EMINENT DOMAIN:

CONDEMNEE'S PERSPECTIVE ON METHODS OF ACQUISITION AND VALUATION ISSUES

Charles N. Pursley

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Any current discussion of eminent domain from a condemnee's perspective or a condemnor's perspective must consider the impact of the United States Supreme Court decision in Kelo v. City of New London, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005) in which the Court upheld the constitutional and statutory authority of the City of New London, Connecticut to condemn private property for the economic redevelopment of the downtown area, including the ultimate use of the property by private enterprise. Whether this case created new condemnation rights for economic redevelopment under a public benefit theory is open to debate. Georgia and virtually every other state had constitutional and statutory provisions that would allow the condemnation of physically, economically and socially impaired property for redevelopment by public or private entities. The truly earth shaking effect after the Kelo decision in Georgia and throughout the United States has been from the governmental and the public reaction to that decision. The rallying cry in news articles, editorials, television and radio commentary and legislative hearings seemed to be "the State can take your property and give it to Wal-Mart."

In Georgia, the Kelo decision and ongoing condemnation cases for economic redevelopment of downtown areas lead to year-long legislative hearings around the State and numerous proposed statutes addressing every imaginable area of eminent domain law. Finally, in the 2006 legislative session, proposed constitutional amendments and statutes were adopted severely limiting if not totally prohibiting the condemnation of property for redevelopment purposes that would include the use of

property by private enterprise. The legislature also adopted substantial amendments to condemnation procedures and to property owners rights in condemnations for traditional public uses. Ga. L. 2006, p.39, et. seq. (House Bill 1313) (the "Act"). The Act is known as "The Landowners Bill of Rights and Private Property Protection Act."

The substantial portions of the Act dealing with property owner protections in condemnation cases are codified in O.C.G.A. §§22-1-1, 22-1-2, and 22-1-9 through 22-1-14. The Georgia Department of Community Affairs has prepared a standardized landowners notice of rights for general information purposes but not as a substitute for legal advice. A copy of the notice is attached as Exhibit "A."

The Kelo case and the media and legislative response to it has had a dramatic and continuing impact on the public in general and jury pools in particular. Before Kelo it was rare to find more than 1 in 12 jurors who had a basic understanding of eminent domain or any particular feelings about this area of law. After Kelo and the resulting publicity, most jurors have some understanding of eminent domain and certainly strong opinions about this area of law, and this knowledge and these opinions have had and continue to have an influence on jury verdicts on condemnation cases.

I. Condemnation Procedures

The methods of condemnation have remained the same – the assessor method (O.C.G.A. §§22-2-20 through 22-2-86), the special master method (O.C.G.A. §§22-2-101 through 22-2-114), and the declaration of taking method (O.C.G.A. §§32-3-1 through 32-3-20) – although the Act contains amendments to the assessor method and the special master method. In representing a condemnee it is wise always to review the statute under which the case is filed and the Act for basic issues such as:

1. Have the proper pre-taking procedures been followed;
2. Is this condemnation for a lawful public use as defined in the Act and in the Georgia Constitution;
3. Is this particular condemnation method authorized for this condemning body and for this particular public use;
4. Are there non-value issues that would limit or defeat the condemnation action such as an inadequate legal description of the rights being condemned, no public use or purpose in the condemnation, bad faith by the condemnor, or condemnation beyond the power or authority of this condemning body;
5. What is the procedure to raise non-value issues;
6. What are the procedures to raise value issues;
7. What are the procedures to appeal for a jury trial.

From day one the attorney for a condemnee should plan for a jury trial but work to avoid trial through negotiation, mediation or an interim fact finder such as a special master panel.

II. Compensation and Damage Issues

A. Just and Adequate Compensation for Real Estate Interests

1. Compensation for Real Estate – An Overview

One of the most fundamental concepts in eminent domain law is that compensation must be determined as of the date on which the legal taking or damaging of the property occurs. DeKalb Co. v. United Family Life Insurance Co., 235 Ga. 417, 219 S.E.2d 707 (1975); Housing Auth. of the City of Decatur v. Schroeder, 222 Ga. 417, 151 S.E.2d 226 (1966); Josh Cabaret, Inc. v. Department

of Transportation, 256 Ga. 749, 353 S.E.2d 346 (1987). Just and adequate compensation usually is based upon the fair market value of the property on that date and not upon its value at some prior or future time. Wright v. MARTA, 248 Ga. 372, 283 S.E.2d 466 (1981); Housing Auth. of the City of Decatur v. Schroeder, supra. In addition to recovery of the fair market of property and property interest actually condemned, just and adequate compensation also includes the recovery of consequential damages to any remaining property not taken measured by the reduction or decrease in fair market value caused by the taking of a part of the property for a public use. Wright v. MARTA, supra; Tiffs County v. Smith, 219 Ga. 68, 131 S.E.2d 527 (1963). Consequential benefits to remaining property may be offset against consequential damages, but benefits may not be offset against the value of the property actually taken. O.C.G.A. §§22-2-62, 22-2-63; Ivy Inn, Inc. v. MARTA, 255 Ga. 557, 340 S.E.2d 600 (1986). A consequential benefit is one that adds to the convenience, accessibility or usefulness of the property. Department of Transportation v. Knight, 143 Ga.App. 748, 240 S.E.2d 90 (1977); Williams v. State Highway Department, 124 Ga.App. 645, 185 S.E.2d 616 (1971).

Evidence of fair market value normally is presented through the testimony of real estate appraisers using one or more of the three traditional appraisal approaches – market or sales comparison approach, income approach or the cost approach. The form of the appraisal evidence normally is through a five step procedure:

1. The witness should first state the opinion of the fair market value of the property before any part is taken.
2. The witness should then give the opinion of the value of the property actually taken.
3. The witness next should state the value of the remaining property just before the part is taken. This is merely the result of subtracting the value of the part taken from the value of the entire property, and this is the basis for evaluating consequential damages and consequential benefits.
4. The witness should then give the opinion of the market value of the remaining property just after the part is taken considering only the negative impact of the taking and the public improvement. The difference, if any, between this figure and the value of the remainder before the taking would indicate the amount of consequential damages.
5. Finally, the witness should state the opinion of the market value of the remaining property just after the part is taken considering all of the positive impact of the taking and the public improvement. The difference, if any, between this figure and the value of the remainder before the taking would indicate the amount of consequential benefits.

The five step procedure was cited with approval in Department of Transportation v. Gunnels, 175 Ga.App. 632, 334 S.E.2d 197 (1985), rev'd on other grounds 255 Ga. 495, 340 S.E.2d 12 (1986).

Relevant evidence of value of real estate may be provided by other expert or non-expert witnesses including the owner or occupant of the property, real estate

agents or brokers, surveyors, civil engineers, structural engineers, or developers of similar properties.

