



Summer 2010

**Striking a Balance in the Valuation of Temporary Takings:  
Examining the Award of Lost Profits in *Primetime Hospitality, Inc.  
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**Recommended Citation**

Tara Kinman, *Striking a Balance in the Valuation of Temporary Takings: Examining the Award of Lost Profits in Primetime Hospitality, Inc. v. City of Albuquerque*, 40 N.M. L. Rev. 337 (2010).

Available at: <https://digitalrepository.unm.edu/nmlr/vol40/iss3/5>

# STRIKING A BALANCE IN THE VALUATION OF TEMPORARY TAKINGS: EXAMINING THE AWARD OF LOST PROFITS IN *PRIMETIME HOSPITALITY, INC. V. CITY OF ALBUQUERQUE*

TARA KINMAN\*

## I. INTRODUCTION

*Primetime Hospitality, Inc. v. City of Albuquerque* determined that an award of lost profits was recoverable as a measurement of loss in inverse condemnation under New Mexico law.<sup>1</sup> The Plaintiff hotel developer, Primetime Hospitality, Inc. (Primetime), was in the process of building a hotel when one of its contractors struck and ruptured a water line, flooding the property.<sup>2</sup> The contractors were unable to resume construction for 142 days as a result of the flooding, causing a substantial loss of profits from the delayed opening of the hotel.<sup>3</sup> Because the City of Albuquerque (City) stipulated to liability for a temporary taking in the inverse condemnation action due to its misplacement of the water lines, the only issue before the court was to determine the correct measure of damages to award to Primetime to justly compensate its loss.<sup>4</sup> The district court awarded Primetime the profits that it lost during the period of delay and the additional construction costs it incurred from the flooding.<sup>5</sup> The City appealed the case to the court of appeals, which reversed the district court's award of lost profits.<sup>6</sup> Primetime then appealed to the New Mexico Supreme Court, which reversed the court of appeals and reinstated the award of lost profits.<sup>7</sup>

The award of lost profits in *Primetime* was particularly significant to New Mexico takings law because lost profits are consequential damages, which have traditionally been precluded as a recoverable damage in takings cases.<sup>8</sup> Although the supreme court did expand New Mexico takings law in considering lost profits as a method of valuation in *Primetime*, the decision is unlikely to impact takings awards significantly because the holding was limited by the Court's reliance on the unchallenged findings of the district court and the characterization of the lost profits as a "non-consequential" damage.<sup>9</sup> In providing this limited holding, the court continued to adhere to an antiquated notion of aversion to consequential damages. This adherence fails to fully compensate condemnees and prevents certainty in the valuation of damages for condemnation. This note will examine the reasoning behind

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1. *Primetime Hospitality, Inc. v. City of Albuquerque*, 2009-NMSC-011, ¶ 1, 206 P.3d 112, 114.

2. *Id.* ¶ 4, 206 P.3d at 114.

3. *Id.* ¶ 6, 206 P.3d at 115.

4. *See id.* ¶ 5, 206 P.3d at 115. One possible issue of contention with the case is whether a temporary taking was actually effected by the misplacement of the waterlines by the City at all, thereby requiring compensation to Primetime. However, because the City stipulated to liability for a temporary taking in the early stages of the case, that issue was not litigated and is therefore outside the scope of the case and this note.

5. *Id.* ¶ 6, 206 P.3d at 115; *see also infra* Part III.B.

6. *See id.* ¶ 8, 206 P.3d at 115; *see also infra* Part III.C.

7. *See id.* ¶ 8, 206 P.3d at 115–16; *see also infra* Part III.D.

8. *See infra* Part II.D.

9. *See infra* Part IV.C.

the New Mexico Supreme Court's decision to award lost profits in *Primetime* and will provide recommendations for the future treatment of lost profits in inverse condemnation.

Part II lays the foundation of takings jurisprudence, first discussing the general facets of takings law as established in the federal courts, including the differences between traditional and inverse condemnation. Second, the Part discusses various measurement methods that have been employed by the courts. Third, the Part discusses the availability of consequential damages in takings cases, specifically with respect to lost profits. Part II concludes with an examination of the measurement of temporary takings in New Mexico and the development of New Mexico precedent up to *Primetime*.

Part III examines the *Primetime* case, tracking the procedural route of the case up to the supreme court. This part concludes with a discussion of the supreme court's reasoning and holdings of the case.

Part IV provides an analysis of the case, including the implications of the award of lost profits and an analysis of the court's reasoning. In addition, the analysis provides recommendations for the future of New Mexico's treatment of lost profits in condemnation actions, including characterizing lost profits awards as consequential and allowing their recovery when they meet the normal limitations on consequential damages.

Part V concludes the note, discussing the future of New Mexico takings law as a result of the precedent set in *Primetime*.

## II. BACKGROUND OF TAKINGS LAW AND DAMAGES RECOVERABLE UNDER TAKINGS

### *A. Takings Law Generally*

Federal takings jurisprudence has developed around the Fifth Amendment Takings Clause that requires private property not be taken for public use without just compensation.<sup>10</sup> New Mexico has adopted a similar takings provision in its state constitution.<sup>11</sup> Property ownership is considered to include "a bundle of rights" that convey the right to the owner to use, dispose of, and handle his property in whatever manner he desires.<sup>12</sup> Therefore, when the government interferes with these fundamental property rights by restricting the owner's use of the property for public benefit, even temporarily, there must be compensation for the deprivation of the right.<sup>13</sup>

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10. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."). "Just compensation" is not explicitly defined in the Fifth Amendment, but has been construed as intending to place the condemnee in as good a position, but no better, than he would have been had the taking not occurred. 3 NICHOLS ON EMINENT DOMAIN, § 12.01 (3d ed. 1997); see also *infra* Part II.B.

11. N.M. CONST. art. II, § 20, ("Private property shall not be taken or damaged for public use without just compensation."); Bd. of Educ., Moriarty Mun. Sch. Dist. v. Thunder Mountain Water Co., 2007-NMSC-031, ¶ 8, 161 P.3d 869, 872 ("[The New Mexico] state Constitution provides similar protection" to the U.S. Constitution's Takings Clause.).

12. 4 NICHOLS, *supra* note 10, § 8.01(4).

13. *Id.*; see also Pa. Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922).

## 1. Traditional Condemnation

Two types of condemnation exist, traditional condemnation<sup>14</sup> and inverse condemnation.<sup>15</sup> Traditional condemnation cases arise out of a governmental entity, also known as the condemnor,<sup>16</sup> physically seizing or “taking” property from a condemnee<sup>17</sup> for public use.<sup>18</sup> The government condemns the property by initiating formal statutory condemnation proceedings.<sup>19</sup> The government is required to pay just compensation for the taking of the property, usually calculated by the fair market value of the land.<sup>20</sup> Condemnation essentially results in a forced sale of the property from the owner to the government.<sup>21</sup> However, because the government does not always initiate condemnation proceedings before taking property, takings law has expanded beyond traditional condemnation to recognize inverse condemnation.<sup>22</sup>

## 2. Inverse Condemnation

Inverse condemnation has developed in takings law to include governmental interference with property rights, expanding beyond traditional condemnation, which only allows compensation when the property is physically taken by the government in formal condemnation proceedings.<sup>23</sup> A cause of action lies in inverse condemnation when the property or a portion of the property is taken in fact by an action of the government, but the government has not instituted formal condemnation proceedings.<sup>24</sup> The primary difference between the two types of condemnation is that the owner of the property brings the cause of action against the government for the inverse condemnation of a portion or all of their property, while the government institutes formal condemnation proceedings.<sup>25</sup> Inverse condemnation can arise in many different ways. One common example is a regulatory taking in which an owner’s use of his property is deprived due to a government regulation that is later invalidated for failing to advance a legitimate state interest.<sup>26</sup> Another way a cause of action in inverse condemnation arises is when the government causes a temporary physical invasion of land that deprives the property owner the use of his

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14. Condemnation is defined as “[t]he determination and declaration that certain property (esp. land) is assigned to public use, subject to reasonable compensation.” BLACK’S LAW DICTIONARY 332 (9th ed. 2009). Condemnation is also referred to as the exercise of eminent domain by the government, defined as “[t]he inherent power of a governmental entity to take privately owned property, esp. land, and convert it to public use, subject to reasonable compensation for the taking.” *Id.* at 332, 601.

15. Inverse condemnation is defined as “[a]n action brought by a property owner for compensation from a governmental entity that has taken the owner’s property without bringing formal condemnation proceedings.” BLACK’S LAW DICTIONARY 332 (9th ed. 2009).

