Mercer Law Review

Volume 51
Number 1 *Annual Survey of Georgia Law*

Article 5

12-1999

A Critical Review of the Law of Business Loss Claims in Georgia Eminent Domain Jurisprudence

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SPECIAL CONTRIBUTIONS

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by Charles M. Cork, III*

I. INTRODUCTION

The Georgia Constitution provides that "private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid."[1] While the courts have recognized that a business is property within the meaning of the constitution, case law would rewrite this provision more or less as follows:

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The Author wishes to thank his research assistant, Wendy L. Sullivan, for her help in preparing this Article.

1. GA. CONST. art. I, § 3, para. 1(a).

> Private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid, except that the business of a property owner may be partially taken or damaged without compensation, and except that the business of a property owner or tenant may be temporarily taken or damaged without compensation.

Contradictory rules have also evolved for the means of valuing both the business damage that occurs and the loss in value of the underlying real property interests. Outcomes have turned on distinctions between "landowner" and "tenant," "permanent" and "temporary," "total" and "partial," "business" and "real property," and "unique" and "nonunique," most of which have no apparent connection with the constitutional text.

This Article surveys the background of business damage claims in Georgia eminent domain and inverse condemnation law. It then critically reviews certain problem areas to show how contradictory and counter-intuitive rulings developed and calls for the resolution of those issues by overruling certain cases. The Article concludes with a proposal for a comprehensive approach to valuation questions in Georgia, including business valuation questions.

II. HISTORICAL SURVEY

A. The Emergence of the Duty to Compensate for Loss of Business in Eminent Domain Cases

Business damages became compensable as a separate item of compensation in 1966 when the supreme court decided *Bowers v. Fulton County*.[2] Before 1966 an owner could use business damage evidence to prove the value of the property before and after the taking, but an owner could not recover business damages as a separate item.[3] In the leading case, *Pause v. City of Atlanta*,[4] in which a tenant claimed damages resulting from the construction of a bridge that impeded access to the premises, the Georgia Supreme Court held that

> neither the profits of the business carried on upon the premises so leased, nor the cost of fixtures or other improvements placed therein, nor of articles purchased for the purpose of enabling the lessee to conduct such business, nor the diminution in value of such fixtures, improvements, or articles as are removed by the lessee from the premises upon leaving the same are recoverable as damages; but the

2. 221 Ga. 731, 146 S.E.2d 884 (1966).
3. *Id.* at 736, 146 S.E.2d at 889.
4. 98 Ga. 92, 26 S.E. 489 (1896).

> increased value of the premises for rent in consequence of the putting in of such fixtures and improvements may be considered in computing the damages to the leasehold estate.
> . . . [I]t is competent for the plaintiff to prove that the business in question was in fact profitable, not for the purpose of recovering any loss in profits, but solely to illustrate and throw light upon the value of the premises for rent.[5]

While the above rules constituted the predominant view before 1966,[6] there were other cases suggesting other measures of damages. Some cases referred to "special damages"[7] or "direct damages,"[8] thereby

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5. *Id.* at 92-93, 26 S.E. at 489.

6. *See, e.g.*, Streyer v. Georgia S. & Fla. R.R., 90 Ga. 56, 56, 15 S.E. 637, 637 (1892) (explaining that the only measure is diminished market value, not market value for a particular purpose and not diminished rental value, though both have a bearing on general market value); Howard v. Bibb County, 127 Ga. 291, 293, 56 S.E. 418, 418-19 (1907) (same, suggesting that damage to dairy cows is not damage to property); Nelson v. City of Atlanta, 138 Ga. 252, 254, 75 S.E. 245, 246 (1912) (same); City of Atlanta v. Atlas Realty Co., 17 Ga. App. 426, 426, 87 S.E. 698, 699 (1916) (explaining that the measure is diminished market value, not diminished rental value or lost rentals).

7. *See, e.g.*, Selma, Rome & Dalton R.R. v. Redwine, 51 Ga. 470, 475 (1874) (allowing special damage to an orchard to be shown); Kavanagh v. Mobile & Girard R.R., 78 Ga. 271, 272-73 (1886) (holding that plaintiff may recover special damages because of noise and smoke of railroad, as in cases of other public nuisances that cause special damages); Campbell v. Metropolitan St. R.R., 82 Ga. 320, 320, 9 S.E. 1078, 1079 (1889) (explaining that plaintiff may recover special damages because of operation of railroad in street); Harvey v. Georgia S. & Fla. R.R., 90 Ga. 66, 66, 15 S.E. 783, 783-84 (1892) (holding that business incurs special damages if alley customers are prevented from using same access as before construction and that the loss of business may not be offset by consequential benefits resulting from the construction); Brunswick & W. R.R. v. Hardey & Co., 112 Ga. 604, 607-08, 37 S.E. 888, 889-90 (1901) (holding that business owner could recover business damages for blockage of access to business and was not limited to loss in value to the realty); Savannah Fla. & W. R.R. v. Gill, 118 Ga. 737, 743-44, 45 S.E. 623, 625-26 (1903) (holding that public nuisance causing special damage gives right of action for damages or abatement). Although these cases involved regulated enterprises rather than governmental entities, the private enterprise was acting under a delegated power of eminent domain. In these cases the supreme court did not distinguish between liability under the constitution or under the common law of nuisance; rather, it treated the nuisance as an exercise of power pursuant to legislative authority that was subject to constitutional limitations on the power of eminent domain. *See, e.g., Campbell*, 82 Ga. at 324-25, 9 S.E. at 1079.

8. *See, e.g.*, City of Atlanta v. Green, 67 Ga. 386 (1881). This was the first case to allow recovery of consequential damages when property was damaged but not taken under the 1877 constitutional amendment that extended liability when property was taken "or damaged." In reaching this conclusion, the supreme court rejected the proposition that damage under the constitution referred only to direct damages such as a "temporary spoliation or invasion." *Id.* at 388-89. It suggests, therefore, that one can recover direct and temporary losses that are not measured by the value of the land.

suggesting that some compensation could be allowed for injury to economically viable activities on the property apart from the general damage of lost fair market value.[9] Tenants, as owners of the *use* of property, could recover for any injury to the use.[10] A tenancy at will was held to have no market value because it was unassignable, and thus its value would have to be determined by an impartial jury in view of all proven facts, including the extent of its profitability.[11]

Finally, a view emerged that realty could have a peculiar value to the owner in excess of its fair market value, and in such cases, the owner is entitled to recover the higher value. Initially, this notion came from cases involving types of property that are so peculiar as to lack a market value or that have such a special design that the general market would not compensate for the loss.[12] In the decade before *Bowers*, this view evolved through a series of court of appeals decisions into the general proposition that the owner of property would be entitled to recover the actual, peculiar, or unique value of the property when the evidence showed that fair market value would not justly and adequately compensate the owner.[13] Thus, these cases recognized that whether

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9. *See, e.g.*, Dougherty County v. Tift, 75 Ga. 815, 815 (1885) (when county condemned the site of a toll bridge to build a free bridge, condemnee could show evidence of the cost of building the toll bridge and the income derived from it in establishing compensation); Davis v. East Tenn. Va. & Ga. Ry., 87 Ga. 605, 611-12, 13 S.E. 567, 569 (1891) (explaining that in a case sounding only in nuisance, special damages could be awarded for lost rentals and profits, and these damages could not be offset by consequential benefits); Central Ga. Power Co. v. Stubbs, 141 Ga. 172, 183, 80 S.E. 636, 641 (1913) (claim for business losses would have been sustained if the nuisance had affected the ability of customers to go to the store).

10. Bentley v. City of Atlanta, 92 Ga. 623, 627, 18 S.E. 1013, 1014 (1893). Even *Pause* makes this point, 98 Ga. at 96-97, 26 S.E. at 490 (quoting *Bentley*, 92 Ga. at 627, 18 S.E. at 1014), without reconciling it with the headnotes quoted above. *See supra* text accompanying note 5.

11. Hayes v. City of Atlanta, 1 Ga. App. 25, 30-31, 57 S.E. 1087, 1089 (1907).

12. *See, e.g.*, Atlantic Coast Line R.R. v. Postal Tel. Cable Co., 120 Ga. 268, 281, 48 S.E. 15, 20 (1904) (holding that, when property, such as a bridge or railroad, is used in a peculiar manner, it may be valued for the particular use rather than for general uses); *see also* Elbert County v. Brown, 16 Ga. App. 834, 847, 86 S.E. 651, 656 (1915) (holding that the value to the owner was awardable for damage to property that was designed for a special use); Housing Auth. of Augusta v. Holloway, 63 Ga. App. 485, 486-87, 11 S.E.2d 418, 419 (1940) (same).

