

Louisiana Law Review

Volume 51 | Number 4
March 1991

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Tracy Lee Howard

Repository Citation

Tracy Lee Howard, *Compensating an Owner to the Full Extent of His Loss: A Reevaluation of Compensable Damages in Louisiana Expropriation Cases*, 51 La. L. Rev. (1991)
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COMPENSATING AN OWNER TO THE FULL EXTENT OF HIS LOSS: A REEVALUATION OF COMPENSABLE DAMAGES IN LOUISIANA EXPROPRIATION CASES

I. INTRODUCTION

In 1974, article I, section 4 of the Louisiana Constitution was revised. The language of the 1921 constitution's expropriation clause giving the landowner the right to "just and adequate compensation"¹ was expanded to grant the landowner the additional right to be "compensated to the full extent of his loss."² The new provision was patterned after the 1972 Montana constitution³ and was designed to provide for a broader range of damage compensation than that found in the 1921 constitution, which echoed the concept of "just compensation" embodied in the fifth amendment of the United States Constitution.⁴

The purpose of this comment is to evaluate Louisiana jurisprudence interpreting the 1974 revision, examine what effect those decisions have given to the expanded language, and determine if the courts are in fact

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1. La. Const. art. I, § 2; art. III, § 37; art. IV, § 15 (1921).
2. La. Const. art. I, § 4 (1974, amended 1989).
3. Mont. Const. art. II, § 29 (1972). The provision states in pertinent part: Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner.
4. See Jenkins, *The Declaration of Rights*, 21 *Loy. L. Rev.* 9, 23 (1975). U.S. Const. amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without *just compensation* (emphasis added).

It should be noted that although the U.S. Constitutional provision requires an award of "just compensation" in expropriation cases, states are certainly free to expand the range of compensable damages beyond that which one might otherwise be allowed under the federal provision. This appears to be the impetus of La. Const. art. I, § 4 (1974). See *Guidry v. Roberts*, 335 So. 2d 438, 448 (La. 1976). For a good discussion of issues pertaining to the expansion of personal rights under state constitutions, see Brennan, *State Constitutions and the Protection of Individual Rights*, 90 *Harv. L. Rev.* 489 (1977); also Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 *U. Balt. L. Rev.* 379 (1980).

awarding the broader scope of damages as intended by the revision. First, the comment focuses on damage awards typically allowed in Louisiana prior to the revision and examines *State Department of Highways v. Constant*,⁵ a post-revision decision that provided the basis for subsequent compensation awards. The second section of the comment addresses the kinds of losses that Louisiana courts have deemed compensable since *Constant* to show that the courts have in fact followed *Constant* by enlarging the scope of compensable damages. Although the spectrum of compensable damages has been expanded, courts have not extended recovery to include subjective or intangible losses. Therefore, the comment examines whether subjective or intangible damage compensation should be awarded under the existing constitutional provision in article I, section 4. Both the language of the provision and the intent of its framers reveal that subjective or intangible losses should be compensated if the owner can prove the loss. Finally, this comment sets forth six recommendations for implementing the constitutional mandate that subjective and tangible losses be awarded in expropriation cases.

II. BACKGROUND

Prior to the 1974 constitutional revision, Louisiana courts limited compensation for expropriation to damages reflected in the value of the property taken. Damages were not awarded to compensate the landowner for incidental losses he personally may have suffered as a result of the taking. Hence, the courts routinely interpreted "just and adequate compensation"⁶ as being the "fair market value" of the property taken. This value has been described as the price a willing buyer and a willing seller would agree upon after free and open negotiations.⁷ In addition to fair market value, severance damages, suffered because of a decline in value of the property as a result of a partial taking, also were compensable prior to the revision.⁸ Awards of fair market value and

5. 369 So. 2d 699 (La. 1979).

6. La. Const. art. I, § 2; art. III, § 37; art. IV, § 15 (1921).

7. M. Dakin & M. Klein, *Eminent Domain in Louisiana* 30-31 (1970); 4 Nichols on *Eminent Domain* § 12.02[1], at 12-62 (J. Sackman rev. 3d ed. 1989); also Note, *Expropriation: Compensating the Landowner to the Full Extent of His Loss*, 40 La. L. Rev. 817, 819 (1980).

8. M. Dakin & M. Klein, *supra* note 7, at 67. Severance damages are those compensable damages which flow from a partial expropriation of a tract of land, i.e., the difference between the market value of the remaining property "before and after" the taking. The "before and after" test was implemented legislatively in La. R.S. 48:453(B) (1984 and Supp. 1990) (effective Jan. 1, 1975) which states in pertinent part:

The measure of damages, if any, to the defendant's remaining property is determined on a basis of immediately before and immediately after the taking, taking into consideration the effects of the completion of the project in the

severance damages were given to relieve the landowner whose property had suffered some form of diminution in substance or had been rendered intrinsically less valuable as a result of the taking.

Limitation to the fair market value of the property or to severance damages, in the event of a partial taking, was consistent with the traditional notion of "just compensation" that included awards for damages to the "res," or property itself.⁹ Consequently, courts denied compensation for loss incurred by owners incidental to the taking if the losses were not reflected in the value of the property taken. Louisiana courts tended to focus more on the physical aspects of the property loss in computing damages (objective losses) rather than on the personal loss an owner may have experienced as a result of the taking (subjective losses).¹⁰ For example, incidental or consequential damages such as moving costs, legal expenses, loss due to business interruption, and loss of rentals due to anticipation of the taking generally were denied.¹¹ When

manner proposed or planned.

La. R.S. 48:453(C) (1984 and Supp. 1990) in addition also recognizes that this test is designed to satisfy the constitutional requirement that an owner be compensated to the "full extent of his loss." Regarding the "before and after" test, see *State Dep't of Highways v. Bitterwolf*, 415 So. 2d 196, 201 (La. 1982).

9. The "res" concept was developed early with respect to eminent domain cases. Compensation was considered due only for the "res," or the thing itself, taken in eminent domain and "not for the disturbance to the relationship between the person and the 'res.'" Hershman, *Eminent Domain: Current Concepts and Practical Problems*, in *A Practical Guide to the Legal and Appraisal Aspects of Condemnation*, 3, 5 (S. Searles ed. 1969). This concept was fully set forth in the landmark case *Monogahela Navigation Co. v. United States*, 148 U.S. 312, 326, 13 S. Ct. 622, 626 (1893). The court there stated in pertinent part:

The noun "compensation," standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So if the adjective "just" had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective "just." There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. And this just compensation, it will be noticed, *is for the property, and not to the owner.*

Id. (emphasis added).

10. M. Dakin & M. Klein, *supra* note 7, at 69. See also Note, *supra* note 7, at 819-21 for a helpful survey of the ways in which courts have measured "fair market value."

11. Hershman, *supra* note 9, at 5; he lists other common incidental damages as: (1) transportation and other expense in moving a family or business; (2) transportation, brokerage and other expenses in searching for a new location; (3) increased cost of financing, rent, etc. for securing substitute dwelling or business location; (4) loss on forced sale of personal property not usable at the new location; and (5) loss of employment by reason of the discontinuance or relocation of the business and loss of opportunity to continue in business.

an expropriation resulted in the loss of business to an owner either because of less convenient access to the property or because of relocation to a less favorable area, such losses were deemed noncompensable.¹² Courts reasoned that incidental damages, including business losses, were simply to be borne by the owner as a portion of the price every citizen in an organized society must pay as part of the cost of maintaining and improving society.¹³ Furthermore, the limitation of expropriation awards no doubt reflected the "fear that high expropriation awards might retard essential public projects."¹⁴

Article I, section 4 of the Louisiana Constitution of 1974, however, made substantial changes that were intended to have far reaching effects on the scope of damage awards in expropriation cases. This provision states in pertinent part:

Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question. In every expropriation, a party has the right to trial by jury to determine compensation, and the *owner shall be compensated to the full extent of his loss.*¹⁵

Most of the changes were aimed at protecting the interests of the property owners themselves rather than focusing merely on property interests.¹⁶

12. M. Dakin & M. Klein, *supra* note 7, at 69.

13. *Id.* at 68-69.

