LANDLORD/TENANT RIGHTS
UNDERSTANDING THE LEGAL RIGHTS OF THE LANDLORD AND THE TENANT IN A CONDEMNATION CASE.

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INTRODUCTION

Georgia law governing landlord/tenant rights in condemnation cases has been developing for more than 100 years. While many issues and uncertainties may remain, Georgia law clearly provides that a tenant in possession of property has rights that cannot be taken or damaged without just and adequate compensation being first paid.[1] A tenant's property interest and right to recover just and adequate compensation may be based upon a leasehold interest in a lease for a term of years, a "mere" usufruct, or even a tenancy at will.[2] As a result, a tenant should always be named as a condemnee in a condemnation action and may even be a necessary party such that the condemnation could be enjoined until the leasehold interest is acquired.[3]

I. Compensability of Leasehold Interests

Generally, just and adequate compensation for the taking or damaging of a leasehold interest is based on the market value of the lease on the date of taking.[4] The measure of compensation is the market value of the leasehold for the remainder of the unexpired term of the lease, less any rents to be paid by the tenant.[5] From a practical standpoint, this measure of compensation involves a comparison of the market rent based on rentals of comparable property, with actual rent being paid by the tenant. If the tenant is paying rent equal to or

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[1] Ga. Const. 1983, Art. I, Sec. III, Para. I; Hayes v. City of Atlanta, 1 Ga. App. 25, 57 S.E. 1087, 1088 (1907); and Hinkel, Georgia Eminent Domain, 2007 Ed., Section 4-2.
[2] Franco's Pizza and Delicatessen, Inc. v. Department of Transportation, 178 Ga. App. 331, 331, 343 S.E.2d 123 (1986); Lee v. Venable, 134 Ga. App. 92, 93, 213 S.E.2d 188 (1975); Alexander v. Rozetta, 110 Ga. App. 660, 660, 139 S.E.2d 451 (1964); Hayes, 1 Ga. App. 25.
[3] See Ammons v. Central Ga. Ry Co., 215 Ga. 758, 762, 113 S.E.2d 438 (1960).
[4] Peek v. Department of Transportation, 139 Ga. App. 780, 781, 299 S.E.2d 554 (1976).
[5] Id. at 781. See also Ellis v. Department of Transportation, 175 Ga. App. 123, 124, 333 S.E.2d 6 (1985); and McGhee v. Floyd County, 95 Ga. App. 221, 223, 97 S.E.2d 529 (1957).

greater than the market rent, his leasehold has no market value. But if the tenant is paying less than market rental the leasehold interest is calculated by the present value of the difference between the two rental figures for the remaining term of the lease.[6] In determining the value of the leasehold, it is relevant to consider whether

> the [tenant] is paying all that the premises are worth under the circumstances or that he is paying more or less than they are worth, the duration and extent of the tenancy at the time of its destruction, the nature of the business conducted by the [tenant] therein, whether profitable or unprofitable and how much so, and the nature and extent of improvements made by the [tenant] on the premises and the fixtures installed by him as tending to illustrate an increased rental value in the premises.[7]

In showing the value of the leasehold, it is relevant for the tenant to testify regarding the difference between the actual rent he was paying and what rentals he could find when he attempted to relocate.[8]

A wrinkle to the leasehold value calculation is the tenancy at will, which would normally have no value on the open market. In such instances, the leasehold value is determined by the jury "in light of all facts and circumstances of the case."[9]

In showing the value of the leasehold, the term of the lease must also be determined, which can become tricky when options to renew are involved. The Court of Appeals stated in Ellis v. Department of Transportation that "a valid option to renew a lease is in itself an interest in land such as will support a compensation award in an eminent domain proceeding."[10] In Ellis, the lease provided for an initial eight (8) year term, with three (3) renewal options for five (5) years each, provided that notice be given to the landlord by the tenant no later than 45 days prior to the expiration of the original term.[11] More than 45 days before the expiration of the original lease, but after the date of taking, the tenant gave notice to the landlord of his intention