16. A condemnor is defined as “[a] person or entity that expropriates property for public use.” *Id.*

17. A condemnee is defined as “[o]ne whose property is expropriated for public use or taken by a public-works project.” *Id.*

18. See 29A C.J.S. *Eminent Domain* § 1 (2007).

19. See *id.*

20. 4 NICHOLS, *supra* note 10, § 12.02.

21. See generally *id.* § 12.02(1) (Fair market value is “the amount of money which a purchaser willing, but not obliged, to buy the property would pay to an owner willing, but not obliged, to sell it”).

22. See 29A C.J.S. *Eminent Domain* § 559 (2007).

23. See Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, 32 B.C. L. REV. 283, 303–309 (1991).

24. 29A C.J.S. *Eminent Domain* § 559 (2007).

25. *Id.* § 1.

26. *Id.* § 6.

property.<sup>27</sup> This type of taking, known as a temporary physical taking, was the type of taking at issue in *Primetime*.<sup>28</sup>

One difficult issue that arises with inverse condemnation involves valuing the loss of the use and enjoyment of property when an owner still physically has title to the property in his possession.<sup>29</sup> A number of methods of valuation have emerged and have been employed by the courts.<sup>30</sup>

### B. Measurement of “Just Compensation”

Under both the U.S. and New Mexico Constitutions, the general requirement for compensating all categories of takings requires that the owner receive “just compensation.”<sup>31</sup> This measure is required in takings because the right to own property is a historically protected constitutional right.<sup>32</sup> The right to just compensation was included in the constitution in response to an aversion to governmental acquisition of these important property rights without compensation.<sup>33</sup> “Just compensation” is not explicitly defined in the Fifth Amendment, but has been construed as intending to place the condemnee in as good of a position, but no better, than he would have been had the taking not occurred.<sup>34</sup> Under the just compensation doctrine, condemnees are entitled to the full value of their property at the time it is taken,<sup>35</sup> but are generally not entitled to recover incidental or consequential losses.<sup>36</sup> The goal of just compensation is to achieve a measure that is fair to both the public who will pay for the property through taxation, and to the condemnee who deserves to be compensated for the full value of what he has lost.<sup>37</sup>

In achieving this balance, there are three potential vantage points from which valuation of taken property can be measured: (1) value to the condemnee, (2)

27. *Id.* § 148.

28. *Primetime Hospitality, Inc. v. City of Albuquerque*, 2009-NMSC-011, ¶ 1, 206 P.3d 112, 114.

29. *Primetime Hospitality, Inc. v. City of Albuquerque*, 2007-NMCA-129, ¶ 15, 168 P.3d 1087, 1092.

30. *See infra* Part II.C.

31. U.S. CONST. amend. V; N.M. CONST. art. II, § 20.

32. *See* U.S. CONST. amend. V; N.M. CONST. art. II, § 4 (“All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of . . . acquiring, possessing and protecting property. . . .”).

33. 3 NICHOLS, *supra* note 10, § 8.01(2) (“It is now well settled law in every part of the United States that when private property is taken by eminent domain the owner of the property is constitutionally entitled to compensation”). For further discussion on the fundamental right to compensation, see Section 8.01(1) of *Nichols on Eminent Domain*.

34. *Id.* § 12.01; *see also* *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 633 (1961) (“The guiding principle of just compensation is reimbursement to the owner for the property interest taken. ‘He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more.’” (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934))).

35. 4 NICHOLS, *supra* note 10, § 12A.02.

36. DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 59 (3d ed. 2002).

37. The tension between fully compensating a condemnee and preventing the taxpayer from extensive liability is described in *Nichols on Eminent Domain*:

[C]ompensation should be just to the condemnor as well as the condemnee . . . :

On the one hand it contemplates that the monies paid into the common Treasury by the taxpayers shall be jealously guarded as a public trust against unfounded and unjust claims. On the other, it guarantees that the Government, having regard for the rights and welfare of its citizens and respect for the restraints on its authority, shall deal fairly and equitably with each of them.

3 NICHOLS, *supra* note 10, § 8.06(1) (quoting *United States v. One Parcel of Land*, 131 F. Supp. 443, 445 (D.D.C. 1955)).

value to the taker, or (3) fair market value.<sup>38</sup> The first method, value to the condemnee, measures the value from the standpoint of what the property owner has lost.<sup>39</sup> The condemnee's subjective view of the value of his property is generally rejected as a valuation measure, unless there is no ascertainable market value because of the special nature of the property.<sup>40</sup>

Second, value to the taker is a measurement of what the property is worth to the government based on the purposes for which it is taken.<sup>41</sup> Value to the taker is ordinarily rejected as a valuation measurement.<sup>42</sup> However, this valuation is allowed in certain circumstances where the value of the property for the taker's projected use is a determinative factor in determining its market value.<sup>43</sup>

Third, fair market value is "the amount of money which a purchaser willing, but not obliged, to buy the property would pay to an owner willing, but not obliged, to sell it."<sup>44</sup> This measure is considered to be the best valuation point because it seeks to achieve a fair balance between the public and the condemnee by providing a measurement of the property for sale in the market.<sup>45</sup> Therefore, fair market value is usually considered to be the best valuation method of the three.<sup>46</sup>

Although fair market value is the preferred measure for valuing takings, courts have provided flexibility for situations in which it does not provide appropriate compensation.<sup>47</sup> The other two methods of valuation, based on the point of view of the taker or the condemnee, are used only in circumstances in which fair market value cannot provide a just measurement.<sup>48</sup> The U.S. Supreme Court has held that courts should provide working measurements to fit the circumstances of different cases, and a deviation from the market value approach is appropriate when market value is not ascertainable and would not provide compensation that is "just."<sup>49</sup> Similarly, New Mexico adheres to the fair market value approach for valuing tak-

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38. 4 NICHOLS, *supra* note 10, § 12.01(5).

39. *Id.*

40. *Id.* Although the fair market value is generally considered from the vantage point of the condemnee, pure subjective values are generally rejected. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* § 12.02(1). This measurement is taken from the standpoint of the value of the property before any damage or decrease resulted from consequences of the taking. *See id.* § 12A.02.

45. *Id.* § 12.02; *see also* United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396, 402 (1949) (The market measure of compensation achieves a fair "balance between the public's need and the claimant's loss.").

46. United States v. 50 Acres of Land, 469 U.S. 24, 28–29 (1984) (noting, in a case regarding a permanent physical taking, that "[t]he Court has repeatedly held that just compensation is normally to be measured by 'the market value of the property at the time of the taking contemporaneously paid in money.'" (quoting Olson v. United States, 292 U.S. 246, 255 (1934))).

47. United States v. Va. Elec. & Power Co., 365 U.S. 624, 633 (1961) ("[Market value] is not an absolute standard nor an exclusive method of valuation [in condemnation cases]."; *see also* 50 Acres of Land, 469 U.S. at 29 ("Deviation from [market value] has been required only 'when market value has been too difficult to find, or when its application would result in manifest justice to the owner or public.'" (quoting United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950))).

48. 4 NICHOLS, *supra* note 10, § 12.01(5).

49. United States v. 564.54 Acres of Land, 441 U.S. 506, 513–14 (1979). The Constitution does not require any specific method of valuation, and while fair market value does provide a useful tool for an objective measure of damages, courts have recognized that it will not equate to "just" compensation in every situation. *See* 4 NICHOLS, *supra* note 10, § 12.01.

ings generally, but has also provided that flexibility for certain circumstances is permissible to fully compensate the property owner based on what he has lost.<sup>50</sup>

### C. Measurement of Damages in Temporary Takings<sup>51</sup>

In traditional condemnation, a full market value award is usually appropriate because the owner has lost the land that was physically taken by the government.<sup>52</sup> However, in temporary takings, the loss that occurs is not of the entire title to the property.<sup>53</sup> Therefore, a full market value award would be inappropriate as it is much greater than the value of what the plaintiff has actually lost.<sup>54</sup> It therefore becomes necessary to define the actual loss that the condemnee suffers when he is deprived of the use or benefit of his property for a period of time, but ultimately regains his property rights. The nature of this loss is generally the loss of the use of the property for the time period of the taking or any loss of value in the property during the period of the taking.<sup>55</sup>

Valuing this loss can be a more difficult measurement to obtain than the full fair market value used in valuing traditional condemnation cases.<sup>56</sup> The next section will discuss various approaches the courts have employed in valuing the loss of use and enjoyment of property. Different approaches have been used by the courts to value a temporary taking including: (1) the market rental approach, (2) the before and after approach, and (3) the economic loss approach.<sup>57</sup>

#### 1. Market Rental Value Approach

The market rental value approach awards the condemnee the fair market rental value of his land that could likely be obtained during the period of the taking.<sup>58</sup> The U.S. Supreme Court has determined that market rental value is the most appropriate approach for valuing temporary takings involving business losses because the loss to the condemnee is the value of the use of the premises during the taking, which normally can be determined by its market rental value.<sup>59</sup> However, the rental value of the property may not always provide just compensation in situations in which “a greater interest has, in fact, been taken.”<sup>60</sup>

50. See *State ex rel. Highway Comm'n v. Pelletier*, 76 N.M. 555, 558–59, 417 P.2d 46, 49–50 (1966) (citing 4 NICHOLS ON EMINENT DOMAIN § 12.314 (2d ed. 1917)).

