#36(L) 7/28/65

Memorandum 65-47

Subject: Study No. 36(L) - Condemnation Law and Procedure (Incidental Business Losses)

Attached to this memorandum is the research study prepared by our consultant entitled "A Study to Determine Whether the Owner of Real Property Should be Compensated for Incidental Business Losses Caused by the Taking of Real Property by Eminent Domain." We urge you to read this study so that you will have the necessary background to make policy decisions in this area.

Incidental business losses generally

Incidental business losses usually include the following major items:

Moving expenses (the subject of Memorandum 65-46).

Loss of goodwill.

Expenses and lost profits resulting from the interruption caused the condemnee as a result of the condemnation.

Lost business profits that will result to the condemnee in the future.

The California and other courts have generally denied compensation for incidental losses on the grounds that only the "property" is being taken and the assertion that such losses are or may prove to be "speculative" and that, consequently, payment for these losses may impair future public improvements and may saddle the taxpayer with too much of a burden. The consultant believes that just compensation should mean nothing less than indemnification and that there is no sound reason why the rights of the individual against the State or other condemning agency should be any less than in contract and similar cases between private parties. The consultant

concludes that incidental losses whenever proved to a reasonable certainty should be compensated for in condemnation actions. He states, however, that although he cannot differentiate between those incidental losses discussed in this memorandum and moving costs, he nevertheless finds it necessary to suggest that because of various reasons it would be desirable to delay effectuating the compensation of condemnees for incidental losses. The reasons given are: (1) the long history of the denial of all incidental losses; (2) the admitted difficulties that the courts and others will have in administering any proposed statute that encompasses compensation for all incidental losses; and (3) the many questions as yet unanswered (due to the lack of adequate experience with statutes providing for compensation for incidental losses.

We will present the staff recommended solution to this problem at the conclusion of this memorandum.

Good will

The problem of compensating for loss of good will is perhaps the most frequently recurring and most difficult one in this area of the law. See the discussion on pages 7-12 of the research study. There is no compensation for this under existing law.

Losses from business interruptions

To be distinguished from lost profits (a sometimes difficult distinction), are the business losses that are incurred by the condemnee as a result of the interruption to the business brought about by the taking. This is the loss that results from the difficult and time-consuming requirement that the condemnee find equivalent premises to those being taken and put his business in operation at the new premises. See the discussion on pages 12-16 of the research study.

Business lost profits

A condemnee often suffers permanent business damage as a result of the taking of his property. In some cases, he may not be able to relocate his business at all. In other cases, he simply makes less profit on the new property than he did on the condemned site. See the discussion on pages 16-20 of the research study.

Staff recommendation

The Select Subcommittee that has been working on the problems of condemnation law and procedure at the federal level has recommended a comprehensive scheme for relocation payments that provides some recognition of the fact that a business may be interrupted (causing the owner loss of profits and other expenses) or the business may be discontinued as a result of the condemnation (causing the owner to lose his livelihood). Attached as Exhibit IV (this is the only exhibit) is the recommendation of the Select Subcommittee and the legislation proposed to give effect to this recommendation.

In substance, the recommendation is that a displaced person who moves or discontinues his business would have the option of accepting a fixed payment, in lieu of reimbursement for actual relocation expenses, equal to the average annual net earnings of the business, or $5,000, whichever is the lesser, if the business cannot be relocated without a substantial loss of its existing patronage and the business is not part of a commercial operation having at least one other establishment not being displaced, which is engaged in a similar business. A similar scheme is provided for farm operations. See the attached Exhibit IV for further detail.

Pennsylvania has a somewhat similar scheme to provide for business dislocation damages where it is shown that the business cannot be relocated without substantial loss of patronage:

Section 609. Business Dislocation Damages.--The condemnee shall be entitled to damages, as provided in this section, for dislocation of a business located on the condemned property, but only where it is shown that the business cannot be relocated without substantial loss of patronage. Compensation for such dislocation shall be the actual monthly rental paid for the business premises, or if there is no lease, the fair rental value of the business premises, multiplied by the number of months remaining in the lease, not including unexercised options, not to exceed twenty-four months or multiplied by twenty-four if there is no lease. The amount of such compensation paid shall not exeeed five thousant dollars ($5000) and shall not be less than two hundred fifty dollars ($250). A tenant shall be entitled to recover for such business dislocation even though not entitled to any of the proceeds of the condemnation.

The staff recommends that a fixed payment scheme similar to that provided in Pennsylvania and recommended to the federal Congress be included in the comprehensive statute to deal with the problem of incidental business losses.

The staff also suggests that the Commission give consideration to the fixed payment scheme recommended in Exhibit IV for residental occupants.

The dollar limits in the fixed payment scheme will obviously result in injustice in particular cases. However, because of the speculative nature of incidental business losses and the fact that it is unlikely that anything more beneficial to the property owners would obtain legislative approval, we recommend the fixed payment scheme.

Other related matters

Two closely related matters are discussed in the research consultant's study of "Problems Connected with the Date of Valuation in Eminent Domain Cases." That study is attached to Memorandum 65-45. These two matters are discussed below.

Business losses occasioned by a delay in bringing about a public improvement. See Date of Valuation Study pages 56-62. Almost all jurisdictions deny compensation for losses of this sort. However, in 1960, Wisconsin enacted legislation to compensate condemnees for:

> Rental loss exceeding normal experience where proved to be caused by the public land acquisition project and when the vacancy occurs after the parcel is shown on a relocation order.

The consultants recommend similar legislation in California, but they recommend that the scope of the statute be broadened to include lost profits as well.

Cost of plans to improve property. See Date of Valuation Study pages 63-66. What compensation should be given to a condemnee who has expended money for plans to improve the property? The consultant reports that a New York court has granted a condemnee compensation for the cost of engineers' surveys and architects' plans relating to the property being condemned. The Wisconsin statute provides compensation for:

> Expenses incurred for plans and specifications specifically designed for the property taken and which are of no value elsewhere because of the taking.

