Public Law: Expropriation

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A number of important changes in expropriation law and procedure were made during the past year, including adoption of a new state constitution restoring a limited jury trial in expropriation cases.\textsuperscript{1} For more than three decades all expropriation issues in Louisiana have been tried to a judge sitting without a jury,\textsuperscript{2} but as a result of the constitutional change any party may demand a trial by jury to determine just compensation.\textsuperscript{3} Since the symposium is generally limited to jurisprudential developments during the past term of court, these legislative changes will not be further detailed here.

**Valuation of Property Taken**

For some years there have been conflicting decisions as to the elements of value includible when the highest and best use of land taken is for subdivision purposes but the land is not yet subdivided. \textit{State v. Terrace Land Co.}\textsuperscript{4} holds that if the sale of lots for subdivision purposes is reasonably prospective and the evidence shows the owner-developer is actually in the process of developing and selling land as subdivision lots, the award may properly include the element of profit estimated to be realized by the owner-developer, presumably discounted back to the date of taking. The court is careful to note, however, that raw acreage value rather than retail lot value may still be appropriate when subdivision of the land is only speculative at the time of the taking.\textsuperscript{5}

The valuation rules applicable when part of a larger tract is taken for the purpose of widening a highway continues to command the attention of the Louisiana courts. If the tract has greater depth than necessary for ideal commercial development, courts apply the "front land-rear land" theory as opposed to an "average value" approach. The theory results in higher awards for front land taken despite the fact that the remaining land then becomes front land on the widened

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1. \textsc{La. Const.} art. 1, § 4.
4. 298 So. 2d 859 (La. 1974).
highway. *State v. Hab Monsur Corp.*⁶ again approves this approach. If the tract taken is less than ideal commercial depth, a court of appeal has held that an average value per square foot must be determined for the commercial property in ideal depth and the tract expropriated must be valued on the basis of the average.⁷ Owners have contended that even within this ideal depth the front portion of the property should be valued at a higher figure than the rear portion. *State v. Guaranty Realty Corp.*⁸ and *State v. Wells⁹* reject this contention, holding that gradations within the ideal depth are not warranted and that values must be determined upon the average value per square foot to the ideal depth estimated by the appraisers.

In *State v. Smith,¹⁰* another case involving a highway taking, the court of appeal noted that when only a portion of a tract is taken and there is a definite difference in use potential between the front and rear portion, application of a graduated valuation criteria may be warranted. If the entire tract is being used for the same purpose and is presumably proportioned depth-wise for that purpose, the average rather than graduated value is more appropriate; the court rejected the graduated criteria, finding the tract to have only one use.¹¹

If additional property is taken after the public improvement is begun or completed the issue arises whether the changed circumstances should lead to a higher judgment for compensation reflecting value added by the improvement. In general the law is clear that the value of the property expropriated should be fixed considering the property at the time of the taking but not enhanced by the purpose of the taking.¹² However, when subsequently expropriated property is not included within the scope of the project at the outset and the project is thereafter enlarged to include the additional property, or if subsequent expropriation is for a separate endeavor, the enhanced value attributable to proximity to the

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6. 301 So. 2d 667 (La. App. 3d Cir. 1974).
7. State v. Evans, 305 So. 2d 151 (La. App. 1st Cir. 1974).
8. 295 So. 2d 490 (La. App. 3d Cir. 1974).
9. 298 So. 2d 301 (La. App. 3d Cir. 1974).
10. 304 So. 2d 77 (La. App. 1st Cir. 1974). See also State v. Evans, 305 So. 2d 151, 154 (La. App. 1st Cir. 1974).
12. LA. CIV. CODE art. 2633.
initial improvement is properly included in the award.\textsuperscript{13} In \textit{State v. Wax}\textsuperscript{14} the subsequent expropriation was clearly for a separate endeavor and consequently enhanced value attributable to the initial public improvement was properly awarded. In a similar case, \textit{State v. St. Tammany Homestead Ass'n},\textsuperscript{15} the court of appeal considered a further refinement of the rule to the effect that "if it is reasonably foreseeable that the original project will probably extend, or will probably be revised, enlarged or expanded to include the property subsequently taken, landowners are not entitled to the enhanced value resulting from the initial expropriation."\textsuperscript{16} The court then concluded that the extension or enlargement of the project was not "reasonably foreseeable" and enhanced value was here also properly awarded.\textsuperscript{17}