51. For the purposes of this article, only the measures of damages for temporary takings of property will be discussed at length, as this was the type of taking at issue in *Primetime*.

52. 4 NICHOLS, *supra* note 10, § 12.02.

53. *Id.* § 12E.01.

54. See generally 29A C.J.S. *Eminent Domain* § 148 (2007).

55. 4 NICHOLS, *supra* note 10, § 12E.01.

56. See *Primetime Hospitality, Inc. v. City of Albuquerque*, 2007-NMCA-129, ¶ 15, 168 P.3d 1087, 1092.

57. See 4 NICHOLS, *supra* note 10, § 12E.01. For the purposes of this note, only measurements of temporary takings of land used for business premises will be discussed, as this was the type of taking at issue in *Primetime*.

58. *Id.*

59. See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7 (1949).

60. 4 NICHOLS, *supra* note 10, § 12E.01.

## 2. Before and After Approach

Another approach to valuing temporary takings of land is the before and after approach. Before and after valuation awards the condemnee the difference in the market value of the land immediately before the taking occurred and the value after the taking has occurred.<sup>61</sup> The before and after approach is also called the “diminution in value” approach because it measures the decrease in the value of the property that results from the governmental interference.<sup>62</sup> However, the before and after approach provides no damages when the market value of the land does not decrease during the time period of the taking, which often is the case in physical temporary takings.<sup>63</sup> The before and after approach is generally better suited for regulatory takings than it is for physical temporary takings. This is due to the fact that regulatory takings decrease the value of land as a result of the government’s temporary regulation, whereas the government’s physical occupation of the land through temporary takings does not decrease the market value of the land.<sup>64</sup>

## 3. Economic Loss Approach

The economic loss approach awards condemnees the loss of the economic value of their property, measured by lost profits or “going-concern value.”<sup>65</sup> A lost profits measure is the valuation of profits that the condemnee can show to have been definitely and certainly lost as a result of the taking.<sup>66</sup> The going-concern value “is the price a willing buyer and seller would accept in [a] free marketplace for the business in question.”<sup>67</sup> These measures are different ways of measuring the loss of a business that existed on premises that are condemned.<sup>68</sup>

Generally economic loss is not considered to be compensable under the requirement of just compensation.<sup>69</sup> Therefore these losses are usually not considered, although they have been allowed in the federal courts in temporary takings where one of the other two methods would not provide an adequate award. Additionally, some state jurisdictions have taken steps to allow their recovery in takings cases.<sup>70</sup>

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61. *Id.*

62. *See id.*

63. *See, e.g.,* Respondent’s Answer Brief at 1, *Primetime Hospitality, Inc. v. City of Albuquerque*, 2009-NMSC-011, 206 P.3d 112 (No. 30,543), available at 2008 WL 6487112 (modifying argument on appeal from advocating for a before and after measurement of value because it recognized that the measure was not “wholly adequate to measure the actual condemnation loss of Primetime” in a temporary physical taking case).

64. *See generally* 4 NICHOLS, *supra* note 10, § 12E.01 (regarding temporary regulatory takings); NMSA 1978, § 42A-1-26 (1981) (requiring a before and after measurement when the government condemns a portion of a piece of property under the New Mexico Eminent Domain Code).

65. Kurtis A. Kemper, *Annotation, Elements and Measure of Compensation in Eminent Domain Proceeding for Temporary Taking of Property*, 49 A.L.R.6th 205, 255–59 (2009).

66. 4 NICHOLS, *supra* note 10, § 12E.01 (“Although potential profits, as a general proposition, are to be ignored as speculative and conjectural, it has been held that present value of future earnings that are definite and certain may be considered.”).

67. 4 NICHOLS, *supra* note 10, § 13.13(2) (quoting *Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co.*, 734 F.2d 133, 148 (3d Cir. 1984)); *see also* *Kimball Laundry Co. v. United States*, 338 U.S. 1, 9-20 (1949). Going-concern value is defined as “[t]he value of a commercial enterprise’s assets or of the enterprise itself as an active business with future earning power, as opposed to the liquidation value of the business or of its assets.” BLACK’S LAW DICTIONARY 1691 (9th ed. 2009).

68. *See* Kemper, *supra* note 65, at 255–59.

69. *See* 4 NICHOLS, *supra* note 10, § 13.13(1).

70. *See, e.g., Kimball*, 338 U.S. at 20; *see also infra* Part II.D.3.

#### D. Availability of Consequential Damages in Condemnation Actions

Consequential damages are traditionally precluded as direct awards in takings.<sup>71</sup> As background for the following sections, this section will address the distinction between general and consequential damages, and the reason and rationale for the preclusion of consequential damages in takings cases.

##### 1. Consequential Damages Versus General Damages

General damages are those that flow directly from the injury and can be readily proven as a direct result of the harm.<sup>72</sup> Specifically with respect to land, general damages are those that measure the market loss to the land itself.<sup>73</sup> Alternatively, consequential damages are “‘losses that do not flow directly and immediately from an injurious act but that result indirectly from the act.’”<sup>74</sup> These damages measure the “consequences” occurring from an injury, such as a loss in profits resulting from damage to land, as opposed to the general damages of the loss in the value of the land itself.<sup>75</sup>

Historically, consequential damages have been suspect as a recoverable measure of damages in all contexts.<sup>76</sup> These suspicions arise from a belief that consequential damages are “more speculative, less certain, more remote, and more likely to have been avoidable if the plaintiff had been more diligent.”<sup>77</sup> Because of this hostility toward consequential damages, certain limitations on their recoverability have emerged to help combat the distrust of these damages.<sup>78</sup>

First, the plaintiff must prove consequential damages with reasonable certainty, by providing evidence that the damages were caused in fact or are reasonably likely to occur.<sup>79</sup> The standard of reasonable certainty ensures that the damages are not speculative.<sup>80</sup> Second, the plaintiff must show that the damages were proximately caused by the harm.<sup>81</sup> Proximate cause further ensures that the damages are not too remote from the defendant’s action.<sup>82</sup> Finally, the damages must be shown to be a distinct harm, rather than merely an additional method of measuring the general damages incurred.<sup>83</sup> If the consequential losses merely provide an alternative measure of general damages, they result in an impermissible double recovery

71. *United States v. General Motors Corp.*, 323 U.S. 373, 379 (1945).

72. *See* BLACK’S LAW DICTIONARY 446 (9th ed. 2009). General damages are also known as direct damages. *Id.*

73. 1 DAN B. DOBBS, *DOBBS LAW OF REMEDIES* § 5.12(2) (2d ed. 1993).

74. BLACK’S LAW DICTIONARY 445-46 (9th ed. 2009). Consequential damages are those that are “[c]onsequent upon but distinct from [the] harm. . . .” DOBBS, *supra* note 73, § 3.3(4).

75. *See* DOBBS, *supra* note 73, § 3.3(4).

76. *See* LAYCOCK, *supra* note 36, at 58–59.

77. *Id.* at 59.

78. *See* DOBBS, *supra* note 73, § 3.3(4).

79. *Id.* §§ 3.4, 5.12(1).

80. *See id.* § 3.4.

81. *Id.* In contract cases, consequential damages must meet the *Hadley v. Baxendale* standard, which requires that the consequential damages claimed were reasonably within the contemplation of the parties at the time the contract was formed. *Id.* However, this standard usually would not arise in a condemnation case, as there is no contract at issue.

82. *Id.*; *see also* BLACK’S LAW DICTIONARY 250 (9th ed. 2009) (defining proximate cause as “[a]n act or omission that is considered in law to result in a consequence, so that liability can be imposed on the actor . . . [a] cause that directly produces an event and without which the event would not have occurred.”).

83. *Id.* § 5.12(1).

to the plaintiff and are therefore only recoverable if they measure a distinct loss from the general damages.<sup>84</sup>

## 2. Consequential Damages in Takings Cases

Consequential damages, including awards of lost profits, may be recoverable when private parties cause harm to a plaintiff's land.<sup>85</sup> However, in the takings context, consequential damages have historically been precluded as a recoverable damage.<sup>86</sup> There are five reasons for this distinction, four of which are grounded in the historical development surrounding consequential damages and takings.