The consultant recommends that a similar statute be enacted in California.

Machinery, equipment, and fixtures. Important problems arise in connection with machinery, equipment, and fixtures when business property is taken. These problems are considered in Memorandum 65-49 which should be taken into account in connection with the problems discussed in this memorandum.

Respectfully submitted,

John H. DeMoully
Executive Secretary

36(L) May 6, 1960

A STUDY TO DETERMINE WHETHER THE OWNER OF REAL PROPERTY SHOULD BE COMPENSATED FOR INCIDENTAL BUSINESS LOSSES CAUSED BY THE TAKING OF REAL PROPERTY BY EMINENT DOMAIN*

*This study was made for the California Law Revision Commission by the law firm of Hill, Farrer & Burrill, Los Angeles. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons and the study should not be used for any other purpose at this time.

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INCIDENTAL LOSSES

I. The Scope of the Study

Incidental losses in eminent domain usually encompass the following major items: moving expenses, loss of goodwill, expenses and lost profits resulting from the interruption caused the condemnee as the result of condemnation, and lost business profits that will result to the condemnee in the future. (Among the "minor" incidental costs condemnees often bear are the costs of purchasing and installing new fixtures in the new location and costs incident to changes in business stationery, telephone service, advertising and signs).

It should be underscored that incidental losses as described in this study concern only those losses suffered by a condemnee when there is initially an acknowledged taking of a property interest. This study does not directly consider other types of damages which are germane to incidental losses but which encompass much broader and even more controversial as well as more difficult questions. Specifically, the question of the police power v. the power of eminent domain, the questions as to indemnification for loss to market value resulting from impairment of access, diminution of value due to noise, smoke, fumes, etc. and other consequential damage suffered by individuals, which the courts often label damnum absque injuria, are perplexing

questions that need separate and special attention. It is recognized that these larger problems dovetail with the problem of incidental losses. But, believing that the two can be separated at this time, it is hoped that the broader problems of consequential damages as distinguished from incidental losses can be tackled at some subsequent time.

A prior study has extensively reviewed the legal status and arguments involved with moving costs. This study will attempt to review principally the questions of loss of goodwill, interruption expenses and losses, and loss of profits. Many of the legal theories that are propounded to support the rejection of compensation for moving costs are equally applicable in denying compensation for good will, interruption losses, and lost profits. In fact, courts generally group these items together and usually label them "noncompensable business losses".

A. An Analysis of the Arguments Denying Compensation.

The courts begin from the premise that in eminent domain, the market value system provides for two separate determinations: A taking must be found; existence of a taking is gauged by the gain inuring to the condemnor. Once the fact of a taking has been established, the measure of compensation is determined according to prevailing market price.[1] As a result of this premise incidental losses do not amount to a "taking". (The condemnor has not literally

taken over any of these intangible losses). The second major argument used to close the door on compensation for these losses is that they are speculative.[2] Before examining the individual losses involved in this matter, it is well to examine, at least broadly, the merit of these two arguments.

The first argument that stands as a barrier against remuneration to the condemnee for these incidental losses is, as stated, that there has been technically no "taking" of any "property interest". In California, as in almost all other jurisdictions, courts reason that governmental authorities need only pay for that which they "take" and that a taking involves a "tangible interest".[3] Since the government, when condemning property, seldom takes over anything but the realty, it need only pay for what it has gained rather than for what the condemnee has lost. Indeed, the Supreme Court, in a case wherein the condemnee's canning business was destroyed due to the inability to re-establish elsewhere, succinctly summed up this argument:[4]

> "There is no finding as a fact that the Government took over the business or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land. There can be no recovery under the Tucker Act as the intention to take is lacking."

This proposition was reinforced in United States ex rel TVA v. Powelson,[5] where the Court held that "the sovereign must pay only for what it takes, not for opportunities which the

owner may lose." In California the leading case concurring on these views is Oakland v. Pacific Coast Lumber and Mill Co.[6] This argument has been further buttressed and given constitutional foundation by the assertion that the right to just compensation is a property right and not personal; in effect the distinction results in the scope of taking being restricted to the property involved. The classic statement of this in rem--in personam dichotomy was advanced by the Supreme Court in Monongahela Nav. Co. v. United States:[7]

> "And this just compensation, it will be noticed, is for the property and not the owner. Every other clause in the Fifth Amendment is personal. 'No person shall be held to answer for a capital, or otherwise infamous crime,' etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the 'just compensation' is to be a full equivalent of the property taken."

That the Monogahela position continues to be the commanding one in the courts cannot be denied. It has on occasion, even before its actual pronouncement, been denounced and some courts even today either ignore it or try to distinguish it.[8] While some recent decisions, as will be shown later, have gone beyond such a restrictive definition of "property" and limited concept of "taking", these narrowly defined terms remain a significant obstacle to the payment to condemnees of the losses involved herein.

The second major argument for denying recovery is that these losses are speculative. Repeatedly, particularly

in recent years, the courts have asserted that compensation for losses which the market standard excludes will result in unfounded and exaggerated awards.[9] Basing their reasoning on the belief that these losses are too difficult, remote and uncertain to measure accurately, they hold that any effort to allow compensation for them would undermine the entire objectivity that is claimed to exist in the market value formula.