14. Note, *supra* note 7, at 818.

15. La. Const. art. I, § 4 (1974, amended 1989) (emphasis added). The phrase "just compensation" is used twice in the third and fourth sentences of the provision. The language, however, refers to the compensation paid into court for the owner's benefit when property is taken by public agencies, not by private entities. The fifth sentence of art. I, § 4 refers specifically to the *level of compensation* to be paid, and it is there that the phrase "compensated to the full extent of his loss" is found; see Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La. L. Rev. 1, 15 n.65 (1974); L. Hargrave, *The Louisiana State Constitution: A Reference Guide* 28 (1991). It is important to note that art. I, § 4 was amended by 1989 La. Acts No. 840, § 1 (effective Nov. 6, 1989). The amendment, however, does not alter the previous expansion in 1974 pertaining to the level of compensation an owner may receive in the event property is expropriated.

16. Note, *supra* note 7, at 821; see also Hargrave, *supra* note 15, at 10-20 for a general discussion of these changes. He points out that examples of expanded rights include the provision allowing for a jury trial for *every* expropriation in order to determine appropriate compensation; further, no private entity authorized by law to expropriate may do so except for a public and necessary purpose. Louisiana courts have also held that

The most significant change was the inclusion of the mandate that a landowner is to be compensated to the "full extent of his loss." No longer was the award merely to be determined by the meaning of "just and adequate compensation." Shortly after the adoption of the 1974 constitution, the Louisiana Legislature re-enacted Louisiana Revised Statutes 48:441-460 in order to implement the new constitutional expropriation provision.¹⁷ These provisions, particularly Louisiana Revised Statutes 48:453, suggest that the legislature understood the scope of the new guarantee pertaining to compensation for expropriation to be broader than the 1921 constitution. For example, prior to the 1974 constitution, attorney fees were not recoverable in expropriation cases.¹⁸ Louisiana Revised Statutes 48:453(E), however, provides that reasonable attorney fees may be a part of the damages awarded in an expropriation proceeding.¹⁹ Another example is found in Louisiana Revised Statutes 48:453(C) which tracks the language of article I, section 4 of the 1974 constitution. It states in pertinent part, "[t]he owner shall be compensated to the full extent of his loss." The language of the provision suggests that the legislature desired compensation awards to expand beyond "fair market value" to include other kinds of loss to the property owner. Neither this provision, however, nor any other in this section of legislation gives much guidance as to how far courts may go in awarding damages.

Although the phrase "just compensation" was retained in article I, section 4, court decisions shortly after the revision viewed the new language, "compensated to the full extent of his loss," as the measure for compensation.²⁰ There was some question, particularly in appellate court decisions, whether the new language would be given a more expanded interpretation. For example, in *Louisiana Power & Light Co.*

art. 1, § 4 of the 1974 La. Const. grants lessees legal status to claim compensation in the event of an expropriation. *State, Dep't of Transp. & Dev. v. Jacob*, 483 So. 2d 592 (La. 1986); *State, Dep't of Highways v. Hayward*, 338 So. 2d 1171 (La. App. 2d Cir. 1976); *State, Dep't of Highways v. LeBlanc*, 319 So. 2d 817 (La. App. 1st Cir. 1975).

17. La. R.S. 48:441-460 (1984 and Supp. 1990); 1974 La. Acts, Ex. Sess., No. 30, eff. Jan. 1, 1975, amended by 1976 La. Acts No. 391, eff. Oct. 1, 1976; 1983 La. Acts No. 33; 1988 La. Acts No. 882. See also La. R.S. 19:1-13 (1979 and Supp. 1990); 1974 La. Acts, Ex. Sess., No. 11, effective Jan. 1, 1975.

18. *M. Dakin & M. Klein*, supra note 7, at 326.

19. La. R.S. 48:453(E) (Supp. 1990) states:

Reasonable attorney fees may be awarded by the court if the amount of the compensation deposited in the registry of the court is less than the amount of compensation awarded in the judgment. Such attorney fees in no event shall exceed twenty five percent of the difference between the award and the amount deposited in the registry of the court.

20. See *State, Dep't of Highways v. Champagne*, 356 So. 2d 1136, 1140 (La. App. 3d Cir. 1978).

v. Caldwell,²¹ the First Circuit Court of Appeal held that the new language meant nothing more than "[fair] market value" compensation.²² This view, however, was short-lived.

The principal case following the 1974 constitutional revision was *State, Department of Highways v. Constant*.²³ The Louisiana Supreme Court, for the first time since the revision, set forth a definitive interpretation of the phrase "compensated to the full extent of his loss."

The Department of Highways sought expropriation of three parcels of land for the construction of a new bridge. The expropriation included the loading and parking area of a marina, thus destroying the marina's business operations on the parent tract. The trial court awarded the owners the costs to replace the facilities taken as well as the market value of the land on which the new facilities were to be constructed. The First Circuit Court of Appeal reversed. The award, said the court, impermissibly exceeded the market value of the entire parent tract prior to the taking.²⁴

The supreme court amended the judgment to increase the landowner's compensation.²⁵ It reasoned that compensation to the "full extent of his loss" might require an amount in excess of the market value of the parent tract.²⁶ Hence, the court awarded compensation that allowed the restoration of the business facilities plus the purchase of land on which the loading area was to be constructed. The court noted that the new constitutional provision was intended to broaden former concepts of the measure of damages and was thus designed to permit the owner "to

21. 353 So. 2d 371 (La. App. 1st Cir. 1977), rev'd, 360 So. 2d 848 (1978).

22. *Id.* at 375.

23. 369 So. 2d 699 (La. 1979).

24. *State, Dep't of Highways v. Constant*, 359 So. 2d 666 (La. App. 1st Cir. 1978).

25. The supreme court awarded the landowner \$64,916.00 as the direct and indirect costs of constructing the replacement loading area. To this figure was added \$3,360.00 for the value of the land upon which the replacement loading area was to be constructed. The court stated that the sum of these figures (\$68,276.00) fully compensated the owner. The court reasoned that "[t]o allow an additional recovery for the land taken would constitute double recovery." *Constant*, 369 So. 2d at 707.

26. Justice Tate, writing for the majority, stated:

In view of the constitutional requirement that they be compensated to the full extent of their loss, it is not constitutionally significant that the award to them will exceed the market value of the property used in their business operations. The very purpose of the constitutional language was to compensate an owner for any loss he sustained by reason of the taking, not restricted (as under the former constitution) [citations omitted] to the market value of the property taken and the loss of market value of the remainder, sometimes including the cost to cure such damage—i. e., where (formerly) the award was based solely upon the physical value of the property itself, but not including injuries to a business or the cost of moving it due to the taking.

Constant, 369 So. 2d at 702.

remain in equivalent financial circumstances after the taking."²⁷ Stated differently, an owner should be put in as good a position pecuniarily as he would have been had the property not been taken.²⁸ Thus, the cost of replacing the loading and parking area was the most appropriate way to compensate the landowner to the "full extent of his loss."²⁹ Further, the court stated that "[i]ts replacement cost is appropriate, because of its *unique* and *indispensable* value to the defendants' business operations conducted at the site."³⁰

The supreme court's language, however, suggests a possible limiting qualification. The court stated:

We do not, by these rulings, announce any general principle that replacement cost is *always* the most appropriate measure of awarding a landowner compensation for the taking of a physical asset used in his business, nor that the depreciation of the former asset should never be considered.³¹

Constant demonstrates the court's willingness, pursuant to the new constitutional language, to expand the category of compensable damages in expropriation cases. The court clearly departed from the "res" concept in the award of damages and recognized "that the value of the property must be considered in relation to the owner and to his business."³² Nevertheless, the court left in doubt the scope of damages available. Although allowing for more than "fair market value," the court consistently referred to the damages award in pecuniary terms such as "economic loss[es],"³³ "as good a position pecuniarily,"³⁴ and "equivalent financial circumstances."³⁵ Arguably, this kind of reference could be construed to mean that damages should be limited only to those kinds that can be measured objectively in pecuniary terms,³⁶ thus excluding any type of intangible or subjective loss. Courts after *Constant* appear to have interpreted the language in this fashion.

III. COMPENSABLE DAMAGES FOLLOWING *CONSTANT*

This section sets forth several ways in which Louisiana courts have expanded the scope of compensable damages since *Constant*. The section

27. *Id.* at 701 (quoting the majority opinion from the court of appeal, *State, Dep't of Highways v. Constant*, 359 So. 2d 666, 671 (La. App. 1st Cir. 1978)).