2. Compensation For Access Damages

Any time the plans for a public road project or any other public project involve a change in the access from any property to an adjoining road, a condemnation action to acquire part of the property will raise issues of just and adequate compensation for the taking, damaging or impairing the owner's right of access. The right of access, as a property right and as a physical attribute, is of critical importance to the use and value of any property, and a taking or interference with access can cause major changes in use and value.

Although condemnation cases involving the taking or damaging of access go back nearly 100 years, the legal concept of access still causes confusion. Some cases are clear cut - the legal right of access is taken specifically for a limited access highway or to control access at certain points. The designations BLA (begin limited access) and ELA (end limited access) on a set of right of way plans can strike fear in the hearts of property owners. But some changes in access are not so clear cut. What about a change in the grade elevation of the road; the construction of a median in front of the property; the relocation of the adjoining road and replacing it with a service road; the obstruction of the road just beyond the property?

The right of access or easement of access to a public road is a property right that arises from the ownership of land adjacent to the road, and the taking or damaging of this right requires the payment of just and adequate compensation

in a condemnation case. MARTA v. Datry, 235 Ga. 568,220 S. E. 2d 905 (1975); Dep't of Transp. v. Hardin, 231 Ga. 359, 201 S. E. 2d 441 (1973); Tift County v. Smith, 219 Ga. 68, 131 S. E. 2d 527 (1963); Dougherty County v. Hornsby, 213 Ga. 114, 114,97 S. E. 2d 300 (1957); State Hwy. Bd. v. Baxter, 167 Ga. 124, 144 S. E. 796 (1928); Brock v. Dep't of Transp., 151 Ga. App. 905, 262 S. E. 2d 156 (1979), overruled on other grounds, Dep't of Transp. v. Hillside Motors, Inc., 192 Ga. App. 637, 642, 385 S. E. 2d 746 (1989); Clayton County v. Billups Eastern Petroleum Co., 104 Ga. App. 778, 123 S. E. 2d 187 (1962).

The owner of property adjacent to a public road has the right in common with the general public to use and enjoy the road for travel to whatever places may be reached by the road. But the owner also has a second category of rights arising solely from his ownership of the property and not shared by the general public, and it is only the taking or damaging of the category of special rights that gives rise to the recovery of just and adequate compensation. Tift County v. Smith, 219 Ga. 68, 131 S. E. 2d 527 (1963); Dougherty County v. Hornsby, 213 Ga. 114, 97 S. E. 2d 300 (1957); Dep't of Transp. v. Eastern Oil Co., 149 Ga. App. 504, 254 S. E. 2d 730 (1979); Whitehead v. Dep't of Transp., 253 Ga. 150, 317 S. E. 2d 542 (1984), aff'g 169 Ga. App. 226, 312 S. E. 2d 344 (1983); MARTA v. Fountain, 256 Ga. 732, 352 S. E. 2d 781 (1987), rev'g 179 Ga. App. 318, 346 S. E. 2d 363 (1986); Dep't of Transp. v. Coley, 184 Ga. App. 206, 360 S. E. 2d 924 (1987).

The compensable property right of access consists of the right of ingress to and egress from the property to the abutting public road and from there to the system of public roads. MARTA v. Datry, 235 Ga. 568, 220 S. E. 2d 905 (1975);

Dougherty County v. Hornsby, 213 Ga. 114, 97 S. E. 2d 300 (1957); State Hwy. Bd. v. Baxter, 167 Ga.124,144 S. E. 796 (1928); Whitehead v. Dep't of Transp., 253 Ga. 150, 317 S. E. 2d 542 (1984), aff'g 169 Ga. App. 226, 312 S. E. 2d 344 (1983); MARTA v. Fountain, 256 Ga. 732, 352 S. E. 2d 781 (1987), rev'g 179 Ga. App. 318, 346 S. E. 2d 363 (1986). The interference with the right of access must in some way limit, restrict, or obstruct the access from the property to the public road. MARTA v. Datry, 235 Ga. 568, 220 S. E. 2d 905 (1975); Dougherty County v. Hornsby, 213 Ga. 114, 97 S. E. 2d 300 (1957); State Hwy. Bd. v. Baxter, 167 Ga. 124,144 S. E. 796 (1928); Valley View Church of God in Christ, Inc. v. Atlanta Housing Auth., 157 Ga. App. 6, 276 S. E. 2d 71 (1981); Dougherty County v. Snelling, 132 Ga. App. 540, 208 S. E. 2d 362 (1974). The nature of the interference could be a curb along the property (Dougherty County v. Hornsby, 213 Ga. 114, 97 S. E. 2d 300 (1957); Dougherty County v. Snelling, 132 Ga. App. 540, 208 S. E. 2d 362 (1974)), the elimination of existing driveways or access points (Dougherty County v. Hornsby, 213 Ga. 114, 97 S. E. 2d 300 (1957); Mayor of Athens v. Gamma Delta Chapter House Corp., 86 Ga. App. 53, 70 S. E. 2d 621 (1952)), the change in the grade of the road (Whipple v. Houston County, 214 Ga. 532,105 S. E. 2d 898 (1958); Dep't of Transp. v. Kendricks, 150 Ga. App. 9, 256 S. E. 2d 610 (1979), rev'd on other grounds, 244 Ga. 613, 261 S. E. 2d 391 (1979); State Hwy. Dep't v. Murray, 102 Ga. App. 210, 115 S. E. 2d 711 (1960)), the elimination of all vehicular traffic from the road (MARTA v. Datry, 235 Ga. 568, 220 S. E. 2d 905 (1975), or the elimination of a sidewalk (Brown v. City of East Point, 148 Ga. 85, 95 S. E. 962 (1918).

An obstruction that is not within the boundary of the property adjoining the road and which, therefore, does not impair the access from the property onto the road does not constitute a compensable interference with access. Tift County v. Smith, 219 Ga. 68,131 S. E. 2d 527 (1963); Floyd County v. Griffin, 109 Ga. App. 802, 137 S. E. 2d 483 (1963). Riviera Associates v. Dep't of Transp., 174 Ga. App. 29, 329 S. E. 2d 221 (1985). See MARTA v. Fountain, 256 Ga. 732, 352 S. E. 2d 781 (1987), rev'g 179 Ga. App. 318, 346 S. E. 2d 363 (1986). For example, where a permanent dead end obstruction is placed across the road a short distance from the property but the access is unchanged along the entire boundary of the property, there can be no recovery for impairment of access. Tift County v. Smith, 219 Ga. 68,131 S. E. 2d 527 (1963); Floyd County v. Griffin, 109 Ga. App. 802, 137 S. E. 2d 483 (1964). The fact that the owner must drive a longer distance to reach a particular location is an inconvenience shared with the general public and is not a taking or damaging of any special property right. Tift County v. Smith, 219 Ga. 68, 131 S. E. 2d 527 (1963); MARTA v. Fountain, 256 Ga. 732,352 S. E. 2d 781 (1987), rev'g 179 Ga. App. 318, 346 S. E. 2d 363 (1986); Dep't of Transp. v. Taylor, 264 Ga. 18, 440 S. E. 2d 652 (1994), rev'g 207 Ga. App. 707, 429 S. E. 2d 108 (1993). Such an inconvenience is considered to be merely circuity of travel for which compensation cannot be recovered. Tift County v. Smith, 219 Ga. 68,131 S. E. 2d 527 (1963); State Hwy. Dep't v. Cantrell, 119 Ga. App. 241,166 S. E. 2d 604 (1969); State Hwy. Dep't v. Bell, 113 Ga. App. 768,149 S. E. 2d 752 (1966); Floyd County v. Griffin, 109 Ga. App. 802, 137 S. E. 2d 483 (1964); Dep't of Transp. v. Katz, 169 Ga. App. 310, 312 S. E. 2d 635 (1983). See