It may be argued that such losses are not as speculative as the courts have asserted. Nonetheless, there can be no doubt that economists and accountants differ widely with the measurement of good will.[10] In compensating a condemnee for losses due to the interruption in his business or for lost profits in the future would raise difficulties of evaluation as well as insure the condemnee for expected earnings. As the courts have stated in the past:

> "The business might chance to be exceedingly profitable, at the time of taking, so that an interruption of it from an interference with the full use of the real estate might cause a loss far greater than the reasonable rental price of the property. . . ." [11]

> "That the plaintiff had made profits in his business in the past was no indication that he would continue to make them in the future. . ." [12]

Still in all there is no denying that in other fields of the law, e. g., contracts, tort, and taxation, courts have resolved almost identical problems which have arisen in private suits. Cases exist in contract law where the plain-

tiff has been awarded lost profits even though the business in which he was engaged had actually yet to begin;[13] and often either lessees or lessors are awarded damages based upon estimated profits;[14] future profits, it is clear, are often the basis of a recovery. In tort law the same is equally true.[15] And in the field of taxation there are numerable cases wherein the courts have ascertained the value of good will.[16]

Furthermore, even in the field of condemnation English and Canadian courts have awarded for lost profits, losses due to interruption of the business, and for good will and there hardly has been any mention in these reported cases or other authorities of any undue difficulty involved in these determinations.[17] Even in this country, at the turn of the century, various Eastern states awarded condemnees compensation for these incidental losses in special types of takings. (see Moving Cost Study) Moreover, a number of states in this country allow for these incidental losses in cases involving partial takings.[18]

Thus confronted by the dual obstacles of a restricted definition of "property" and the assertion that such losses are "speculative", condemnees have generally been denied compensation for incidental losses.[19] In so acting, the courts have ignored their own dictates that the property owner should be idemnified in condemnation so that after the taking he should be no worse off than before.[20] While there

are strong arguments to adhere to the position that a limited definition of "taking" and "property" should be utilized in eminent domain and that allowance for such losses will result in "swollen verdicts",[21] this position perhaps overlooks the concept of just compensation. As the English court stated in this matter:[22]

> "What a payer has to pay by way of compensation is . . . a sum so as to put, so far as money can do it, the owner in the same position as if his land had not been taken from him; and this . . . is exactly the same measure as the measure of damages applied to the case of [illegible] liable to pay compensation for breach of contract, or, for that matter (where there is no question of punitive damages) in tort."

B. Good Will

Of the incidental losses resulting from condemnation, good will is perhaps the most frequently recurring and one of the most vexatious. One form of good will, that which inheres in the real estate itself, is normally compensable since it is included as part of the market value formula -- property is evaluated according to its "highest and best use". A second category of good will, one enjoyed by most small businessmen, is more personal. It inheres in the business aside from the physical property and grows from the personality and the ability of the proprietor, the reputation of the business and the customers' habit of dealing with a firm due to its tradition and familiarity.[23] For this type of good will, often greatly damaged when the owner must move

from the neighborhood to some other locale, often a considerable distance away as the result of modern takings, American courts seldom grant (and even more rarely admit granting) compensation.

In rejecting claims for loss of good will, the courts generally resort to one of the two standard arguments: That no "property" was taken or that the loss is speculative. At times, they also contend that the good will losses are de minimis. But dismissing such a loss as one court has, by stating "a good plumber should be able to continue his business in almost any location and do as well as he formerly did in a neighborhood where in many homes there was a lack of adequate plumbing facilities,"[24] expresses business naiveté, especially since courts denying good will compensation have recognized that the businesses were irreparably destroyed by condemnation.

At times courts have awarded for good will by stretching the strictures of the market value formula by considering good will a factor to be included within that formula. For example, in Housing Authority v. Lustig,[25] a 1952 Connecticut case, the court there was confronted with the fact that the property was valued at $6,500.00. On the property was an established poultry slaughtering business which was valued at $10,000. The court there asserted that the "highest economic use" made this particular property more valuable and awarded the condemnee $16,500.00. While this

case has been attacked by other courts and authorities,[26] it is illustrative of the ways in which good will and akin losses are at times compensated for though technically such factors should not rightfully be included within the market value formula.

The tendency to expand the borders of market value has been highlighted by the United States Supreme Court in Kimball Laundry Co. v. United States.[27] In that case the taking by the condemnor was a temporary one and the property was to be returned to the condemnee-lessee within a specified time prior to the time when the lessee's term would have terminated. This taking effectively damaged the lessee's business trade routes, an element of good will. The court sought to distinguish such situations from a taking of the entire fee where good will is held noncompensable; the argument in the former, unlike the latter, event is that the condemnee remains saddled with the property temporarily assumed by the government. Accordingly, his future business conduct is rendered uncertain, and he deserves special consideration, or as Justice Frankfurter stated "it is a difference in degree wide enough to require a difference in result".[28]

It is difficult, however, to reconcile the Court's holding in Kimball with the different result in a permanent taking situation. As Justice Douglas stated in dissent:[29]

"There would be a complete destruction of the trade routes if the taking of the plant were permanent and a depreciation of them (I assume) where it is temporary. Why the latter is compensable when the former is not is a mystery. Even the academic dissertation on valuation which the opinion imports into the Fifth Amendment from accounting literature conceals the answer."

Whatever the reasoning of Kimball, however, that case indicates the Supreme Court's willingness (and that of other courts as well) to discard the notion that "taking" in condemnation must be equated to "taking over", and rejects the concept that such items as good will are not "property rights" within the scope of just compensation. The courts therefore are, apparently, relying mainly upon the proposition that incidental losses, including good will, are too speculative to be the basis of compensation. As indicated before such losses are admittedly difficult to ascertain and often involve considerable guess work and speculation. Nonetheless, the same problems have been dealt with by courts in other fields of law and the results there have not been met by this speculative argument.

Indeed, so effective has the speculative argument been intertwined with compensation for good will and other incidental losses, that courts are prone to deny compensation for these losses and label them speculative when, in the fact situations involved, the value of good will is scarcely speculative. For example, in a 1959 Alabama case, City of Dothan v. Wilkes,[30] the court denied the lessee-

condemnee remuneration for amounts he paid for the good will factor to the prior lessee. This amount was clear, certain, definite and certainly not speculative. The court, however, labelled good will as being speculative and held that this evidence was inadmissible as to the question of compensation. The courts in other cases involving other incidental losses that could hardly be labelled speculative have acted in a similarly summary manner.[31]

A recent case by the Georgia Supreme Court [32] discarded both the strictures of the market value formula and the legerdemain of "expanding" the market value formula; it forthrightly allowed, despite the opposing argument "speculative", for loss of a good will item although it admittingly was not an element of market value. Ignoring the legal barrier created by case law, the court found the market value standard inapplicable wherever it failed to indemnify the condemnee for all his losses, including incidentals. The assertion is summarized in the approved charge to the jury:

> "I further charge you, gentlemen, that the Constitutional provision as to just and adequate compensation does not necessarily restrict the lessee's recovery to market value. The lessee is entitled to just and adequate compensation for his property; that is, the value of the property to him, not its value to the Housing Authority. The measure of damages for property taken by the right of eminent domain, being compensatory in its nature, is the loss sustained by the owner, taking into consideration all relevant factors . . ."