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[6] See, Hinkel, Georgia Eminent Domain, 2007 Ed., Section 6-7.
[7] Minsk v. Fulton County, 83 Ga. App. 520, 64 S.E.2d 336 (1951).
[8] Fulton County v. Dangerfield, 195 Ga. App. 208, 287, 393 S.E.2d 285 (1990), rev'd on other grounds, 260 Ga. 665, 398 S.E.2d 14 (1990).
[9] Hayes, 1 Ga. App. 25.
[10] Ellis, 175 Ga. App. at 124.
[11] Id. at 123.

to exercise the first five (5) year option. The trial court ruled that the tenant could not recover leasehold damage for the renewal period.[12] The Court of Appeals reversed, holding that where "a renewal lease is entered into after a taking or damaging by eminent domain, but in pursuance of the terms of a lease antedating such event, the tenant is entitled to recover as though the original lease had, in the first instance, provided both terms as one continuous term."[13]

The opposite conclusion was reached in Cann v. MARTA,[14] where the tenant's lease had nine (9) months remaining on the date of taking, but provided:

> [F]or four additional five-year terms, [the tenant] "shall have the option of extending this lease . . . upon the same terms and conditions which were in effect during the original term, EXCEPT that . . . the annual rent for the renewed term, . . . if renewed, shall be as may be agreed upon by the parties hereto, but in no event less than the annual rent during the last year of the preceding term."[15]

The trial court granted the condemnor's motion in limine limiting the introduction of evidence as to the value of the tenant's leasehold to the nine (9) months that were remaining on the original lease.[16] On appeal, the tenant contended that it had more than twenty (20) years remaining if renewal terms were included.[17] The Court of Appeals affirmed, holding:

> [The tenant] had only a nine month's tenancy remaining on the date of taking because the twenty-year renewal provision was unenforceable for a lack of certainty as to the amount of rent for that renewal period. A provision for the renewal of a lease must specify the terms and conditions of the renewal . . . with such definite terms and certainty that the court may determine what has been agreed upon, and if it falls short of this requirement it is not enforceable. *It must be certain and definite both as to the time the lease is to extend and the rent to be paid.. . . [I]f terms, such as duration and rent, are left for future ascertainment, and no method is provided by which they are to be determined, the contract is unenforceable for uncertainty*. . . . [The tenant's] lease provided no method by which the specific amount of future rents was to be determined, but provided only that future rent would be in some unspecified amount at least as great as that which had previously been paid. Accordingly, insofar as the twenty-year extension of the lease is concerned, [the tenant] had no legally compensable interest in the property upon its . . . condemnation.[18]

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[12] Ellis, 175 Ga. App. at 123.
[13] Id. at 124, quoting 2 Nichols, Law of Eminent Domain, § 5.06 [1] (3rd ed. 1983).
[14] Cann, 196 Ga. App. 495, 396 S.E.2d 515 (1990)
[15] Id. at 495 – 496 (emphasis in original).
[16] Id.
[17] Id. at 496.
[18] Id. (emphasis added).

A tenant's claim for a leasehold interest in the real estate is likely to raise issues and disputes between the tenant and its landlord, because any recovery of leasehold value by the tenant would decrease the amount of the landlord's recovery for the fair market value of his property. In Fulton County v. Funk, the Supreme Court affirmed the applicability of the undivided fee rule in condemnation cases.[19] Pursuant to the undivided fee rule, a single valuation of fair market value will represent the total amount of just and adequate compensation that must be paid for the real property taken, and all claimants, including the landlord and tenant, are entitled to their respective shares of fair market value.[20] The only exception to the rule is when a condemnee proves that the property has a special or unique value that exceeds the fair market value of the property.[21]

II. Applicability of a Condemnation Clause

The condemnation clause in a lease is the most important consideration in determining the respective rights of the landlord and tenant when the property that is the subject of the lease is condemned. Yet the condemnation clause is often one of the most overlooked provisions during lease negotiations. While Georgia courts have developed a substantial body of law regarding the various elements of just and adequate compensation in general and relating specifically to compensation for the landlord and for the tenant, the condemnation clause in the lease may substantially modify or eliminate the right of a tenant to recover compensation.