The first reason that has been propounded concerns the development of takings law. Historically, takings did not give rise to consequential damages because land taken by the government was usually undeveloped or unclaimed.<sup>87</sup> Taking this type of land usually did not incur consequential losses for the condemnee.<sup>88</sup> Because of the nature of these early takings, there was a lack of consideration of consequential losses in the original formulation of measurements of "just compensation" to which many courts adhere today.<sup>89</sup>

The second reason that has been offered suggested that the Fifth Amendment does not require compensation for consequential losses.<sup>90</sup> This theory determines that consequential damages are not part of the taking affected and therefore are not "taken" by the government.<sup>91</sup> Because these damages are not part of the actual "taking," there is no requirement for compensation by the government.<sup>92</sup>

The third historical reason that consequential damages are precluded in takings arises from the general aversion to consequential damages as an award for damage to property.<sup>93</sup> When consequential damages were first considered with respect to property rights, the courts determined that they were too intangible to give rise to damages in relation to property.<sup>94</sup> While courts later began awarding consequential damages in other property actions, they nonetheless held on to the antiquated notion that consequential damages were unrecoverable in eminent domain.<sup>95</sup>

In addition to the three arguments usually discussed, there is another historical argument that could be made for the preclusion of consequential damages. A possible analogy exists in comparing condemnation to the tort of conversion. In conversion, when a tortfeasor takes a chattel from its rightful owner, the tortfeasor must pay the rightful owner damages for the value of the chattel, essentially result-

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84. *Id.* § 5.12(2).

85. *Id.* § 5.12(1).

86. *United States v. General Motors Corp.*, 323 U.S. 373, 379 (1945).

87. *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 *YALE L.J.* 61, 65 (1957).

88. *Id.*

89. *Id.*

90. See Emerson G. Spies & John C. McCoid, II, *Recovery of Consequential Damages in Eminent Domain*, 48 *VA. L. REV.* 437, 441-43 (1962).

91. *Id.* at 442-43.

92. *Id.*; see also *United States v. 50 Acres of Land*, 469 U.S. 24, 33 (1984) ("[T]he Fifth Amendment does not require any award for consequential damages arising from a condemnation.").

93. *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, *supra* note 87, at 66-67; see also *supra* Part II.D.1.

94. *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, *supra* note 87, at 66.

95. *Id.* at 66-67.

ing in a forced sale.<sup>96</sup> Conversion historically prevented the recovery of consequential damages resulting from the action and only allowed recovery of the fair market value of the chattel.<sup>97</sup> Similar to conversion, in traditional condemnation, the taking essentially results in a forced sale of the property.

However, unlike modern takings law, modern conversion law has recognized that lost profits are recoverable as a consequential damage in all but one jurisdiction.<sup>98</sup> Further, in temporary takings the circumstance does not resemble a forced sale of the land as in a traditional condemnation, but rather it provides compensation for interference with the right of an owner to use his own land.<sup>99</sup> Therefore, based on the current state of the law, the analogy to conversion does not rationally extend to the preclusion of consequential damages in temporary takings, nor does the analogy support the preclusion in traditional condemnation.

In addition to the historical arguments developing from the history of takings and consequential losses, courts have also denied recovery of consequential damages on the grounds that they are too “speculative.”<sup>100</sup> Courts have rationalized that awarding consequential damages in takings would result in exaggerated awards because these losses are more difficult to measure with certainty.<sup>101</sup> Because courts are attempting to be mindful of the taxpayer in striking a fair measurement, they have determined that consequential damages should not be recoverable when the market value award can secure a more “objective” measure.<sup>102</sup>

Relying on the theory that the Fifth Amendment does not require compensation for consequential losses, the U.S. Supreme Court has held that consequential damages are not recoverable in condemnation cases.<sup>103</sup> In *United States v. General Motors Corp.*, the Court noted that consequential damages could be considered in calculating market value, as they would likely be used in determining the price an owner would accept for the property; however, they were not awardable as individual damages in condemnation cases.<sup>104</sup> The Court stated that where the government is compensating for a taking, “compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of good-will which inheres in the location of the land, or other like consequential losses. . . .”<sup>105</sup>

### 3. Lost Profits in Takings Cases

Lost profits are usually considered consequential, and have therefore been precluded as a recoverable award in takings.<sup>106</sup> Furthermore, a business is not consid-

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96. *Damages—Measure of Damages—Trover for Conversion of Goods in Transit*, 21 HARV. L. REV. 629, 629 (1908) (citing *Seymour v. Ives*, 46 Conn. 109 (1878)).

97. *Id.*

98. 18 AM. JUR. 2D *Conversion* § 130 (2004).

99. *See supra* Part II.A.2.

100. *Id.* at 70–71.

101. *Id.* at 71.

102. *Id.*

103. *United States v. General Motors Corp.*, 323 U.S. 373, 379–80 (1945).

104. *Id.* at 380.

105. *Id.*

106. *Id.* at 379–80.

ered to be property covered under the Fifth Amendment's protection.<sup>107</sup> Due to this, a condemnee is usually not entitled to recover losses to his business resulting from a taking.<sup>108</sup> Therefore, in apportioning takings damages regarding a business property, the value of a business is usually only considered as a factor in determining market value of the property.<sup>109</sup> Additionally, lost profits resulting from the taking of a new business are considered to be far too speculative to award because of the usual lack of evidence that the business would have been profitable had the business proceeded without the taking's occurrence.<sup>110</sup>

Several cases illustrate courts' treatment of the recoverability of economic damages resulting from a taking. In *Yuba Natural Resources, Inc. v. United States*, the condemnee requested lost profits from gold that existed on the property, but had never been extracted at the date of the taking.<sup>111</sup> The court determined that this was the exact type of speculative, consequential damage intended to be precluded in takings cases.<sup>112</sup> The court noted that although this was a potentially valuable use of the property, it was highly speculative whether the gold would have been extracted, and if it were taken out, what value it might have had at that time.<sup>113</sup>

Further illustrating the federal courts' aversion to consequential damages in eminent domain is the case of *Mitchell v. United States*.<sup>114</sup> In *Mitchell*, the government condemned land that was used for a corn cannery.<sup>115</sup> After the taking of his property, the condemnee was unable to start a corn cannery elsewhere because no suitable land was available for that purpose at the time his property was taken.<sup>116</sup> The Court held that the lost profits from the loss of the corn cannery were not recoverable and only awarded the market value of the taken land.<sup>117</sup> The Court reasoned that the lost profits were unrecoverable because the unavailability of corn cannery land was a consequential incident and not a direct result of the taking by the government.<sup>118</sup>

However, in *Kimball Laundry Co. v. United States*, the U.S. Supreme Court measured just compensation by the going-concern value, a type of economic damage measuring business losses.<sup>119</sup> In *Kimball*, the government condemned a laundry business for temporary use by the military during World War II.<sup>120</sup> The Court determined that the going-concern value of the condemnee's business was the proper measure of damages because the government's temporary occupation of the business effectively denied the condemnee the ability to open a laundry elsewhere.<sup>121</sup> The going-concern value of the laundry business to the condemnee included steady

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107. See *supra* Part II.D.2.

108. 4 NICHOLS, *supra* note 10, § 13.13(1).

109. *Id.*

110. *Id.* § 13.13(6).

111. See 904 F.2d 1577, 1581 (Fed. Cir. 1990).

112. *Id.* at 1583.

113. *Id.*

114. 267 U.S. 341 (1925).

115. *Id.* at 343.

116. *Id.*

117. See *id.* at 345-46.

118. *Id.* at 345.

119. 338 U.S. 1, 9-10 (1949).

120. *Id.* at 3.