The recent tendency, as can be seen both here and in subsequent pages, is to compensate the condemnee for these factors, factors over and above the market value formula.

C. Losses due From Business Interruptions.

Germane to and at times indistinguishable from lost profits resulting from condemnation are the business losses that are incurred by the condemnee as a result of the interruption to the business brought about by the taking.[33] All the arguments advanced against granting awards for incidentals, as outlined above in this study and in the moving cost study, are utilized by the courts in denying compensation for these damages,[34] even though such denials may seriously, and often permanently, injure the economic position of the enterprise concerned.

Business interruptions, which are seldom avoidable, are often of considerable duration; some businesses, both large and small, can rarely re-establish as going concerns within a matter of days, or even weeks. And the effect of interruptions, especially in retail trade where annual profits are largely dependent on volume, may be sufficient to eradicate the earnings of an entire year. True, a condemnee may know of the impending taking months in advance and prevent the interruption and its concomitant loss, but such action would force the condemnee to bear without compensation the expense of two sites for the period prior to the time

of eviction. Moreover, these losses due to interruption in business enterprises are somewhat more prevalent in modern takings since today's public improvements often cover large contiguous areas thus making it more difficult and more time-consuming for the condemnee to find equivalent premises to those being taken.

While the courts have been fairly unanimous in rejecting claims for compensation for these costs due to interruption, a 1959 Michigan case, seems to have caused a major breach in the otherwise solid wall against remuneration in these instances. In Highway Department v. Dake Corporation,[35] a unanimous Michigan Supreme Court clearly awarded the condemnee $53,000 in expenses which he incurred in preparing for and in facilitating the operation of a new substitute plant so as not to lose any production during the changeover from the condemned property to the new site. The condemnee in that case hired the Certified Public Accountant firm of Ernst and Ernst to do a cost study of the actual expenses incurred in that over-all operation and the detail and certification of the method adopted by the condemnee, as incorporated in the accounting firm's report, was convincing enough to the court so as to influence it in permitting compensation for those expenses. Apparently, the methodical planning was such as to overcome the barrier of "speculative losses." Indeed,

the court, after allowing for these losses, stated:

> "To recover damages from business interruption the proof must not be speculative and must possess a reasonable degree of certainty. The Dake Corporation, by resorting to the methodical methods it did, met that reasonable degree of certainty."

The Dake case, aside from its importance in allowing for business interruption losses, is also significant insofar as it distinguishes those losses from lost profits due to condemnation.

The Dake case reviewed Michigan law in regard to interruption losses and lost profits. Initially, it is well to note that Michigan law both in regard to incidental losses and compensation for fixtures is fairly unique among American jurisdictions.[36] Two 19th century Michigan cases, are among the very few throughout the United States that allow condemnees compensation for business interruption losses.[37] In fact, so broad were these holdings that a fair reading of them would allow for incidental losses including good will and lost profits. Later 20th century Michigan cases, however, appeared to veer away from the concept that compensation in eminent domain should be measured by the same rules that cover compensation in the fields of contracts and torts.[38] The condemnor in the Dake case cited these more recent cases in the course of arguing that the Michigan courts had reputiated the tort concept of compensation in eminent domain and the earlier cases. In allowing for business interruption losses as dis-

tinguished from lost profits, the Dake court referred to the more recent Michigan cases cited by the condemnor and the court stated:

> "An examination of the four above cases cited by the appellant discloses that the Court held that the property owner could not recover loss of profits because of damages caused by business interruption but did not repudiate Moesta or Weiden in regards to expenses incurred by business interruption. To eliminate any doubts of this court's position, we hold that the evidence introduced in this condemnation proceeding showing expenses occasioned by business interruption was properly introduced for consideration as to value and weight by the commissioner making the award." (emphasis added)

This distinction between expenses incurred as a result of business interruption, on the one hand, and lost profits due to business interruption, on the other hand, is a very fine one and obviously will be quite difficult to ascertain in most instances. The case, therefore, truly seems to hold that if interruption expenses are certain and definite, they may be recovered; but that lost profits, whether or not certain or definite, are noncompensable. The crux of this holding is apparently based upon the belief that lost profits are seldom non-speculative; although a 1952 Michigan case presented a situation wherein such lost profits were fairly certain, nonetheless, this same Michigan court rejected such evidence.[39]

It is further interesting to note that the Dake case, while not specific on this point, apparently awarded these business interruption losses over and above the market value

of the property taken. As indicated elsewhere, if such incidentals are to be awarded the condemnee, they rightfully should not be incorporated within the market value formula.

D. Business Lost Profits Resulting From Condemnation.

Certainly the most difficult to determine and one of the most recurring incidental losses is the loss profits involved in the condemnee's business or his inability to relocate. As might be expected, the courts buttress their denial of compensation for these losses by using all the traditional arguments.

A condemnee often suffers permanent business damage as the result of the taking of his property. To begin with, he may be forced to bear increased expenses for comparable property. In urban renewal programs, for example, condemnation of large areas of land may cause a diminution of available sites resulting in higher costs for the remaining property.[40] Since the market value of the condemned property is established as of the time of the taking, this increase may not be reflected in the award. Moreover, there might also be added the testimony of one appraiser who states:[41]

> "Often a homeowner or the owner of a business site in a neighborhood where the property is moderately priced is compelled to sell for a sum of money which will be inadequate to pay for similar property in a different section of the town, thus necessitating a substantially larger outlay of funds. In many cases he may not be in a position to raise the excess amount required. This happens frequently where freeways require the taking of numerous properties."