One strength of Louisiana's system of judicially-determined expropriation awards has been the judges' exercise of control over unrealistic or distorted application of appraisal theory in seeking a maximum value for property expropriated. \textit{State v. Anselmo}\textsuperscript{18} illustrates the virtues of that procedure. The owner, in seeking maximum value for a building taken, determined a total value on a replacement cost basis but sought to reduce the replacement costs by depreciation on the original cost of the building rather than on the greater replacement cost. The court properly rejected the approach and also rejected as unhelpful an attempt to use capitalization of income as a basis. The owner had capitalized rental income by compounding lease rentals for a sixty-five year term, resulting in a figure 490% of its present value on the basis of market determination by comparable sales.\textsuperscript{19} The court also refused to augment severance damages by substituting actual income studies for a six-year period subsequent to the taking for actual comparable sales in the area immediately after the taking.

\begin{thebibliography}{9}
\bibitem{13} M. Dakin & M. Klein, \textsc{Eminent Domain in Louisiana} 93-95 (1970) [hereinafter cited as Dakin & Klein].
\bibitem{14} 295 So. 2d 833 (La. App. 1st Cir. 1974).
\bibitem{15} 304 So. 2d 765 (La. App. 1st Cir. 1974).
\bibitem{16} \textit{Id.} at 769.
\bibitem{17} \textit{Id.} at 770.
\bibitem{18} 301 So. 2d 915 (La. App. 4th Cir. 1974).
\bibitem{19} \textit{Id.} at 920.
\end{thebibliography}
SEVERANCE DAMAGES

In measuring severance damages Louisiana courts use the so-called “before and after rule” entailing the valuation of the property before and after the taking, the difference between the fair market values constituting severance damages.20 Replacement value less depreciation may properly be used to measure the value of improvements provided the land and improvements are actually in use at the time of the taking.21 In State v. Wood Preserving Service, Inc.22 a court of appeal rejected the use of replacement value and reduced the severance damage award since the plant in question had not been used for at least eight years prior to the taking and it was not shown that the property satisfied any of the normal appraisal requirements for implying the “value in use” concept. The appellate court was free to substitute its judgment as to the appropriate “expert” approach in view of the fact that an inappropriate application of an appraisal rule would constitute error of law subject to correction by the appellate court.23

In State v. Jacobsen,24 a court of appeal approved the use of replacement cost for the calculation of severance damages but corrected the trial court’s failure to deduct depreciation from replacement costs new. The court also noted that since a building on the remaining tract would have to be demolished, the costs of demolition, rather than the replacement cost, were properly a part of severance damages. The court approved special benefits as a reduction in severance damages awarded, noting, however, that the burden of proving special benefits was upon the expropriator whether on a percentage basis or an actual dollar basis; special benefits were proven to the extent of five percent of the “before” value.25

In State v. Denham Springs Development Co.26 the Louisiana Supreme Court reinstated a trial court judgment allowing severance damages for the taking of property from

20. Dakin & Klein at 75.
21. Id. at 247; W. Kinard, Industrial Real Estate 418 (2d ed. 1970).
22. 302 So. 2d 655 (La. App. 3d Cir. 1974).
24. 306 So. 2d 886 (La. App. 4th Cir. 1974).
25. Id. at 892-93.
an existing shopping center. The court found damages proven since existing practice demonstrated a need for a ratio of parking space to service space of three to one and since, after the taking, the potential building area was commensurately reduced. The court calculated severance damages based on what the original tract would have commanded in shopping center rentals versus what it would command in its reduced square footage. Dissenters would have rejected such evidence as “entirely speculative.”

The Louisiana Supreme Court has expressed disapproval of “cost to cure” as a primary approach to measuring severance damages but it has used the method when other methods such as market data are unavailable or impracticable to measure “before and after” value. In State v. Nisbet Properties, Inc. a court of appeal concluded that severance damages to a parking lot could be properly calculated by determining the cost to replace the parking spaces taken. Although an obvious deficiency in the method is that the costs proposed may cure more than the actual damages caused by the taking, the court approved its use, having adjusted costs to reflect only actual damages. On the other hand, in State v. A-1 Equipment Rentals, Inc., the court rejected the method when the record was completely devoid of any evidence that the cure urged by the state could in fact be effective.