28. *Id.*

29. *Id.* at 702.

30. *Id.* at 707 (emphasis added).

31. *Id.* at 706 (emphasis added).

32. Note, *supra* note 7, at 824.

33. *Constant*, 369 So. 2d at 703.

34. *Id.* at 702.

35. *Id.* at 701 (quoting the majority opinion of the court of appeal, *State, Dep't of Highways v. Constant*, 359 So. 2d 666, 671 (La. App. 1st Cir. 1978)).

36. Note, *supra* note 7, at 827.

then discusses reasons why some types of damages, heretofore noncompensable, should be included within the language "full extent of his loss."

A. *Economically Related Damages*

1. *Fair Market Value and Severance Damages*

Courts in Louisiana have continued in some situations to award an owner only the fair market value of the property taken by expropriation. These cases frequently distinguish *Constant*, stating that the case did not stand for the proposition that recovery of consequential damages, such as replacement costs or business losses, was the exclusive remedy for an owner. According to these opinions, recovery for damages other than fair market value or severance damages is available only when the property is either "unique" or "indispensable" to an ongoing business.³⁷ Absent one of these two criteria, courts in Louisiana have tended to award only the fair market value of the property taken as well as severance damages in the case of a partial taking.

For example, in *State, Department of Transportation & Development v. Shannon-Page Investment Co.*,³⁸ the state expropriated a parcel of land on which a warehouse building was situated. The only issue before the court of appeal was the amount of compensation for the building. The defendant, citing *Constant*, urged the court to award the replacement cost of the expropriated building without any deduction for depreciation. The court, however, accepted the state's contention that *Constant* applies only to situations in which there is an ongoing business on the expropriated property operated by the owner. Because the defendant had merely held the property for investment purposes, replacement costs were denied. Such costs were not necessary, said the court, to allow the property owners to continue their business operations without undue loss. The court read *Constant* to require generally that the property owner be placed in as good a pecuniary position as before the taking. Some situations, it noted, may require replacement costs to satisfy this mandate while others may only require fair market value. Hence, in this situation, the court considered fair market value to be adequate compensation.

37. The court in *Constant* noted that the criteria for deciding whether replacement costs were compensable were "uniqueness" and "indispensability." *Constant*, 369 So. 2d at 707; see supra text accompanying notes 25-30. See also, *State, Dep't of Transp. & Dev. v. Lobel*, 571 So. 2d 742 (La. App. 2d Cir. 1990), writ denied, No. 91-C-0047 (La. Feb. 8, 1991) (1991 LEXIS 396); *City of Lafayette v. Cason*, 393 So. 2d 424 (La. App. 3d Cir. 1980).

38. 478 So. 2d 702 (La. App. 3d Cir. 1985).

In *State, Department of Transportation and Development v. Campisi*,³⁹ the defendant sought compensation for the replacement cost of a service station building containing an upstairs apartment. The trial court, relying on *Constant*, awarded replacement costs for the service station as well as a sum for the purchase of an additional lot. The Third Circuit Court of Appeal reversed. The property, it said, was neither unique in nature nor in a location indispensable to the conduct of the business operation. The court awarded the owner the fair market value of the property.

It remains well settled in Louisiana, even since *Constant*, that severance damages are compensated frequently in the event of a partial taking.⁴⁰ The court may consider such factors as aesthetics, air pollution and noise; any of these may serve to reduce the value of the remainder of the property and support an award of severance damages. It should be noted, however, that the award in such cases is tied directly to property valuation and not to personal or incidental damage.⁴¹ Although mere inconvenience to a landowner after expropriation is not a proper element in the consideration of severance damages, when the inconvenience is extraordinary, resulting in financial loss to the property, such may be considered in the award of severance damages.⁴² When the taking forces a landowner to make a choice in how to use his property with neither choice being favorable, such taking constitutes a genuine loss to the remaining portion of the property and hence severance damages are recoverable.⁴³ "Cost to cure" damages, those awarded to a landowner for the cost of curing a problem presented by a partial taking, have also been included under the rubric of severance damages.⁴⁴ Courts sometimes distinguish their own factual situation from that in *Constant* by noting that the property is neither "unique" nor "indispensable" to an ongoing business. In the absence of these factors courts will grant severance damages in the event of a partial taking.⁴⁵

39. 509 So. 2d 618 (La. App. 3d Cir. 1987).

40. Examples are numerous. *State, Dep't of Transp. & Dev. v. Crawford Business Trusts*, 538 So. 2d 1078 (La. App. 3d Cir.), writ denied, 542 So. 2d 1381 (La. 1989); *Transcontinental Gas Pipe Line Corp. v. Terrell*, 416 So. 2d 571 (La. App. 1st Cir.), writ denied, 421 So. 2d 249 (1982); *State, Dep't of Highways v. Wilson*, 372 So. 2d 632, 633 (La. App. 1st Cir. 1979).

41. *Missouri Pacific R.R. v. Nicholson*, 460 So. 2d 615, 626 (La. App. 1st Cir. 1984), writ denied, 462 So. 2d 185 (La. 1985).

42. *State, Dep't of Transp. & Dev. v. Ford*, 470 So. 2d 389 (La. App. 3d Cir. 1985).

43. *State, Dep't of Transp. & Dev. v. Chaisson*, 477 So. 2d 115 (La. App. 1st Cir. 1985).

44. *East Baton Rouge Parish v. Hays*, 498 So. 2d 43 (La. App. 1st Cir. 1986), writ denied, 501 So. 2d 236 (La. 1987).

45. *State, Dep't of Transp. & Dev. v. Sonnier*, 503 So. 2d 1144 (La. App. 3d Cir.), writ denied, 506 So. 2d 1230 (La. 1987).

Courts sometimes use what is called the "highest and best use" evaluation in order to determine the value of the remaining property if there is only a partial taking. Highest and best use is the most favorable use to which property is adaptable and to which it may reasonably be put in the not too distant future.⁴⁶ In any event, the determination of what amount will compensate a landowner to the full extent of his loss due to the taking will be based on the facts of each case and in accord with the uniqueness of the thing taken.⁴⁷

2. *Incidental or Consequential Damages*

As previously noted, prior to the 1974 constitutional revision, Louisiana courts were hesitant to grant consequential or incidental damage awards in expropriation cases. The theory underlying such awards was at odds with the theory that compensation was to be limited to damages to the market value of the property. Several cases, however, have followed *Constant* to grant compensation damages incidental to the taking. The willingness of the courts, particularly at the appellate level, to expand the category of compensable losses is evident from an examination of two types of cases: replacement costs cases and business loss cases.

a. *Replacement Costs*

Replacement costs are those expenses arising from the cost of replacing structures due to the expropriation of property on which the original constructions were situated. Traditionally, this kind of incidental damage was denied because it did not pertain to the market value of the property itself. Thus, any additional costs to replace the building at current market prices were borne by the owner. Louisiana courts, however, have granted replacement costs when the court has determined that they are necessary in order to compensate an owner to the "full extent of his loss." By doing so, courts have shown a clear departure from the "res" theory of awards and have shifted their focus more to the personal loss an owner experiences from the taking.⁴⁸

46. *State, Dep't of Transp. & Dev. v. Fakouri*, 541 So. 2d 291 (La. App. 3d Cir.), writ denied, 544 So. 2d 405 (1989); *City of New Orleans v. McKendrick*, 485 So. 2d 653, 655 (La. App. 4th Cir. 1986).

47. *Southern Natural Gas Co. v. Poland*, 406 So. 2d 657, 663 (La. App. 2d Cir. 1981), writ denied, 412 So. 2d 86, cert. denied, 459 U.S. 833, 103 S. Ct. 75 (1982).

48. This comment does not purport to address situations in which private individuals themselves are "displaced" as the result of the acquisition of their property by a state agency for a program or project undertaken by that agency. This situation is covered by La. R.S. 38:3101-3110, enacted in 1971 by the Louisiana Legislature. These statutes were patterned after the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C.A. §§ 4601-4655. The purpose of both the federal and Louisiana

Since *Constant*, appellate courts have granted replacement costs for structures and improvements taken by expropriation. The cases reveal that the decision to award or deny such compensation typically depends on how closely the facts of the particular case align with *Constant*. For example, replacement costs are awarded when the court determines that the property taken (along with its improvements) is either "unique" or "indispensable" to an ongoing business enterprise. Either of these criteria is satisfied when the evidence shows that absent the replacement of the particular improvement, the business would suffer significant economic loss.

