

**TENANT RIGHTS AND
COMPENSATION ISSUES**

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TENANT RIGHTS AND COMPENSATION ISSUES

INTRODUCTION

Georgia law governing tenants' rights in condemnation cases has developed 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. Ga. Const. 1983, Art. I, Sec. III, Para. I; Hayes v. City of Atlanta, 1 Ga.App. 25, 57 S.E. 1087 (1907); Hinkel, Georgia Eminent Domain, 2007 Ed., Section 4-2. 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. Franco's Pizza and Delicatessen, Inc. v. Department of Transportation, 178 Ga.App. 331, 343 S.E.2d 123 (1986); Lee v. Venable, 134 Ga.App. 92, 213 S.E.2d 188 (1975); Alexander v. Rozetta, 110 Ga.App. 660, 139 S.E.2d 451 (1964); Hayes v. City of Atlanta, *supra*.

The major issues of tenants' rights and compensation usually involve:

- (1) The terms of and the value of the "leasehold interest" in the real estate;
- (2) Compensation for tenant improvements, fixtures and equipment;
- (3) Compensation for relocation expenses; and
- (4) Compensation for business loss or damage.

I. Tenant Interest in Real Property

Just and adequate compensation for the taking or damaging of a leasehold interest generally is based on the market value of the lease on the date of taking. Peek v. Department of Transportation, 138 Ga.App. 780, 299 S.E.2d 554 (1976). 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 lessee. Peek v. Department of Transportation, supra. McGhee v. Floyd County, 95 Ga.App. 221, 97 S.E.2d 529 (1957); Ellis v. Department of Transportation, 175 Ga.App. 123, 333 S.E.2d 6 (1985). 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 lessee. If the lessee is paying rent equal to or greater than the market rent, his leasehold has no market value. But if the lessee 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.¹ See, Hinkel, Georgia Eminent Domain, 2007 Ed., Section 6-7. In determining the value of the leasehold, it is relevant to consider whether “the lessee 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 lessee therein, whether profitable or unprofitable and how much so, and the nature and extent of improvements made by the lessee on the premises and the fixtures installed by him as

¹ The “unexpired term of the lease” may include an option to extend or renew the lease provided that the option contains sufficiently specific terms to be enforceable. Department of Transportation v. Calfee Co. of Dalton, Inc., supra.

tending to illustrate an increased rental value in the premises.” Minsk v. Fulton County, 83 Ga.App. 520, 64 S.E.2d 336 (1951).

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. The Georgia Supreme Court has affirmed the applicability of the undivided fee rule in condemnation cases. Fulton County v. Funk, 266 Ga. 64, 463 S.E.2d 883 (1995). Pursuant to the undivided fee rule as set forth in the Funk case, 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 lessor and lessee, are entitled to their respective shares of fair market value. 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. Fulton County v. Funk, supra.

The condemnation clause in a lease is the most important consideration in determining the respective rights of the landlord and tenant when there is a condemnation of the property that is the subject of the lease. Yet the condemnation clause often is one of the most overlooked provisions in the lease. 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 owner/landlord and for the tenant/lessee, the condemnation clause in the lease may substantially modify or eliminate the right of a tenant to recover compensation.

Georgia law provides that “[a]bsent a public policy interest, contracting parties are free to contract to waive numerous and substantial rights Thus, a lessee may in the lease assign away or waive its right to just and adequate compensation in any type of condemnation proceedings, which assignment or waiver we will enforce.” McGregor v. Board of Regents of the University System of Georgia, 249 Ga.App. 612, 548 S.E. 2d 116 (2001). In determining the validity and extent of any assignment or waiver, the courts have stated that “as a general rule, the provisions of a contract will be construed against the draftsman, and those of the lease will be construed against the lessor. Provisions that result in forfeiture of tenant’s possessory right will be strictly construed against the lessor. Department of Transportation v. Calfee Co. of Dalton, Inc., 202 Ga.App. 299, 414 S.E. 2d 268 (1991) (cert. denied 1992).