In City of New Iberia v. Yeutter the landowner made the rather disingenuous argument that he was entitled not only to the fair market value of the property as determined by comparable sales but also was entitled to the full undiscounted amount of rentals anticipated from the entire property under a forty month lease subject to renewal for an additional sixty months; the duplicative claim was rejected by the court. The owner contended that the lease rentals constituted a vested right analogous to the right for which compensation was awarded in Parish of Jefferson v. Miron. In Miron, a disabled owner was compensated for his equity in

27. Id at 308.
29. 309 So. 2d 398 (La. App. 2d Cir. 1975).
30. Id. at 402.
31. 310 So. 2d 673 (La. App. 1st Cir. 1975).
32. 307 So. 2d 393 (La. App. 3d Cir. 1975).
33. Id. at 395. See DAKIN & KLEIN at 266-69.
34. 288 So. 2d 65 (La. App. 4th Cir. 1974).
the property and the mortgage holder was compensated for the unpaid mortgage indebtedness. In addition, the court awarded the discounted value of future disability payments payable to the owner by the mortgage insurer. The disability payments were to apply on the indebtedness as made but would terminate if the mortgage was prepaid. However, since the expropriation triggered an involuntary prepayment of the mortgage and thus terminated the disability payments, the court reasoned that the expropriation deprived the owner of a vested right to collect disability payments for a maximum period of sixty months; no duplication of payment occurred since the expropriation clearly deprived the owner of the possibility of reducing the mortgage indebtedness over the remaining period and thus enhancing his equity in the property. In Yeutter, on the other hand, a demand for the undiscounted value of the rentals from the entire property in addition to the full fair present market value of the entire property would be to demand the value of the property unencumbered by the lease, which would be its entire value, and the value of the lease which necessarily would reduce the unencumbered value; the lease would have its own independent value, not, however, the undiscounted total rentals, but the present discounted value of the expected future rentals.

A court of appeal has again held that esthetic considerations may reduce the market value of property adjacent to a transmission line servitude. In Southwest Louisiana Electric Membership Corp. v. Beck the court accepted opinion evidence that adjacent property would suffer a thirty percent diminution in value as a result of proximity to a transmission line. In Southwest Louisiana Electric Membership Corp. v. Duhon the same court accepted opinion evidence that a decrease of fifty percent in value was suffered by land adjacent to a transmission line. The court held that unsightliness coupled with public market resistance to the property adjoining servitudes supporting such utilities characterized by danger, "whether real or presumed," resulted in a loss in market value. In State v. Clement, in which a taking for

35. Id. at 67.
36. Id.
37. DAKIN & KLEIN at 266-69.
38. 299 So. 2d 411 (La. App. 3d Cir. 1974).
40. 311 So. 2d 5 (La. App. 1st Cir. 1975).
interstate highway purposes resulted in reducing the distance of a rural residence from the highway by some 250 feet to some 12 feet at the nearest point, the court accepted opinion evidence that the damage to the residence, resulting from traffic noise, impairment of view and loss of privacy, had impaired value to the extent of some eighty percent. The court corrected a trial court determination of severance damage to the land itself for failure to exclude from a “before and after” calculation the value already compensated for by virtue of a previously transferred servitude on the same property.41

As a general rule, if no property is taken courts will not allow compensation for damage caused by traffic regulation, since this is usually termed an exercise of the police power.42 In the exceptional case when damage resulting from traffic regulation is compensable, the damage must be special or peculiar to the particular property rather than common to all other property owners in proximity.43 In State v. Capone44 the court found no special or peculiar damages when a parking area, previously available on an unused portion of a dedicated street in front of commercial premises, was utilized for another lane of traffic; a trial court award of “cost of cure” damages, consisting of the cost to set back the building sufficiently to provide new parking spaces, was reversed.45

PROCEDURE

Several years ago Louisiana adopted a “quick taking” statute for the purpose of expediting highway construction.46 The public interest was deemed sufficiently important to depart from established expropriation practice pursuant to which a taking was permissible only after final judicial determination of just compensation.47 Only a timely answer raising the issue of lack of public purpose, followed by determination of that issue in the landowner’s favor, will defeat the expropriation.48 The parties may not litigate the issues of