1. Assignment and Waiver

Georgia law provides that "[a]bsent a public policy interest, contracting parties are free to contract to waive numerous and substantial rights . . . . Thus, a [tenant] may in the lease assign away or waive its right to just and adequate compensation in any type of condemnation

[19] Fulton County v. Funk, 266 Ga. 64, 65 - 66 463 S.E.2d 883 (1995).
[20] Id. at 65 – 66.
[21] Id. at 66.

proceedings, which assignment or waiver we will enforce."[22] In determining the validity and extent of any assignment or waiver, the Court of Appeals has stated:

> [A]s a general rule, the provisions of a contract will be construed against the draftsman, and those of the lease will be construed against the [landlord]. Provisions that result in forfeiture of tenant's possessory right will be strictly construed against the [landlord].[23]

a. Assignment

A tenant may assign any claims he may have with regard to his leasehold interest in the property and "the form of the assignment of a chose in action is immaterial. It is sufficient if it is in writing and manifests the intention of the owner to transfer to the assignee his title to the chose in action."[24] At first glance, the outer limit of this issue seems clear. In the case of Henson v. Dept. of Transportation, the lease stated that the tenant assigned to the landlord "any award, claim or demand to which the [tenant] may be entitled by reason of such taking other than moving expenses to which [tenant] may be entitled by law."[25] The Court of Appeals held that this was "dispositive of [the tenant's] claims, [the landlord] being entitled to an award which included the full value of the property taken, including the value of [the] leasehold interest therein."[26]

On the opposite end of the spectrum is Simmerman v. Department of Transportation,[27] where the lease stated that the tenant "assigns to [landlord] all of [the tenant's] right to or interest in any [award for condemnation], subject to [the tenant's] right to receive a portion of such compensation from [the landlord] if and as required by law."[28] The Court of Appeals held that this lease provision did not assign the condemnation award totally to the landlord, but

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[22] McGregor v. Board of Regents of the University System of Georgia, 249 Ga. App. 612, 613, 548 S.E. 2d 116 (2001), quoting Henson v. Dept. of Transportation, 160 Ga. App. 521, 522 (1), (287 S.E.2d 299) (1981).
[23] Department of Transportation v. Calfee Co. of Dalton, Inc., 202 Ga. App. 299, 301, 414 S.E. 2d 268 (1991) (cert. denied 1992).
[24] Henson, 160 Ga. App. at 522, quoting Lumpkin v. American Surety Co., 61 Ga. App. 777, 779 – 780, 7 S.E.2d 687 (1940).
[25] Id. at 160
[26] Id.
[27] Simmerman, 167 Ga. App. 383, 307 S.E.2d 4 (1983).
[28] Id. at 384.

rather assigned "the right to collect or not as [the landlord] chooses; but [the tenant] retains his right to a share of whatever [the landlord] does collect if the law declares ('requires') he has a compensable interest in it."[29]

The law on this issue becomes less clear when we consider the cases of Department of Transportation v. Calfee Company of Dalton, Inc.[30] and McGregor v. Board of Regents of the University System of Georgia.[31] In Calfee, the lease provided:

> In the event any or part or all of the premises shall be taken . . . this lease shall terminate and all rights of the tenant shall immediately cease and terminate . . . and **the tenant shall have *no claim against the landlord* for the value of the unexpired term hereof and the tenant shall not be entitled to any part of the *condemnation award or purchase price*.**[32]

The Court of Appeals held that this language did not assign the tenant's right to recover for the value of the leasehold, stating that this language

> neither waives any and all claims arising from the lease termination nor does it assign any and all condemnation awards or claims, whatsoever, to the landlord. Rather, only certain express and limited claims against the landlord are waived, and the only assignment, if any, which and then only be means of a liberal rather than strict interpretation, can be said to have been created is an assignment by the [tenant] to the landlord of any claim or entitlement to the condemnation award or purchase price which the landlord received for the taking of their property. The intent of the parties remains clear that the [tenant] at most was renouncing the right to assert any right of entitlement to any condemnation award received by the landlord for the latter's separate condemnation claim for the taking of their property.[33]

In McGregor, the lease provided:

> In the event that all of the premises shall be condemned or taken . . ., the Lease shall forthwith cease and terminate as of the date of vesting title . . .. If this Lease is terminated . . . **[the tenant] shall have no claim against [the landlord] or the condemning authority for the value of the unexpired term of this Lease or otherwise. All compensation awarded or paid upon a total or partial taking of the Premises or Building or any part thereof shall belong to and be the property of [the landlord] without any participation therein by [the tenant] or by an Agent, if any.** [34]

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[29] Simmerman, 167 Ga. App. at 384.
[30] Calfee, 202 Ga. App. 299.
[31] McGregor, 249 Ga. App. 612.
[32] 202 Ga. App. at 300-301 (italics in original, bold emphasis added).
[33] Id. at 301-302.
[34] 249 Ga. App. at 612 (emphasis added).