1. Lease Termination Issues.

a. Acquisition of Part of the Leased Property.

1. The condemnation clause should determine the circumstances under which the lease can be terminated if only part of the property is taken. This is a question of how much of a taking is too much for the lease to continue and who gets to decide how much is too much. In one case the lease provided that:

“In the event that the premises or any part thereof are taken or condemned or are conveyed under the threat of eminent domain, at Lessee’s option the lease may be terminated as of the date of such taking.” Budd Land Company, Ltd. v. K&R Realty Company, 159 Ga.App. 448, 283 S.E. 2d 665 (1981)

The Court of Appeals call this a “standard clause,” but a landlord clearly would conclude that this clause is too broad in favoring the tenant. In the Budd Land case, the tenant terminated the lease when a small strip of land was taken in a condemnation action even though the taking did not substantially impair the tenant’s use of the remaining property. The Court of Appeals held that the lessee had a contractual right to terminate the lease and affirmed the trial court’s grant of summary judgment.

From my observations and experience, there is no such thing as a “standard condemnation clause.” The lease should address the specific termination rights for a partial taking based upon the impact of the taking on the tenant’s reasonable use of the leased premises for the purposes of the lease. This standard can be stated in terms of:

- (1) Whether the remaining property is sufficient for the reasonable operation of tenant’s business,
- (2) Whether a specific percentage of the leased premises (building and/or land area) is taken,
- (3) Whether certain access has been impaired,
- (4) Whether a certain amount of parking has been taken, or
- (5) Any other issues specific to the tenant’s use that the parties agree would significantly diminish the use of the leased premises if taken in a condemnation case.

2. The condemnation clause also should specify who decides whether the partial taking is sufficient to terminate the lease – landlord, tenant or

either. The deciding party or parties should be required to make this decision by a reasonable exercise of discretion based upon the facts of the condemnation.

3. The condemnation clause also should specify when the termination would become effective, whether written notice of the effective date is required, and the date through which rent must be paid. The obvious choices are for the termination to be effective would be on the date of taking or on the date the condemning body is granted the right of possession of the property. Normally the rent would continue to be paid until the date of termination.

4. The condemnation clause should address the respective rights of the landlord and tenant in the event the taking of part of the property does not result in the termination of the lease. This provision should specify a formula for determining the rent to be paid on the remaining premises, a provision for restoration of the property, if possible, the party responsible for restoration, and a provision for the source of the funds to restore the property (i.e., the condemnation award).

b. Acquisition of the Entire Leased Premises.

In the event of a condemnation or purchase of the entire leased premises, termination of the lease normally would be automatic and no written notice normally would be required. The condemnation clause still should provide the effective time of the lease termination, either on the date of taking or on the date the governmental body obtains the right of possession of the property. Provision

also should be made that rent would be paid until the effective date of the termination.

2. Compensation Issues.

The condemnation clause must provide for the respective rights of the landlord and tenant to recover just and adequate compensation. Georgia law clearly allows a tenant to waive its claim of compensation against both the landlord and the condemnor and to assign its claims to the landlord with or without a right to recover compensation from the condemnor. McGregor v. Board of Regents, supra, Department of Transportation v. Calfee Co., supra. Simmerman v. Department of Transportation, 167 Ga.App. 383, 307 S.E.2d 4 (1983). The terms of the waiver or assignment are matters of negotiation between the landlord and tenant.

The first issue normally is compensation for the value of the property and improvements (real estate issues). This is an issue of critical importance to the parties, because the unified fee rule is alive and well in Georgia. Fulton County v. Funk, supra. Therefore, the tenant's recovery of a leasehold value in the real estate will result in the reduction of the landlord's award for the unencumbered fee simple value of that real estate. It is in the landlord's interest to insist upon the tenant waiving and assigning its claim of leasehold interest or value of the unexpired term of the lease so that the tenant has no claim against the landlord or the condemnor for that leasehold value. As a compromise, some condemnation clauses allow the tenant to recover the unamortized portion of any tenant improvements paid for by the tenants that were not reimbursed by the landlord.