13. *See, e.g.*, Housing Auth. of Savannah v. Savannah Iron & Wire Works, Inc., 91 Ga. App. 881, 884-86, 87 S.E.2d 671, 675-76 (1955) (explaining that actual pecuniary value is awardable when actual value and market value are not the same); Georgia Power Co. v. Pittman, 92 Ga. App. 673, 675, 89 S.E.2d 577, 579 (1955) (explaining that actual pecuniary value is to be awarded if market value is difficult to determine); Polk v. Fulton County, 96 Ga. App. 733, 736, 101 S.E.2d 736, 738 (1957) (holding that fair and reasonable value of property is to be awarded if fair market value does not coincide with actual value); Fulton

fair market value constituted just and adequate compensation was to be determined by the circumstances of the case rather than by dogma or ideology.[14] No specific measure of damages was assigned for such cases, but because the owner could show the profitability of the realty and because the jury could award the actual value of the realty, the cases strongly suggested that realty could be valued in terms of its economic use.

In 1966 the court in *Bowers* pronounced the statements in the earlier cases against the recoverability of business damages to be

> obiter dictum because they either did not involve the taking or directly damaging of the condemnee's physical property by the condemnor, but were suits in which damages were claimed because improvements made by the condemnor rendered less valuable the condemnee's premises or in which no claim for damages was made on account of damage to the condemnee's business or for expenses incurred by him.[15]

The court rejected the earlier cases as suggesting that the meaning of property in the constitution was limited to physical objects.[16] Instead, the court held that property signifies "every species of property, real and personal, corporeal and incorporeal"[17] and embraces not only the thing itself but also "the right of a person to possess, use, enjoy, and dispose of it, and the corresponding right to exclude others from the use."[18]

County v. Cox, 99 Ga. App. 743, 748, 109 S.E.2d 849, 853 (1959) (explaining that value above fair market value is awardable only if the property has special and unique value to the owner alone); Housing Auth. of Atlanta v. Troncalli, 111 Ga. App. 515, 518, 142 S.E.2d 93, 95 (1965) (holding that the owner is entitled to pecuniary value for loss of business located in a place that could not be duplicated in other locations near its customer base).

14. A pattern jury instruction arose from this line of cases as follows: "While fair market value is ordinarily the same as actual value, there may be circumstances in which it may not be the same, and under those circumstances your measure of damage would be actual value. It is up to you to determine whether such circumstances exist." COUNCIL OF SUPERIOR COURT JUDGES OF GEORGIA, SUGGESTED PATTERN JURY INSTRUCTIONS—VOLUME I: CIVIL CASES 55 (3d ed. 1991).

15. 221 Ga. at 736-37, 146 S.E.2d at 889. An earlier case also had reached the same conclusion about *Pause*. *See* Brunswick & W. R.R. v. Hardey & Co., 112 Ga. 604, 608-09, 37 S.E. 888, 889-90 (1901).

16. *Bowers*, 221 Ga. at 737, 146 S.E.2d at 889.

17. *Id.*

18. *Id.*, 146 S.E.2d at 890 (internal quotation marks omitted). *Bowers* thus provides two ways to understand the nature of business. Depending on one's metaphysical proclivities, business can be understood as an incorporeal entity, connected with the real property as a soul is attached to a body. Using Ockham's razor, the rest of us may understand business as a particular way one uses corporeal property. In the first case, business is primarily a noun; in the latter, it is a verb.

Under this standard, a business is property that is protected by the eminent domain clause of the constitution.[19]

The court in *Bowers* found no conflict between its holding that business damages are a separate item of recovery and the prior rule that the suitability of real property for peculiar purposes, as manifested by its income-producing potential, could show a value in excess of fair market value.[20] The court reasoned that "[t]he destruction of an established business is and must be a separate item of recovery" because business loss does not reflect mere loss in market value; indeed, the value of a business may often exceed the value of the real estate on which it is located.[21] Using the example of a $100,000 business operating in a "shabby and cheap building" worth $5000, the court considered it "absurd" and "fallacious" to appraise the realty as having the value of the business.[22]

In a case decided the same year as *Bowers*, the supreme court provided the following observation that may serve to explain its conceptual orientation in *Bowers*:

> Private property is the antithesis of Socialism or Communism. Indeed, it is an insuperable barrier to the establishment of either collective system of government. Too often, as in this case, the desire of the average citizen to secure the blessings of a good thing like beautification of our highways, and their safety, blinds them to a consideration of the property owner's right to be saved from harm by even the government. The thoughtless, the irresponsible, and the misguided will likely say that this court has blocked the effort to beautify and render our highways safer. But the actual truth is that we have only protected constitutional rights by condemning the unconstitutional method to attain such desirable ends, and to emphasize that there is a perfect constitutional way which must be employed for that purpose. Those whose ox is not being gored by this Act might be impatient and complain of this decision, but if this court yielded to them and sanctioned this violation of the Constitution we would thereby set a precedent whereby tomorrow when the critics are having their own ox gored, we would be bound to refuse them any protection. Our decisions are not just good for today but they are equally valid tomorrow.[23]

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19. *Id.* at 738-39, 146 S.E.2d at 890-91.
20. *Id.*
21. *Id.* at 739, 146 S.E.2d at 891.
22. *Id.*
23. State Highway Dep't v. Branch, 222 Ga. 770, 772, 152 S.E.2d 372, 374 (1966).

In other decisions from the same period, the court also noted the importance of property as a barrier to totalitarianism[24] and that the duty to pay just compensation was a protection of individuals from the oppressive and tyrannical power of the state.[25]

B. The Emergence of an Element of Uniqueness Before Business Losses May Be Recovered

Taken to its logical extreme, *Bowers* would have authorized recovery for the taking or damaging of every business on every condemned lot, even if the business could be resumed on neighboring property with minimal interruption or customer attrition. Moreover, by finding no conflict between *Bowers* and the peculiar value cases, the court arguably authorized recovery of business damages *and* a value of the realty based on its income-related peculiar value, thus posing a substantial risk of double recovery for the same loss. Subsequent cases addressed the former problem by invoking a uniqueness requirement for recovery of business damages. The latter problem did not materialize because, apparently, owners chose, or trial courts persuaded them, not to assert claims that would run the risk of double recovery.

The first pertinent case after *Bowers* rejected a farmer's claim that the income stream from the sale of his farm's products and his pond's fish justified finding that the farm had a peculiar value above fair market value.[26] Another similar case involved a claim for lost rental income because the taking of a large strip of land for a road in the middle of a farm persuaded the tenant to cease farming operations.[27] In rejecting this claim, the court distinguished *Bowers* on the ground that the evidence failed to show that the value of the property to the landlord was greater than the inherent value of the land for farming.[28]

The earliest case that explicitly mentioned a uniqueness requirement did so only in conjunction with a distinction between a total and a partial destruction of a business. Unlike *Bowers,* which involved the total destruction of a business and mentioned no explicit requirement of

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24. *See* Bailey v. Housing Auth. of Bainbridge, 214 Ga. 790, 791-92, 107 S.E.2d 812, 813 (1959), *quoted in* McCord v. Housing Auth. of Atlanta, 246 Ga. 547, 550, 272 S.E.2d 247, 250 (1980).

25. *See* Whipple v. County of Houston, 214 Ga. 532, 538-39, 105 S.E.2d 898, 903 (1958); *see also* Williams v. City of LaGrange, 213 Ga. 241, 243, 98 S.E.2d 617, 620 (1957) (explaining that taking private property perpetuates hardship and oppression).

26. State Highway Dep't v. Noble, 114 Ga. App. 3, 7-8, 150 S.E.2d 175, 177 (1966).

27. State Highway Dep't v. Hood, 118 Ga. App. 720, 720, 165 S.E.2d 601, 602-03 (1968).

28. *Id.* at 721-22, 165 S.E.2d 601, 603-04.

uniqueness, the court in *Williams v. State Highway Department*[29] held that for a business owner to recover damages for partial loss of a business, some evidence of a unique value must be presented.[30] Quoting the trial court, the court of appeals stated,

> "In the absence of a showing of 'a special or unique value' to the owner, the damage to a business by a partial taking of the land is no basis for compensation, except evidence of such damage may be given to the jury to help establish market value of the property."[31]

It is important to note that the prohibition against recovery of business damages was conditional upon the absence of uniqueness because *Williams* would later be misread for the proposition that the owner of property may not recover business damages for partial business loss under *any* circumstances.[32]

The drift toward the uniqueness requirement continued in *Hinson v. Department of Transportation*,[33] in which the court phrased the rule as follows: "The destruction or loss of a business being operated upon the condemned property requires compensation where the land is shown to be 'unique.'"[34] In this phrasing, the word "where" is ambiguous; it can be understood as "in any case that" or as "if and only if." If the latter, it would extend the uniqueness requirement even to the total destruction of a business, which the court in *Bowers* addressed. Significantly, the court in *Hinson* upheld the jury verdict against the owner's business damage claim because of evidence that the owner "would not be damaged by the relocation of his business."[35]

Two years later, in 1977, the court showed that it understood *Hinson* in the latter sense by upholding a business damage award in a total taking case "[b]ecause there [was] evidence of a 'unique' value of the condemned land" to the owner.[36] In 1978 the court capped the process by explaining that the uniqueness requirement developed in cases after *Bowers* does not conflict with *Bowers* but instead "creates a highly practical presumption which says that, as a matter of law, business losses cannot be attributed to the condemnation unless the property had

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29. 124 Ga. App. 645, 185 S.E.2d 616 (1971).
30. *Id.* at 647, 185 S.E.2d at 618.
31. *Id.*
32. *See infra* text accompanying notes 48-50.
33. 135 Ga. App. 258, 217 S.E.2d 606 (1975).
34. *Id.* at 259, 217 S.E.2d at 607.
35. *Id.*, 217 S.E.2d at 608.
36. Kessler v. Department of Transp., 142 Ga. App. 170, 170, 235 S.E.2d 636, 637 (1977).

some uniqueness for the business."[37] Thus, by 1978, to recover for any loss of business, an owner had to prove that the property was in some sense unique.