The Court of Appeals held that this language did assign the tenant's rights to recover any compensation to the landlord, stating:

> [The tenant] expressly agreed that, in the event that lease was terminated by condemnation, the [tenant] would 'have no claim against the condemning authority' for compensation of any loss to the value of the leasehold interest arising out of the taking. He further agreed that any proceeds paid for the public taking of the building would be the property of [the landlord] without participation by [the tenant], thus effectively assigning to [the landlord] any condemnation compensation possibly due him. He thus contracted away his constitutional rights to compensation.[35]

Thus, even though the language in the lease in McGregor was similar to the language in Calfee, the Court of Appeals came to differing conclusions about assignment. In acknowledging the differing conclusions, the Court in McGregor placed emphasis on the lease language which discussed the condemning authority, speaking in terms of waiver: "[Calfee] is distinguishable in that, . . . the [tenant] waived its right to seek compensation from the [landlord], . . . the [tenant did not] purport to waive its right to seek compensation for the condemning authority."[36]

b. Waiver

A tenant must be careful of waiving his right to recover for the taking or damaging of his leasehold interest. Again, the case law on this issue is less than clear.

In Josh Cabaret, Inc. v. Department of Transportation,[37] the Supreme Court held that a tenant was not entitled to damage to its leasehold interest or relocation expenses where the tenant voluntarily abandoned the lease prior to the condemnation. In Josh Cabaret, the tenant received a letter from the condemnor stating:

> This is to advise that due to the proposed construction of the above Highway project, you will be required to move your personal property from the above property. You will not be required to move from and surrender possession of the property prior to September 30, 1982, which is three months from the date of this letter. When title to the above property is secured, you will be notified, in writing, of the exact date you will have to remove your personal property.[38]

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[35] McGregor, 249 Ga. App. at 613.
[36] Id.at 614.
[37] Josh Cabaret , 256 Ga. 749, 353 S.E2d 346 (1987).
[38] Id. at 749.

The tenant removed its assets in August, 1982 and, shortly thereafter, the project was halted by the local government.[39] The tenant sued the Department of Transportation for inverse condemnation for "loss of its advantageous leasehold interest" and relocation expenses.[40] The trial court granted the Department's motion for summary judgment, and the tenant appealed. The Supreme Court affirmed, holding:

> . . . [L]osses occurring to property before the actual date of taking are not compensable in direct condemnation actions. Thus, while there is a diminution in value as a result of anticipated condemnation, no compensation may be paid.
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> The corporation was advised that no move was required before September 1982, and that written notification would precede a required removal. Its decision to move in August 1982, was by voluntary choice, and cannot be attributed to an interference by the Department with its exclusive rights of ownership, use and enjoyment.
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> Whether this action is characterized as direct or inverse condemnation, the losses claimed did not result from an exercise of eminent domain. Hence, as a matter of law, they are not compensable as damage or as taking.[41]

Seemingly at odds with the holding in Josh Cabaret, is the case of Smiway, Inc. v. Department of Transportation,[42] where the tenant challenged the trial court's evidentiary rulings which effectively precluded the tenant from placing evidence of leasehold damage at issue. In Smiway, the condemnor presented evidence that at the time of the taking, the tenant's building was in disrepair and unoccupied.[43] In response, the tenant attempted to show that it had vacated "because DOT had indicated that the condemnation of the property would be accomplished very soon."[44] The trial court found this evidence to be irrelevant.[45] The Court of Appeals, however, reversed, holding that the tenant should have been allowed to show:

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[39] Josh Cabaret, 256 Ga. at 749.
[40] Id.
[41] Id. at 749 – 750 (internal citations and punctuation omitted).
[42] Smiway, 178 Ga. App. 414, 343 S.E2d 497 (1986)
[43] Id. at 415.
[44] Id.
[45] Id.