121. *Id.* at 15.

and established patronage and other assets for which a rental value award would not compensate.<sup>122</sup> The Court therefore determined that market rental value would fail to measure the condemnee's loss, because the owner was essentially deprived of the value of the laundry business itself during the temporary period of the taking.<sup>123</sup> Normally, in a permanent taking of property, any business on the property could be moved elsewhere, but here the business was occupied and a deviation from market rental value was required to provide full compensation.<sup>124</sup> The U.S. Supreme Court's holding in *Kimball* represents an exception to the federal courts' aversion to lost profits. The exception allows economic loss damages when there is a temporary taking and the taking is for the use of a business itself.<sup>125</sup>

Some states have taken action to allow compensation for economic losses in state condemnation actions. Certain state legislatures have passed statutes allowing for recovery of economic losses under specific circumstances, while other states have allowed for their recovery under precedent.<sup>126</sup> Finally, one state has amended its constitution to specifically expand just compensation to include business losses.<sup>127</sup>

Florida's legislature has passed a statute allowing for recovery of business losses if a portion of the property is condemned for a right of way, but excluding business losses if the entire property is condemned.<sup>128</sup> Vermont's legislature has similarly provided for business losses limited to takings resulting from the construction of highways.<sup>129</sup> In addition, both California and Wyoming have adopted a section of the Uniform Eminent Domain Code that provides for the loss of goodwill in takings damages.<sup>130</sup> Louisiana also amended its state constitution in 1974 to allow for compensation for business losses. Its state constitution now requires that a condemnee be compensated "to the full extent of his loss."<sup>131</sup> The caselaw interpreting the constitutional provision has provided that Louisiana condemnees are now entitled to business losses resulting from condemnation, including lost profits.<sup>132</sup>

The Georgia Supreme Court has required compensation for business losses in order to meet its state constitutional requirement of just compensation.<sup>133</sup> Further, the Minnesota Supreme Court has allowed compensation for going-concern value

122. *See id.* at 10.

123. *Id.* at 16.

124. *See id.* at 10, 15.

125. *See Oswald, supra* note 23, at 315–19.

126. *See id.* at 322–54.

127. *See id.* at 354–62.

128. FLA. STAT. ANN. § 73.071(3)(b) (West 2002); *see also Oswald, supra* note 23, at 322–26.

129. VT. STAT. ANN. tit. 19, § 501(2) (1995); *see also Oswald, supra* note 23, at 326–29.

130. *See CAL. CIV. PROC. CODE* § 1263.510 (West 2006); WYO. STAT. ANN. § 1-26-713 (1981); Oswald, *supra* note 23, at 329–34 (discussing Uniform Eminent Domain Code: Official Text with Comments § 1016 (1974)).

131. LA. CONST. art 1, § 4 (“In every expropriation or action to take property pursuant to the provisions of this Section . . . the owner shall be compensated to the full extent of his loss. Except as otherwise provided in this Constitution, the full extent of loss shall include, but not be limited to, the appraised value of the property and all costs of relocation, inconvenience, and any other damages actually incurred by the owner because of the expropriation.”).

132. *See Marisa Fegan, Comment, Just Compensation Standards and Eminent Domain Injustices: An Underexamined Connection and Opportunity for Reform*, 6 CONN. PUB. INT. L.J. 269, 295 (2007) (citing *State ex rel. Dep't of Highways v. Constant*, 369 So.2d 699 (La. 1979)).

133. *See Oswald, supra* note 23, at 334–38 (discussing *Bowers v. Fulton Cnty.*, 146 S.E.2d 884, 891 (Ga. 1966)).

in similar circumstances as *Kimball*, when a public utility was condemned for its particular use, or when the taking was only temporary.<sup>134</sup> Michigan allows going-concern recovery when a taking of land prevented a business from relocating or a location was so unique that transfer of the business was impossible.<sup>135</sup> Additionally, the Wisconsin Supreme Court has also allowed recovery of rents lost as a result of a taking, finding that compensation should be from the standpoint of what the owner has lost and that rents lost as a result of a taking implicated a compensable property interest.<sup>136</sup> However, there were three dissents in the decision, and a subsequent case has construed the precedent very narrowly, limiting it to its facts.<sup>137</sup>

Perhaps the most notable state court action with respect to the recoverability of consequential damages has occurred in Alaska. In *State v. Hammer*, the Alaska Supreme Court completely rejected the notion that consequential damages should be precluded in takings cases at all.<sup>138</sup> The court held that consequential damages, and specifically lost profits, should be awarded in takings cases because they reflect the actual value of the condemnee's loss resulting from the taking.<sup>139</sup> The court addressed the commonly advanced arguments that consequential damages are not part of the taking by the government and are too speculative to award in takings cases.<sup>140</sup> Rejecting these arguments, the court found no sufficient reason purported in the theories to preclude consequential damages in takings.<sup>141</sup> The court determined that there should be no distinction between the availability of consequential damages for private damage to land and eminent domain.<sup>142</sup> The court reasoned that consequential losses reflected a measure of what was actually lost and therefore should be awarded in order to achieve just compensation.<sup>143</sup> Further, the court determined that the fears of speculative damages would be dissuaded by the requirement that consequential damages be proven with reasonable certainty.<sup>144</sup>

In addition to Alaska, other states have allowed consequential damages in temporary takings through precedent. The states of California, Georgia, Missouri, New Jersey, New York, Ohio, and Pennsylvania have all expressly stated in caselaw that consequential damages may be recoverable in temporary takings cases.<sup>145</sup> In summary, the current state of the law is that the federal courts have precluded consequential damages as a recoverable damage, although business losses may be available in a temporary taking or public use of the business itself, as in *Kimball*. Most state courts follow the federal courts in precluding consequential

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134. See *id.* at 338–42 (citing *State v. Saugen*, 169 N.W.2d 37 (Minn. 1969)).

135. See *id.* at 342–48 (citing *City of Detroit v. Michael's Prescriptions*, 373 N.W.2d 219 (Mich. Ct. App. 1985)).

136. See *id.* at 347–51 (citing *Luber v. Milwaukee County*, 177 N.W.2d 380 (Wis. 1970)).

137. See *id.* at 349–51 (citing *Hasselblad v. City of Green Bay*, 427 N.W.2d 140 (Wis. Ct. App. 1988)).

138. 550 P.2d 820 (Alaska 1976); see also *Oswald*, *supra* note 23, at 351–54.

139. *Hammer*, 550 P.2d at 824–25.

140. *Id.* at 823–26.

141. *Id.* The court also discussed the distinction between the U.S. Constitution and the Alaska Constitution. *Id.* Unlike the U.S. Constitution, the Alaska Constitution requires compensation for the taking of personal property. *Id.* This distinction was another factor in the court's reasoning and dealt with the argument that the U.S. Constitution's Fifth Amendment does not require compensation for consequential losses. *Id.* at 824.

142. See *id.* at 824–27.

143. See *id.* at 827.

144. See *id.* at 824–25.

145. *Kemper*, *supra* note 65, at 238–39.

damages in eminent domain, although others have rejected their preclusion, as mentioned.

### E. New Mexico Takings Law

Before *Primetime*, New Mexico courts had never unconditionally prohibited lost profits as a recoverable damage in takings.<sup>146</sup> Generally, New Mexico takings law has been considered to have a broad view of just compensation.<sup>147</sup> Just compensation is defined in New Mexico law as “an amount sufficient to cover [the condemnee’s] loss—that is, to make him whole and fully indemnify him.”<sup>148</sup> This language slightly differs from the U.S. Supreme Court’s general approach of only awarding the full market value in that New Mexico’s approach is to “fully indemnify” the condemnee.<sup>149</sup>

The New Mexico courts have typically applied the market value approach to the valuation of takings, although the courts follow the flexible approach when market value fails to provide an adequate award.<sup>150</sup> With respect to partial takings cases in New Mexico, the measure of damages typically used is the before and after approach.<sup>151</sup> For temporary takings, the measure of damages had not been settled before *Primetime*.<sup>152</sup>

Although New Mexico had never directly addressed the availability of lost profits awards in temporary takings before *Primetime*, the courts had discussed analogous issues. The New Mexico Supreme Court had considered using lost profits as evidence to assist in ascertaining market value.<sup>153</sup> The New Mexico Court of Appeals had additionally once declined to award lost profits in an inverse condemnation action.<sup>154</sup>

The New Mexico Supreme Court has held that the definite plans a condemnee has for property are a proper consideration in determining market value.<sup>155</sup> In *Pelletier*, the court allowed testimony that the condemnee bought the land for the

146. See *infra* Part II.E.

147. *Primetime Hospitality, Inc. v. City of Albuquerque*, 2009-NMSC-011, ¶ 15, 206 P.3d 112, 117.

148. *State ex rel. Highway Comm’n v. Pelletier*, 76 N.M. 555, 560, 417 P.2d 46, 49 (1966).

149. Although New Mexico’s Constitution mandates just compensation when property is taken, it is silent to the proper valuation of measurement in any particular circumstance. New Mexico also has a statutory eminent domain code that provides for other categories of measurement but does not discuss measurement for temporary takings. For traditional condemnation the “actual value [as of the date a petition of condemnation is filed] shall be the measure of compensation for all property taken, and also the basis of damages for property not taken but injuriously affected in cases where such damages are legally recoverable.” NMSA 1978, § 42A-1-24(A) (1981).