A condemnee, moreover, may not be able to relocate at all.[42] This is more likely to arise in extensive takings in a concentrated area. Particular businesses that are established to cater to the nature of the condemned neighborhood may find that their services are not in demand because of the different complexion of the changed area, or are not needed or permitted in other surrounding areas. Often such businesses as automobile repair firms, paint shops and chemical companies find it virtually impossible to procure a suitable location not too far removed from their present location due to local zoning laws.[43]

The vast amount of cases involving lost profits, however, involve situations wherein the condemnee is likely to make less profit on the new property than he did on the condemned site. (It might be added, of course, that often condemnees make more profit on the new sites than they did on the condemned property.) Due to a fear of "opening up the flood gates" courts are almost unanimous in denying for lost profits in these situations.[44] On the few occasions when they have afforded the condemnee compensation for these losses by "expanding" the market value formula, the lost profit figure was fairly certain and ascertainable.[45] However, because the courts are so sensitive that any exception to the denial of lost profits would bring about a wholesale raid upon the condemnor's treasury, they have denied compensation

for lost profits even though there was undisputed proof that past profits and "orders on hand" would, with reasonable certainty, guarantee similar profits in the future.

In the wake of this overwhelming weight of authority effectively denying condemnee for lost profits and other business losses, the State of Vermont, cognizant of the inequities involved in that situation, in 1957 enacted remedial legislation. The 1959 Vermont statute reads as follows:[46]

> "II. Damages resulting from the taking or use of property under provisions of this act shall be the value for the most reasonable use of property or right therein and of the business thereon, and the direct and proximate lessening in the value of the remaining property or right therein and the business thereon . . ."

Even a quick reading of this language is enough to show both that legislature sought to allow for business losses and, secondly, that the statute is undoubtedly too broad insofar as apparently on the surface it permits the condemnee to receive the value of his business whether or not there is a business loss. This provision was tested in a late 1959 case before the Supreme Court of Vermont. In Record v. Vermont State Highway Board[47] the defendants' land, used as a house trailer park, was condemned. The court held that since the condemnees had been fortunate in developing a like business in another place, that fact could be considered as lessening or mitigating their business damages; it, therefore, held that the capitalized value of the business on the

property being taken, under the instant fact situation, was not the proper measure of compensation. The court cited the 1957 Vermont statute (supra) and stated in that regard:

> "Prior to this enactment our law measured damage by the market value rule. This value was the difference between the value of the entire tract before the taking and its value thereafter. [cases cited] In the Nelson case [110 Vt. 44, 52, 1 A. 2d 689, 692] the Court recognized that there are many injuries resulting from highway construction for which land owners cannot be compensated. Mindful of these inequities the legislature quite clearly recognized that in some instances a business enterprise might be invaded and the yield of the business lessened or destroyed as the result of the taking of the land upon which the business is situated. Thus it imposed the statutory function upon the trial court to look beyond the value of the improved real estate actually seized by the state and search out to what extent, if any, the business interests of the land owners were damaged. It is only to the extent that a business is taken by the appropriation of the land on which it is situated that the legislature meant the compensation to be paid. A business may be intrinsicably [sic] related and connected with the land where it is located so that an appropriation of the land means an appropriation of the business. More often, however, this is not the case and an appropriation of the land has but a limited effect on the business. And this effect is not necessarily adverse. Where an appropriation necessitates a relocation in whole or in part of the business the question is what has, or would the business suffer by being transplanted. The trial court was required to look at all of the circumstances. A factual problem was presented, -- rather than a legal one."

The above language indicates that while the court found there was a complete mitigation of business damages in this case, in future cases Vermont will allow for business losses, specifically including lost profits, whenever the condemnee is unable to lessen or mitigate a business damage

due to the taking. To say the least, this is a radical departure from modern case law and even goes beyond both the limited exceptions presently being carved out in various jurisdictions regarding moving costs and the broad language used by some courts so as to enable condemnees to be reimbursed for losses of good will and for interruption expenses. In fact, the Vermont statute and the language in the Record case is virtually the same as the statutes and case law involved with the special Water Supply Statutes that existed in a few states at the turn of the century. (See discussion in Moving Cost Study.)

The difficulty with the Vermont statute is clear. Aside from the unnecessary and harmfully broad and ambiguous language adopted, the statute is exceedingly difficult to administer in the cases wherein the condemnation proceeding commences before the condemnor takes possession and the condemnee has moved to a new site. But even assuming these obstacles can be overcome by adequate statutory provisions, the question still remains, from a policy point of view, to what extent should a condemnor be held liable for business losses?

In conclusion, therefore, it might be stated that while courts will, on rare occasions, allow for lost profits by unduly expanding the market value formula, they are exceedingly wary of punching a hole in the dike of denial for fear of the ultimate or at least unknown consequences. Probably the Record case is a major modern exception to this rule.

E. Summary of Present Status of the law in Regard to Incidental Losses.

As was shown in the Moving Costs Study, there has been a recent trend by both the legislatures and courts permitting condemnees to recover for at least some of their moving expenditures. The "liberalization" of compensation has been reflected, as well, in regards to other aspects of incidental losses suffered by many condemnees as the result of governmental takings.[48] A few cases have awarded the condemnee for good will, business interruption damages, and other business losses, generally by broadening the market value formula. This trend is nowhere near as marked as the trend witnessed in moving cost situations. Indeed, the overwhelming weight of authority still is against the condemnee being compensated for such business damage. Even more pronounced is the continued denial by the courts and legislatures to consider the question of compensability for business lost profits.[49] The Vermont statute and the related case in that state are certainly exceptions to the rule.