> [T]hat, even though it was not in actual possession of the premises at the time of the taking, it had not abandoned the leasehold itself back to the [landlord] and, as the holder of the separate interest, was entitled to at least some of the compensation to be awarded for the taking of the property.[46]

Another case which appears to be seemingly at odds with Josh Cabaret, is the case of Department of Transportation v. 2.734 Acres,[47] where the condemnor appealed a jury charge that allowed the tenant to receive both business and leasehold damages, despite the fact that the tenant had discontinued operations and sold its business one month prior to the date of taking.[48] After stating that the issue had not been properly preserved for appeal, the Court of Appeals noted that, even if the issue had been preserved, the law on the issue fell against the condemnor because "the catalyst of the sale was undoubtedly the impending condemnation proceedings."[49]

2. Lease Termination

The case law is clearer on the issue of lease termination caused by a condemnation. On one end of the spectrum is Franco's Pizza & Delicatessen, Inc.,[50] where the lease provided for termination in the event of condemnation.[51] The last two sentences of the lease provision addressing termination in the event of condemnation stated:

> Such termination, however, shall be without prejudice to the right of either Landlord or Tenant to recover compensation and damage caused by the condemnation from the condemnor. It is further understood and agreed that neither the Tenant nor the Landlord shall have any rights in any award made to the other by any condemning authority.[52]

The trial court held that the lease terminated upon the taking and denied the tenant's right to recover damage to its leasehold interest.[53] The Court of Appeals reversed, holding:

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[46] Smiway, 178 Ga. App. at 415 – 416.
[47] 2.734 acres, 168 Ga. App. 541, 309 S.E.2d 816 (1983).
[48] Id. at 541.
[49] Id. at 543.
[50] Franco's Pizza & Delicatessen, Inc., 178 Ga. App. 331.
[51] Id. at 332.
[52] Id.
[53] Id. at 331.

> In view of the sentence preserving the rights of the landlord and tenant to recover compensation and damage caused by condemnation, we construe this provision as providing that the lease is terminated in event of condemnation as between the parties to the lease only. The trial court erred in concluding that the [tenant] was precluded from proceeding to recover appropriate compensation from condemnor.[54]

On the opposite end of the spectrum is Emanuel Tractor Sales, Inc. v. Department of Transportation,[55] where the parties entered into a lease on March 2, 1998 to memorialize a 1982 lease that had been lost.[56] The lease provided:

> [I]n the event any part of the leased premises is taken through condemnation, or should the [landlord] voluntarily sell any part of the leased premises to any City, County, State or Federal Agency for right of way purposes and should said condemnation or conveyance either [sic] restrict the ability of [the tenant] to maintain its business on the premises, this lease shall automatically terminate. Additionally, [the tenant] shall have the sole and exclusive right and remedy to terminate this lease at any time upon thirty days notice to [the landlord] of his desire to terminate said lease, in the event any actual or proposed condemnation proceeding shall, in the [tenant's] opinion, create such an inconvenience, hindrance or total inability to transact business on the leased premises, the [tenant] deems it necessary to vacate said premises.[57]

On June 5, 1998, the parties executed an amendment to correct "a number of errors", including the substitution of parties and the correction of a renewal term from 15 years to 25 years.[58]

The landlord sold the underlying property to the DOT and the tenant sued for inverse condemnation, claiming damage to its leasehold interest.[59] The trial court granted summary judgment in favor of the DOT, finding that the tenant did not have a compensable interest in the property because the lease terminated automatically upon the sale to the DOT.[60] The Court of Appeals affirmed, stating:

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[54] Franco's Pizza & Delicatessen, Inc., 178 Ga. App. at 331.
[55] Emanuel Tractor Sales, Inc., 257 Ga. App. 360, 571 S.E.2d 150 (2002).
[56] Id. 360 – 361.
[57] Id. at 361.
[58] Id. at 361 – 362.
[59] Id. at 360 – 362.
[60] Id.