A condemnation clause provision that would allow the tenant to recover just and adequate compensation for items that would not reduce the landlord's recovery often are included in the lease. These items would include business damage, fixtures and personal property of the tenant and relocation benefits.

The various options for recovery of just and adequate compensation can be summarized as follows:

a. The landlord is entitled to recover the entire payment of just and adequate compensation, the tenant assigns to landlord all its claims of compensation and waives any claims for compensation against either the landlord or the condemning body.

b. The landlord is entitled to recover the entire payment of just and adequate compensation subject to lessee's right to recover from the landlord a portion of the compensation as provided by law or statute. This type provision most often appears in property that is subject to the Federal Petroleum Marketing Practice Act (15 USCA §2801, et. seq.), but the Georgia courts have interpreted this language in a broader context. Simmerman v. Department of Transportation, supra. In that case the Court of Appeals allowed the tenant to recover from the landlord not only business losses as specified in the federal statute but also a possible leasehold interest.

c. The landlord recovers the entire award of just and adequate compensation, and the tenant waives any claims against the landlord but reserves all claims against the condemnor. See, Department of Transportation v. Calfee Co., supra.

d. The landlord and tenant each may recover just and adequate compensation from the condemning body as allowed by law, provided that neither landlord or tenant shall have a claim against each other.

e. The landlord is entitled to recover the entire award of just and adequate compensation provided that the tenant retains the right to claim a separate award from the condemnor for business damage, tenant improvements and fixtures installed by tenant, personal property and relocation expenses.

II. 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.

III. Relocation Expenses

In Georgia, certain relocation expenses may be recovered as part of the condemnation action or in a separate administrative proceeding, but a tenant cannot recover relocation benefits under both methods. Department of Transportation v. Gibson, 251 Ga. 66, 303 S.E.2d 19 (1983).

The Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1971, 42 U.S.C. §§4601-4655 and the Georgia Relocation Assistance and Land Acquisition Policy Act, O.C.G.A. §22-4-1 to 22-4-15 provide the administrative procedure for the recovery of relocation expenses for a public project is 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.

In 2006, the Georgia General Assembly passed the Landowner's Bill of Rights and Private Property Protection Act, O.C.G.A. §22-1-13. The relocation benefits under this act are very similar to those under the federal relocation act but may be recovered in State or local government funded projects where there is no federal funding assistance.

The 2006 act, like the federal act and the previous State act, is an administrative process that is separate from the condemnation action. The 2006 act provides benefits that are in addition to the relocation expenses that otherwise could be recovered under Georgia law, but has with the prior federal and Georgia relocation acts, a tenant could not recover benefits both under the 2006 act and under the relocation benefits recovery in a condemnation case.

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. Bowers v. Fulton County, 221 Ga. 731, 146 S.E.2d 833 (1966); Department of Transportation v. Gibson, supra. While relocation expenses under Georgia condemnation law are part of a claim for business damage, a tenant does not have to prove that the condemned property was unique in order to recover relocation expenses. MARTA v. Mobasser, 212 Ga.App. 260, 441 S.E.2d 441 (1994); MARTA v. Leibowitz, 264 Ga. 486, 448 S.E.2d 435 (1994).

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. MARTA v. Funk, 263 Ga. 385, 435 S.E.2d 196 (1993).

In that case, the 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.”