But while the denial of business losses, in general, and lost profits, in particular, is still part of the basic pattern of compensation in American jurisdictions, it is equally clear that the grounds for this denial are somewhat more rational and more limited than formerly. No longer do the courts stress that these losses do not constitute property or property interests. No longer do the courts stress that

a "taking" must be equivalent to "taking over" in order that compensation be allowed. No longer do courts ignore these losses or dismiss them as being de minimis. Clearly, today the crux of non-compensability for incidental losses is that they are or may prove to be speculative and that, consequently, payment for these losses may impair future public improvements and may straddle the taxpayer with too much of a burden.

II. Recommendations Regarding Compensability for Incidental Losses.

Any proposed recommendation made must be advanced with the full recognition that the conflict on this subject involves perhaps the most basic tenet in all eminent domain law: What is "just compensation"? We have seen in this study as in the Moving Cost, Evidence and Apportionment studies the brooding omnipresence of this most difficult and unresolved question. The courts have taken the bull by the horns and have run in both directions -- they assert that the owner must be made whole, he must be indemnified and he must be put in the position, pecuniarily, after the taking as he was before. At the same time (excepting the instances as pointed out throughout these studies) the courts have almost unanimously adopted the in rem criterion of compensation. Having accepted this position, they have, in effect, equated just compensation with market value.

As the Evidence Study indicated, the problem of what is just compensation has not been squarely met by most

courts; the "internal" approach to value (with which the Evidence Study dealt) avoids the question by equating just compensation with market value, rather than with indemnification. This Study on Incidental Losses (including the study of moving costs) cannot evade this question. The "external" approach to value which includes factors over and above those things considered within market value, necessitates a resolution of the conflict as to whether just compensation really means indemnification.

We suggest that just compensation does and should mean nothing less than indemnification. There is no rational ground for differentiating between the rights of an individual as against other individuals, on the one hand, and as against a public body, on the other hand. In litigation between individuals the evolution of the law clearly has been brought to a stage wherein it can be said that if a person in any way harms another, without lawful cause, the injured person receives indemnification for his loss.[50] When a duty between private parties is broken, the law imposes a standard of indemnification because that is held to be in the expectation of the parties. Compensation for legal injury in private actions means indemnification. Today, it is advanced, the same expectation exists on the part of individuals whenever a public body causes injury. There remains no acceptable reason why the rights of the individual against the State or

its agencies should be relegated to an inferior position -- particularly in light of the import of the Fifth Amendment and the various state constitutions.

It is, therefore, advanced that incidental losses whenever provable to a reasonable certainty should be compensated for in condemnation actions. We cannot differentiate between those incidental losses discussed in this Study and moving costs but we find it necessary to go one step further and suggest that because of the long history of the denial of all incidental losses; because of the admitted difficulties that the courts and others will have in administering any proposed statute that encompasses compensation for all incidental losses; and, lastly, because of the many questions as yet unanswered (due to the lack of adequate experience with such statutes) a moratorium or delay would be in order before effectuating such a change.

Assuming that a moving cost statute is adopted, the courts, administrators and attorneys will have an opportunity to gain experience with reimbursement of at least one type of incidental loss. This should provide all concerned with some guidance in providing compensation for other incidental losses. To some extent it will give a better clue as to what the costs involved in broadening the scope of compensation will actually amount to. It will give public bodies time to test various methods of administering these costs which are over and above the market value criterion.

This considered delay will enable all those concerned to weigh the effects that the allowance of moving costs will have on courts, juries, appraisers and others.[51] Lastly, it will help to clarify, at least to some extent, the question of whether incidental losses are speculative and whether payment for these losses will lead to "swollen" verdicts.

Just compensation calls for nothing less than indemnification. Practicalities, however, warrant a delay in enforcing a full measure of compensation.

FOOTNOTES

(1) 1 Orgel on Valuation §3; see, generally, Evidence Study II.

(2) See, Comment, 67 Yale L.J. 61 (1957).

(3) 1 Orgel §2; Commissioners of Homochitto River v. Withers, 29 Miss. 21, 32 (1855); cf. Oakland v. Pacific Coast Lumber & Mill Co., 171 Cal. 392, 398, 153 Pax. 705, 707 (1915).

"The decision as to whether compensation should be made generally has been reached, however, upon purely legalistic grounds with a physical conception of the eminent domain process in mind." Cormack, "Legal Concepts in Cases of Eminent Domain," 41 Yale L.J. 221, 257-58 (1931).

(4) Mitchell v. United States. 267 U. S. 341, 345 (1925).

(5) 319 U.S. 266, 282 (1943).

(6) 171 Cal. 392, 398, 158 Pac. 705, 707 (1915).

(7) 267 U.S. 341, 345 (1925). See also State Hwy. Comm. v. Burk, 200 Ore. 211, 244-45, 265. P. 2d 783, 799. (1954).

(8) A number of judicial protests were raised against the practice of using such reasoning to deny compensation for non-physical losses. See Patterson v. Boston, 40 Mass. (23 Pick) 425 (1839). Compare Pumpelly v. Green Bay Co., 80 U.S. 166 (1871); Eaton v. B.C. & M.R.R.,

51 N.H. 504, 511 (1872); Thompson v. Androscoggin River Improvement Co., 54 N.H. 545, 551 (1874) where courts objected to the restricted meaning of "taking". See also Sedgwick, Statutory and Constitutional Law 524 (1857). See, generally, Cormack, supra Note 3.

Nichols states that the Eaton case, supra, came "too late to stand on its own merits as an interpretation of the constitution." 2 Nichols 288. But see, e. g., Jacksonville Express Auth'y v. Henry G. Dupree Co., 108 S. 2d 289, 291 (Fla. 1958) and Housing Auth'y v. Savannah Iron & Wire Works, Inc., 91 Ga. App. 881, 87 S.E. 2d 671 (1955).