> The provision in the lease for automatic termination upon certain things occurring was a condition subsequent agreed to by the parties that would cause the lease to terminate with no further duties or obligations on any party. No precise technical words are required to create a condition subsequent. The law favors conditions to be subsequent rather than precedent and to be remediable by damages rather than by forfeiture. A condition subsequent to an enforceable contract is a term of the contract within the intent of the parties that the happening or nonoccurrence of an event after the contract becomes binding upon the parties, which, by pre-agreement of the parties, causes the contract to terminate without further duties and obligations on any party.[61]

In holding that the automatic termination provision of the lease was a condition subsequent which relieved the tenant of all rights and obligations under the lease, including the right to seek damage to its leasehold interest from the DOT, the Court of Appeals emphasized the intent of the parties, and the fact that at the time of the 1998 amendment, "the parties were aware that DOT intended to either buy or take a right of way across the front of the property when they entered into the lease."[62]

When a lease is terminated because of a condemnation, the landlord may recover additional damages as a result of the lease termination. [63] The courts have not established any standards for measuring the damages from such lease termination, but it would seem that the amount of damages would depend upon the suitability of the remaining property for rental purposes after the taking and completion of the project.[64] If the remaining property could rent for as much or more than the rent before the taking, the landlord would not be entitled to additional damages.[65] If the property, however, would rent for a lower amount after the taking, the landlord's consequential damages would be reflected in the reduced market value of the property based upon an income approach to value.[66]

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[61] Emanuel Tractor Sales, Inc., 257 Ga. App. at 364.
[62] Id.
[63] See Carasik Group v. City of Atlanta, 146 Ga. App. 211, 246 S.E.2d 124 (1978); and Hinkel, Georgia Eminent Domain, 2007 Ed., Section 6-8.
[64] Hinkel, Georgia Eminent Domain, 2007 Ed., Section 6-8.
[65] Id.
[66] Id. The value of the property is separated into the present value of the right to receive rents during the term of the lease, together with the value of the landlord's reversion at the end of the lease. City of Atlanta v. West, 160 Ga. App. 609, 287 S.E.2d 558 (1981).

A landlord cannot recover his loss of rental income stream as a separate element of compensation in addition to the fair market value of the property and consequential damages to the remaining property.[67]

III. Tenant Improvements, Fixtures and Equipment

In many cases the real estate appraiser for the condemnor or the condemnee may appraise a building improvement as including the basic interior build-out, electrical systems, plumbing systems, HVAC systems and equipment necessary for basic building operations. Any special or upgraded interior build-out, fixtures or equipment will be appraised by a special fixtures appraiser.

In appraising these items, which generally are included under the category of "fixtures," the fixture appraiser normally will evaluate the cost new to install the fixtures and deduct depreciation to reach an opinion of the fair market value of the fixtures in place on the date of taking. Then, under the theory that the value of those fixtures to the condemnor would only be salvage value, the fixture appraiser will deduct salvage value from the value of the fixtures in place for an opinion of just and adequate compensation for the fixtures. Under this appraisal theory, the condemnor normally would have no objection to the condemnee removing the fixtures on the grounds that the condemnor already had recovered salvage value for those items.

Under a lease where the condemnation clause allows a tenant to claim compensation for tenant improvements, fixtures or equipment installed by the tenant, these items may be recovered even where the tenant cannot recover for a leasehold value as such. In cases where the landlord has provided a tenant improvement allowance to the tenant, the unamortized value of that allowance could be deducted from the recovery for the tenant improvements.

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[67] Continental Corp. v. Department of Transportation , 185 Ga. App. 792, 793, 366 S.E.2d 160 (1988); and DeKalb County v. Queen, 135 Ga. App. 307, 310; 217 S.E.2d 624 (1975).

IV. Relocation Expenses

In Georgia, certain relocation expenses may be recovered either as part of the condemnation action or in a separate administrative proceeding, but a tenant cannot recover relocation benefits under both methods.[68]

1. Administrative relocation expenses

The Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1971[69] and the Georgia Relocation Assistance and Land Acquisition Policy Act[70] provide the administrative procedure for the recovery of relocation expenses for a public project financed in whole or in part by federal funds. The recovery of relocation benefits under these acts is through an administrative procedure that is separate from the condemnation action. The type of benefits allowed and the amount of recovery are established by statute and administrative regulations.