150. *Pelletier*, 76 N.M. at 560, 417 P.2d at 49 (“When there is a ready market for the property, market value should be utilized to arrive at the correct amount without need to consider values peculiar to the owner.” (citing 4 NICHOLS ON EMINENT DOMAIN § 12.22(2) (Rev. 3d ed. 1964))); *id.* at 560, 417 P.2d at 50 (“Exceptional circumstances will modify the most carefully guarded rule. . . .” (quoting 4 NICHOLS ON EMINENT DOMAIN § 12.314 (Rev. 3d ed. 1964))).

151. *Primetime*, 2009-NMSC-011, ¶ 15, 206 P.3d at 117.

152. *Id. But see id.* ¶ 19, 206 P.3d at 118 (“Market rental value seems to us to be a reasonable way to measure *Primetime*’s compensable loss. . . .”).

153. *Pelletier*, 76 N.M. 555, 561–62, 417 P.2d 46, 50.

154. *PDR Dev. Corp. v. City of Santa Fe*, 120 N.M. 224, 227, 900 P.2d 973, 976 (Ct. App. 1995).

155. *Primetime*, 2009-NMSC-011, ¶ 22, 206 P.3d at 119 (citing *State ex rel. State Highway Dep’t of N.M. v. Kistler-Collister Co.*, 88 N.M. 221, 224, 539 P.2d 611, 614 (1975)); see also *El Paso Elec. Co. v. Pinkerton*, 96 N.M. 473, 474, 632 P.3d 350, 351 (1981) (allowing testimony of cutting of alfalfa crops in addition to the taking of the property to indicate that existing crops were damaged in order to help determine what price an owner would accept in the market to lose the property and crops).

eventual construction of a convenience store.<sup>156</sup> The property owner had secured the land as an investment because of its adjacent location to a highway.<sup>157</sup> The court found this testimony was relevant for a proper determination of marketable uses for the land, thereby effecting the determination of its market value for the valuation of a permanent taking.<sup>158</sup> Although it was not a direct award of lost profits, admitting this evidence was indicative of a consideration of future profits in determining market value of a property.

The New Mexico case that dealt the most directly with the availability of lost profits in inverse condemnation was *PDR Development Corp. v. City of Santa Fe*.<sup>159</sup> In *PDR*, the New Mexico Court of Appeals declined to award lost profits to a condemnee regarding the wrongful application of a zoning code to its property.<sup>160</sup> *PDR* was in the process of finalizing a contract for the sale of condominium properties to a developer when the developer learned of a zoning code on the property. The developer dropped its bid on the contract and the property was eventually foreclosed upon. *PDR* filed an action asking for an award of the lost profits it would have realized from the completion of the contract.<sup>161</sup> The court found that there was a wrongfully applied zoning code and therefore there was a regulatory taking in inverse condemnation.

In determining damages, the court of appeals declined to award lost profits and instead awarded a before and after measure of value of the property. This valuation measured the difference between the market rate of return on the property without the zoning restriction and the market rate with the restriction.<sup>162</sup> The court of appeals held that the loss of the contract was not recoverable because there was no direct interference with the contract, but rather, the loss was a consequential result of the zoning code.<sup>163</sup> The court noted that recovery of this type of consequential damage was not supported by caselaw and its award would have resulted in a double recovery to *PDR*.<sup>164</sup> The court reasoned that fair market value already took into account future lost profits.<sup>165</sup>

*PDR*'s holding prevented lost profits in addition to a market value award, but the court did not discuss if lost profits could alternatively be used as a full measurement of the loss of use and enjoyment. The issue of whether lost profits were recoverable in other circumstances was unclear until *Primetime*.

### III. PRIMETIME HOSPITALITY, INC. V. CITY OF ALBUQUERQUE

The following part discusses the progression of the *Primetime Hospitality* case through the New Mexico courts. The discussion initially examines the circumstances that led to *Primetime Hospitality, Inc. (Primetime)* filing suit against the City of Albuquerque. Following the facts, the discussion tracks the procedural

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156. 76 N.M. at 560, 417 P.2d at 49.

157. *Id.* at 561, 417 P.2d at 50.

158. *Id.*

159. 120 N.M. 224, 900 P.2d 973 (Ct. App. 1995).

160. *Id.* at 225, 900 P.2d at 974.

161. *Id.* at 226, 900 P.2d at 975.

162. *Id.* (citing *Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 270 (11th Cir. 1987)).

163. *Id.* at 227, 900 P.2d at 976.

164. *Id.*

165. *Id.* (citing *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401, 411 (1994)).

route of the case from the district court up to the appellate level, with an examination of the reasoning and holdings of the respective courts. The part concludes with an in-depth discussion of the supreme court's reinstatement of the district court's award of lost profits, and its reasoning for so holding.

### A. Facts

Primetime was an experienced hotel developer, who specialized in constructing and opening new hotel franchises.<sup>166</sup> In early 2000, Primetime entered into a franchising agreement with Hilton Inns to build a Hilton Garden Inn near the Albuquerque airport.<sup>167</sup> The franchising agreement required Primetime to complete the construction of the hotel by April 30, 2002, and assessed a liquidated damages penalty of \$385,000 if Primetime failed to do so or otherwise breached the agreement.<sup>168</sup> To facilitate the construction of the hotel, Primetime secured a construction loan of \$4,435,000 to finance the project and hired an architect and general contractor for \$300,000 each.<sup>169</sup>

Two months after the start of construction, Primetime's contractor inadvertently struck a city water line while constructing the underground parking garage that would serve as the hotel's structural foundation.<sup>170</sup> The water line ruptured, flooding the property and halting construction of the hotel.<sup>171</sup> Shortly thereafter, another encroaching city water line was discovered on the property.<sup>172</sup> Both water lines had to be moved before construction could resume.<sup>173</sup> The water lines were relocated and construction was again feasible within 102 days; however, the project was further delayed by winter weather that had set in during the period of initial delay.<sup>174</sup> When construction was able to resume, Primetime had incurred a total delay of 140 days in the project.<sup>175</sup>

### B. The District Court's Decision

Primetime filed a complaint seeking damages for inverse condemnation or, alternatively, for trespass.<sup>176</sup> Before trial, the parties agreed to dismiss the trespass claim, and the City stipulated to liability for the inverse condemnation action.<sup>177</sup> Therefore, the only issue that remained unresolved was the measure of damages owed to Primetime from the City's admitted temporary taking.<sup>178</sup>

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166. *Primetime Hospitality Inc. v. City of Albuquerque*, 2009-NMSC-011, ¶ 3, 206 P.3d at 114.

167. *Id.*; *Primetime Hospitality Inc. v. City of Albuquerque*, 2007-NMCA-129, ¶ 2, 168 P.3d 1087, 1089.

168. *Id.*

169. *Primetime*, 2009-NMSC-011, ¶ 3, 206 P.3d at 114.

170. *See id.* ¶ 4, 206 P.3d at 114; Plaintiff-Petitioner *Primetime Hospitality, Inc.*'s Brief-in-Chief at 6, 30, *Primetime Hospitality, Inc. v. City of Albuquerque*, 2009-NMSC-011, 206 P.3d 112 (No. 30,543), available at 2007 WL 6680358.

171. *Primetime*, 2009-NMSC-011, ¶ 4, 206 P.3d at 114.

172. *Id.* ¶ 4, 206 P.3d at 114.

173. *Primetime Hospitality, Inc. v. City of Albuquerque*, 2007-NMCA-129, ¶ 3, 168 P.3d 1087, 1089.

174. *Id.*

175. *Id.*

176. *Primetime*, 2009-NMSC-011, ¶ 4, 206 P.3d at 114.

177. *Id.* ¶ 5, 206 P.3d at 115.