Before *Bowers*, how to define the element of uniqueness that would authorize a recovery of peculiar value in excess of market value was an issue that simmered in the court of appeals.[38] When uniqueness became an essential element of a separate business damage claim, the issue came to a full boil. The history of the appellate litigation over this issue is ably recounted in the leading case, *Department of Transportation v. 2.734 Acres of Land*,[39] in which the court reviewed various concepts of uniqueness adduced in "a convoluted maze of seemingly irreconcilable decisions" and concluded that evidence of any one of the three previously competing concepts (described below) would justify an award of compensation exceeding market value, including business damages.[40]

First, under the "locality test," property is unique "'[i]f the property must be duplicated for the business to survive, and if there is no substantially comparable property within the area.'"[41] Second, under

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37. MARTA v. Ply-Marts, Inc., 144 Ga. App. 482, 483-84, 241 S.E.2d 599, 601 (1978).

38. *Compare* Housing Auth. of Atlanta v. Troncalli, 111 Ga. App. 515, 518, 142 S.E.2d 93, 94-95 (1965) (focusing on the inability to relocate a business on similar property in the same customer area), *with* City of Gainesville v. Chambers, 118 Ga. App. 25, 26-28, 162 S.E.2d 460, 462-63 (1968) (criticizing *Troncalli* as overly broad and too inclusive of almost all real property and focusing instead on the characteristics of the property that lack value in the general market but that have peculiar value to the owner).

39. 168 Ga. App. 541, 309 S.E.2d 816 (1983).

40. *Id.* at 543-45, 309 S.E.2d at 819-20.

41. *Id.* at 543, 309 S.E.2d at 819 (quoting *Troncalli*, 111 Ga. App. at 518, 142 S.E.2d at 95).

Property can be found unique under this rule when it is the best location for the particular business. *See, e.g.*, Department of Transp. v. Livingston, 202 Ga. App. 67, 67-68, 413 S.E.2d 249, 249-50 (1991) (gas station); DeKalb County v. Glaze, 189 Ga. App. 1, 4, 375 S.E.2d 66, 69 (1988) (grocery store); Cobb County v. Crain, 172 Ga. App. 594, 594-95, 323 S.E.2d 890, 891 (1984) (automobile body repair shop); Department of Transp. v. Clower, 170 Ga. App. 750, 752-53, 318 S.E.2d 161, 163 (1984) (liquor store); City of Atlanta v. Hadjisimos, 168 Ga. App. 840, 840-41, 310 S.E.2d 570, 572 (1983) (automobile repair shop); DeKalb County v. Cowan, 151 Ga. App. 753, 754-55, 261 S.E.2d 478, 480 (1979) (antique store); Kessler v. Department of Transp., 142 Ga. App. 170, 170, 235 S.E.2d 636, 637 (1977) (liquor store).

High visibility on major thoroughfares with easy access may make a location unique under this concept. *See, e.g.*, Department of Transp. v. A.R.C. Sec., Inc., 189 Ga. App. 34, 34-36, 375 S.E.2d 42, 43-44 (1988); Smiway, Inc. v. Department of Transp., 178 Ga. App. 414, 417, 343 S.E.2d 497, 500 (1986); Department of Transp. v. White, 173 Ga. App. 68, 71, 325 S.E.2d 397, 399 (1984).

Location adjoining a particular source of business may make a property unique. MARTA v. Ply-Marts, Inc., 144 Ga. App. 482, 483, 241 S.E.2d 599, 602 (1978) (next to railroad facilities); Glynn County v. Victor, 143 Ga. App. 198, 199, 237 S.E.2d 701, 702 (1977) (meal

the "value to the owner test," property is unique if it is "'property with characteristics of location or construction which limit its usefulness, and therefore, its value, to the particular owner of it, so that these elements of value cannot pass to a third party.'"[42] Finally, under the "no market value test," property is unique if it is "'generally not of a type bought or sold on the open market.'"[43]

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ticket arrangement with nearby bus company).

Absence of similar properties nearby with business-critical amenities makes a property unique. Department of Transp. v. 2.953 Acres of Land, 219 Ga. App. 45, 50, 463 S.E.2d 912, 917 (1995).

Inability to purchase similar property with the amount of money tendered by the condemnor may support a finding of uniqueness. *Troncalli*, 111 Ga. App. at 519, 142 S.E.2d at 95.

Even failure of the business at a new location may show that the original location was unique. *Crain*, 172 Ga. App. at 595, 323 S.E.2d at 891; *2.734 Acres of Land*, 168 Ga. App. at 546, 309 S.E.2d at 821.

Under this rule, property may be found to be unique if the owner relocates a few blocks away and the business nonetheless loses some or all of its normal trade. Department of Transp. v. Bales, 197 Ga. App. 862, 865, 400 S.E.2d 21, 24 (1990).

42. 168 Ga. App. at 544, 309 S.E.2d at 819 (quoting *Chambers*, 118 Ga. App. at 27, 162 S.E.2d at 462-63 (internal quotation marks omitted).

Some cases hold that the peculiar benefit must relate to characteristics of the land or of the owner's use of it and not to the owner's personal characteristics alone. *See, e.g.*, Department of Transp. v. Metts, 208 Ga. App. 401, 402, 430 S.E.2d 622, 623-24 (1993). However, others have approved findings of uniqueness when the owner is retired and is using the property for retirement income that he could collect without paying management fees, Fulton County v. Winkles, 176 Ga. App. 690, 691, 337 S.E.2d 453, 454-55 (1985), and when the owner is too old to seek a job from the owner of other property, *Troncalli*, 111 Ga. App. at 519, 142 S.E.2d at 95.

Longevity of an operation at one location may give the owner benefits that a purchaser would not obtain, thereby giving the property a unique value to the owner. Department of Transp. v. Livingston, 202 Ga. App. 67, 68, 413 S.E.2d 249, 250 (1991). Likewise, evidence showing that the particular property is important for the continued well-being of the owner's business operation justifies a finding of uniqueness. *Crain*, 172 Ga. App. at 595, 323 S.E.2d at 891; *Hadjisimos*, 168 Ga. App. at 841, 310 S.E.2d at 572.

Particular facilities that are built into the subject property and that distinguish it from otherwise similar properties may justify a finding of uniqueness. *2.953 Acres of Land*, 219 Ga. App. at 50, 463 S.E.2d at 917.

43. 168 Ga. App. at 544, 309 S.E.2d at 819-20 (quoting Department of Transp. v. Eastern Oil Co., 149 Ga. App. 504, 505, 254 S.E.2d 730, 732 (1979)).

Archetypical examples are churches, college buildings, clubhouses, golf clubs, schools, and cemeteries. Macon-Bibb County Water & Sewerage Auth. v. Reynolds, 165 Ga. App. 348, 353, 299 S.E.2d 594, 598 (1983); Department of Transp. v. James Co., 183 Ga. App. 798, 798, 360 S.E.2d 56, 57 (1987).

More common examples of business properties that have been found to be unique because they are not typically bought and sold include service stations, *Livingston*, 202 Ga. App. at 68, 413 S.E.2d at 250; *Winkles*, 176 Ga. App. at 691, 337 S.E.2d at 455; *Eastern Oil Co.*, 149 Ga. App. at 505, 254 S.E.2d at 731, convenience stores, *Bales*, 197 Ga. App. at 865, 400 S.E.2d at 24, and veterinary clinics, Department of Transp. v. Harris, 201 Ga. App. 160,

For reasons given below,[44] uniqueness should be conceived as an application of the doctrine of mitigation of damages. If the owner can mitigate damages by reasonable means, such as relocating the business, the owner should do so and should recover the reasonable costs of doing so. On the other hand, if the owner cannot do so reasonably, the owner will not have been justly and adequately compensated unless the owner recovers at least the lost value of the business operated on the property.