Dep't of Transp. v. Whitehead, 253 Ga. 150, 317 S. E. 2d 542 (1984), aff'g 169 Ga. App. 226, 312 S. E.2d 344 (1983), for a discussion of the difference between a compensable taking of access and a non-compensable circuity of travel. See also MARTA v. Fountain, 256 Ga. 732, 352 S. E. 2d 781 (1987), rev'g 179 Ga. App. 318, 346 S. E. 2d 363 (1986); Mathis v. Dep't of Transp., 185 Ga. App. 658, 365 S. E. 2d 504 (1988).

In Department of Transportation v. Whitehead, supra., the court distinguished between the special property rights of a landowner which are compensable and the rights in common with the general public, which are non-compensable. The closing of 19th Street at its intersection with Peachtree Street, which was not within the boundary of the property, was not compensable, but the taking of the legal right of access to Peachtree Street and West Peachtree Street within the boundary of the property was compensable even though that access was not used at the time of the condemnation. The Whitehead case also holds that when a property owner's right of access to a public road is taken or interfered with, the fact finder may consider the inconvenience and circuity of travel in reaching his property in determining the amount of consequential damages caused by the taking of or interference with access, and whether the property has other means access.

Not every obstruction of access within the boundaries of the property requires compensation. The owner is not entitled to access to his land at all points along the boundary between the road and the property, but his access cannot be totally cut off, he must be given convenient access to his property and improvements,

and his means of ingress and egress may not be substantially interfered with. Charles v. Cobb County, 231 Ga. 696, 203 S. E. 2d 503 (1974); State Hwy. Bd. v. Baxter, 167 Ga. 124, 144 S. E. 796 (1928); Brock v. Dep't of Transp., 151 Ga. App. 905, 262 S. E. 2d 156 (1979), overruled on other grounds, Dep't of Transp. v. Hillside Motors, Inc., 192 Ga. App. 637, 642, 385 S. E. 2d 746 (1989); Clayton County v. Billups Eastern Petroleum Co., 104 Ga. App. 778,123 S. E. 2d 187 (1962); Dep't of Transp. v. Pilgrim, 175 Ga. App. 576, 333 S. E. 2d 866 (1985); Dep't of Transp. v. Katz, 169 Ga. App. 310, 312 S. E. 2d 635 (1983); Panos v. Dep't of Transp., 162 Ga. App. 53, 290 S. E. 2d 295 (1982).

Whether the property owner has reasonable access to the property and whether the existing access was substantially interfered with are questions of fact to be decided by the jury. Circle K General v. Dept. of Transportation, 196 Ga. App. 616, 396 S.E.2d 522 (1990); DeKalb County v. Glaze, 189 Ga. App. 1, 375 S.E.2d 66 (1988).

The term "access" does not include the use of a public road for parking or loading zones even though these uses may be quite valuable to the property; a property right to use a public road for parking or loading does not exist as an incident of the right of access or independently of that right. MARTA v. Datry, 235 Ga. 568, 220 S. E. 2d 905 (1975). The right of access also does not include any right to a certain flow of traffic along the road in front of the property, so long as all vehicular traffic is not prohibited. MARTA v. Datry, 235 Ga. 568, 220 S. E. 2d 905 (1975); Dougherty County v. Snelling, 132 Ga. App. 540, 208 S. E. 2d 362 (1974). The public authority may prohibit certain types of vehicles, Schlesinger v.

City of Atlanta, 161 Ga. 148,129 S. E. 861 (1925), prohibit left turns into the property, Dougherty County v. Snelling, 132 Ga. App. 540, 208 S. E. 2d 362 (1974) (but see Dep't of Transp. v. Consolidated Equities Corp., 181 Ga. App. 672, 353 S. E. 2d 603 (1987)), permit traffic in one direction only, Hadwin v. Mayor of Savannah, 221 Ga. 148, 143 S. E. 2d 734 (1965); Dep't of Transp. v. Katz, 169 Ga. App. 310, 312 S. E. 2d 635 (1983), or construct median dividers without the payment of compensation for an impairment of access, Hadwin v. Mayor of Savannah, 221 Ga. 148,143 S. E. 2d 734 (1965); Clark v. Clayton County, 133 Ga. App. 171, 210 S. E. 2d 335 (1974); Dougherty County v. Snelling, 132 Ga. App. 540, 208 S. E. 2d 362 (1974) (but see Dep't of Transp. v. Consolidated Equities Corp., 181 Ga. App. 672, 353 S. E. 2d 603 (1987)).

The taking of property for a limited access highway does not give rise to a compensable loss of access to the new highway, although damages may be recovered when the new highway replaces an existing road to which the property had access. Dep't of Transp. v. Hardin, 231 Ga. 359,201 S. E. 2d441 (1973); State Hwy. Dep't v. Kinsey, 131 Ga. App. 770, 206 S. E. 2d 835 (1974); State Hwy. Dep't v. Ford, 112 Ga. App. 270,144 S. E. 2d 924 (1965). Furthermore, where a limited access highway divides the property into two tracts, the owner may recover damages for the loss of access from one tract to the other. Dep't of Transp. v. Hardin, 231 Ga. 359,201 S. E. 2d441 (1973); State Hwy. Dep't v. Kinsey, 131 Ga. App. 770,206 S. E. 2d 835 (1974); State Hwy. Dep't v. Ford, 112 Ga. App. 270, 144 S. E. 2d 924 (1965). The construction of a service road in connection with the new highway will not prevent the recovery of damages for the loss of access to the

existing road. Circle K General v. Dept. of Transportation, 196 Ga. App. 616, 396 S.E.2d 522 (1990); Clayton County v. Billups Eastern Petroleum Co., 104 Ga. App. 778, 123 S. E. 2d 187 (1962).