IV. Business Damage

When a tenant operates a business on the property condemned, the tenant may recover business damages as a separate element of compensation if the business is totally destroyed or merely partially damaged. Department of Transportation v. Dixie Highway Bottle Shop, 245 Ga. 314, 265 S.E.2d 10 (1980); Department of Transportation v. Kendricks, 248 Ga.App. 242, 250 S.E.2d 854 (1978); Department of Transportation v. 2.734 Acres of Land, 168 Ga.App. 541, 309 S.E.2d 816 (1983). 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 held that there are three tests of uniqueness that have merged as independent criteria under one general rule. Only one of the three criteria needs to be met in order to authorize a recovery of business damage. Under the first test, known as the relocation test, a tenant who has an established business may recover business damages if the property on which the business is located must be duplicated for the business to survive and it there is no substantially comparable property within the area. The second test of uniqueness provides that the business owner must prove, not that the property itself is unique, but that the business 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 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. 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. Department of Transportation v. 2.734 Acres of Land, 168 Ga.App. 541, 309 S.E.2d 816 (1983); Hinkel, Georgia Eminent Domain, 2007 Ed., Section 5-12.

Whether the property is unique for purposes of business damage is a jury question. MARTA v. Ply-Marts, Inc., 144 Ga.App. 482, 241 S.E.2d 599 (1978); Smiway, Inc. v. Department of Transportation, 178 Ga.App. 414, 343 S.E.2d 497 (1986); Department of Transportation v. Coley, 184 Ga.App. 206, 360 S.E.2d 924 (1987); Department of Transportation v. 19.646 Acres of Land, 178 Ga.App. 287, 242 S.E.2d 760 (1986). While uniqueness is a jury question, it is error to submit this issues to jury unless there is sufficient evidence to support its finding of uniqueness. Southwire Co. v. Department of Transportation, 147 Ga.App. 606, 249 S.E.2d 650 (1978); Department of Transportation v. 2.734 Acres of Land, supra.; Georgia Power Co. v. Bishop, 162 Ga.App. 122, 290 S.E.2d 328 (1982). Only slight evidence of uniqueness is required to submit the issue to the jury, and it is for the jury to decide if there is sufficient evidence to support the business damage claims. Department of Transportation v. 19.646 Acres of Land, supra. The condemnee has the burden of proof to show that property is unique in order to recover business damage as a separate element of compensation. Kim v. MAOGA, 227 Ga.App. 563, 489 S.E.2d 372 (1987).

The measure of damage that a tenant/condemnee 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. Various elements such as loss of profits, loss 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. MARTA v. Martin, 193 Ga.App. 566, 388 S.E.2d 346 (1989); Old South Bottle Shop v. Department of Transportation, 175 Ga.App. 295, 333 S.E.2d 127 (1985); Whitefield v. Department of Transportation, 248 Ga.App. 172, 946 S.E.2d 308 (2001). The evidence of business loss cannot be remote or speculative. Department of Transportation v. Dixie Highway Bottle Shop, supra. Department of Transportation v. Kendricks, supra.; Venable v. State Highway Department, 138 Ga.App. 788, 227 S.E.2d 509 (1976).

A tenant claiming business damage has an obligation to mitigate his damages, Department of Transportation v. Eastern Oil Company, 149 Ga.App. 504, 254 S.E.2d 730 (1979); Fountain v. MARTA, 147 Ga.App. 465, 249 S.E.2d 296 (1978); MARTA v. Ply-Marts, Inc., 144 Ga.App. 42, 241 S.E.2d 599 (1978), but there must be sufficient evidence to indicate what options were available to the tenant to mitigate his business damages before a charge on the subject is authorized. Department of Transportation v. Eastern Oil Company, supra.; MARTA v. Ply-Marts, Inc., supra. Where there is no evidence to show what actions the tenant/condemnee could have taken to avoid or minimize his damages, it is reversible error to give a mitigation of damages charge. Fountain v. MARTA, supra.; Bowden v. Department of Transportation, 190 Ga.App.

827, 380 S.E.2d 356 (1989); Department of Transportation v. Pitman, 223 Ga.App. 797, 479 S.E.2d 112 (1996).

A condemnee is not required to relocate its business to another location in order to mitigate business loss damage when the estimated relocation costs exceed the value of the business. Carroll County Water Authority v. L.J.S. Grease and Tallow, Inc., 274 Ga.App. 353, 617 S.E.2d 612 (2005).