III. A CRITICAL REVIEW OF CERTAIN PROBLEM AREAS

Unfortunately, business damage case law has developed several areas of conflicting rules, scholastic distinctions without substance, and substantial departures from the text of the constitution, precedent, and reason. This is due in part to the absence of a comprehensive approach to business loss questions, in part to the aggressive positions taken by practitioners on both sides, and in part to faulty reasoning. This section of the Article looks at these contentious issues critically and suggests the proper resolutions.

A. The Distinctions Between Landowner and Tenant and Between Total and Partial Destruction of Business, for Purposes of the Recoverability of Damages, Are Unfounded

Before the uniqueness rule was established as a universal element in all business damage cases, the court of appeals held that to recover for business damages caused by a partial taking of land, the property must be unique: "In the absence of a showing of 'a special or unique value' to the owner, the damage to a business by a partial taking of the land is no basis for compensation," except that it may show market value.[45] This rule was quoted in the later case of *Department of Transportation v. Dent*,[46] though the requirement that the property be unique was by then redundant.[47] The rule as stated in *Dent*, however, was misconstrued in a later case, *Department of Transportation v. Kendricks*,[48] as standing for the proposition that an owner, unlike a tenant, could not

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161, 410 S.E.2d 360, 361 (1991).

Also unique under this rule are lesser real property interests such as easements, Housing Auth. of Atlanta v. Southern Rwy., 245 Ga. 229, 230, 264 S.E.2d 174, 175 (1980), and tenancies at will, Hayes v. City of Atlanta, 1 Ga. App. 25, 26, 57 S.E. 1087, 1089 (1907).

44. *See infra* Part IV.D.

45. *Williams*, 124 Ga. App. at 647, 185 S.E.2d at 618.

46. 142 Ga. App. 94, 95, 235 S.E.2d 610, 612 (1977).

47. *See supra* text accompanying note 37.

48. 148 Ga. App. 242, 250 S.E.2d 854 (1978).

recover for business losses unless the business was totally destroyed.[49] The court apparently ignored the qualifying language "in the absence of a showing of 'a special or unique value.'"[50]

In *Department of Transportation v. Dixie Highway Bottle Shop, Inc.*,[51] the supreme court attempted to resolve the resulting tension between *Dent* and *Kendricks*.[52] In a per curiam decision, the court decided that there was no conflict between the two cases, though in so doing, it had to adopt *Kendricks*'s misreading of *Dent*.[53] The court concluded,

> When the business belongs to the landowner, total destruction of the business at the location must be proven before business losses may be recovered as a separate element of compensation. On the other hand, when the business belongs to a separate lessee, the lessee may recover for business losses as an element of compensation separate from the value of the land whether the destruction of his business is total or merely partial, provided only that the loss is not remote or speculative.[54]

The court explained the difference between landowners and tenants as based on the doctrine that the use of the property and title of the property are merged in the owner's case, but are separate and distinct in a case in which the owner leases property to a business tenant.[55] Thus, the court concluded that a landowner may not recover for business losses as a *separate* item of recovery unless there is a "total destruction of the business at the location," whereas a tenant may recover a separate award of business loss even if it is merely partial.[56]

The interests of landowner and business owner may in fact be merged when an owner is operating a business on the property,[57] but that fact is insignificant when the value of the owner's lost business exceeds the market value of the property taken. One will search the chain of

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49. *Id.* at 245-46, 250 S.E.2d at 857-58.
50. *Williams*, 124 Ga. App. at 647, 185 S.E.2d at 618.
51. 245 Ga. 314, 265 S.E.2d 10 (1980).
52. *Id.* at 314-15, 265 S.E.2d at 10.
53. *Id.*
54. *Id.* at 315, 265 S.E.2d at 10 (citation omitted).
55. *Id.* at 314-15, 265 S.E.2d at 10.
56. *Id.* at 315, 265 S.E.2d at 10. This disparity has led to at least one equal protection challenge, which the court noted, but did not resolve. *See* Timmers Chevrolet, Inc. v. Department of Transp., 261 Ga. 270, 271 n.1, 404 S.E.2d 121, 122 n.1 (1991); *see also* Richmond County v. 0.153 Acres, 208 Ga. App. 208, 210-11 & n.1, 430 S.E.2d 47, 50 & n.1 (1993).
57. 245 Ga. at 314-15, 265 S.E.2d at 10.

authority culminating in *Dixie Highway Bottle Shop*[58] in vain for an explanation of the significance of this merger concept. At most, those cases express the *assumption* that the value of the property for a particular business is reflected in the market value for the property. This assumption will normally be true when the market provides many suitable sites for the owner's business. In such a fortunate situation, the owner can sell the current site for market value and replace it with a similar one for roughly the same market value. As the many cases that explore the uniqueness principle make clear, this assumption is not always true.[59] In fact, one may expect over time, with increasing development of vacant land and increasing land-use restrictions, that this assumption will prove to be increasingly less justified. In any case, the progression from a general rule (business value is *generally* included in market value) to a universal rule (in partial takings when the landowner operates the business, business value is *always* included in market value) is a logical error that occurs frequently in Georgia's eminent domain jurisprudence.

Both the owner-operator and the lessee-operator have property rights in the land and in their businesses, and a damage to the business of one is not conceptually different from damage to the other's business.[60] The business value of the property to the landowner-operator or tenant-operator may be greater than the market value of the land or leasehold. If so, and if either loses that value, an award of mere market value will not provide the compensation that the constitution requires. Certainly, the tenant and landowner may have different options to mitigate damages, but the mere merger of interests of the landowner-operator in one person does not extinguish the business value of the property. If

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58. *See Kendricks*, 148 Ga. App. at 244-47, 250 S.E.2d at 857; *Dent*, 142 Ga. App. at 95, 235 S.E.2d at 612; *Williams*, 124 Ga. App. at 647, 185 S.E.2d at 618; Bowers v. Fulton County, 122 Ga. App. 45, 49-50, 176 S.E.2d 219, 224 (1970) ("*Bowers II*"); *Hood*, 118 Ga. App. at 721-22, 165 S.E.2d at 603. Including *Bowers II* in this chain also requires a misreading of that case. While *Bowers II* suggests that in cases involving a partial taking, the measure of damages would be the loss in market value, the decision refers to the market value of the *business* rather than market value of the *realty*, as opposed to other potential measures of business loss such as "loss of profits, loss of customers or possibly what might be termed a decrease in the earning capacity." 122 Ga. App. at 50, 176 S.E.2d at 224.

59. *See supra* notes 41-43.

60. In an earlier case, the supreme court explained that

> the owner of property of a given rental value is entitled, if he elects to be at once his own landlord and tenant, to get an amount of enjoyment out of it equal to the sum he would be obliged to pay as rent for premises of a like rental value belonging to another.

Swift v. Broyles, 115 Ga. 885, 888, 42 S.E. 277, 279 (1902).

merger truly extinguished the business value of property, it would be impossible for the landowner to recover business losses in any case, including a case involving the total destruction of a business. In addition, it would be completely irrational to hold that the landowner's interests merged subject to later severance in a case of total, but not partial, destruction of the business.

These distinctions conflict with both the language and the spirit of the constitution. Specifically, in some cases, compensating only for the market value of real property does not adequately compensate the business owner for his losses. This, in turn, runs a serious risk of violating the constitutional commandment of just compensation.[61] The supreme court should reform the law to erase these distinctions that deprive citizens of protections guaranteed under the Georgia Constitution.

B. The Distinctions Between Permanent and Temporary Business Losses and Between Temporary Consequential Damages and Temporary Business Losses, for Purposes of the Recoverability of Damages, Are Unfounded

Another issue arises when the effects of the taking are temporary, either because the business owner moves the business away from the affected property or because the condemnor takes a temporary interest in the property, typically in the form of an easement for construction. The former situation occurred in *Housing Authority of Atlanta v. Southern Railway Co.*,[62] in which the condemnee sought business damages when it relocated the business.[63] The court quoted the trial court's instruction "'that a mere temporary loss of profits associated with the extinguishment by condemnation of Condemnee's property interest is not a proper element for consideration in determining just and adequate compensation,'"[64] but it did not pass on the validity of the instruction because the condemnee did not appeal the issue. Instead, the condemnor appealed, contending that the jury's verdict awarded double damages for the costs of relocating the business and for loss of business. The condemnor apparently argued that the condemnee should not recover the costs of relocation of a business when it also recovers for the loss of the same business because the latter award provides complete

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61. *See* GA. CONST. art I, § 3, para. 1(a).

62. 245 Ga. 229, 264 S.E.2d 174 (1980).