A compensable taking or damaging of access is not a separate element of compensation, but it is one factor to be considered in assessing consequential damages to the remaining property. Potts v. State Hwy. Dep't, 120 Ga. App. 164, 169 S. E. 2d 678 (1969); Klumok v. State Hwy. Dep't, 119 Ga. App. 505,167 S. E. 2d 722 (1969); Dep't of Transp. v. Whitehead, 253 Ga. 150, 317 S. E. 2d 542 (1984), aff'g 169 Ga. App. 226, 312 S. E. 2d 344 (1983); Dendy v. MARTA, 163 Ga. App. 213, 293 S. E. 2d 372 (1982), rev'd on other grounds, 250 Ga. 435, 298 S. E. 2d 498 (1983). The damages are measured by the reduction in the market value of the remaining property caused by the condemnation. MARTA v. Datry, 235 Ga. 568,220 S. E. 2d 905 (1975); Potts v. State Hwy. Dep't, 120 Ga. App. 164,169 S. E. 2d 678 (1969); Klumok v. State Hwy. Dep't, 119 Ga. App. 505, 167 S. E. 2d 722 (1969). In some cases the temporary, total obstruction of access can cause the destruction of a business for which business damages may be recovered. DeKalb County v. Cowan, 151 Ga. App. 753, 261 S. E. 2d 478 (1979); Dep't of Transp. v. Martin, 174 Ga. App. 616, 331 S. E. 2d 45 (1985); Downside Risk, Inc. v. MARTA, 168 Ga. App. 202, 308 S. E. 2d 547 (1983).

B. Business Damage Issues

The concept of a unique value that is different from and greater than fair market value of the real property to be acquired in a condemnation case has been recognized for many years. This concept has evolved into two distinct theories of

just and adequate compensation; one where real property has a unique or peculiar value to its owner in excess of the fair market value, and another where property is uniquely suited for a particular business and the business suffers damage that is separate from the compensation for the taking of the real property. Raiford v. Department of Transportation, 206 Ga.App. 114, 424 S.E.2d 789 (1992). In cases involving business loss claims, Georgia courts continue to focus on the definitions of "uniqueness" and how the theories of unique value apply in such cases.

1. Business Damage - An Overview

It is not uncommon to see business damage claims many times larger than the value of the real estate alone. In such cases, the condemnation case becomes more of a business litigation matter rather than a real estate evaluation problem.

Any time a condemnation action touches property devoted to business use, there is a potential claim for business damage. The claim can arise regardless of whether the business is operated by the property owner or by a lessee and regardless of whether the entire property or just a part of it is condemned. Even if a small portion of the property is condemned, the taking may significantly affect the operation of the business by impairing access to or parking for the business.

The recovery of compensation for business damage originated in 1966 when the Georgia Supreme Court held for the first time in Bowers v. Fulton County, 221 Ga. 731, 146 S.E.2d 884 (1966) that a property owner could

recover for business damage as a separate item of damage in addition to the value of the property condemned. In so holding, the Court expressly overruled numerous earlier cases that disallowed the recovery of business damages and limited evidence of such damages to the purpose of showing the use and value of the property condemned. The Court held that the pronouncement of those cases was obiter dictum and that the cases failed to perceive that the owner was entitled to recover for damage to all species of property, including real and personal, corporeal and incorporeal property.

The loss of an established business is different from a consideration of the business use of the property that affects the value of the property itself, because the value of the business may exceed the value of the premises where it is conducted. The destruction of a business is a separate item of recovery in a condemnation case because the constitution requires compensation for the taking or damaging of all species of property and for the expenses caused by the condemnation proceedings. Bowers v. Fulton County, supra.

In spite of the broad language of the Bowers decision, there are several elements of procedure and proof that are required before business damage may be recovered. The condemnee must plead and prove business damage as a separate element - the condemnor is not required to include business damage in its computation of just and adequate compensation. Lil Champ Food Stores, Inc. v. Department of Transp., 230 Ga.App. 715, 498 S.E.2d 94 (1998). Initially, the condemnee must prove that a business was operated on the property. Georgia Power Co. v. Jones, 277 Ga.App. 332, 626 S.E.2d 554

(2006); Davis Company, Inc. v. Department of Transp., 262 Ga.App. 138, 584 S.E.2d 705 (2003); Taylor v. Jones County, 205 Ga.App. 628, 422 S.E.2d 890 (1992). Department of Transp. v. Morris, 194 Ga.App. 813, 392 S.E.2d 291 (1990). But see, Department of Transp. v. Acree Oil Co., 266 Ga. 336, 467 S.E.2d 319 (1996) holding that the absence of a business in operation on the property on the date of taking did not necessarily preclude evidence of business loss. See also Carroll County Water Authority v. L.J.S. Grease & Tallow, Inc., 274 Ga.App. 353, 617 S.E.2d 612 (2005) (holding that closure of business more than a year prior to date of taking did not preclude claim for business loss where closure was due to pending condemnation).

The condemnee also must prove a unique relationship between the business and the property condemned in order to recover for business damage. Department of Transp. v. Acree Oil Co., 266 Ga. 366, 467 S.E.2d 319 (1996), Department of Transp. v. Dixie Hwy. Bottle Shop, 245 Ga. 314, 265 S.E.2d 10 (1980); Housing Auth. of Atlanta v. Southern Ry. Co., 245 Ga. 229, 264 S.E.2d 174 (1980); Department of Transp. v. 2.734 Acres, 168 Ga.App. 541, 309 S.E.2d 816 (1983); Department of Transp. v. Fitzpatrick, 184 Ga.App. 249, 361 S.E.2d 241 (1987); MARTA v. Ply-Marts, Inc., 144 Ga.App. 482, 241 S.E.2d 599 (1978).

Furthermore, different standards are applied to the total destruction of the business and to mere partial damage to the business, such as when the business continues to operate on the remaining property. Department of Transp. v. Dixie Hwy. Bottle Shop, 245 Ga. 314, 265 S.E.2d 10 (1980);

Richmond County v. 0.153 Acres of Land, 208 Ga.App. 208, 430 S.E.2d 47 (1993); Williams v. State Hwy. Dep't., 124 Ga.App. 645, 185 S.E.2d 616 (1971); State Hwy. Dep't. v. Hood, 118 Ga.App. 720, 165 S.E.2d 601 (1968). The recovery of business damage can differ significantly depending upon whether the business is operated by the owner of the property or a tenant. Generally, a tenant may recover for either total or partial destruction of his business, but an owner must prove total destruction of the business before he may recover. Department of Transp. v. Acree Oil Co., 266 Ga. 336, 467 S.E.2d 319 (1996), Department of Transp. v. Dixie Hwy. Bottle Shop, 245 Ga. 314, 265 S.E.2d 10 (1980); Richmond County v. 0.153 Acres of Land, 208 Ga.App. 208, 430 S.E.2d 47 (1993); Department of Transp. v. George, 202 Ga.App. 270, 416 S.E.2d 307 (1991); Sims v. Foss, 201 Ga.App. 345, 411 S.E.2d 59 (1991).

In Department of Transp. v. Hillside Motors, Inc., 192 Ga.App. 637, 385 S.E.2d 746 (1989), the Court overruled earlier cases and held that business damage can be awarded without a showing profitability prior to the condemnation. The principle was referred to as "a right not to lose any more money." See also, Department of Transp. v. Bales, 197 Ga.App. 862, 400 S.E.2d 21 (1990), where a reduction in sales raised the issue of business damage.