178. *Id.*

The parties filed cross-motions for summary judgment alleging different measures of damages to be applied in the case.<sup>179</sup> Primetime argued that a full measure of consequential damages was proper, while the City argued for a before and after measure of damages.<sup>180</sup> The full measure of consequential damages would allow Primetime to recover the lost profits and excess construction costs incurred as a result of the water line break.<sup>181</sup> Alternatively, the City's proposed before and after method would award the difference in the value of the property before and after the water line break and after the water line break during the period of the taking.<sup>182</sup> The district court granted Primetime's motion for summary judgment as to the award of lost profits, stating that they were a "proper element of damages" and that the before and after method would not be appropriate to measure Primetime's loss.<sup>183</sup> Relying on this reasoning, the judge awarded Primetime the exact damages that it had requested, consisting of lost profits in the amount of \$456,242 and additional construction costs in the amount of \$153,518.45, both with interest.<sup>184</sup>

### C. The Court of Appeals' Decision

The City appealed the district court's ruling to the New Mexico Court of Appeals, and Primetime cross-appealed the district court's denial of attorney's fees.<sup>185</sup> The City did not dispute the district court's finding that the lost profits and additional construction costs were a *direct result* of the encroaching water lines; rather, the City argued that lost profits were precluded *as a matter of law* because they were consequential damages.<sup>186</sup> The City changed its position on appeal from what it had argued in the district court, recognizing that the before and after measurement of damages might not be adequate to award Primetime just compensation in the circumstances of the case.<sup>187</sup> Instead, the City argued that market rental value was the appropriate valuation measure under the circumstances.<sup>188</sup>

The New Mexico Court of Appeals reversed the district court's award of lost profits.<sup>189</sup> The court of appeals determined that the district court had erred in directly awarding the lost profits, because they represented consequential damages that were precluded in takings cases.<sup>190</sup> The court determined that lost profits could be properly considered in the calculation of damages, but should not be awarded

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179. *Primetime*, 2007-NMCA-129, ¶ 5, 168 P.3d at 1090.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* ¶ 1, 168 P.3d at 1089.

185. *Id.*

186. See *Primetime Hospitality, Inc. v. City of Albuquerque*, 2009-NMSC-011, ¶ 7, 206 P.3d 112, 115.

187. Respondent's Answer Brief at 1, *Primetime Hospitality, Inc. v. City of Albuquerque*, 2009-NMSC-011, 206 P.3d 112 (No. 30,543), available at 2008 WL 6487112.

188. *Primetime*, 2007-NMCA-129, ¶ 26, 168 P.3d at 1195.

189. *Id.* ¶ 54, 168 P.3d at 1100. The court also affirmed the award of excess construction costs, with one exception in reversing the award of construction costs for a buttress wall constructed to mitigate damage. *Id.* The court of appeals remanded this award to determine if this was a reasonable mitigation measure. *Primetime*, 2007-NMCA-129, ¶ 26, 168 P.3d at 1095. In addition, the court of appeals vacated the award of costs from Primetime's expert, remanding for a determination by the district court that the expert aided in determining the value of the taking. *Primetime*, 2009-NMSC-011, ¶ 7, 206 P.3d at 115.

190. *Primetime*, 2007-NMCA-129, ¶ 33, 168 P.3d at 1096.

independently.<sup>191</sup> Rather, the court held that the use of lost profits should be limited as a factor in the calculation of rental value based on what the landowner would accept to lose those profits.<sup>192</sup> The court determined that the proper valuation method was “[w]hat . . . an objective property owner [would] accept to delay construction of a hotel facility in this circumstance for a period of 142 days,” and remanded for the district court to determine this measure.<sup>193</sup>

#### D. The Supreme Court’s Decision

Primetime sought appellate review from the Supreme Court of New Mexico after the court of appeals reversed the district court decision. Primetime requested reversal of the court of appeals’ determination that lost profits were precluded as a direct award.<sup>194</sup> The supreme court ruled in favor of Primetime, reversing the court of appeals and holding that “lost profits may be recovered when they are the best measure of the value of the lost use and enjoyment of condemned land.”<sup>195</sup> The supreme court looked to New Mexico and federal takings law in determining that the lost profits were a proper award under the circumstances. The court also examined whether the lost profits were awarded as consequential damages in this case, based on the effect of their characterization as a direct result in the unchallenged district court finding.

##### 1. The Supreme Court’s Reasoning

The New Mexico Supreme Court sought to determine whether the district court had awarded a proper measure of compensation which would justly compensate Primetime under the circumstances of the case. The court initially examined New Mexico precedent’s general interpretation of just compensation, discussing the previously employed approaches to valuing different types of takings in New Mexico.<sup>196</sup> The court noted that in a permanent total taking, the measure of damages would be the fair market value of the property on the date of the taking.<sup>197</sup> Further, the court noted that in partial permanent takings cases, the legislature has pro-

191. *Id.* ¶ 40, 168 P.3d at 1098.

192. *Id.*

193. *Id.* ¶ 41, 168 P.3d at 1098. The court was also careful to note that it would not create a measure to be used in all takings cases and adhered to the flexible approach of valuation for eminent domain. *Id.* ¶ 22, 168 P.3d at 1094.

194. *Primetime*, 2009-NMSC-011, ¶ 9, 206 P.3d at 116. It also requested reversal of the excess construction costs and expert witness costs, which are not discussed in this note. *Id.*

195. *Id.* ¶ 2, 206 P.3d at 114. With respect to the excess construction costs, the court held that they were additionally recoverable because they had directly resulted from the damage caused by the taking. *Id.* The New Mexico Supreme Court affirmed the district court’s award of construction costs, because of the unchallenged finding that they were a direct result of the taking. *Id.* ¶ 41, 206 P.3d at 125. The court agreed with the court of appeals and held the costs were similar to the repair and restoration damages that were properly awarded by the U.S. Supreme Court in *General Motors* and *Kimball* and those provided for in New Mexico partial takings cases under UJI 13-705 NMRA. *Id.* ¶ 39, 206 P.3d at 125. In addition, the court reversed the court of appeals on the issue of the buttress wall, because it was also a direct result under the unchallenged finding. *Id.* ¶¶ 42–43, 206 P.3d at 124–25. The court found that the testimony at trial demonstrated that the cost of the wall was less than the amount of days that the construction would have been further delayed without the mitigation efforts of building the wall. *Id.* ¶ 43, 206 P.3d at 125. With respect to the expert witness costs, the court reversed the court of appeals, holding that because the lost profits were a proper award the expert testimony was “reasonably necessary” and therefore should be compensated. *Id.* ¶ 44, 206 P.3d at 125.

196. *Id.* ¶ 15, 206 P.3d at 117.

197. *Id.*

vided that the difference in the fair market value of the property resulting from the taking is recoverable, a before and after measurement.<sup>198</sup> The court ultimately determined that based on these valuation measures, the trend in New Mexico law was to treat just compensation broadly.<sup>199</sup> The court additionally noted that a standard measure for valuing temporary takings had not been settled in New Mexico law.<sup>200</sup>

The supreme court turned next to the court of appeals' holding, examining whether the rental value measure identified by the court of appeals was an appropriate award of damages in the case. The supreme court agreed that market rental value is an appropriate way to measure damages in temporary takings.<sup>201</sup> However, the court noted that awarding market rental value "raises as many questions as it answers" in determining the proper award of damages under these circumstances.<sup>202</sup> In particular, the rental value measurement could potentially range from the value of the land at the time of the taking (a partially excavated lot) to the rental value of a fully functioning hotel.<sup>203</sup> Therefore, the court determined that the damages valuation was not resolved by assessing the market rental value because the property's actual value for rental did not reflect its value to the condemnee at the time of the taking.<sup>204</sup>

The court turned to New Mexico and federal decisions to attempt to determine an appropriate method of valuation to justly compensate Primetime's loss. The court first looked to *PDR Development Corp. v. City of Santa Fe*, a New Mexico decision dealing with lost profits. In *PDR*, the New Mexico Court of Appeals held that lost profits were not recoverable in an inverse condemnation action where a temporary regulatory taking occurred while the condemnee was in negotiations for the sale of the property to a condominium developer.<sup>205</sup> The *Primetime* court found that *PDR* did not necessarily control in the facts of *Primetime*, as *Primetime* dealt with a total physical taking as opposed to the regulatory taking in *PDR*.<sup>206</sup> Further, the court noted that *Primetime* was distinguishable from *PDR* because the *PDR* court explicitly ruled that the loss of the contract was not a direct result of the government action, whereas here, the lost profits were found to be a direct result by the district court, a finding that was unchallenged on appeal.<sup>207</sup>

Finding that *PDR* did not provide an appropriate measure for the circumstances in the case, the court turned to two federal cases similar to *Primetime* for guidance in valuing this type of loss.<sup>208</sup> In *United States v. 883.39 Acres*, the 8th Circuit Court

198. *Id.*; see also *supra* Part II.C.2.

199. *Id.* Interestingly, this was contrary to the conclusion of the court of appeals upon examination of New Mexico caselaw regarding just compensation. *Primetime Hospitality, Inc. v. City of Albuquerque*, 2007-NMCA-129, ¶ 33, 168 P.3d 1087, 1097.

200. *Primetime Hospitality, Inc. v. City of Albuquerque*, 2009-NMSC-011, ¶ 15, 206 P.3d at 117.

201. *Id.* ¶ 19, 206 P.3d at 118.

202. *Id.* ¶ 20, 206 P.3d at 118.

203. *Id.* ¶ 20, 206 P.3d at 118–19.

