preponderance of the evidence. According to this more stringent burden of proof may preclude some landowners from recovery, it is necessary to prevent nonmeritorious claims from reaching the trier of fact.

B. Selecting an Appropriate Remedy

Once a landowner is found to have suffered a compensable loss, the precise remedy to be granted must be determined. In all cases, the court should have the discretion to determine whether damages should be paid or whether the condemning authority should be forced to acquire the property. As a guide in exercising its discretion, the court should look to the present “taking-damage” distinction. If a de facto taking of the landowner’s property has occurred, the condemning authority generally should be required to appropriate the parcel. If a lesser injury has been sustained, the landowner should be compensated for the damages suffered. Exercise of judicial discretion in determining which remedy is appropriate would foster more efficient land usage; in many situations, an injured landowner can be made whole by an award of damages and the government will not be forced to acquire property for which it has no use.

In proving the damage suffered, the landowner must first demonstrate the approximate time that the condemnor’s activities caused the reduction in value of the parcel of land in question. That date would become the date of the injury. Second, the landowner must establish the value that the property would have had at that date if the condemning authority had not engaged in the condemnation activities. Third, the land-
owner must establish a comparison value: the landowner of condemned property must prove the value of the property on the date of acquisition; the landowner of property within an abandoned project area must prove the value of the property on the date that the project was abandoned; the landowner of abutting property must prove the value of the property on the date that the condemnor terminated the condemnation activities in the neighboring area.\footnote{
280} The landowner should recover the difference between these two amounts, together with interest from the date of acquisition, abandonment, or project termination.\footnote{
281} Interest should be computed based on the market value of the property on the date of the injury.\footnote{
282} Any excess of rental income over actual disbursements made for the property's maintenance during this period should be subtracted from the compensation award.\footnote{
283}

Thus, pursuant to the suggested standard, any landowner who has suffered a clearly demonstrable, pecuniary loss, proximately caused by the condemning authority's activities, would be entitled to compensation, regardless of whether the loss constitutes a "taking" or a "damage" to the property. Those terms become relevant only when a court must determine whether forcing a condemnor to acquire a landowner's property or awarding damages is the more appropriate remedy, which will depend on the extent of the loss suffered by a landowner.

V. Conclusion

As the use of condemnation in urban centers expands, an increasing number of landowners feel the effects of condemnation activities on their property. Landowners whose property has diminished in value as a result of condemnation activity have encountered significant barriers to receiving compensation for their losses. Although landowners of condemned property generally have been compensated for their losses by means of either a condemnation blight or de facto taking analysis, owners of uncondemned property who have suffered similar losses have not been as successful in securing compensation. In cases involving uncondemned property, the courts have become bogged down with the task of construing the elusive constitutional concepts of "taking" and "damage." Clearly, this area of the law presents issues for which no easy solution exists.

hypothetical nature, but maintained that the use of such evidence would achieve a more just result than using a date prior to the time the public agency's activities began having a detrimental effect. The court reasoned that in any blighted area, property values are likely to decline regardless of any action on the part of the public agency. The city should not be responsible for those losses. \textit{Id.} at 124 n.11, 343 A.2d at 416 n.11.\footnote{
280} See \textit{id.} at 124, 343 A.2d at 416-17.\footnote{
281} See \textit{id.} at 124, 343 A.2d at 417.\footnote{
282} See \textit{id.} at 124, 343 A.2d at 416-17.\footnote{
283} See \textit{id.}
In Minnesota, the current standard for recovery—requiring a substantial invasion that deprives a landowner of the practical enjoyment of his property—is inadequate. The standard has been interpreted conservatively by the Minnesota courts and fails to account for many injuries that do not constitute a "taking" of property yet do amount to a "damage" to property. Thus, the standard does not satisfy the Minnesota constitutional requirement that compensation be paid for any "taking" of or "damage" to property. In addition, the current standard conflicts with a Minnesota statute that construes the term "taking" liberally.

In contrast to the current Minnesota standard, the standard suggested in this Note merely looks to the pecuniary loss suffered by the landowner, as proximately caused by the actions of the condemning authority. By doing so, the standard circumvents the difficulty of construing such vague and vexatious terms as "taking" and "damage," arriving at a more equitable resolution to the problem of compensation for loss caused by condemnation activities.