In all cases, the evidence must be sufficient to prove with reasonable certainty the amount of loss attributable to the condemnation. Timmers Chevrolet, Inc. v. Department of Transp., 261 Ga. 270, 404 S.E.2d 121 (1991); Davis Company, Inc. v. Department of Transp., 262 Ga.App. 138, 584 S.E.2d

705 (2003); Department of Transp. v. Martin, 174 Ga.App. 616, 331 S.E.2d 45 (1985); Mauney v. Department of Transp., 169 Ga.App. 563, 313 S.E.2d 782 (1984). Evidence of any loss that results in a diminution of value of a condemnee's business is admissible. Action Sound, Inc. v. Department of Transportation, 265 Ga.App. 616, 594 S.E.2d 773 (2004). The business damage being claimed, however, must be actual loss and must be neither remote nor speculative. Department of Transp. v. Acree Oil Co., 266 Ga. 336, 467 S.E.2d 319 (1996); Department of Transp. v. Dixie Hwy. Bottle Shop, 245 Ga. 314, 265 S.E.2d 10 (1980); Department of Transp. v. Kendricks, 148 Ga.App. 242, 250 S.E.2d 854 (1978); Venable v. State Hwy. Dep't., 138 Ga.App. 788, 227 S.E.2d 509 (1976); Hinson v. Dep't. of Transp., 135 Ga.App. 258, 217 S.E.2d 606 (1975).

Just as in cases involving consequential damages, the business operator has a duty to mitigate his damages. Brown v. Department of Transp., 194 Ga.App. 530, 391 S.E.2d 32 (1990); Llano v. DeKalb County, 174 Ga.App. 693, 331 S.E.2d 36 (1985); Department of Transp. v. Eastern Oil Co., 149 Ga.App. 504, 254 S.E.2d 730 (1979); Fountain v. MARTA, 147 Ga.App. 465, 269 S.E.2d 296 (1978); MARTA v. Ply-Marts, Inc., 144 Ga.App. 482, 241 S.E.2d 599 (1977); Department of Transp. v. Dent, 142 Ga.App. 94, 235 S.E.2d 610 (1977); Garber v. Housing Auth. of Atlanta, 123 Ga.App. 29, 179 S.E.2d 300 (1970). But a mitigation of damages charge is required only when there is evidence that it was possible for a condemnee to mitigate his damages and that he failed to do so. Department of Transp. v. Pitman, 223 Ga.App. 797,

479 S.E.2d 112 (1996). In Carroll County v. L.J.S. Grease & Tallow, Inc., Water Authority, 274 Ga.App. 353, 617 S.E.2d 612, 615, however, the Court of Appeals upheld a finding that the property owner did not fail to mitigate its damages where the cost of relocation to an alternative sites actually exceeded the value of the business.

2. The Uniqueness Rule

Taken at face value, Bowers would require compensation for business damage in any case where all or part of the business property is condemned. In subsequent cases, however, the Courts have held that business damage is not recoverable as a separate element of compensation unless the property is unique. Department of Transp. v. Dixie Hwy. Bottle Shop, 245 Ga. 314, 265 S.E.2d 10 (1980); Housing Auth. of Atlanta v. Southern Ry. Co., 245 Ga. 229, 264 S.E.2d 174 (1980); Department of Transp. v. Fitzpatrick, 184 Ga.App. 249, 361 S.E.2d 241 (1987); Department of Transp. v. 2.734 Acres, 168 Ga.App. 541, 309 S.E.2d 816 (1983); Department of Transp. v. Kendricks, 148 Ga.App. 242, 250 S.E.2d 854 (1978); MARTA v. Ply-Marts, Inc., 144 Ga.App. 482, 241 S.E.2d 599 (1978); Department of Transp. v. Dent, 142 Ga.App. 94, 235 S.E.2d 610 (1977); Hinson v. Department of Transp., 135 Ga.App. 258, 217 S.E.2d 606 (1975). The uniqueness rule does not conflict with Bowers by precluding the recovery of business losses caused by the condemnation. Instead, the rule creates a practical presumption that, as a matter of law, business losses cannot be attributed to the condemnation unless the property

had some uniqueness for the business. MARTA v. Ply-Marts, Inc., 144 Ga.App. 482, 241 S.E.2d 599 (1978).

Whether the property is unique is a jury question. Department of Transp. v. Livingston, 202 Ga.App. 67, 413 S.E.2d 249 (1991); Department of Transp. v. Franco's Pizza & Delicatessen, Inc., 200 Ga.App. 723, 409 S.E.2d 281 (1991); Strickland v. Department of Transp., 196 Ga.App. 322, 396 S.E.2d 21 (1990); Department of Transp. v. Coley, 184 Ga.App. 206, 360 S.E.2d 924 (1987); Smiway, Inc. v. Department of Transp., 178 Ga.App. 414, 343 S.E.2d 497 (1986); MARTA v. Ply-Marts, Inc., 144 Ga.App. 482, 241 S.E.2d 599 (1978). The condemnee has the burden of proving that the property is unique. Kim v. Metropolitan Olympic Games Auth., 227 Ga.App. 563, 489 S.E.2d 372 (1977). A witness cannot testify to an opinion that the property is unique, although he can use other terms to provide the factual basis for the jury to conclude that the property meets the legal definition of "uniqueness." Department of Transp. v. Franco's Pizza & Delicatessen, Inc., 200 Ga.App. 723, 409 S.E.2d 281 (1991); Brown v. Department of Transp., 194 Ga.App. 530, 391 S.E.2d 32 (1990).

The exact definition of "uniqueness" was the subject of some dispute for several years. The Georgia Court of Appeals attempted to resolve the uniqueness dispute in Department of Transp. v. 2.734 Acres of Land, 168 Ga.App. 541, 309 S.E.2d 816 (1983), but its search for the present test of uniqueness led "through a convoluted maze of seemingly irreconcilable decisions." The Court found that three tests of uniqueness have emerged as

independent criteria under one general rule. Only one of the three criteria need be met to authorize the recovery of business damage.

The first criteria or test equates uniqueness with the ability of the business to relocate on similar property where the entire business property is condemned or where the business cannot continue to operate on the remaining property. Under this "relocation test," every person who has an established business in a location that cannot be duplicated in the immediate vicinity suffers a loss that is unique to him. If the property must be duplicated for the business to survive and if there is no substantially comparable property within the area, the loss of the condemnee is such that market value does not represent just and adequate compensation to him. Housing Auth. of Atlanta v. Troncalli, 111 Ga.App. 515, 142 S.E.2d 93 (1965). See also, Department of Transp. v. Livingston, 202 Ga.App. 67, 413 S.E.2d 249 (1991); Heilman v. Department of Transp., 162 Ga.App. 547, 290 S.E.2d 189 (1982); Hinson v. Department of Transp., 135 Ga.App. 258, 217 S.E.2d 606 (1975).