(9) See United States v. General Motors Corp., 323 U.S. 373, 385 (1945) (Douglas J., concurring in part: "promises swollen verdicts"). See also United States v. 3.544 Acres of Land, 147 F. 2d 596, 598 (3d Cir. 1945); Eagle Lake Improvement Co. v. United States, 141 F. 2d 562, 564 (5th Cir. 1944); Housing Auth'y v. Green, 200 La. 463, 474, 8 So. 2d 295, 299 (1942); Sawyer v. Commonwealth, 182 Mass. 245, 247, 65 N.E. 52, 53 (1902); In re Slum Clearance, 332 Mich. 485, 496, 52 N.W. 2d 195, 200 (1952); Banner Milling Co. v. New York, 240 N.Y. 533, 540, 148 N.E. 668, 670 (1925).

(10) See, generally, Note, "Good Will", 53 Colum. L. Rev. 660 (1953). See also Foreman, "Conflicting Theories of Good Will", 22 Colum. L. Rev. 638 (1922).

(11) Bailey v. Boston & P.R.R., 182 Mass. 537, 539, 66 N.E. 203, 204 (1903).

(12) Sauer v. Mayor, 44 App. Div. 305, 308, 60 N.Y. Supp. 648, 650 (1st Dept. 1889).

(13) Standard Mach. Co. v. Duncan Shaw Corp., 208 F. 2d 61 (1st Cir. 1953).

(14) Perkins v. Langdon, 237 N.C. 159, 74 S.E. 2d 634 (1953); Pace Corp. v. Jackson, 284 S.W. 2d 340 (Tex. 1955); Wood v. Pender-Doxey Grocery Co., 151 Va. 706, 144 S.E. 635 (1928). See Webster v. Beau, 77 Wash. 444, 450, 137 Pac. 1013, 1015 (1914) where the court said: "[W]here an established business has been interrupted or destroyed by breach of contract, or by tort, a resulting loss of profits may become the basis of a recovery, there being a past experience sufficient to render the extent of such loss reasonably certain, and fairly susceptible of proof." See, generally, 5 Corbin, Contracts §§1020, 1023, 1029 (1950).

(15) Roseland v. Phister Mfg. Co., 125 F. 2d 417, 420 (7th Cir. 1942) (expected profits allowed in restraint of Trade suit); Johnson v. Railroad, 140 N.C. 574, 578-79, 53 S.E. 362, 364 (1906) (prospective profits allowed where factory tortiously burned). See also 1, 2 Harper & James, Torts §§6.13, 25.3 (1956); Nims, "Damages and Accounting Procedure in Unfair Competition Cases, 31 Cornell L. Q. 431 (1946); Wright, "Tort

Responsibility for Destruction of Good Will," 14 Cornell L.Q. 298 (1929); Note, The Requirement of Certainty in the Proof of Lost Profits, 64 Harv. L. Rev. 317, 318 (1950); Note 7 Stan. L. Rev. 97, 111 (1954).

(16) See Adams Express Co. v. Ohio, 166 U.S. 185, 221 (1897) (good will thing of value and taxable as such); Raytheon Production Corp. v. Comm'r, 144 F. 2d 110 (1st Cir.), cert. denied, 323 U.S. 779 (1944); Richard S. Wyler, 14 T.C. 1251 (1950); Armstrong, "Tax Valuation of Good Will" 1951 U. So. Calif. Tax. Inst. 453; Schwartz, "Good Will in Tax Law," 8 Tax. L. Rev. 96 (1952); Note, 1 Stan. L. Rev. 64 (1948).

(17) None of the reported cases and none of the authorities in England;and Canada have broached the existence of any particular problem in ascertaining these losses. The consultants have communicated with various authorities in England, particularly the Ministry of Housing and Local Government and the Ministry of Transportation, both ministries are responsible for the bulk of condemnation in England. In replying to our letters, they have stated that the payment of incidental losses (Moving Cost and other disturbance costs) has not impaired to any noticeable extent public improvement. Nor have they made mention of any difficulty that may possibly arise regarding the ability of the courts to

determine exactly the amounts payable for these losses. The Moving Cost Study cited the various cases, statutes and authorities in England and Canada on this subject. The British Housing Act of 1957 grants the Ministry the discretionary power for compensating condemnees for these incidental losses. The following is the pertinent text of that Act:

"Part II - Section 32
Payments to persons displaced.

"32. A local authority may pay to persons displaced from a house to which a demolition order made under this Part of this Act, or a closing order, applies, or which has been purchased by them under this Part of this Act, such reasonable allowance as they think fit towards his expenses in removing, and to any person carrying on any trade or business in any such house they may pay also such reasonable allowance as they think fit towards the loss which, in their opinion, he will sustain by reason of the disturbance of his trade or business consequent on his having to quit the house, and in estimating that loss they shall have regard to the period for which the premises occupied by him might reasonably have been expected to be available for the purpose of his trade or business and the availability of other premises suitable for that purpose."

"Part III - Section 63
Power of local authority to make allowances to persons displaced.

"63. - (1) A local authority may pay to any person displaced from a house or other building -

(a) to which a clearance order applies, or

(b) which has been purchased by them under the provisions of this Part of this Act relating to clearance areas, or

(c) which has been purchased by them under the provisions of this Part of this Act relating to redevelopment areas as being unfit for human habi-

tation, and not capable at reasonable expense of being rendered so fit,

such reasonable allowance as they think fit towards his expenses in removing, and to any person carrying on any trade or business in any such house or other building, they may pay also such reasonable allowance as they think fit towards the loss which, in their opinion, he will sustain by reason of the disturbance of his trade or business consequent on his having to quit the house or building, and in estimating that loss they shall have regard to the period for which the premises occupied by him might reasonably have been expected to be available for the purpose of his trade or business and the availability of other premises suitable for that purpose.

(2) Where, as a result of action taken by a local authority under the provisions of this Part of this Act relating to clearance areas, the population of the locality is materially decreased, they may pay to any person carrying on a retail shop in the locality such reasonable allowance as they think fit towards any loss involving personal hardship which in their opinion he will thereby sustain, but in estimating any such loss they shall have regard to the probable future development of the locality."