41. Id. at 8-9.
42. DAKIN & KLEIN at 66.
44. 298 So. 2d 94 (La. App. 1st Cir. 1974).
45. Id. at 97.
47. DAKIN & KLEIN at 322.
48. Id. at 317.
necessity and expediency, and filing a valid petition establishes a prima facie case for public purpose.\textsuperscript{49} The expropiator's advantage in the procedure is evident in such cases as \textit{Southwestern Electric Power Co. v. Conger},\textsuperscript{50} in which the issue of public necessity was raised under the general expropriation statute and used as a delaying factor, although ultimately it proved unsuccessful. Initial litigation\textsuperscript{51} established the legal authority of the electric generating company to expropriate for a pipeline on the ground that while the statute speaks only of expropriation for transmission lines and stations, it also provides for expropriation of all "needed property"; the court deemed the right of way for gas pipelines necessary in order to provide fuel for the plant, which translated the energy into electricity.\textsuperscript{52} However, it required additional litigation during the past term to establish that, under the requisite authority, the expropriator had established the public necessity for the taking.\textsuperscript{53}

The general expropriation statute also suffers in another respect when compared by the expropriator with the quick-taking procedure provided for highway takings. In taking under the general statute the difference between market value of property immediately before and after the taking will determine any severance damages.\textsuperscript{54} Presumably in order to safeguard the public fisc, in the case of highway takings a special provision states that severance damages may be determined as of the date of the trial, which may be had within a year after the completion of the project.\textsuperscript{55} The Louisiana Supreme Court noted in \textit{State v. Wells}\textsuperscript{56} that the special provision was intended for the purpose of specifying "that the damages the remainder suffers should be reduced by special benefits which result to it from the completion of the highway construction. . . ."\textsuperscript{57} No opportunity to mitigate severance damages is available under the general statute.\textsuperscript{58} Louisiana

\begin{footnotes}
\item 49. \textit{Id.} at 369-70.
\item 50. 307 So. 2d 380 (La. App. 2d Cir. 1975).
\item 52. \textit{Id.} at 260-61.
\item 54. \textit{Dakin \& Klein} at 75.
\item 55. \textit{Id.} at 318.
\item 56. 308 So. 2d 774 (La. 1975).
\item 57. \textit{Id.} at 776.
\item 58. \textit{Id.}
\end{footnotes}
follows the rule that special benefits conferred by an expropriation of land and improvements are not available as deductions against awards for property taken and that the benefits may only reduce any severance damage award. In State v. Stein the court notes that the burden of proof to establish special benefits by a preponderance of the evidence is on the expropriating authority. General benefits may not be deducted at all, the underlying reason being that "a citizen whose property is taken should not bear more of the cost of the public improvements than other property owners whose property is neither taken nor damaged."

In expropriation cases tried to a judge sitting without a jury the accepted practice is for the trial judge to determine value without being bound by expert opinion expressed by appraisers. In Recreation & Park Commission v. Gully & Associates, a statement by the trial judge in his reasons for judgment is typical: "We have not attempted to say that the reasoning of one appraiser is more logical or proper than that of any other. Frankly we have picked and chosen portions of the evidence, without regard to appraisal source, in an attempt to reach a decision which we think would reflect the fair market value of the property at the time of the taking."

In amendments to the quick-taking statute providing for jury trial the legislature also seems to contemplate considerable freedom on the part of the jury since, by stipulation, appraisal reports or summaries thereof may be taken into the jury room. Without stipulation, statements of the relevant value conclusions admitted as evidence may be taken into the jury room and the judge "shall not recapitulate or comment upon the evidence in such manner as to exercise any influence upon their decision as to the facts." One might infer, at least

59. DAKIN & KLEIN at 90-91.
60. 301 So. 2d 384 (La. App. 4th Cir. 1974).
61. Id. at 389-90.
63. DAKIN & KLEIN at 401.
64. 303 So. 2d 827 (La. App. 1st Cir. 1975).
65. Id. at 831.
in the case where the jury by stipulation has access to appraisal reports, that it would be free to arrive at a verdict by the same reasoning indicated by the trial court in the Gully case.

Currently the State Department of Highways usually takes title to rights of way acquired by expropriation, rather than merely acquiring servitudes.68 Other expropriators usually limit the taking to a servitude as a matter of economy and expedition.69 The result of the latter practice, however, as held in Koch v. Louisiana Power & Light Co.70 is that additional users of the servitude not included by its terms must seek the consent of the surface owner for additional use even though conducting the activity within the confines of the original servitude.71 In Koch, the court upheld a mandatory injunction precluding additional use until consent was obtained.72 In Dickerson v. R.J.M. Pipelines, Inc.,73 the indispensable element for injunctive relief of irreparable injury was not present although relocation of a pipeline was begun before title vested in the state, since title vested under the quick taking statute by the time of the hearing of the matter. In these circumstances the landowner faced no irreparable injury since the only possibility of upsetting the taking would be by showing a lack of public purpose which, if shown, could be compensated by money damages;74 on the other hand, the court held that the application for injunction was a proper mode of protecting property rights and the state's demand for delay damages was rejected.75