The second test of uniqueness focuses more on the relationship of the owner and the business to the real property. Under this "value to the owner test" it must appear, not that the property itself is unique, but that the owner's relationship to the property is unique, such that its advantages to him are more or less exclusive, that it is property having unique value to the owner alone, without like value to others who might acquire it, property with characteristics of location or construction that limit its usefulness to the owner, so that the elements of value cannot pass to a third party who might

acquire the property. City of Gainesville v. Chambers, 118 Ga.App. 25, 162 S.E.2d 460 (1968). See also, Department of Transp. v. Livingston, 202 Ga.App. 67, 413 S.E.2d 249 (1991); Department of Transp. v. Coley, 184 Ga.App. 206, 360 S.E.2d 924 (1987); Southwire Co. v. Department of Transp., 147 Ga.App. 606, 249 S.E.2d 650 (1978); State Hwy. Dep't. v. Clark, 123 Ga.App. 627, 181 S.E.2d 881 (1971).

The third test of uniqueness focuses on the inadequacy of fair market value as a measure of just and adequate compensation. Since fair market value presupposes a willing buyer and a willing seller, property is unique such that fair market value will not afford just and adequate compensation when the property is not of a type generally bought or sold in the open market. Department of Transp. v. Eastern Oil Co., 149 Ga.App. 504, 254 S.E.2d 730 (1979). See also, Housing Auth. of Atlanta v. Southern Ry. Co., 245 Ga. 229, 264 S.E.2d 174 (1980); Department of Transp. v. Livingston, 202 Ga.App. 67, 413 S.E.2d 249 (1991); Department of Transp. v. Harris, 201 Ga.App. 160; 410 S.E.2d 360 (1991); Department of Transp. v. Bales, 197 Ga.App. 862, 400 S.E.2d 21 (1990); Department of Transp. v. A.R.C. Security, Inc., 189 Ga.App. 34, 375 S.E.2d 42 (1988); The "no market value test" seems better suited to instances where there is a unique value to the real estate rather than where business damage is involved, but the Courts have specifically applied it to a business damage case. See Department of Transp. v. Fitzpatrick, 184 Ga.App. 249, 361 S.E.2d 241 (1987). See also, Department of Transp. v. Dixie Hwy.

Bottle Shop, 245 Ga. 314, 265 S.E.2d 10 (1980); Theo v. Department of Transp., 160 Ga.App. 518, 287 S.E.2d 333 (1981).

While the determination of whether property is unique is a jury question, it is error to submit this issue to the jury unless there is at least slight evidence to support a finding of uniqueness. Department of Transp. v. Bales, 197 Ga.App. 862, 400 S.E.2d 21 (1990); City of Atlanta v. Hadjisimos, 168 Ga.App. 840, 310 S.E.2d 570 (1983); Department of Transp. v. 2.734 Acres, 168 Ga.App. 541, 309 S.E.2d 816 (1983); Southwire Co. v. Department of Transp., 147 Ga.App. 606, 249 S.E.2d 650 (1978); State Hwy. Dep't. v. Clark, 123 Ga.App. 627, 181 S.E.2d 881 (1971); City of Gainesville v. Chambers, 118 Ga.App. 25, 162 S.E.2d 460 (1968); Hinson v. Dep't. of Transp., 135 Ga.App. 258, 217 S.E.2d 606 (1975).

3. Measure of Business Damage

When the issue of business damage or destruction of a business is properly before the Court, the measure of compensation for such damage is the difference between the market value of the business before the property is taken and its market value after the taking. Timmers Chevrolet, Inc. v. Department of Transp., 261 Ga. 270, 404 S.E.2d 121 (1991); MARTA v. Martin, 193 Ga.App. 566, 388 S.E.2d 346 (1989); Fulton County v. Dangerfield, 195 Ga.App. 208, 393 S.E.2d 285 (1990); Old South Bottle Shop, Inc. v. Department of Transp., 175 Ga.App. 295, 333 S.E.2d 127 (1985); Bowers v. Fulton County, 122 Ga.App. 45, 176 S.E.2d 219 (1970). Elements such as loss of profits, loss of customers, or decrease in the earning capacity of

the business may be considered in determining the decrease in the value of the business, but they are not separate elements of damage in themselves. Action Sound, Inc. v. Department of Transportation, 265 Ga.App. 616, 594 S.E.2d 773 (2004); Old South Bottle Shop, Inc. v. Department of Transp., 175 Ga.App. 295, 333 S.E.2d 127 (1985); Bowers v. Fulton County, 122 Ga.App. 45, 176 S.E.2d 219 (1970). See also, Department of Transp. v. Bales, 197 Ga.App. 862, 400 S.E.2d 21 (1990).

Lost profits are not the only element to be considered in determining the damages from the partial or total destruction of a business. Old South Bottle Shop, Inc. v. Department of Transp., 175 Ga.App. 295, 333 S.E.2d 127 (1985). In fact a condemnee can recover business damages even though the business is not profitable at all. Department of Transp. v. Hillside Motors, Inc., 192 Ga.App. 637, 385 S.E.2d 746 (1989). But where profits are in issue, evidence of profitability must reflect net profit after expenses rather than just the gross income from the business. Department of Transp. v. Martin, 174 Ga.App. 616, 331 S.E.2d 45 (1985); Mauney v. Department of Transp., 169 Ga.App. 563, 313 S.E.2d 782 (1984).

The Courts have given no direct guidelines for the evaluation of a business, but the theory of appraising a business as a going concern is not unusual. Business appraisers, accountants, bookkeepers, business analysts, some real estate appraisers, and businessmen in the same type of business may be familiar with the generally accepted principles for evaluating a business and with actual market transactions involving similar businesses. The specific

education, training and experience of the business valuation witness is critical in his or her qualification to testify as an expert witness and his or her credibility with a jury. Such expert witnesses can evaluate the business before and after the taking and account for any differences in income, profits, location, equipment, or capitalization of the business to determine the net difference in its value. The witnesses should be careful to avoid a duplication of compensation because the value of a business may include real estate, improvements, fixtures, and equipment that may be evaluated as part of the real property taken.

C. Mitigation Of Consequential Damages And Business Damage

The Georgia Constitution requires that before property can be taken or damaged for a public purpose, just and adequate compensation must first be paid. Just and adequate compensation encompasses both actual damages for the property condemned and consequential damages to any remaining property, and in many cases, it may include business damages. In either case, the damage to the value of the property or the business may include a "cost to cure" value in lieu of or in mitigation of those damages. In theory, the cost to cure can be more advantageous for both the condemnor and the owner. For the condemnor, it may provide a cheaper alternative to paying the fair market value of consequential damages to property or business. It also may allow the owner to minimize the impact of the taking, or to continue operating the business during the interruption caused by the condemnation. From an evidentiary standpoint, the cost to cure not only satisfies the owner's duty to

mitigate by reducing the impact of the condemnation on the property or business, it also demonstrates that actual loss occurred as a result of the condemnation.