In *Monroe Redevelopment v. Succession of Kusun*,⁴⁹ costs were granted to replace a showroom and warehouse of a furniture retail business because the court considered them "indispensable" to the economic success of the business. In *City of Shreveport v. Standard Printing Co. of Shreveport, Inc.*,⁵⁰ the second circuit awarded replacement costs, reasoning that if the defendant was forced to relocate outside of the downtown area, he would suffer a significant adverse effect economically. The defendant had shown that almost ninety percent of the sales were made to customers whose stores and offices were situated in Shreveport's central business district.

Recently, in *State, Department of Highways v. Enserch*,⁵¹ the first circuit awarded the defendant the costs of tearing down and replacing business facilities. The court, although citing *Constant*, did not rely on the factors of "uniqueness" or "indispensability." Instead, it based the holding strictly on article I, section 4 of the 1974 constitution, concluding that the provision requires an award sufficient to restore the business facilities to the condition prior to the taking even when the required amount exceeds the market value of the property taken. This represents a departure from both *Monroe Development* and *Standard Printing*, both of which required a showing of either "uniqueness" or "indispensability" to recover compensation beyond the fair market value of the improvements.⁵²

legislation is to provide relocation assistance for persons who would otherwise suffer disproportionate injuries resulting from programs designed to benefit the public as a whole. For a good discussion of the Louisiana legislation, see *Polk v. State, Dep't of Transp. & Dev.*, 538 So. 2d 239 (La. 1989).

49. 398 So. 2d 1159 (La. App. 2d Cir. 1981).

50. 427 So. 2d 1304 (La. App. 2d Cir.), writ recalled, 441 So. 2d 737 (1983).

51. 559 So. 2d 787 (La. App. 1st Cir.), writ denied, 567 So. 2d 85 (1990).

52. Uniqueness and indispensability were also discussed in *State, Dep't of Transp. & Dev. v. Clark*, 548 So. 2d 365 (La. App. 2d Cir.), writ denied, 552 So. 2d 395 (1989). The court of appeal reversed an award for replacement costs to a corporation because the party suing, i.e., the owners rather than the corporation, lacked standing. The court, however, admitted that the corporation, due to its unique location, might have been entitled to the cost of renovating another facility possessing the same unique location requirements had the proper party brought suit.

Courts typically have not reduced the award for replacement costs by deducting depreciation of the structure taken, regardless of its age. In *Monroe Development*, the court reasoned that "depreciation is designed to deduct for functional obsolescence, i.e., incurable depreciation."⁵³ Because the buildings taken had a use from 50-100 years, this period of time constituted a "lifetime use" and thus no deduction was made for depreciation.⁵⁴

A similar conclusion was reached in *State, Department of Transportation v. Hecker*.⁵⁵ The fifth circuit, citing both *Constant* and *Monroe Development*, concluded that the defendant was entitled to recover replacement costs for its bulk oil distribution facility without any deduction for depreciation. The rationale for the court's holding was that the use values of the old structures and their replacement costs were equivalent. Thus, the award of full replacement costs, without depreciation for the use of the old structures, was consistent with the principle of putting the owner in the same pecuniary position as before the taking.⁵⁶

b. Business Losses

In order to compensate an owner to the full extent of his loss, Louisiana courts have awarded compensation for business related losses. In granting this remedy, as in the cases awarding replacement costs,⁵⁷ courts have continued to broaden the scope of compensation to include awards that otherwise would have been considered noncompensable under the 1921 constitution.⁵⁸

53. *Monroe*, 398 So. 2d at 1161.

54. *Id.*

55. 493 So. 2d 125 (La. App. 5th Cir.), writ denied, 494 So. 2d 325 (1986).

56. *Id.* at 129.

57. Arguably, replacement costs could be placed within the category of business losses. Business losses, however, contemplate other kinds of losses, in addition to replacement costs, such as damages for lost profits due to relocation to an unfavorable market area or less convenient access to the business property. Lost rentals resulting from expropriation also have been included as business losses.

58. Most jurisdictions outside of Louisiana typically deny incidental damages that are the consequence of an expropriation. This includes business losses resulting from noise, inconvenience of access, and disturbance that an expropriation might create. The value normally offered to a landowner is the "fair market value" of the property. See, e.g., *L.U. Sheep Co. v. Board of County Comm'rs*, 790 P.2d 663 (Wyo. 1990); *Division of Administration v. West Palm Garden Club*, 352 So. 2d 1177, 1181 (Fla. Dist. Ct. App. 1977); *Washington Mkt. Enters., Inc. v. City of Trenton*, 68 N.J. 107, 117, 343 A.2d 408, 413 (N.J. 1975); *Thomsen v. State*, 284 Minn. 468, 473, 170 N.W.2d 575, 579 (Minn. 1969); *State, Road Comm'n v. Williams*, 22 Utah 2d 331, 332-33, 452 P.2d 881, 882-83 (Utah 1969); *People v. Presley*, 239 Cal. App. 2d 309, 317, 48 Cal. Rptr. 672, 677 (Cal. Dist. Ct. App. 1966); *Rutledge v. State*, 100 Ariz. 174, 412 P.2d 467, 471 (Ariz. 1966); *People v. Symons*, 54 Cal. 2d 855, 861, 9 Cal. Rptr. 363, 366-67, 357 P.2d 451, 454-55

Louisiana appellate courts have justified the award of business losses by the principle from *Constant* that an owner must be placed in as good a position pecuniarily as he would have been had his property not been taken.⁵⁹ One court has reasoned that “[t]he right to use property for business pursuits in hope of generating a profit is clearly one of the rights which flows from property ownership.”⁶⁰ In some situations, the application of the *Constant* criterion of “uniqueness” has been employed to validate the award of business losses: if the property is unique to the ongoing business enterprise, compensation for business losses is granted.⁶¹

Business losses have been awarded in a number of cases. For example, they have been compensated when the expropriation substantially interferes with the access to the property resulting in economic loss to the owner.⁶² This type of compensation also has been awarded to the

(Cal. 1960). Some jurisdictions, however, grant incidental damages caused by noise and dust if the property is identified as “special purpose;” others do not restrict such awards to the type of property but require that the noise has caused some diminution in property value. See, e.g., *State, Comm’r of Transp. v. Carroll*, 234 N.J. Super. 37, 559 A.2d 1381 (N.J. Super. Ct. App. Div. 1989); *City of Yonkers v. State*, 386 N.Y.S.2d 865, 869, 40 N.Y.2d 408, 412, 353 N.E.2d 829, 832 (N.Y. 1976). The restriction of compensable damages by many states merely to the “fair market value” of the property is probably due to the fact that most jurisdictions have eminent domain provisions similar to the 1921 Louisiana Constitution, i.e., “just compensation” or “just and adequate compensation.” See 2 Nichols on Eminent Domain § 6.01[3], at 6-21 n.42 (J. Sackman & P. Rohan rev. 3d ed. 1989) for a listing of the constitutional provisions of these jurisdictions.

Interestingly, in a recent decision, the Montana Constitution art. II, § 29 (“full extent of the loss”), after whose language the 1974 Louisiana Constitution was patterned, was interpreted as denying incidental or consequential damages for expropriation. *Adams v. Dep’t of Highways of Mont.*, 230 Mont. 393, 753 P.2d 846, 851 (Mont. 1988). The rationale for the holding was that such damages, even financial losses, are an ordinary and general consequence of public projects that are considered a part of a person’s obligation to society. This policy is one that Louisiana courts have routinely rejected since *Constant*. Furthermore, since Louisiana’s convention record is rather clear regarding the meaning of article I, § 4, little significance should be attached to Montana’s constitutional development.

59. *State, Dep’t of Transp. & Dev. v. Ford*, 520 So. 2d 774 (La. App. 3d Cir. 1987), writ denied, 522 So. 2d 564 (1988).