63. *Id.* at 229-30, 264 S.E.2d at 175.

64. *Id.* at 232, 264 S.E.2d at 176. The source or rationale of the trial court's instruction was not given. No Georgia source that supports this principle has been discovered.

compensation.[65] The supreme court cited the trial court's instruction to show that the condemnee could not have received a double recovery because the jury would have awarded business damages for the business that was permanently lost, as opposed to the business lost from the first site that was ultimately regained by relocation to the second site.[66] Hence, the instruction more than sufficed to avoid a double recovery for permanent business losses, but it was at most dictum regarding any potential challenge by a *condemnee* that the lower court's instruction resulted in a failure to obtain compensation for temporary business losses that occurred while the business was reestablishing itself.

The second situation occurred in *Hillman v. Department of Transportation*,[67] in which the condemnor took a construction easement over part of a parking lot for a period of months.[68] Rejecting an implication in earlier cases that damage to the remaining property could be shown only if the damage is a "'continuous and permanent incident of the improvement,'"[69] the supreme court found "that the only proper distinction to be made in cases of temporary takings is the same requirement in force for permanent takings."[70] Furthermore, "[w]hile the condemnee is not permitted to recover for the inconveniences of the construction process, the constitution requires that damages, *including* consequential damages, be paid. The constitution does not distinguish between permanent and temporary damage."[71] Although most of *Hillman* was phrased in terms of a recovery of consequential damages,[72] its reasoning led the full bench of the court of appeals in *Department of Transportation v. Hillside Motors, Inc.*[73] to conclude that the Georgia Constitution *requires* that temporary business losses be recoverable.[74]

The problem in this area arose in *Buck's Service Station, Inc. v. Department of Transportation*,[75] in which both appellate courts mistook the trial court's jury instruction in *Southern Railway* as an appellate holding against the recovery of business damages caused by a temporary

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65. *Id.* at 231-32, 264 S.E.2d at 175-76.
66. *Id.*, 264 S.E.2d at 176-77.
67. 257 Ga. 338, 359 S.E.2d 637 (1987).
68. *Id.* at 338, 359 S.E.2d at 638.
69. *Id.* (quoting State Highway Dep't v. Hollywood Baptist Church of Rome, 112 Ga. App. 857, 860, 146 S.E.2d 570, 572 (1965)).
70. *Id.* at 339, 359 S.E.2d at 639.
71. *Id.* at 340, 359 S.E.2d at 640 (emphasis added).
72. *Id.* at 338, 359 S.E.2d at 638.
73. 192 Ga. App. 637, 385 S.E.2d 746 (1989).
74. *Id.* at 639, 385 S.E.2d at 748 (citing *Hillman*, 257 Ga. at 340, 359 S.E.2d at 640).
75. 259 Ga. 825, 387 S.E.2d 877 (1990), *aff'g*, 191 Ga. App. 341, 381 S.E.2d 516 (1989).

taking and attempted to reconcile that "holding" with *Hillman*.[76] The supreme court ruled,

> We expressly hold that evidence of *any* business losses which result in a diminution of the value of a condemnee's business is admissible. However, evidence of temporary loss of business is admissible not for the purpose of recovering for the temporary loss of business but for the limited purpose of demonstrating fair market value of the land not taken immediately after the taking. We reach this conclusion because business property facing loss of business may suffer a diminution in fair market value. This is true whether the losses occur because of the condemnation of a temporary construction easement or whether they occur because of a permanent taking.[77]

The court thereby precluded the admission of temporary loss of business evidence for the purpose of recovering for that loss, although it allowed the admission of business loss evidence for the express purpose of showing the value of property interests immediately after the taking.[78] The court did so despite recognizing that the owner could recover for consequential damages that are caused by the same temporary taking that resulted in temporary business losses.[79] Hence, the court established two distinctions that are not apparent in the text of the Georgia Constitution: (1) temporary business losses may not be recovered, though otherwise identical permanent business losses may be recovered; and (2) loss in value to the realty caused by a temporary taking may be recovered, but lost profits caused by the same taking may not be recovered.[80]

Undoubtedly, if a private citizen did temporary construction work on another's property without the other's consent and injured that party's business, the loss would be recognized as a compensable business damage. "'In a continuing, abatable nuisance case, the plaintiff is not limited to a recovery of rental value or market value; rather, he may recover any special damages whether the injury is of a temporary or a permanent nature.'"[81]

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76. 259 Ga. at 826-27, 387 S.E.2d at 878; 191 Ga. App. at 341-42, 381 S.E.2d at 517. Because the misread case did not have occasion to address the validity of the supposed rule, and because the courts in *Buck's Service Station* simply assumed that the rule existed, there is no appellate discussion in Georgia that explains why this supposed rule is valid.

77. 259 Ga. at 827, 387 S.E.2d at 878.

78. *Id.*

79. *Id.*

80. *Id.* at 826-27, 387 S.E.2d at 878-79.

81. Fulton County v. Wheaton, 252 Ga. 49, 51, 310 S.E.2d 910, 911-12 (1984) (quoting City of Columbus v. Myszka, 246 Ga. 571, 573, 272 S.E.2d 302, 305 (1980)).

Because two distinctions have been imposed on the law of eminent domain that cannot be justified in the text of the constitution or by persuasive reasoning, the results appear arbitrary and unfair. Fidelity to the constitution demands substantial justification for a rule that permits recovery of permanent business losses while precluding recovery of temporary business losses. This rule contravenes the only reasoned analysis of the constitution's text, which does not distinguish between permanent and temporary damages.[82] The supreme court should reform the law to erase these unfair distinctions.

C. The Law Should Allow the Valuation of Business Damage Claims in Terms of Lost Profits in Appropriate Cases

Assuming that an owner has jumped the hurdles discussed above and may assert a business damage claim, there are two threads of Georgia cases that reach contradictory conclusions about the measure of those damages. One thread maintains that the only appropriate measure of business damages is the difference in market value of the business before and after the taking.[83] In this line of cases, the existence of lost profits, lost customers, and decreased earning capacity of the business may evidence a loss in business value, but it is not a separate item of recovery.[84] This will be called the "diminution only" theory. Another thread holds that lost business value and lost profits are alternative measures of value, so that an owner may recover either in an appropriate case, at least when the owner supplies sufficient information to allow a calculation of net profits with reasonable certainty.[85] This will be called the "valuation alternatives" theory.

The diminution only theory is erroneous, and more flexibility should be allowed in the assessment of business damage claims in eminent domain law as in other fields of law. The diminution only theory has never been explained by an appellate court. It arose in *Bowers II*

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82. *See supra* note 71 and accompanying text.

83. *See, e.g.*, MARTA v. Martin, 193 Ga. App. 566, 567, 388 S.E.2d 346, 347 (1989); Old South Bottle Shop, Inc. v. Department of Transp., 175 Ga. App. 295, 295, 333 S.E.2d 127, 128 (1985); *Bowers II*, 122 Ga. App. at 50, 176 S.E.2d at 224.

84. *See, e.g.*, MARTA v. Martin, 193 Ga. App. 566, 567, 388 S.E.2d 346, 347 (1989); Old South Bottle Shop, Inc. v. Department of Transp., 175 Ga. App. 295, 295, 333 S.E.2d 127, 128 (1985); *Bowers II*, 122 Ga. App. at 50, 176 S.E.2d at 224.

85. *Bowers*, 221 Ga. at 734, 146 S.E.2d at 888; Department of Transp. v. Morris, 194 Ga. App. 813, 814, 392 S.E.2d 291, 293 (1990); Department of Transp. v. Hillside Motors, Inc., 192 Ga. App. 637, 642-43, 385 S.E.2d 746, 751 (1989); Mauney v. Department of Transp., 169 Ga. App. 563, 563, 313 S.E.2d 782, 783 (1984); *Hadjisimos*, 168 Ga. App. at 842, 310 S.E.2d at 573; Department of Transp. v. Vest, 160 Ga. App. 368, 369-70, 287 S.E.2d 85, 86-87 (1981).

spontaneously, and the court held it to be the proper measure "in our opinion."[86] The court of appeals in *Bowers II* evidently overlooked the precise holding of the original *Bowers* decision, in which the supreme court ruled upon the enumeration of error that the trial court refused to give instructions five, six, and seven.[87] Charge seven dealt with removal costs,[88] and charge six dealt with "'loss, injury to, or diminution of business,'"[89] while charge five dealt with "'loss of profits.'"[90] After providing its analysis, which established that business losses may be recovered, the supreme court found "the requested instructions pertinent and applicable to the issues of the case. In this situation it was error to refuse to give them in charge to the jury."[91] Therefore, the supreme court approved a jury instruction for the recovery of lost profits apart from diminished business value.[92]

Furthermore, there is no constitutional basis for a prohibition against lost profits as a measure of recovery in appropriate cases. Lost profits and other business damages are considered just compensation in other kinds of cases.[93] There is nothing in the constitution that prevents lost profits or other business damages from being just and adequate compensation in condemnation cases.[94]

Practical considerations suggest that there will be cases in which recovery of lost profits will be the best and most appropriate measure of a business's damages. First, the business may often be valuable because of its ongoing ownership, which would be lost upon sale to others. Market value of the business for sale would yield an artificially low

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86. 122 Ga. App. at 50, 176 S.E.2d at 224.