2. The Landowner's Bill of Rights and Private Property Protection Act

In 2006, the Georgia General Assembly passed the Landowner's Bill of Rights and Private Property Protection Act, which provides for, among other things, the recovery of relocation damages for condemnation actions. O.C.G.A. §22-1-13 provides that any condemnee that is displaced as a result of the condemnation shall be entitled to:

(1) Actual reasonable expenses in moving himself or herself, his or her family, business, farm operation, or other personal property within a reasonable distance from the property condemned;

(2) Actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation;

(3) Such other relocation expenses as authorized by law; and

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[68] Department of Transportation v. Gibson, 251 Ga. 66, 67 – 69, 303 S.E.2d 19 (1983).
[69] 42 U.S.C. §§ 4601-4655.
[70] O.C.G.A. §§ 22-4-1 to 22-4-15

(4) With the consent of the condemnee, the condemnor may provide alternative site property as full or partial compensation.

The terms relocation damages and reasonable expenses are not defined in the Act, and it is unclear as to what would be included within these terms. However, O.C.G.A. § 22-1-13 is similar to the Federal Uniform Relocation and Assistance and Real Property Acquisition Policies Act and decisions interpreting relocation expenses under the Federal Act may provide some guidance as to how courts would interpret O.C.G.A. § 22-1-13.

3. Relocation expenses under Georgia condemnation law

Under Georgia condemnation law, where a tenant operates a business on property acquired in a condemnation case, and the business is forced to relocate because of the condemnation, the owner may recover his relocation costs as a separate item of damage in the condemnation action.[71] Although relocation expenses are a separate element of compensation, much like business damage, there is no requirement of a finding of uniqueness before relocation expenses are awarded.[72] Relocation expenses may be recovered where the entire property is condemned or where only part of the property is condemned but the remaining property is not adequate for the business operation of the tenant.

Renovation expenses of new premises are not recoverable as relocation expenses under Georgia condemnation law.[73] In the case of MARTA v. Funk, the Supreme Court stated:

> "The owner of a business who received 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 a result of a condemnation. He is paid for his interest in the real property which was taken, indemnified for the damage to his separate business interest, and reimbursed for the . . . expense of removing his equipment, fixtures and supplies from the building sought to be condemned . . . . An additional recovery of renovation expenses, in the guise of relocation expenses, would constitute an overpayment."[74]

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[71] Gibson, 251 Ga. 66, 68, citing Bowers v. Fulton County, 221 Ga. 731, 146 S.E.2d 833 (1966).
[72] Bowers, 221 Ga. at 731. See also MARTA v. Leibowitz, 264 Ga. 486, 486 – 487, 448 S.E.2d 435 (1994); MARTA v. Mobster, 212 Ga. App. 260, 262, 441 S.E.2d 441 (1994).
[73] See MARTA v. Funk, 263 Ga. 385, 435 S.E.2d 196 (1993).
[74] Id. at 388.

a. Residential Property

The recovery of relocation expenses as a separate element of compensation in a condemnation action is not applicable to residential property. In the case of residential property, moving expenses are merely a personal expense and not an element of damage to either corporal or incorporeal property.[75]

V. Business Damage

1. Tenant

When a tenant operates a business on the property condemned, the tenant may recover business damage as a separate element of compensation if the business is totally destroyed or merely partially damaged.[76] Regardless of whether the tenant's business is totally destroyed or partially damaged, all elements of proof justifying a recovery of business damage must be satisfied.

Initially, the tenant must prove a unique relationship between the business and the property. The Georgia appellate courts have developed three tests of uniqueness that have merged as independent criteria under one general rule.[77] Only one of the three tests needs to be met in order to authorize a recovery of business damage.[78] Under the first test, known as the relocation test, a tenant who has an established business may recover business damage if the property on which the business is located must be duplicated for the business to survive and if there is no substantially comparable property within the area.[79] The second test of uniqueness focuses on the relationship of the owner and the business to the real property. Under this test it must appear, not that the property itself is unique, but that the business owner's relationship to

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[75] City of Gainesville v. Chambers, 118 Ga. App. 25, 29 162 S.E.2d 460 (1968). But see O.C.G.A. § 22-1-13(1) (providing that "any condemnee that is displaced as a result of the condemnation shall be entitle to [a]ctual reasonable expenses in moving himself or herself, his or her family . . . or other personal property within a reasonable distance from the property condemned).