60. *State, Dep’t of Transp. & Dev. v. Exxon Corp.*, 430 So. 2d 1191, 1195 (La. App. 1st Cir.), writ denied, 437 So. 2d 1155 (1983).

61. *State, Dep’t of Transp. & Dev. v. Pipes*, 489 So. 2d 293, 295 (La. App. 4th Cir.), writ denied, 492 So. 2d 1219 (1986); *State, Dep’t of Transp. & Dev. v. Winn*, 463 So. 2d 648 (La. App. 4th Cir. 1984); *Southern Natural Gas Co. v. Poland*, 406 So. 2d 657 (La. App. 2d Cir. 1981), writ denied, 412 So. 2d 86 (1982), cert. denied, 459 U.S. 833, 103 S. Ct. 75 (1982).

62. *State, Dep’t of Transp. & Dev. v. Traina*, 537 So. 2d 792 (La. App. 2d Cir.), writ denied, 540 So. 2d 332 (1989).

owner of property for lost rentals due to the taking.⁶³ Recently, in *State, Department of Transportation and Development v. Dietrich*,⁶⁴ the supreme court extended the award of business losses to include not only present losses but also estimated future business losses.

Although business losses are now compensable damages in Louisiana, they are not automatic. The party alleging such damages must present adequate proof before the court will grant an award.⁶⁵ The mere introduction of income tax returns will most likely be insufficient.⁶⁶ Business records demonstrating a net loss of revenue, the out-of-pocket expenses incurred and permanent loss of market due to the move, marketing surveys showing the adverse economic effect of the move, and expert testimony regarding the economic impact of the move on the business, are examples of the evidence necessary to recover business losses.

c. *Summary*

Louisiana courts have interpreted the 1974 constitution as having enlarged the scope of compensable damages available to the property

63. *State, Dep't of Transp. & Dev. v. Davis*, 400 So. 2d 926 (La. App. 3d Cir.), writ denied, 406 So. 2d 611 (1981). The third circuit concluded that a former decision [e.g. *City of New Iberia v. Yeutter*, 307 So. 2d 393 (La. App. 3d Cir. 1975)], in which the cause of action for future rentals arose prior to the 1974 Constitutional revision and in which the court denied recovery, was no longer valid due to the revision's intent to expand compensation in expropriation cases. Some courts, however, have held that damages for business profits are measurable only up to the expiration of the lease but not beyond since any amount thereafter would be speculative. *State, Dep't of Transp. & Dev. v. Exxon Corp.*, 430 So. 2d 1191, 1196 (La. App. 1st Cir.), writ denied, 437 So. 2d 1155 (1983). Damages for business profits have also been awarded to lessees under leasehold agreements in which the operators of a business suffered economic loss as a result of the expropriation. *State, Dep't of Transp. & Dev. v. Sheridan*, 517 So. 2d 415 (La. App. 1st Cir. 1987).

64. 555 So. 2d 1355 (La. 1990).

65. *Davis*, 400 So. 2d at 928.

66. *State, Dep't of Transp. & Dev. v. Tynes*, 433 So. 2d 809, 818 (La. App. 1st Cir.), writ denied, 437 So. 2d 1153 (1983). In *Tynes*, the defendant operated a convenience store on the Amite river. The state expropriated the property on which the store was located in order to build a new bridge over the Amite river at Grangeville in East Feliciana Parish. The defendant alleged business losses of \$94,069.39.00. The first circuit court of appeal reversed the trial court's decision allowing for the award of such losses. It reasoned that because the defendant failed to prove loss of market resulting from the expropriation, the trial court's award was clearly wrong due to inadequate proof. See also *State, Dep't of Highways v. Enserch Corp.*, 559 So. 2d 787, 792 (La. App. 1st Cir.), writ denied, 567 So. 2d 85 (1990); *City of Lafayette v. Cason*, 393 So. 2d 424, 426 (La. App. 3d Cir. 1980).

If, however, evidence of business loss is introduced, the state's failure to object to the introduction of the evidence of economic loss to the business enterprise constitutes a waiver of their right to object to such evidence on appeal. *State, Dept. of Transp. & Dev. v. Crawford Business Trusts*, 538 So. 2d 1078 (La. App. 3d Cir.), writ denied, 542 So. 2d 1381 (1989).

owner whose property is expropriated. The decisions reflect that the 1974 revision has accomplished in some measure what it was intended to do: to render compensable types of non-property related damages that had been unavailable to property owners under the 1921 constitution. Louisiana courts, however, have refused to grant recovery for losses that are more difficult to measure monetarily.

B. Subjective and Intangible Losses

1. Jurisprudence

Despite the enlargement of the category of compensable damages to allow recovery for fair market value, severance damages and property related damages incidental or consequential to the taking, Louisiana courts have consistently denied compensation for subjective or intangible losses experienced by a property owner due to expropriation.⁶⁷ Perhaps the reason for this disparity is the relative difficulty of measuring subjective losses.⁶⁸

Subjective or intangible damages are similar to "moral damages" found in contract or tort law. When an owner's property rights are affected, there is often an impact on the emotions of the holder of such rights. These emotions include mental anguish, mental suffering, emotional distress and disappointment. These emotions may result from damage to aesthetic or sentimental sensibilities or from mere inconvenience resulting from the taking. Such damage does not have a current market value that is readily ascertainable.

In *Louisiana Resources Co. v. Noel*,⁶⁹ the third circuit refused to grant subjective losses under the new language of the 1974 constitutional revision. The plaintiff had acquired a natural gas pipeline right-of-way across two tracts of property. The defendants, worried over possible damages the pipeline construction might cause to their property, had spent four and nine hours respectively inspecting the construction, and claimed damages. The court stated:

The jury award for the inspection of the pipeline by defendants is a subjective type of loss similar to inconvenience, worry, and

67. See, e.g., *Brooks v. New Orleans Public Services, Inc.*, 370 So. 2d 686, 690 (La. App. 4th Cir.), writ denied, 373 So. 2d 512 (1979).

68. See M. Dakin & M. Klein, *supra* note 7, at 141. The authors note that, traditionally, the denial of recovery in these areas is due to the fact that the alleged damages are "damna absque injuria—particular sacrifices which society has the right to inflict for the public good." It should be pointed out that prior to the 1974 constitutional revision, the same rationale was given for the denial of damages which are now deemed compensable in Louisiana, namely, replacement costs and business losses.

69. 499 So. 2d 1016 (La. App. 3d Cir. 1986).

anxiety. The provisions of La. Const. Art. I, Section 4, do not authorize an award for that item.⁷⁰

The court failed to offer any reason why the constitutional provision does not authorize such an award. It was satisfied merely to cite one of its earlier decisions, *State, Department of Highways v. Johnson*,⁷¹ as supporting its conclusion.

In *Johnson*, the third circuit considered whether a landowner was entitled to subjective losses such as the inconvenience of having to move from an existing residence to a new one and aesthetic losses due to the taking of trees. The trial court awarded the defendant \$5,000.00 for subjective damages reasoning that article I, section 4 of the 1974 constitution was intended to broaden the scope of recovery to include this kind of loss.

The court of appeal reversed under the rationale that article I, section 4 "necessarily implies that the compensation due the defendant be in a monetary form" and that the constitutional provision mandates only that a person be placed "in as good a position pecuniarily as he would have been, had his property not been taken."⁷² The reference to "monetary form" is perplexing. Certainly one would admit that the award for subjective losses granted by the trial court was in a monetary form (\$5,000.00). Perhaps the court meant that awards must be given only for those kinds of damages that one can measure objectively in some pecuniary fashion. Despite this ambiguity, the court rejected the claim that subjective losses were compensable under the new language "full extent of his loss."⁷³

Judge Watson dissented. He noted that article I, section 4 of the 1974 constitution recognized that *intangible losses* can be compensated in the event of expropriation.⁷⁴ Moreover, he stated:

Although the amount of loss is difficult to evaluate, Johnson's new residence will undoubtedly suffer from being located behind his well shed without the screen of trees and shrubbery which now serve as a highway buffer. . . . Further, being effectively evicted from a residence occupied for thirty years is an *intangible loss*. Unless it is compensated, *the landowner cannot be made*

70. *Id.*

71. 369 So. 2d 191 (La. App. 3d Cir. 1979).

72. *Id.* at 194.