87. 221 Ga. at 734, 146 S.E.2d at 888.

88. *Id.* at 735-36, 146 S.E.2d at 888-89.

89. *Id.* at 735, 146 S.E.2d at 888.

90. *Id.* at 734-35, 146 S.E.2d at 888.

91. *Id.* at 738, 146 S.E.2d at 890.

92. *Id.* at 738, 741, 146 S.E.2d at 888, 892.

93. *See, e.g.*, Bennett v. Smith, 245 Ga. 725, 726-27, 267 S.E.2d 19, 20 (1980) (negligent supply of contaminated feed to plaintiff's hen house); Barham v. Grant, 185 Ga. 601, 605, 196 S.E. 43, 47 (1938) (road change nuisance); Brunswick & W.R.R. v. Hardey & Co., 112 Ga. 604, 607-09, 37 S.E. 888, 889-90 (1901) (road work nuisance); Gaines v. Crompton & Knowles Corp., 190 Ga. App. 863, 864, 380 S.E.2d 498, 500 (1989) (breach of noncompetition agreement justified damages for lost net profits, lost customers, and lost employees); Gilmore Int'l Travel, Inc. v. Equitable Life Assurance Soc'y, 183 Ga. App. 116, 117-18, 358 S.E.2d 279, 280 (1987) (fraud); Moultrie Farm Ctr, Inc. v. Sparkman, 171 Ga. App. 736, 738, 320 S.E.2d 863, 866 (1984) (contaminated feed for cows); Summerfield v. Decinque, 143 Ga. App. 351, 352-53, 238 S.E.2d 712, 714-15 (1977) (car wreck's effect on owner's art gallery).

94. *See* GA. CONST. art. I, § 3, para. 1(a).

estimation of its true value to the owner.[95] Recognizing this fact is consistent with the definition of property as embracing not only the right of the owner to sell it, but also the owner's "right to possess, use, [and] enjoy" the property.[96] Diminished market value should be rejected when the government's action does not diminish the owner's ability to *sell* the business as much as it damages the *operation* of the business. Because a business can be damaged in a variety of ways, there is no a priori reason why there should be only one way of measuring that damage.[97]

Second, market value may be inappropriate for a number of reasons. A market standard should be rejected when, for any reason, what the hypothetical market purchaser gains is not equivalent to what the owner loses by reason of the condemnation. For example, a business that has minimal market value because it is merely breaking even may lose a lot of money during a construction process that causes a compensable loss. As it was erroneous in *Bowers* to instruct the jury that the constitution mandates a market valuation of property,[98] it should be erroneous to assert a similar position about business values. Diminished market value of a business cannot exist when the business is a franchise or leasehold, which is, by its terms, nontransferable. In addition, some businesses have no market value because there is no market for them. A business may be a one-of-a-kind business or a monopoly, which would not be sought by typical investors. Market value, by measuring a permanent transfer of ownership, is inapposite when the issue is a temporary business loss because of road construction[99] or any other compensable temporary business loss.

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95. Note that in business cases, the "value to the owner" standard (as opposed to a market standard) is not subject to the abuses that can occur in cases involving mere residential property. In business cases the value to the owner rests upon cash transactions that can be verified and that supply objective criteria for determining value. Therefore, unlike the need to reject testimony of the sentimental value of a home, there is no reason to reject this standard in business cases.

96. *Bowers*, 221 Ga. at 737, 146 S.E.2d at 890.

97. *See, e.g.*, State Highway Dep't v. Sullivan, 121 Ga. App. 767, 771, 175 S.E.2d 152, 155 (1970) (inventory of junkyard car lot valued in terms of sales income because it would not be feasible to move some of it to a new location).

98. 221 Ga. at 741, 146 S.E.2d at 892 ("The Constitution does not contain any allusion to fair market value as a criterion for determining just and adequate compensation.").

99. *See, e.g.*, Department of Transp. v. Martin, 174 Ga. App. 616, 616-17, 331 S.E.2d 45, 45-46 (1985) (gas station could not operate during period of construction); *Hillside Motors, Inc.*, 192 Ga. App. at 638-39, 385 S.E.2d at 748 ("To say that a business loss that occurs over a specific period of time (as opposed to permanently) is not compensable not only defies logic but our constitution as well.") (dictum).

Finally, in some cases, lost profits will be the most simple and direct measure of damages, and in those cases it should be preferred to a market approach.[100] If lost profits are exceptionally clear and a business valuation is exceptionally murky, using the former may better serve the interests of justice. For these reasons, the conflict between these lines of cases should be resolved, and the supreme court should authorize a recovery of lost profits in appropriate cases.

D. The Law Should Allow the Valuation of the Underlying Property in Terms of its Business Value When No Double Recovery Would Result

In cases in which a business loss is allowed as a separate item of recovery, allowing the underlying property to be evaluated in accordance with its income-producing qualities would pose a substantial risk of double recovery. However, when an owner cannot recover business damages as a separate item of recovery under one of the above rules, or chooses not to do so, an issue arises as to whether the owner may elect to show the actual, peculiar, or unique value of the property in excess of fair market value as allowed by case law before *Bowers*.[101] Unfortunately, this issue has been obscured by several recent conflicting decisions.

Under the correct view that the underlying real property interest may be valued in terms of a business income approach, which is reflected in the supreme court's recent unanimous decision in *Department of Transportation v. Edwards*,[102] an appraiser may apply the "income method" to the business income of the property to determine what a well-informed buyer would pay and what a seller would accept for the property before and after the sale.[103] Likewise, in *Housing Authority of Atlanta v. Southern Railway Co.*,[104] an appraiser evaluated a railroad easement in terms of the business income that it was used to generate, and the supreme court unanimously held that it was proper "to instruct the jury on lost profits as a means of awarding just and

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100. *See, e.g.*, Whitaker Acres, Inc. v. Schrenk, 170 Ga. App. 238, 241, 316 S.E.2d 537, 539-40 (1984).

101. *See supra* notes 12-14 and accompanying text.

102. 267 Ga. 733, 736-37, 482 S.E.2d 260, 263-64 (1997).

103. *Id.* at 736, 482 S.E.2d at 263. Contrary to the opinions of some appraisers and commentators, the case law developed in this section clearly authorizes the use of business income, not merely rental income, for calculations of the value of property under the income approach. The view that considers only rental income arbitrarily privileges the position of the absentee landlord as the standard by which to judge the value of the property of everyone else.

104. 245 Ga. 229, 264 S.E.2d 174 (1980).

adequate compensation because the income approach necessarily takes into account what future earnings would be were the property interest not extinguished."[105] This holding is consistent with decisions in other areas of the law in which a party introduced business profits and losses to prove the value of real property interests, some of which expressly recognize that a party could thereby indirectly recover business profits if the party persuades a jury that business profits are the best measure of the value of the underlying property interests.[106]

Unfortunately, two recent decisions have introduced doubts about these principles. In *Bill Ledford Motors, Inc. v. Department of Transportation*,[107] the court of appeals rejected a claim that a tenant's leasehold interest should be valued in terms of the value of the business operating on the premises, even though the property was unique and the tenant was not allowed to seek a separate award of business damages because of the temporary nature of the damage.[108] The court based its decision on the general rule that fair market value is the appropriate measure of damages, but it added the rhetorical question from *Bowers* that, when a $100,000 business is located in a $5000 building, how can the value of the business be included in the value of the property?[109] The answer to this question comes from the numerous peculiar value cases: normally the business cannot be included in the realty, but when the

105. *Id.* at 231, 264 S.E.2d at 176; *see also* Hall County v. Merritt, 233 Ga. App. 526, 528, 504 S.E.2d 754, 756 (1998) (cash flow analysis to determine value of landfill); Richmond County v. 0.153 Acres of Land, 208 Ga. App. 208, 209, 430 S.E.2d 47, 49 (1993) ("evidence of damage to the business may not be the basis for compensation except as evidence to help establish the market value of the remainder of the property," though an owner may not combine this approach with a traditional fair market value approach to claim double damages); Coastal Equities, Inc. v. Chatham County Bd. of Tax Assessors, 201 Ga. App. 571, 572, 411 S.E.2d 540, 541 (1991) (approving appraisal of motel based on its gross income even though its income depended on many factors other than the value of the real estate); *Hillside Motors, Inc.*, 192 Ga. App. at 642-43, 385 S.E.2d at 751 (income losses used for car dealership during periods in which dust from construction interfered with car sales); Department of Transp. v. A.R.C. Sec'y, Inc., 189 Ga. App. 34, 37-38, 375 S.E.2d 42, 45 (1988) (property appraised by method including its income stream); *Sullivan*, 121 Ga. App. at 771, 175 S.E.2d at 155 (inventory of junkyard car lot valued in terms of sales income); City of Rome v. Lecroy, 59 Ga. App. 644, 645-46, 1 S.E.2d 759, 760 (1939) (upholding tenant's suit for impairment of access for fifteen days based on lost profits of a business reflected in a sales decline compared with "the usual and ordinary sales for that period").