A new challenge arises, however, when a business must relocate in order to continue operating, yet no suitable property is readily available. Some businesses are operated on property that is so unique in location or in relationship to the owner that no viable relocation alternative exists without substantial modification. Some businesses must be fully operational in the replacement location before ceasing operation on the subject property, or else substantial loss, if not complete destruction, of the business would occur. This requires a "turn key" cost to cure where suitable property is located and built out before the business closes and a single box is packed and moved off the subject property.

What if the "turn key" cost to cure exceeds the current value of the business? Is an owner entitled to present evidence and recover compensation based on the actual costs to "cure" the destruction of the business, or can the condemnor force an owner to go out of business simply because it is cheaper than paying the cost to save it? Does an owner's duty to mitigate extend to accepting a monetary value for its business instead of the cost to cure at the new location? Or, is there a constitutional right to continue operating a business?

1. Consequential Damages Overview

Where a condemning authority takes only a part of the subject property, the remaining property is subject to consequential damages, which arise out of an interference with a special right incident to ownership that is not shared by the general public. Tift County v. Smith, 219 Ga. 68, 131 S.E.2d 527 (1963). The standard measure of consequential damages for the remainder property is the reduction, if any, in the fair market value of the remainder in its circumstances just before the taking, compared with its fair market value in its new circumstances just after the taking. Wright v. MARTA, 248 Ga. 372, 283 S.E.2d 466 (1981).

Under the Georgia Supreme Court's landmark decision in Bowers v. Fulton County, 221 Ga. 731, 146 S.E.2d 884 (1966), an owner is entitled to recover damages to a business as a separate element of compensation, in addition to the value of and damages to the condemned property. The Supreme Court confirmed in Bowers the now well-known principle that the term "property" is comprehensive that is used "not only to signify things real and personal owned, but to designate the right of ownership, and that which is subject to be owned and enjoyed," including the value of ownership of a business. 221 Ga. 731, 146 S.E.2d at 890 (citing Woodside v. City of Atlanta, 214 Ga. 75, 103 S.E.2d 108 (1958)).

In pursuing a claim for consequential damages or business damages, a condemnee has a duty to mitigate damages by taking those reasonable steps to minimize the effect of the condemnation, including relocation of

the business. Llano v. DeKalb County, 174 Ga. App, 693, 331 S.E.2d 36 (1985). The issue of whether this duty has been satisfied is triggered only under limited circumstances. First, such evidence is relevant where there is evidence that it was possible for the owner to mitigate and that he failed to do so. DOT v. Pitman, 223 Ga.App. 797, 479 S.E.2d 112 (1996). In addition, an owner may use evidence of mitigation to support a claim for consequential damages by showing that loss actually occurred and that steps were taken to minimize them. Garber v. Housing Auth. of City of Atlanta, 123 Ga.App. 29, 179 S.E.2d 300 (1970).

2. The Basics Of The Cost To Cure or to Mitigate Damages

Whether a condemnation involves an actual partial take, or a constructive full take, a "cost to cure" plan often is necessary to mitigate damages to the property or to a business operating after the take occurs. See DOT v. Old National Inn, Inc., 179 Ga.App. 158, 345 S.E.2d 853, 856-57 (1986) (cost to correct parking deficit caused by partial taking of hotel parking area); DOT v. 2.953 Acres of Land, 219 Ga.App. 45, 463 S.E.2d 912 (1995) (cost of additional land to build warehouse space after taking reduced space designated for future expansion of grocery distributor). The "cost to cure" refers to evidence submitted by the condemnor or the condemnee regarding the actions and the cost necessary to "cure" or mitigate the damages to property or to a business that are caused by a taking. Old National Inn, Inc., 179 Ga.App. 158, 345 S.E.2d at 856-57. The value of the cost to cure is determined as of the date of taking, Wright,

248 Ga. 372, 283 S.E.2d at 468. It is not awarded as a separate item of recoverable damages, but instead, may be considered in determining the amount of consequential damages or business damages that are recoverable. DOT v. Metts, 208 Ga.App. 401, 430 S.E.2d 622, 624 (1993).

3. The Cost To Cure and Improving New Property

Typically, the cost to cure encompasses changes to the remainder property on which the business continues to operate. Where the take is so complete that it renders continued operation impossible, relocation to a new site is the only option to mitigate the destruction of the business. In order to do so, the new site must be suited to and developed for the needs of the particular business. If no suitable alternative property exists for relocation, however, mitigation or "cure" is not possible, and the business may be destroyed.

Is the Georgia Supreme Court's language in Bowers, 221 Ga. 731, 146 S.E.2d 884, which recognized the separate and inherent value of business ownership, broad enough to encompass to the right to continue operating at a new location? Or is a business owner required to close its doors because the costs to relocate exceed the current market value of the business? These questions are not easily answered under current Georgia law to the favor of either the condemnor or the owner.

From the condemnor's standpoint, there are no decisions that expressly permit an authority to force an owner to shut its doors if the cost to cure plan is too expensive. A condemning authority's right to condemn

for a public purpose is well established by constitutional provision and case law: "[p]rivate property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid." Art. I, § III, ¶I (Ga. Const. 1983). The governmental power of eminent domain for a public purpose cannot be abridged. Art III, § VI, ¶III (Ga. Const. 1983). In fact, the right of an authority to condemn property is rarely at issue in a condemnation case. Instead, the value of the thing condemned is disputed. Does this power entitle the condemnor to decide that just and adequate compensation excludes the right to continue operating a business?

On the other hand, a property owner's right to own, use and enjoy his or her property is a universally recognized principle of common, statutory and case law. If a condemnor can force an owner out of business in lieu of a more costly relocation, doesn't this violate the constitutional provision of just and adequate compensation? From the condemnee's standpoint, a viable argument can be made under Georgia law that the cost to cure should include development of or improvements to vacant or unsuitable land.

In Bowers, the Supreme Court established that the bundle of property rights extends to "every species of property taken or damaged, real or personal, corporeal or incorporeal," requiring that separate just and adequate compensation be paid for the loss or destruction of a business. Id. By holding that the loss of an established business affords a right of

recovery separate from the loss of land, the Supreme Court thus recognized the right to just and adequate compensation for the inherent value of owning a business. If a condemnor is permitted to force an owner out of business instead of paying to improve alternate land, the true value of the business to the owner is lost. The owner loses the value of continued operations at the new site that cannot be measured by the current market value on the subject property.

4. Georgia Courts Uphold The Intrinsic Value Of Owning A Business

The principle of compensating an owner for the inherent value of a business was upheld in Department of Transportation v. Kendricks, 148 Ga.App. 242, 244-245, 250 S.E.2d 854, 857 (1978):

> [T]he question which properly addresses itself to the jury's consideration is not 'What has the taker gained?', but 'What has the owner lost?', and that where there are separate interests to be condemned, the jury, in arriving at just and adequate compensation, is not only authorized but required to consider that value which the thing taken has to the respective owners of the interests being condemned.