73. *Id.* The third circuit relied on its earlier decision in *State, Dep't of Highways v. Champagne*, 356 So. 2d 1136 (La. App. 3d Cir. 1978). What is troublesome, however, is that the court in neither decision dealt specifically with an interpretation of the phrase "his loss" nor did it offer any policy reasons for excluding subjective losses from the category of compensable damages.

74. *Johnson*, 369 So. 2d at 195 (Watson, J., concurring in part and dissenting in part).

whole, which we understand to be the intent of the 1974 Constitution.⁷⁵

Notwithstanding Watson's analysis, subjective or intangible losses have remained noncompensable in Louisiana. The supreme court, however, in a recent decision, *State, Department of Transportation and Development v. Dietrich*,⁷⁶ written by now Supreme Court Justice Watson, left open the question of whether subjective or intangible damages will be included as compensable damages in the future.

The decision does not address squarely whether subjective or personal intangible losses are compensable. The case, however, does hold that both past and *future business losses* may be recovered by an owner.

Dietrich involved the taking of part of the owner's property used for raising cattle. The taking forced the owner to reduce the number of calves produced for slaughter. This resulted both in present and future economic losses.⁷⁷ The Third Circuit Court of Appeal, however, was unwilling to recognize future business losses as compensable and stated that future projections do not fall under what is meant by "full extent of the loss."⁷⁸

The supreme court reversed. The court based its decision not only on *Constant* but, more particularly, the meaning of "full extent of his loss" in article I, section 4 of the 1974 constitution. Justice Watson wrote:

Article I, Section 4, *does not specify how to fully compensate a landowner whose property is taken*. Delegates to the Constitutional Convention explained that full compensation should include moving costs, costs to relocate, *inconvenience* and loss of profits from takings of business premises . . . Article I, Section 4, provides that the landowner should be compensated for "*his loss*" *not merely the loss of the land*.⁷⁹

Hence, business losses, albeit future losses, are recoverable.

75. *Id.* at 195-96 (emphasis added).

76. 555 So. 2d 1355 (La. 1990).

77. Allen Joe Simpson, a dealer in livestock and an expert in raising cattle, testified that, due to the expropriation, the Dietrichs could not profitably raise a production herd on the remaining property. He stated, "[T]o run 50 head, the Dietrichs will have to double their costs and duplicate everything that is on the east side at a cost of \$30,000 to \$50,000." *Dietrich*, 555 So. 2d at 1357.

78. *State, Dep't of Transp. & Dev. v. Dietrich*, 544 So. 2d 675, 677 (La. App. 3d Cir. 1989). The court questioned "whether it is proper to calculate economic loss resulting from an expropriation on the basis of the effect on an entirely different business enterprise of the landowner situated outside the expropriated area and unaffected by the expropriation itself."

79. *Id.* at 1358 (emphasis added).

Although *Dietrich* reaffirmed the holding of *Constant*, it went further. The award for "future business losses" raises the question whether more speculative damages may be allowed in future cases. Anytime future business losses are considered, some sort of future projection and speculation inevitably is involved. One cannot be certain that the demand for a particular product or that market prices will remain the same. The estimate for future inflation is likewise guesswork. There also is uncertainty whether the product or the process for its production may become obsolete. In short, such projections are by their nature speculative. The fact that the supreme court was willing to engage in this endeavor, at least to some degree, raises the possibility that the court might also be willing to extend this kind of analysis to consider personal intangible damages.

The court's discussion recognized that the constitutional provision did not provide a litmus test for measuring compensation such as "damages that may be measured objectively in pecuniary terms." In fact, the court cited with approval the assertion by convention delegates that "intangible losses" such as inconvenience should be included in the category of compensable damages. Further, the opinion emphasized, unlike previous appellate decisions denying such recovery,⁸⁰ that compensation should reflect the *owner's* loss ("his loss"), not merely losses that are tied solely to the value of the property. Admittedly, the court did not address directly whether subjective or intangible losses are compensable and the court's language pertaining to an award for personal intangible losses could be construed as dicta. The discussion, however, certainly leaves the question open as to whether subjective or personal intangible losses might be deemed compensable in the future.

2. Analysis

a. Language of the Provision

The language of article I, section 4 of the 1974 constitution implies, if not demands, that compensation should include any loss that a property owner experiences due to expropriation. The expansion of the former provision "just and adequate compensation"⁸¹ by the addition of the phrase "full extent of his loss" demonstrates an effort by the 1974 convention to provide for broader coverage than previously allowed, i.e., damages related only to the loss in value of the property.

80. The third circuit, for example, has revealed its continued hostility toward granting subjective damage awards in expropriation cases.

81. La. Const. art. I, § 2; art. III, § 37; art. IV, § 15 (1921).

Although the provision does not specify how to compensate an owner fully, it does say that the compensation should be to the "full extent"⁸² of his loss. This is the standard by which compensation should be measured. Had the drafters desired to place limitations on the scope of possible recovery, they certainly could have done so. Instead, they left the scope of compensation unqualified.

The provision also focuses on the personal element of compensation. The provision requires compensation for "his loss" (damages the owner personally experiences) rather than for "the loss" (losses merely to the property). On its face, the new and expanded provision envisions full recovery for any losses, including subjective or intangible damages, that affect the owner personally.

One certainly could make the argument that damage awards for these kinds of losses are too speculative. In fact, one convention delegate expressed the opinion that claims for subjective or intangible losses are "wholly speculative" and hence should not be compensated.⁸³ The amendment, however, that this delegate was addressing proposed to change the wording to "*the* loss" rather than "*his* loss."⁸⁴ Had this amendment passed, the provision would have focused more naturally on monetary compensation arising out of damage to the value of the property itself. The fact that the proposed language change was rejected suggests that the scope of recovery should be measured by the entirety of the owner's personal loss due to the taking.

b. Intent of the Framers

Statements by the delegates to the 1973 Constitutional Convention, particularly those intimately associated with the drafting of article I, section 4, reveal that the intent of the expanded provision ("full extent of his loss") was designed to include subjective or intangible losses the owner himself experienced from expropriation.

82. At the expense of stating the obvious, the word "full" in its adjectival sense is defined as "to the utmost extent: to the highest degree, state, or condition." Webster's Third New International Dictionary 919 (1986).

83. 6 Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts, Aug. 30, 1973, at 1064 (statement of Delegate Leigh) [hereinafter Transcripts].

84. *Id.* at 1064. Delegate Leigh noted: "I have changed, however, the word "his" to "the" because I'm afraid that by using the word "his" and guaranteeing to the owner compensation to the full extent of his loss, we may be opening the door to claims for damage for mental anguish, for injured feelings and for other intangible damages. The owner should be fully compensated for everything that is taken but should not be allowed to claim other intangible damages which might be wholly speculative." This amendment proposal failed by a vote of 67 to 43. What is important about Leigh's statement, however, is that he recognized that the phrase "his loss" included potentially "subjective or intangible" losses.

Certainly, the attempt to ascertain the intent of a piece of legislation is at times tenuous. In fact, one writer suggests that such an inquiry is "often a fiction involving determination of what the legislature must have meant in enacting a statute, a result necessitated by a lack of information on the legislature's purposes, since committee hearings and legislative debates are not transcribed and published."⁸⁵ This situation, however, is not present when examining the provisions of the 1974 constitution. The same writer goes on to say:

However, the documents of the convention have been preserved and are available as the best source of purpose and intent of the convention. . . . The availability of the documents, plus the court's imprimatur on their use, will be of tremendous assistance in giving insight into the background of the constitution and will have the salutary effect of providing in many instances an *intent that is more real than fiction*.⁸⁶

One simply cannot dismiss the problem of intent because the issue has been considered either difficult or elusive. This is particularly the case when the convention records reveal something about the purpose of a provision. It is also evident from the supreme court decisions in *Constant* and *Dietrich* that the court attempted to give some weight to the framer's intent.⁸⁷ Why should the inquiry cease when the issue of subjective or intangible damages arises?

The phrase "the full extent of his loss" was in the original committee proposal and was continued in the final compromise.⁸⁸ The author of the provision, Delegate Louis Jenkins, insisted on using the term "his loss" rather than "the loss" in order to indicate that consideration be given to the property owner's *subjective intangible losses* rather than merely to objective determinations.⁸⁹ Shortly after the convention, Jen-

85. Hargrave, *Louisiana Constitutional Law, Work of Appellate Courts 1974-1975*, 36 La. L. Rev. 533, 534 (1976).

86. *Id.* at 534 (emphasis added).