(18) See In re Slum Clearance 332 Mich. 485, 495, 52 N.W. 2d 195, 199-200 (1952); Dallas v. Priolo, 150 Tex. 423, 426-27, 242 S.W. 2d 176, 179 (1959); Herndon v. Housing Auth'y, 261 S.W. 2d 221, 223 (Tex. Civ. App. 1953). See also 6 Fla. Stat. Ann. §73.10 (Supp. 1956) Cf. Ind. Ann. Stat. §3-1706 (Burns Supp).

(19) See, generally, Comment, 67 Yale L.J. 61 (1957).

(20) See United States v. New River Collieries Co., 262 U.S. 341 (1923); United States v. Miller, 317 U.S. 369 (1943).

(21) United States v. General Motors Corp., 323 U.S. 373, 385 (1945); United States v. Building Known

as 651 Brannan Street, 55 F. Supp. 667, 670 (N.D. Cal. 1944); Housing Auth'y v. Holloway, 63 Ga. App. 485, 488, 11 S.E. 2d 418, 420 (1940).

(22) W. Rought, Ltd. v. West Suffolk County Council [1955] 2 all E.R. 337, 342 (C.A.).

(23) See Note, "Good Will," 53 Colum. L. Rev. 660, 664-65 (1953). See also 1 Orgel §75; McCormick, Damages, 547.

(24) In re Jeffries Home Housing Project, 306 Mich. 638, 651, 11 N.W. 2d 272, 276 (1943).

(25) Housing Auth'y v. Lustig, 139 Conn. 73, 90 A. 2d 169 (1952).

(26) See 1 Orgel §164. Cf. Highway Comm'n v. Superbilt Mfg. Co., 204 Ore. 393, 420-21, 281 P. 2d 707, 719-20 (1955). See, generally, Comment, 67 Yale L.J. 61, 75-76; 26 Conn. B.J. 404, 406-07 (1952).

(27) 338 U.S. 1 (1949).

(28) 338 U.S. at 15.

(29) 338 U.S. at 23.

(30) 114 So. 2d 237, 242 (1959).

(31) The courts have labeled such losses "speculative" even when a condemnee's moving expenses at the time of condemnation have proved necessarily greater than those which would

exist at some future date. See 1 Orgel §69; cf. New York Cent. & H.R.R.R. v. Pierce, 35 Hun. 306 (N.Y. Sup. Ct. 1885), or when the condemnee has not acted upon whim in relocating after condemnation, but has incurred only reasonable expenses. See, e.g., St. Louis v. St. Louis S.M.&S. Ry., 266 Mo. 694, 698, 182 S.W. 750, 751 (1916) ("It is conceded even that, if these three items were proper subjects of damage, then the amount allowed the respondent therefor is fair and reasonable."). See also United States v. 40.558 Acres of Land, 62 F. Supp. 98, 100-01 (D.C. Del. 1945); Highway Comm'n v. Superbilt Mfg. Co., 204 Ore. 393, 281 P. 2d 707 (1955). See Note (39).

(32) Housing Auth'y v. Savannah Iron & Wire Works, Inc., 91 Ga. App. 881, 87 S.E. 2d 671 (1955).

(33) The Michigan court in the Dake case, infra, sought to distinguish "interruption expenses" from "lost profits due to interruption". It is doubtful whether such a distinction will be meaningful in most instances.

(34) See, generally, 67 Yale L.J. 61, 80 (1957).

(35) 357 Mich. 20, 97 N.W. 2d 748 (1959).

(36) Compare Grand Rapids & I.R. Co. v. Weiden,

70 Mich. 390, 38 N.W. 294, 295 (1888) with Dake and In re Slum Clearance, 332 Mich. 485, 495, 52 N.W. 2d 195, 199-200 (1952)

(37) Weiden case, supra and Commissioners of Parks & Boulevards v. Moesta, 91 Mich. 149, 154, 151 N.W. 903, 905 (1892).

(38) 97 N.W. 2d at 753-54.

(39) In re Slum Clearance, 332 Mich. 485, 496, 52 N.W. 2d 195, 200 (1952).

(40) See, e.g., In re Slum Clearance, N. 39 supra See also Slonim, "Injustices in Eminent Domain," 25 Appraisal J. 421, 423 (1957).

(41) Slonim, supra, Note (40)

(42) See Mitchell v. United States, 267 U.S. 341 (1925) (inability to find substitute land to raise particular crop); Reeves v. Dallas, 195 S.W. 2d 575, 581 (Tex. Civ. App. 1946) (inability to find substitute premises for night club.)

(43) See Slonim, supra Note (40), at 424.

(44) See, Comment, 67 Yale L. J. 61, 62, N. 7.

(45) See, e.g. Patterson v. Boston, 40 Mass. (23 Pick.) 425, 430 (1840).

(46) 19 V.S.A. §221 (2) (1957).

(47) 154 A. 2d 475 (1959).

(48) See, e.g., The Dake and Record cases, supra. See also, Searles and Raphael, "Current Trends in the Law of Condemnation," 27 Ford. L. Rev. 529, 549 (1959).

(49) See "Report of Massachusetts Special Commission Relative to Certain Matters Pertaining to the Taking of Land by Eminent Domain," House No. 2738, p. 13 (1956); See also 88 Cong. Rec. 1649, 1650, 1653, 1654, 1656 (1942). Even the "liberal" Dake case emphasized that lost profits are noncompensable.

(50) See notes 13-16, supra.

(51) Cf. Pearl, "Appraiser's Guide Under Law Allowing Moving Costs", 21 Appraisal J. 327, 330 (1930) wherein the author after commenting about the fact that some appraisers "subconsciously" allow for incidental losses, indicated the probable effect of the 1952 federal act allowing Moving Costs in defense projects: "While no actual cases of such influences [subsconscious inclusion] have been documented or are known to exist, suffice to say that henceforth defense projects, large and small alike, will be removed from the pale of such influences, objective or subjective. All will know and be ever mindful that by the payment of his expenses in moving a fair and specific contribution is being effected towards making the seller truly 'whole'",