106. *See, e.g.*, Dual Enters., Inc. v. Kingston Atlanta Partners, 211 Ga. App. 108, 111, 438 S.E.2d 90, 92 (1993); Carusos v. Briarcliff, Inc., 76 Ga. App. 346, 351-52, 45 S.E.2d 802, 806-07 (1947).

107. 225 Ga. App. 548, 484 S.E.2d 510 (1997).

108. *Id.* at 549-51, 484 S.E.2d at 513-14.

109. *Id.* at 550, 484 S.E.2d at 513 (citing *Bowers*, 221 Ga. at 739, 146 S.E.2d at 891).

business is tied to the realty because the realty is unique, then the realty that has a low fair market value also has a high peculiar value to the owner, which the market does not reflect.[110] Thus, the owner will be deprived of just compensation if the owner is restricted to a recovery of fair market value.

Likewise, in *Department of Transportation v. Scott*,[111] the supreme court rejected an approach that valued the destruction of patented, and therefore unique, "mother plants" on a farm in terms of loss of income during the time in which the farmer could grow replacements and continue sales.[112] However the plants could have been characterized (as personalty, realty, part of a leasehold, or a business interest), the plants were property under the constitution, and compensation was due, but compensation could not be paid unless the objective, income-generating value of the tenant's business formed a part of the tenant's recovery.[113] In a particularly brief and puzzling discussion, the majority ruled that evidence of income loss was irrelevant because the farmer was not seeking recovery of business losses as a separate item.[114] The majority failed to explain why the evidence would not be relevant to the value of the property taken.

Neither the court in *Bill Ledford Motors* nor the court in *Scott* explained how the result in each case could be reconciled with the peculiar value cases or with the recognition that the constitution protects the profitable use of property as well as market value. This is particularly troubling because both cases involved claims by tenants, and the law has always recognized that a tenant does not own the property but does own the right to use the property for profit.

> When a leasehold is condemned, the lessee does not lose the value of the improved property. The value of the improved property is lost to the lessor who owned it and who is compensated therefor. The lessee loses only the *use* of the improved property for a specified time at a set amount of rent.[115]

The traditional rule that a tenant's interest in a leasehold should be valued by means of market value, as an item to be bought and sold in the open market, is usually nothing more than a legal fiction. Reason suggests that if a tenant loses the use of some property, compensation should be determined by the value of the tenant's use of the property.

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110. *See supra* notes 12-14 and accompanying text.
111. 268 Ga. 579, 492 S.E.2d 216 (1997).
112. *Id.* at 579-80, 492 S.E.2d at 216-17.
113. *Id.* at 580, 492 S.E.2d at 217.
114. *Id.*
115. MARTA v. Funk, 263 Ga. 385, 387, 435 S.E.2d 196, 199 (1993).

Reason does not suggest that the tenant's compensation should be based on the value of the improved property for rent, which would more appropriately constitute the measure of the tenant's right to sublease the property. Tenants generally do not acquire leases for the purpose of subleasing at a higher rate. Instead, tenants pay to get the use of property for the purpose of doing business to make profits. A taking deprives the tenant of those profits. Therefore, the lessee's interest should be valued not in terms of the right to sublease the property, but in terms of the right to uninterrupted enjoyment of the premises. However, mitigation of damages applies in this case too; if the tenant can lease property with similar utility, the tenant must do so. In such cases of available similar rental properties, a market value approach is far more appropriate.

This area of eminent domain law should be reformed for consistency. Without flouting common sense and Georgia's entire peculiar value jurisprudence, the courts should recognize that owners of real property interests have constitutionally protected property rights in the use of their properties, including the right to use the properties for profits. When for any reason the business owner cannot avoid the effects of a condemnation by relocating the profitable enterprise to other property, the value of the right to use the property for profit should be valued by those profits.

IV. A RETURN TO FUNDAMENTALS WILL SOLVE THE PROBLEMS

The decisions discussed above have created a climate in which the same issues must be litigated in case after case throughout Georgia. Attorneys for condemnors and condemnees frequently do not agree on the ground rules for resolving business damages cases, and it is often difficult to explain to clients why valid claims go unheard. The decisions in the preceding section of this Article manifest arbitrariness and, it must be admitted, sloppiness of thought. The situation cries out for resolution and correction.

Fortunately, a return to constitutional fundamentals provides an elegant and sound solution to these controversies. The constitution is the source of all law on the meaning of just and adequate compensation, and any correct rules for decision must relate back to constitutional provisions. Under the constitution, the ultimate measure of a citizen's recovery is and must be "just and adequate compensation."[116] Anything more or less is simply unconstitutional. The language, history, and purpose of article I, section 3, paragraph 1(a) of the Georgia

116. GA. CONST. art. I, § 3, para. 1(a).

Constitution support the availability of business loss valuations in appropriate cases, as is true of damage valuations in other types of cases. The constitution protects the right to use property for profit as well as the right to sell it. When the value of the right to use the property exceeds the value of the right to sell the property, just compensation requires an award based on the higher value unless the principle of mitigation of damages, which is also applicable in other types of cases, requires that the owner move the business to other property.

Conforming the decisions on business loss evidence to the terms of the constitution will bring consistency to the law. The constitution contemplates no distinctions between landlord and tenant, permanent and temporary damages, or total and partial damages for the purpose of recovery.[117] For the law to reflect the constitutional protections, these distinctions should be abolished. All eminent domain value questions can be resolved by determining (1) whether the party had a property right that was taken or damaged, (2) the value of the property right before the taking or damage, and (3) how much of the value was lost because of the taking, as opposed to other causes, including the owner's failure to mitigate damages. The sum of the lost property value is just and adequate compensation under the constitution.

A. The Language and Purpose of the Constitution

The terms of article I, section 3, paragraph 1(a) will support an award based on business losses in appropriate cases. The constitution provides in pertinent part that "private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid."[118] The constitution is not limited by a term such as "private real estate," or a clause such as "except that compensation shall not include business losses caused by the taking." It speaks in general terms. If property is taken or damaged, then "just and adequate compensation" must be paid.[119]

When the constitutional convention used these general terms, it neither intended to adopt a system of damages different from the prevailing system of compensatory damages nor authorized the courts to do so. Instead, it intended to incorporate the conventional law of damages in similar cases against nongovernmental parties as a known and accepted framework for deciding eminent domain issues. The supreme court has stated,

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117. *See id.*
118. *Id.*
119. *Id.*

> [T]he purpose was, to make the law of damages uniform, so that a plaintiff could recover against a city or railroad under the same circumstances that would have authorized a recovery against those not armed and protected by the power of eminent domain .... The constitution intended to take away the city's exemption, and to leave it and the manufacturing company on an equal footing .... Thereafter, what is damage by one is damage by all ....[120]

Therefore, "[t]he test is, would the injury, if caused by a private person without authority of statute, give the plaintiff a cause of action against such person?"[121] Cases in other fields, particularly nuisance and trespass, should therefore have precedential value in eminent domain jurisprudence, subject to the observation that the acts of the condemnor are lawful. Again, the law applicable to property damage generally allows a recovery of special damages resulting from the taking, whether temporary or permanent.[122] Therefore, the courts should review existing or proposed rules in eminent domain cases with a careful eye to determine whether the rule is consistent with the general law of damages for injury to property.

The convention that framed the terms of article I, section 3, paragraph 1(a) understood compensation as requiring that the property owner be put in the position he would have been in but for the other's acts, no better and no worse. "Just and adequate compensation for the real property that is *taken* is certainly intended to put a condemnee in substantially the same financial position that he was in prior to the taking."[123] Thus, "the measure of damages for property taken by the right of eminent domain, being compensatory in its nature, is the pecuniary loss sustained by the owner, taking into consideration all relevant factors."[124] Owners should be put in substantially the same financial position that they would have obtained if the condemnation or construction had not occurred.

B. The Relevance of Market Value

The constitution, supplemented only by general law, also explains the relationship of fair market value to just and adequate compensation,

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120. Austin v. Augusta Terminal Ry., 108 Ga. 671, 675, 34 S.E. 852, 853 (1899); *see also* Mayor of Albany v. Sikes, 94 Ga. 30, 31, 20 S.E. 257, 257 (1894) ("[A municipal] corporation will be liable to make compensation in damages, if an individual would be liable for causing injuries or damages of the same kind.").