[76] Department of Transportation v. Dixie Highway Bottle Shop, 245 Ga. 314, 314, 265 S.E.2d 10 (1980), citing Department of Transportation v. Kendricks, 148 Ga. App. 242, 250 S.E.2d 854 (1978).

[77] 2.734 Acres of Land, 168 Ga. App. 541, 545.

[78] Id. at 545.

[79] Housing Authority of Atlanta v. Troncalli, 111 Ga. App. 515, 518, 142 S.E.2d 93 (1965).

the property is unique, such that its advantages to him are more or less exclusive; that it is property having unique value to the business owner alone, without like value to others who might acquire it; property with characteristics of location or construction that limit its usefulness to the business owner, so that the elements of value cannot pass to a third party who might acquire the property.[80] The third test of uniqueness provides that 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.[81] Whether the property is unique for purposes of business damage is a jury question.[82] Only slight evidence of uniqueness is required to submit the issue to the jury.[83] The tenant has the burden of proof to show that property is unique in order to recover business damage as a separate element of compensation.[84]

The measure of damage that a tenant can recover for damage to his business is the difference between the market value of the business prior to the taking and its market value after the taking.[85] Various elements such as loss of profits, loss of customers, or a decrease of earning capacity of the business may all be considered in determining the decrease of the value of the business, although these factors do not themselves represent separate elements of compensation.[86] The evidence of business damage cannot be remote or speculative.[87]

A tenant claiming business damage has an obligation to mitigate his damages,[88] but there must be sufficient evidence to indicate what options were available to the tenant to

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[80] Chambers, 118 Ga. App. at 27 – 28.
[81] Housing Authority of Atlanta v. Southern R. Co., 245 Ga. 229, 230, 264 S.E.2d 174 (1980). See also Department of Transp. v. Eastern Oil Co., 149 Ga. App. 504, 254 S.E.2d 730 (1979).
[82] Department of Transportation v. Coley, 184 Ga. App. 206, 209, 360 S.E.2d 924 (1987); and Smiway, 178 Ga. App. at 417.
[83] Department of Transportation v. 19.646 Acres of Land, 178 Ga. App. 287, 287, 242 S.E.2d 760 (1986).
[84] Kim v. MAOGA, 227 Ga. App. 563, 563, 489 S.E.2d 372 (1987).
[85] Bowers, 122 Ga. App. 45, 50, 176 S.3.2d 219 (1970).
[86] 122 Ga. App. at 50.
[87] Dixie Highway Bottle Shop, 245 Ga. at 314, citing Kendricks, 148 Ga. App. 242.
[88] Eastern Oil Co., 149 Ga. App. at 505-506; and MARTA v. Ply-Marts, Inc., 144 Ga. App. 482, 485, 241 S.E.2d 599 (1978).

mitigate his business damages before a charge on the subject is authorized.[89] Where there is no evidence to show what actions the tenant could have taken to avoid or minimize his damages, it is reversible error to give a mitigation of damages charge.[90]

A tenant is not required to relocate its business to another location in order to mitigate business damage when the estimated relocation costs exceed the value of the business.[91]

2. Landlord

In addition to the elements of proof discussed above, a landlord/owner must show total destruction of the business to recover business damage.[92] Alternatively, the landlord/owner can use evidence of business damage to show consequential damages to the remainder real estate.[93]

[89] Eastern Oil Company, 149 Ga. App. 505-506.
[90] Department of Transportation v. Pitman, 223 Ga. App. 797, 798 479 S.E.2d 112 (1996); and Fountain v. MARTA, 147 Ga. App. 465, 471, 249 S.E.2d 296 (1978).
[91] Carroll County Water Authority v. L.J.S. Grease and Tallow, Inc., 274 Ga. App. 353, 354, 617 S.E.2d 612 (2005).
[92] Dixie Highway Bottle Shop, 245 Ga. at 314, citing Dept. of Transp. v. Dent, 142 Ga. App. 94, 235 S.E.2d 610 (1977).
[93] Department of Transportation v. George, 202 Ga. App. 270, 271, 414 S.E.2d (1991).