87. *State, Dep't of Highways v. Constant*, 369 So. 2d 699, 702-03 (La. 1979); *State, Dep't of Transp. & Dev. v. Dietrich*, 555 So. 2d 1355, 1358 (La. 1990).

88. Hargrave, *supra* note 15, at 16. The amendment passed by a vote of 82 to 26; see 1 Records of the Louisiana Constitutional Convention of 1973: *Journal of Proceedings*, Sept. 13, 1973, at 475.

89. Hargrave, *supra* note 15, at 15-16. Jenkins saw the need to expand the compensation an owner might receive by experiencing personal loss. He noted, "[I]n other words, when someone's property is taken, *he* has a certain loss, and this section says *that loss* shall be the measure of just compensation" (emphasis added). Transcripts, *supra* note 83, Aug. 30, 1973, at 1031. See also the excerpt from a memorandum by City-Parish Attorney Joseph Keogh to the Committee on Bill of Rights and Elections, June 6, 1973 at 8, in which Keogh notes that the phrase "full extent of his loss" suggests the inclusion of subjective or intangible losses; cited by Jenkins, *supra* note 4, at 23-24 n.69.

kins set forth what the provision "full extent of his loss" was designed to include. He wrote:

The amount of compensation to be paid when property is taken is not merely "just compensation" as that term has been understood under the fifth and fourteenth amendments of the Federal Constitution and the 1921 State Constitution. Instead, the owner must be compensated "to the *full extent* of his loss." This is intended to include things "which, perhaps, in the past may have been considered *damnum absque injuria*, such as cost of removal," attorney fees, inconvenience, loss of aesthetic value or business profits and so forth. The loss to be measured is the loss sustained by the owner himself. The Section very carefully says that the owner is to be compensated "to the full extent of *his* loss" instead of "to the full extent of *the* loss" (emphasis added). In other words, the compensation is to be determined subjectively with emphasis on the value placed on the property by the owner instead of on its so-called market value or replacement cost. This emphasis will generally require compensation to be much greater than in the past.⁹⁰

Thus the co-author of the provision, "full extent of his loss," intended that the language be construed so as to include subjective or intangible losses.

c. An Evaluation of the Reasoning and Policies Underlying the Denial of Subjective Damages

The problem with those decisions that have rejected the award of subjective or intangible damages is that too often they dismiss the issue by citing other cases that support the proposition as though that resolves the issue. Implicit in these decisions is the notion that policy considerations are to be given more weight than the plain sense of the provision's language, although unfortunately, the opinions rarely state explicitly what those policies are. Courts are rightly concerned that if expropriation awards are broadened to include subjective or intangible losses, the prospect of high damage awards could effectively retard essential public projects. While this policy may have been validly cited prior to the 1974 constitutional revision to deny recovery for incidental or consequential damages,⁹¹ it should not bar such recovery today. The new Constitution's framers themselves balanced the owner's personal interests and essential public projects and placed more weight on the side of the owner by deliberately expanding his rights in article I, section

90. Jenkins, *supra* note 4, at 23-24 (footnote omitted).

91. Note, *supra* note 7, at 818.

4. This expansion suggests they regarded the policy of ensuring public works as having little significance.⁹²

Furthermore, the expansion of the constitutional language in 1974 did result in a broader scope of compensable damage recovery. The expansion has not discouraged the continuation of important public projects and may suggest that former policies promoting stricter limitations on expropriation awards have been eroded. Thus, the fear that an expansion of damage awards might retard essential public works seems more theoretical than real.

An additional reason for the denial of subjective or intangible losses is that they are difficult to measure.⁹³ This rationale, however, is unconvincing because similar types of damages are awarded in both tort⁹⁴ and contract law.⁹⁵ The difficulties in placing a monetary value on one's sentimental loss, for example, are no different from the difficulties courts face in placing values on mental distress resulting from a tort or breach of contract. In the analogous situation in *Dietrich*, the supreme court awarded future business losses which are by nature somewhat speculative. The court did not dismiss the claim because the damages were difficult to measure. Instead, it took steps to ensure that the award be reasonable in light of the evidence by reducing the number of years by which annual losses were to be calculated (four years instead of thirty-nine).⁹⁶

Subjective or intangible losses are no less genuine damages to the property owner, and unless they are compensated the owner will not "be made whole."⁹⁷ Personal values on property oftentimes involve

92. This may also have been due to existing federal statutes that provided compensation when state public works were financed with federal funds. See 23 U.S.C.A. §§ 101-158 (1983).

93. This rationale is suggested and then rejected by Watson in his dissent in *State, Dep't of Highways v. Johnson*, 369 So. 2d 191, 195 (La. App. 3d Cir. 1979) (Watson, J., concurring in part and dissenting in part).

94. Prosser and Keeton on the Law of Torts, § 12 (5th ed. 1984).

95. La. Civ. Code art. 1998 (1987) states in pertinent part:

Damages for nonpecuniary loss may be recovered when the contract, because of its nature, is intended to gratify a nonpecuniary interest and, because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss.

See Litvinoff, *Moral Damages*, 38 La. L. Rev. 1 (1977); see also Comment, *Nonpecuniary Damages: A Guide to Damage Awards under Louisiana Civil Code Article 1998*, 50 La. L. Rev. 797 (1990). The author proposes that there is some question as to whether La. Civ. Code art. 1998 really overruled *Meador v. Toyota of Jefferson, Inc.*, 332 So. 2d 433 (La. 1976). *Meador*, however, never said that nonpecuniary damages were unavailable; it only denied such damages due to the fact that the claimant failed to prove "intellectual loss." *Meador*, 332 So. 2d at 437.

96. *State, Dep't of Transp. & Dev. v. Dietrich*, 555 So. 2d 1355 (La. 1990).

97. See Judge Watson's dissent in *Johnson*, 369 So. 2d at 195.

subjective considerations that cannot be measured by an appeal to "fair market value" or even "incidental costs" objectively measured. Two commentators offer a simple yet helpful illustration of this point:

The value of an asset to its owner usually will differ significantly from the asset's cost, depending upon timing and circumstances. A new tire for an automobile might have a normal retail price of \$100, for example, but the value of that new tire to a potential owner would depend upon whether that person were standing in a retail showroom with a car still operable and near at hand, or in a wilderness far from civilization, with an automobile completely disabled. In the latter case, convenience, or even survival, might make the value of the new tire worth far more than \$100 to the individual involved.

Other examples abound: the value of a gallon of water in a desert, of an uninterrupted air supply to a deep sea diver, of a \$5 hinge to an astronaut. In these and many other instances, this point holds true: the value of the asset in question is not determined by its production cost or "normal" resale value, but rather by the nature of the circumstances surrounding its use.⁹⁸

Consider also the following examples: an owner who for years has desired an old plantation estate and has finally purchased it only to have a major portion expropriated for a state project; or a property owner who bought a particular piece of property solely because of its aesthetic qualities, most of which are destroyed by the construction of an interstate highway; or finally, the expropriation of a tract of land that has been in the family for five generations and which has great sentimental value to the owner.

Losses such as these are certainly hard to measure, yet they are genuine. They should not be categorically excluded simply because they are hard to measure.

IV. RECOMMENDATIONS

Both the language of article I, section 4 of the Louisiana Constitution of 1974 and the statements by the drafters of this provision strongly suggest that subjective or intangible losses are within the purview of the phrase "full extent of his loss." In *Constant* the supreme court opened the door to broader compensation awards by noting that the new provision mandated that an owner be placed in as good a position

98. Claurette and Harju, Expropriations under Louisiana Law: "Compensation to the Full Extent of the Loss," 30 La. B.J. 368, 368-69 (1983).

pecuniarily as he would be had the taking not occurred.⁹⁹ Recently, *Dietrich* reaffirmed the *Constant* proposition that the phrase "full extent of his loss" was intended to provide for a broader scope of compensation awards due to expropriation. The supreme court, however, did not address specifically whether subjective damages should be included in the compensable category.¹⁰⁰

The obvious question pertaining to subjective or intangible losses is where do courts go from here? First, Louisiana courts should construe the language of article I, section 4 carefully when evaluating whether subjective or intangible damages are compensable. Opinions should reflect a recognition that the phrases "full extent" and "his loss" are broad in reference. Furthermore, because the language is broad, it should be construed to allow for any loss the landowner personally suffers and can prove.