121. Peel v. City of Atlanta, 85 Ga. 138, 140, 11 S.E. 582, 583 (1890).

122. *See supra* notes 7-8 and text accompanying note 81.

123. *Funk*, 263 Ga. at 385, 435 S.E.2d at 198.

124. *Savannah Iron & Wire Works, Inc.*, 91 Ga. App. at 882, 87 S.E.2d at 673.

when other measures of damages are appropriate, and why property should be unique for alternative measures to apply.

The Georgia Supreme Court has held that "[t]he Constitution does not contain any allusion to fair market value as a criterion for determining just and adequate compensation."[125] Therefore, there is no inherent or necessary connection between just compensation and fair market value. Regardless of whether fair market value is more or less than the amount which justly and adequately compensates the citizen, the latter amount must be awarded.

Instead of being necessarily connected, fair market value is relevant because most fee simple property has some value for sale in the marketplace, and taking the property takes away the owner's right to sell it. However, the right to sell the property is not the only valuable right that a property owner has.

> "The term 'property' is a very comprehensive one, and is used not only to signify things real and personal owned, but to designate the right of ownership and that which is subject to be owned and enjoyed. The term [property] comprehends not only the thing possessed, but also, in strict legal parlance, means the rights of the owner in relation to land or a thing; the right of a person to possess, use, enjoy and dispose of it, and the corresponding right to exclude others from the use."[126]

Thus, along with the right to dispose of property, the constitution protects the right to possess, use, and enjoy property. These two categories, value in exchange and value in use, are recognized by law and appraisers.[127]

Fair market value measures the value of the owner's right to dispose of the property,[128] which is its value in exchange. There is almost always some ascertainable market for the property for which a pecuniary value can be set.[129] Property also has a value in use because "[t]he

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125. *Bowers*, 221 Ga. at 741, 146 S.E.2d at 892.

126. *Id.* at 737, 146 S.E.2d at 890 (quoting Woodside v. City of Atlanta, 214 Ga. 75, 83, 103 S.E.2d 108, 114 (1958)) (alteration in original) (citation omitted); *see also* O.C.G.A. § 51-9-1 (1982) ("The right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a tort for which an action shall lie.").

127. AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, THE APPRAISAL OF REAL ESTATE 16-21 (9th ed. 1987); *see also* Davis v. East Tenn. Va. & Ga. Ry., 87 Ga. 605, 611-12, 13 S.E. 567, 569 (1891) (owner could not recover for lost value of land because the improvements increased the value, but owner could recover for lost value in use without reduction because of the increased land value).

128. AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, *supra* note 127, at 16-20.

129. *Id.* at 17-18.

value of property consists [ultimately] in its use."[130] This value in use is the pecuniary value of those rights of use.[131] However, there may or may not be an ascertainable standard to measure the value in use of particular property.[132]

Fair market value is an appropriate measure of value, therefore, when (as is typically the case) there is a market for the property for which a determinate value can be assigned. It is also appropriate when there is no determinate pecuniary value of the right to use the property (its value in use)[133] or when the right to use the property has a pecuniary value less than fair market value. In such cases, fair market value puts the owner in the pecuniary position the owner would have occupied but for the taking. In the typical case, the owner can keep the cash equivalent or use it to buy an equivalent lot on the market.

The same principles hold true even when the entire property is not taken. There, the owner recovers the value of the part taken and the loss of exchange value (diminution of fair market value) of the remainder.[134] The owner may then sell the remainder at the diminished price to obtain the monetary equivalent of the original property, which the owner can keep or use to buy property similar to the original lot.

Hence, a market standard is normally pertinent to compensation because there is almost always some market value, but there is often no determinate value in use. Market value may therefore be presumed to be the proper measure of compensation in the absence of competent evidence that the value in use of the property exceeds market value.

C. When Market Value is Inappropriate

It also follows that when there is no market for the property, when there is no determinate market value, or when the determinate pecuniary value of the right to use the property exceeds the market value of the property, the owner is not justly and adequately compensated for the pecuniary loss by market value. Compensation is not just and adequate unless the award equals the pecuniary loss in use value. Likewise, when the property is taken only in part, if the resulting pecuniary loss of use value exceeds the loss of exchange value, the principle of compensation requires that the owner be awarded the lost

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130. Wells v. Mayor of Savannah, 87 Ga. 397, 399, 13 S.E. 442, 442 (1891); *see also* AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, *supra* note 127, at 20.

131. AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, *supra* note 127, at 20.

132. *Id.*

133. For example, it is difficult to imagine a way to quantify the value in use of a residence apart from the value in exchange of selling it or renting it.

134. *See, e.g.*, Wright v. MARTA, 248 Ga. 372, 373, 283 S.E.2d 466, 468 (1981).

value of the use. In such cases, a mere market standard is inappropriate.

The foregoing points, flowing from constitutional language and general principles, are well summarized as follows:

> [W]hile market value is the general yardstick in a condemnation proceeding . . ., there may be circumstances in which market value and actual value [value in use] are not the same, and in such event the jury may consider the actual value of the land or interest therein appropriated . . . . In determining just and adequate compensation, under the constitutional provision, market value and actual value will ordinarily be synonymous. If they are not, that value which will give "just and adequate compensation" is the one to be sought by the jury in rendering its verdict.[135]

In *Bowers* the court recognized that "frequently the value of the business greatly exceeds that of the premises where it is conducted."[136] The court thereby recognized that just and adequate compensation may require payment of lost business damages.[137]

D. Uniqueness and Mitigation of Damages

This does not mean that there is a compensable business loss every time a condemnor takes all or part of business property. Not only must the value in use of the business property exceed its market value, but the condemnee is also bound by the principle of mitigation of damages. Essentially, if the owner could obtain other property on which to relocate the business, it should do so.[138] Mitigation of damages manifests itself in the so-called uniqueness concept discussed extensively above.[139]

The basic idea behind the "locality test"[140] is obviously that, if the business can continue by recovering market value for the lot and buying a similar piece of property that has similar use value, mitigation of damages requires that it do so and limits damages accordingly. However, if the owner cannot mitigate the business losses by this means, then the total pecuniary loss will not be compensated by market value. In earlier times, when vacant land in cities was still uniformly available, property could almost never be unique under this rule. But as vacant

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135. *Savannah Iron & Wire Works, Inc.*, 91 Ga. App. at 885-86, 87 S.E.2d at 676 (citations omitted).

136. 221 Ga. at 739, 146 S.E.2d at 891.

137. *Id.*

138. Brown v. Department of Transp., 194 Ga. App. 530, 531, 391 S.E.2d 32, 33 (1990).

139. *See supra* Part II.B.

140. *See supra* note 41 and accompanying text.

land becomes filled with more useful and specially designed improvements, more and more lots have and will become unique.

The "value to the owner test"[141] is nothing more than an application of the following basic calculus: this owner's value in use exceeds the value of the lot in exchange to others.

The "no market value test"[142] concerns the unusual case in which market value is intrinsically inapplicable and some determinate value must be found for the property's value in use.

The above rules for determining when business damage claims are appropriate are imperfect. They are overinclusive in that one of these rules may apply, but the owner still may be able to mitigate its damages through reasonable efforts. In such a case, there is a risk that the owner could recover damages for total business loss at one location and recover some or all of the business at another location. The rules are also underinclusive in that a case may not fall within one of them, and yet the owner could not otherwise mitigate damages by relocating the business elsewhere. In such a case, limiting the owner to market value may easily fail to award true compensation. An approach that focuses exclusively on mitigation of damages avoids both extremes.

V. CONCLUSION

For the foregoing reasons, the supreme court should harmonize the law and thereby reconcile it with the text of the constitution. In particular, the following outline is suggested for resolving questions of compensation under the constitution's eminent domain clause:

1. The overarching purpose of the inquiry in an eminent domain case is to determine what is just and adequate compensation for each property owner's interest in the property taken or damaged. All other rules must yield to this principle.

2. In the absence of any other evidence, market value is presumed to be the appropriate standard for valuing each property interest.

3. Any party may show otherwise relevant evidence of business profits and losses to show that a property interest had a business value greater than market value, whether the owner of the interest is a landlord or tenant, whether the taking is total or partial, and whether the taking is temporary or permanent.

4. Any party may show the availability of property with similar utility in the market to show that the business could relocate to the other

141. *See supra* note 42 and accompanying text.

142. *See supra* note 43 and accompanying text.

property or to assert a claim for the expenses incurred and losses caused by such relocation.

5. If a business valuation is not foreclosed by the mitigation of damages rule or any other rule, the choice between market value and business value should be the measure that will yield just and adequate compensation.