In State v. Mims,76 a trial court sought unsuccessfully to expedite the trial of expropriation cases by requiring plaintiffs and defendants to exchange appraisal reports seven days before trial. Thereafter the reports would be filed as evidence and the expert allowed limited direct testimony as to acquaintance with the property and other pertinent information concerning his knowledge of the property; the expert

68. DAKIN & KLEIN at 42.
69. Id. at 34.
70. 298 So. 2d 124 (La. App. 1st Cir. 1974).
71. Id. at 127-28.
72. Id. at 129.
73. 303 So. 2d 262 (La. App. 2d Cir. 1974).
74. Id. at 264.
75. Id. at 265.
76. 311 So. 2d 914 (La. App. 3d Cir. 1975).
would then be tendered for cross-examination. The court hoped that this would eliminate extensive direct examination adducing the contents of written reports. The appellate and supreme courts denied supervisory writs on the ground that there was no irreparable injury and no final judgment to review. Thereafter the trial court proceeded in accordance with the outlined procedure and the state appealed. An appellate court reversed on the ground that the procedure ordered was in violation of the law that precludes ordering "production or inspection of any part of the writing that reflects the mental impressions, conclusions, opinions or theories of an attorney"; the case was remanded for trial in accordance with conventional rules for adducing direct testimony. A dissenting judge would have approved the procedure; in any event he would not have remanded but would have reviewed the case on the record as made. The majority was impressed with the fact that the lower court proposed to try all future expropriation cases in accordance with its rule, deeming the procedure approved by the denial of supervisory writs. Viewing the procedure as requiring parties to give up rights assured by the Code of Civil Procedure, the majority remanded even though appellate review might have successfully corrected errors in the resulting valuation.

In a case involving a pipeline taking under the general expropriation statute, Monterey Pipeline Co. v. DeJean, the landowner filed an untimely answer coupled with a reconventional demand; the expropriator urged that the failure to answer timely was a waiver of all defenses. The court of appeal held that the general expropriation statute contained no prohibition against joining additional actions with expropriation and upheld the landowner's claim that prior negotiations had resulted in a valid compromise price substantially in excess of that offered in the expropriation suit; the argument that the contract was void for error was rejected by the court.

77. Id. at 915.
79. LA. CODE CIV. P. art. 1452.
80. State v. Mims, 311 So. 2d 914, 918 (La. App. 3d Cir. 1975).
81. Id.
82. Id. at 917-18.
83. 295 So. 2d 466 (La. App. 3d Cir. 1974).
84. Id. at 468.
85. Id. at 468-69.
The landowner often feels forced to litigate an expropriation in order to obtain what he and his experts conceive to be the fair market value of the property and adequate severance damages. If he is right in his position, he is entitled to recover the fees of experts who supported him in court. However, as held in Dixie Electric Membership Corp. v. Guitreau, if his resort to litigation results in no increased recovery he may find himself a serious loser, since the legislature has provided "if a tender is made of the true value of the property to the owner thereof, before proceeding to a forced expropriation, the cost of the expropriation proceedings shall be paid by the owner."88

A change in plans by an expropriating authority may also work hardship on a landowner. Thus, in Parish of Jefferson v. Harimau, Inc., where a change of plans occurred, the expropriator sought dismissal by ex parte motion which was granted without prejudice after appropriate notice of judgment. The court rejected the argument that such a dismissal must be with prejudice on the ground that the action would forever terminate an expropriator's right to later expropriation. The court further noted that in the meantime the landowner could place improvements upon the property and, if a building permit was not forthcoming, compel it by mandamus. Since the statute does not provide for appraiser's fees in abandoned or unsuccessful expropriation suits, the court refused to award them since they would not have been "used on the trial" as required by statute. While attorney's fees were for many years not included as legal costs, the legislature has now provided for a reasonable attorney's fee when expropriation fails or the proceeding is abandoned by the expropriator. Most recently the legislature has provided for the award of attorney's fees in successful litigation; the award may not exceed twenty-five percent of the excess of the judgment over the amount tendered by the expropriator.89

86. DAKIN & KLEIN at 325.
87. 302 So. 2d 324 (La. App. 1st Cir. 1974).
89. 297 So. 2d 694 (La. App. 4th Cir. 1974).
90. Id. at 695.
91. Id. at 696.