This intrinsic value of the business to the owner is so fundamental under Georgia law that even a business operating at a loss before the condemnation can recover damages caused by the condemnation. DOT v. Hillside Motors, Inc., 192 Ga.App. 637, 385 S.E.2d 746, 750-751 (1989). Referred to as the principle of the "right not to lose any more money," its purpose is to protect even the most marginal or struggling business and recognize that the value of the business to the owner must be compensated when taken or damaged. Id.

Of course, Georgia courts have long recognized the concept of "uniqueness" in valuing real property and business damages by a different yardstick when fair market value fails to reach a property's true value. DOT v. 2.734 Acres of Land, 168 Ga.App. 541, 309 S.E.2d 816 (1983). In fact, two of the three tests for "uniqueness" specifically focus on the inherent value of the business to the owner. Under the "relocation test," where a business cannot be duplicated because no substantially comparable property exists, "then the loss of the forced seller is such that market value does not represent just and adequate compensation to him." Housing Authority v. Troncalli, 111 Ga.App. 515, 142 S.E.2d 93, 95 (1965). The "value to owner test" recognizes the special relationship of the owner and business to the real property with its characteristics that limit usefulness to that owner. DOT v. Livingston, 202 Ga.App. 67, 413 S.E.2d 249 (1991). These well-established principles of evaluating property should extend to the business and encompass the right to continue operating at a new location.

In addressing cost to cure in DOT v. Old National Inn, Inc., 179 Ga.App. 158, 159-160, 345 S.E.2d 853 (1986), the Court of Appeals held that a condemnor cannot reduce or offset the value of the cost to cure by the actual damages paid for the property taken. In that case, the condemnor condemned a strip of land from a hotel parking lot, which deprived the hotel of enough parking spaces to force it out of business on that location. As a result, the hotel attempted to cure the damage to the

remainder by either building a parking deck, or acquiring adjacent land to replace the condemned spaces. The condemnor argued that the hotel was entitled to only the difference between actual damages and the cost of the adjacent land, and that condemnee was required to use actual damages to pay for the cost to cure. The Court disagreed, finding that the condemnee was entitled to the full value of the actual damage and the full value of the cost to cure, i.e. the purchase of the adjacent land. Id. at 160-161, 345 S.E.2d 853. In affirming the trial court's grant of a motion to strike the testimony of condemnor's expert, the Court held that the "condemnee has no duty to expend actual damage funds to reduce consequential damages." Id. at 161, 345 S.E.2d 853.

Although the cost of relocating to and improving new land was not directly at issue in Old National Inn, the Court's decision tacitly recognized that a condemnee may be entitled to the more expensive cost to cure:

> Obviously, the consequential damages would be greater if that land, which would adequately serve the purpose intended for the taken land, was not available and the condemnee was left with either having to build a parking deck or being precluded from expanding and so losing future growth.

179 Ga.App. 158, 345 S.E.2d at 857. Under the facts of that case, the condemnee opted for the less expensive parking lot on the adjacent land, rather than building a more costly deck on the remainder.

In a similar case, DOT v. 2.953 Acres of Land, 219 Ga.App. 45, 463 S.E.2d 912, 915 (1995), the Court of Appeals held that the cost to replace the condemned property designated for future expansion of a business is

recoverable. The partial taking in that case left a wholesale grocer with an irregularly shaped property that could no longer be used for the construction of a warehouse in the future as the business grew. The condemnees sought to recover the purchase price of adjacent land as the cost to cure the damages to the remainder. The Court of Appeals upheld the trial court's admission of this evidence, finding that the "loss of space allocated for future expansion" can be considered in determining consequential damages. 219 Ga.App. 45, 463 S.E.2d at 915.

Furthermore, paying for improvements to the new property as a cost to cure does not pose the risk of double recovery found in the payment of relocation costs. Georgia law is clear that renovation or improvement costs at the new location are not recoverable as relocation expenses because such recovery constitutes a double recovery. MARTA v. Funk, 263 Ga. 385, 435 S.E.2d 196, 198 (1993). The condemnor has already paid just and adequate compensation for the property that was taken or damaged. Id. It cannot also be required to pay for the costs to make the new property more valuable or unique. Id. Thus, "the owner of a business who receives just and adequate compensation for his interest in the real property, for his business losses, if any, and for his relocation expenses, if any, is fully compensated for all the consequences suffered as the result of a condemnation." Id., 263 Ga. 385, 435 S.E.2d at 200. With the compensation received, an owner "can buy or lease new premises and continue to operate his business as before, having been paid for what he

actually lost and reimbursed for the costs of moving what was not taken in the condemnation. Id.

In dealing with a cost to cure, however, there is no double recovery because the owner reduces or foregoes payment of consequential damages or business damages in exchange for the cost to cure those damages. Thus, there is no risk of a condemnee enjoying two bites at the apple. This result is consistent with Old National Inn in which the condemnee was paid actual damages for the land taken and consequential damages in the form of the cost to cure the parking deficiency caused by the take. 179 Ga.App. 158, 345 S.E.2d at 856. See also 2.953 Acres of Land, 219 Ga.App. 45, 463 S.E.2d 912 (allowing evidence of cost to cure of purchase price of additional land).

5. Valuing The Cost To Cure – How Far Does It Go?

Assuming that a claim for the cost to cure that includes improvements is an admissible measure of damage, the next question is how to appropriately value it. If a property and its location to the business are so unique such that a ready replacement cannot be found, how far should the cost to cure budget extend? Georgia law already recognizes a principle of "replacement" value in the cost approach method of determining the fair market value of condemned property. MARTA v. Dendy, 250 Ga. 538, 299 S.E.2d 876 (1983). Under this method, the cost of replacing a building or other improvement, minus depreciation and other factors, is used to arrive at the market value of the building on the date of taking. Id.

In valuing consequential damages, Georgia courts also recognize a "cost to repair" value that entitles an owner to the cost of repairing a building damaged by the taking. DOT v. Dent, 142 Ga.App. 94, 235 S.E.2d 610 (1977). The owner is entitled to the amount required to restore the building to its former condition on the date of the taking. Id. If the repairs increase the value of the building, a depreciation factor is applied to reflect the new and improved condition. Id. A combination of both the replacement cost and the cost to repair values could be applied to determine the value of duplicating buildings and facilities at the new location.

Even with a formula to rely upon, however, the particulars of what items should be included in, and what items would be excluded from, the cost to cure remain an unknown element. Should all costs incurred to build out a new facility at the new location down to the last nail? What about upgrades in equipment? For example, in relocating a gas station and convenience store to a new location, should the cost to cure include updating old pumps and related equipment, particularly if the franchisor requires the upgrade in order to continue operating under the brand?

Although a cost to cure in theory is a viable alternative, in practice it can raise several hurdles for certain property owners, particularly under current Georgia law. Together, the decisions in Bowers, Hillside Motors, and Old National Inn provide a compelling position that based on the inherent value of a business to an owner, a condemnor should not be

permitted to force a business to close its doors simply because it is the cheaper alternative.