Second, courts should also follow the lead of *Dietrich* to conclude that the phrase "his loss" expanded compensable damages beyond merely the value of the property.¹⁰¹ *Dietrich* provides the groundwork by its expansion of *Constant* to include areas that are more subjective in nature, i.e., future business losses. This expansion should be continued in future decisions to include other kinds of subjective and intangible losses. The award of such compensation may raise difficulties, yet as long as the provision of article I, section 4 remains in its present form to read "full extent of his loss," courts must address it honestly rather than merely citing a previous court decision to support its conclusion¹⁰² or worse yet avoiding the issue entirely.

99. *State, Dep't of Highways v. Constant*, 369 So. 2d 699, 702 (La. 1979). This writer would suggest that qualifying phrases such as "being placed in as good a pecuniary position as one would be had there been no taking" or "put in equivalent financial circumstances" should not be read as the measuring stick for all possible compensable damages under art. I, § 4. The language of the provision does not reveal how to ascertain damages that are compensable and those that are not. In *Constant* these phrases were appropriate because the type of damage alleged was a kind one could measure objectively in pecuniary terms, i.e., replacement costs. Perhaps a better, yet broader, standard, and one which more accurately reflects the language of art. I, § 4, is the phrase Watson used in his dissent in *Johnson*, 369 So. 2d at 195. He stated that in order to compensate an owner to the "full extent of his loss," the owner must *be made whole*. This standard is broad enough to include subjective and intangible losses.

100. It should be recalled that Watson, who wrote the *Dietrich* opinion, wrote the dissenting opinion in *Johnson* while still on the third circuit court of appeal. In his dissent, he argues that intangible losses are available under art. I, § 4 of the 1974 Constitution. He is not as explicit on that issue in *Dietrich*, although intangible losses in that case were not a significant consideration. One wonders, however, whether some of the same propositions expressed in *Johnson* are not lurking in the background of the *Dietrich* opinion.

101. *State, Dep't of Transp. & Dev. v. Dietrich*, 555 So. 2d 1355, 1358 (La. 1990).

102. For example, in *State, Dep't of Transp. & Dev. v. Jacob*, 491 So. 2d 138 (La.

Third, courts should fashion criteria for determining whether subjective or intangible losses might be recovered. Requirements regarding the nature and character of the property as well as higher burdens of proof for the claimant are just two ways in which the court could restrict recovery. Restriction of recovery by establishing limiting criteria, however, is different conceptually from the notion of refusing the admission of evidence entirely. One action may satisfy constitutional requirements, i.e., due process, while the other poses serious problems regarding the property rights of owners. *Constant* used the limiting criteria of "uniqueness" and "indispensability" in its expansion of compensable damages beyond fair market value. Similar criteria could also be employed to evaluate whether subjective damages should be awarded in a given situation. The shift in analysis, however, would be away from the nature of the property itself to the vantage point of the owner. One would look to see whether the property was unique or indispensable from the owner's standpoint. Stated differently, can the owner, for example, demonstrate by sufficient proof that the property was unique or indispensable in terms of sentimental or aesthetic value or was purchased for unique personal reasons?

The jury can evaluate the evidence to determine whether the claimant has proved the unique or indispensable character of the loss. Immediately preceding the provision "full extent of his loss" in article I, section 4 is the statement: "a party has the right to trial by jury to determine compensation." The claimant should be allowed to present his or her evidence and the jury should be given the privilege of deliberating on the facts presented. Juries have deliberated and granted awards for subjective losses in both tort and contract cases. There is no reason why they should not be able to do the same in the area of expropriation cases. If the compensation granted is unreasonable, the award may always be reduced on appeal. Arguably, the denial of the right to present evidence before the jury pertaining to subjective or intangible losses could be viewed as a dilution of a property owner's constitutional right for a jury to determine the *full* extent of the loss.

Policy considerations promoting the restriction of certain types of compensable losses are certainly important, but they should be weighed against the interest of property owners. These policies should never be

App. 3d Cir.), writ denied, 496 So. 2d 331 (1986), the appellees asserted that the trial court had erred by disallowing evidence offered to prove non-pecuniary damages due to expropriation. The third circuit, without explanation, dismissed the allegation by citing two of its former opinions and concluded: "We have reconsidered our decisions in these cases and conclude that they are correct and are *dispositive* of the issue presented." *Jacob*, 491 So. 2d at 146 (emphasis added). A similar analysis also may be found in the recent case, *State, Dep't of Transp. & Dev. v. Anderson*, 568 So. 2d 657 (La. App. 3d Cir. 1990).

allowed to swallow up rights granted to the property owner by article I, section 4.

Fourth, courts are no doubt concerned that by admitting such evidence the flood gates of litigation might be opened and frivolous suits might result. One way to avoid this problem is to require claims for subjective or intangible damages be brought in conjunction with other claims for severance damages or consequential losses resulting from the expropriation. Nevertheless, the policy of preventing a "wide door" for litigants is hardly justification for denying recovery for any genuine subjective loss. The court can distinguish legitimate claims from frivolous ones by carefully scrutinizing the evidence supporting the claim. The elimination of false claims in the area of subjective damages for expropriation call for nothing more than the same common sense that has distinguished serious from frivolous claims in other areas of law. This process of isolating frivolous claims is further checked by Louisiana's appellate review of fact.

Fifth, if Louisiana courts feel the necessity to label subjective or intangible damages as noncompensable after a careful examination of article I, section 4, then they should offer a reasonable explanation of the interpretive and policy bases upon which their decisions rest. The courts should state whether the policy for denial is an apprehension for unusually high damage awards, a desire to restrict litigation, the difficulty in measuring subjective losses, or even the desire to promote essential public works. The courts should also offer some explanation as to how their denial of intangible awards is supported by article I, section 4.

Finally, the preceding analysis provides a suitable basis for legislative amendment. This comment has established that the 1974 constitutional provision, "full extent of his loss," was intended to include not only economically related damages pertaining to expropriation, but also any subjective or intangible losses the property owner can prove.¹⁰³ As noted previously, the legislature, shortly after the constitutional convention, enacted Louisiana Revised Statutes 48:451-460 in order to implement the expanded language of the provision.¹⁰⁴ Louisiana Revised Statutes 48:453, which addresses the measure of compensation, incorporated the precise language of article I, section 4 of the 1974 constitution. Section C of the statute states in full:

The owner shall be compensated to the full extent of his loss. The court shall include in its consideration the difference between the rate of interest of any existing mortgage on an owner-occupied residence and the prevailing rate of interest re-

103. Jenkins, *supra* note 4, at 24.

104. See *supra* note 17.

quired to secure a mortgage on another owner-occupied residence of equal value.¹⁰⁵

In the absence of jurisprudential recognition of compensation for subjective or intangible losses, a legislative amendment to Louisiana Revised Statutes 48:453(C) is suggested.¹⁰⁶ The proposed language states:

Moreover, the court shall consider, pursuant to its judgment of compensation, any evidence pertaining to an owner's personal loss resulting from the expropriation and make any award reasonably based upon such evidence.

The suggested amendment is intentionally broad in order to allow the court considerable discretion to establish any limiting criteria it deems necessary. It would, however, provide a legislative mechanism to ensure serious consideration of all the property owner's interests, both objective and subjective, involved in the taking.

V. CONCLUSION

The scope of compensable damages resulting from expropriation has gradually been enlarged since article I, section 4 of the Louisiana Constitution of 1974 was enacted. The new language is now interpreted as requiring compensation for consequential damages related to the taking. The important question remaining is whether the courts will expand the category of compensable damages to include "subjective or intangible losses." In this writer's opinion, until Louisiana courts are willing to do so, they will fail to grant all of the rights granted to the owner by article I, section 4. Legislative action might be the solution required to implement the owner's constitutional rights if the courts decline to do so.

Tracy Lee Howard

105. La. R.S. 19:9(B) was amended in 1983 to include identical language.

106. The suggested amendment would also apply to La. R.S. 19:9(B).