204. See *id.*

205. See *id.* ¶¶ 16–17, 206 P.3d at 117 (discussing *PDR Dev. Corp. v. City of Santa Fe*, 120 N.M. 224, 900 P.2d 973 (Ct. App. 1995)); see also *supra* Part II.E.

206. *Primetime*, 2009-NMSC-011, ¶¶ 16–17, 206 P.3d at 117; see also *supra* Part II.E.

207. *Id.* ¶ 26, 206 P.3d at 121. New Mexico appellate rules of procedure dictate that findings of the trial court that are unchallenged on appeal are binding on the appellate court. Rule 12-213 NMRA; see also *Corдова v. Broadbent*, 107 N.M. 215, 216, 755 P.2d 59, 60 (1988).

208. *Primetime*, 2009-NMSC-011, ¶ 20, 206 P.3d at 118–19.

of Appeals refused to consider evidence of potential commercial value of undeveloped pastureland based on the owner's intentions to commercialize the property.<sup>209</sup> Rather, the court awarded the value of similar undeveloped land.<sup>210</sup> The New Mexico Supreme Court determined that the construction site in *Primetime* was distinguishable from the pastureland in *883.39 Acres* because the construction project in *Primetime* had undergone substantial planning and was in the process of physical construction.<sup>211</sup>

In the second federal case, *United States v. 37.15 Acres of Land*, the Federal District Court of California awarded an operating hotel its specific, normally generated earnings during the period of the taking.<sup>212</sup> The district court calculated the time period during which the hotel was rendered inoperable as a result of the taking and made the proper adjustments according to fluctuations in market conditions.<sup>213</sup> The New Mexico Supreme Court held that *Primetime* was also distinguishable from *37.15 Acres*, because the property at issue in *Primetime* was far from an operable hotel with evidence of specific earnings.<sup>214</sup>

The court stated that rental value would be easy to determine in either of the federal cases discussed, but because the property at issue in *Primetime* was neither a completely undeveloped property, nor a fully functioning hotel, rental market value in this context would not reflect the condemnee's loss.<sup>215</sup> The market rental value would be measured by an empty lot or a partially excavated lot that was likely worth less than the value at the time of purchase, and neither would represent the actual loss that *Primetime* incurred as a result of the taking.<sup>216</sup>

Turning to the damages in *Primetime*, the supreme court further emphasized that just compensation must be determined from the standpoint of what the condemnee has lost.<sup>217</sup> Disagreeing with the court of appeals' determination that the district court had not awarded an objective measure of damages, the supreme court determined that the lost profits were a measure of the land's market rental value to *Primetime*.<sup>218</sup>

Because the court determined the lost profits were the measure of market rental value in *Primetime*, it turned to a range of precedent from federal and state courts that had discussed the issue of the recoverability of consequential damages in eminent domain to determine if the lost profits were properly recoverable in this case.<sup>219</sup> Ultimately, the court determined that the award of lost profits and construction costs in *Primetime* were by their nature non-consequential.<sup>220</sup> The court

209. 442 F.2d 262, 265 (8th Cir. 1971).

210. *Id.*

211. *Primetime*, 2009-NMSC-011, ¶ 20, 206 P.3d at 118.

212. 77 F. Supp. 798, 801 (S.D. Cal. 1948).

213. *See id.*

214. *Primetime*, 2009-NMSC-011, ¶ 20, 206 P.3d at 119.

215. *Id.* ¶ 20, 206 P.3d at 118–19.

216. *Id.* ¶ 20, 206 P.3d at 118.

217. *Id.* ¶ 23, 206 P.3d at 120.

218. *Id.*

219. *Id.* ¶¶ 24–32, 206 P.3d at 119–23. The court of appeals and the supreme court both noted that earlier New Mexico cases that used the term consequential damages to refer to “injuries to adjacent property, such as loss of access to roads, when a parcel of land is taken” dealt with a different sense of the term “consequential,” which was not at issue in *Primetime*. *Id.* ¶ 25 n.2, 206 P.3d at 120; *see also Primetime*, 2007-NMCA-129, ¶¶ 31–32, 168 P.3d at 1096.

220. *See Primetime*, 2009-NMSC-011, ¶¶ 25–33, 206 P.3d at 120–23.

held that the unchallenged finding that the lost profits were a direct result of the taking mandated that the damages were not consequential, but rather the actual measure of what Primetime had lost.<sup>221</sup>

In determining that lost profits were appropriate under the circumstances in *Primetime*, the New Mexico Supreme Court rejected the notion held in other jurisdictions that lost profits can never be recoverable in takings cases. The court discussed several cases that held that lost profits should not be available in takings cases whether they are characterized as consequential or non-consequential.<sup>222</sup> These cases precluded lost profits specifically on the grounds that they would result in a double recovery if awarded with a market value award, are speculative, and are a consequential damage.<sup>223</sup> The New Mexico Supreme Court affirmed the principle that precludes consequential damages in eminent domain when the damages are purely speculative or would result in a double recovery, but determined in *Primetime* that the damages were not subject to these concerns.<sup>224</sup> The court further determined that there would be no double recovery because the lost profits were the only damage awarded, and therefore no separate award of property value could be recovered.<sup>225</sup> In addition, the fact that the direct result finding was unchallenged prevented any argument that the damages were speculative.<sup>226</sup> Further, the court determined that the lost profits were not awarded as consequential damages by the district court, but rather as a method of measuring rental value.<sup>227</sup> Based on this principle, the court ultimately developed the holding that where “lost profits are the best evidence of the taken property’s value . . . they should be the measure of just compensation.”<sup>228</sup>

The court reasoned that the lost profits were the best evidence of the value of just compensation under the circumstances by looking to several factors.<sup>229</sup> First, the court analogized *Primetime* to *Kimball*, where the Supreme Court found that the temporary deprivation of a laundry business deprived the owner of an ability to conduct his business elsewhere.<sup>230</sup> Likewise, in *Primetime*, the nature of the taking prevented Primetime from doing anything but suffering the loss because there was no option but to wait for the water to be cleared and the water lines moved.<sup>231</sup>

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221. *Id.* ¶ 23, 206 P.3d at 119.

222. *Id.* ¶ 27–32, 206 P.3d at 120–22.

223. *Id.* ¶ 27–31, 206 P.3d at 120–22 (citing *Mitchell v. United States*, 267 U.S. 341, 343 (1925) (consequential damages should be precluded in eminent domain); *Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1578 (Fed. Cir. 1990) (lost profits are too speculative); *Wheeler v. Pleasant Grove*, 833 F.2d 267, 268–69 (11th Cir. 1987) (double recovery)).

224. *Id.* ¶¶ 28, 30, 206 P.3d at 121.

225. *Id.* ¶ 28, 206 P.3d at 121.

226. *Id.* ¶ 30, 206 P.3d at 121.

227. *Id.* ¶ 32, 206 P.3d at 122. The court cited several state cases that held that lost profits could be used in determining what an appropriate rental value would be for property. *Id.* (citing *Brooklyn E. Dist. Terminal v. City of New York*, 139 F.2d 1007, 1013 (2d Cir. 1944); *Keystone Assoc. v. State*, 433 N.Y.S.2d 695, 700 (Ct. Cl. 1980); *Anderson v. Chesapeake Ferry Co.*, 43 S.E.2d 10, 19 (Va. 1947)).

228. *Primetime*, 2009-NMSC-011, ¶ 32, 206 P.3d at 122.

229. *Id.* ¶ 33, 206 P.3d at 122–23.

230. *Id.* ¶ 33, 206 P.3d at 122 (discussing *Kimball Laundry Co. v. United States*, 338 U.S. 1, 12–13 (1949)).

231. *Id.*

Additionally, in *Primetime* there was an unchallenged finding of fact that the taking directly deprived Primetime of nearly \$500,000 in lost profits.<sup>232</sup> Therefore, the court found that this loss was the actual measure of damages that Primetime suffered, and the proper award to fully indemnify Primetime.<sup>233</sup> Further, the court found that the damages that were requested would not result in a double recovery of lost profits and market value, but were the *actual* measure of the loss of use and enjoyment.<sup>234</sup> The lost profits were awarded as the measurement of just compensation and no additional “consequential” award was recovered.<sup>235</sup> Therefore, there was no issue with a potential for double recovery, which distinguished *Primetime* from *Wheeler*, a federal case in which both consequential and general damages were sought.<sup>236</sup> Because of these factors, the court determined that the amount awarded was a proper award of lost profits under the circumstances of the case.<sup>237</sup>

## 2. The Holding of *Primetime*

The supreme court agreed with the determination of both the district court and the court of appeals that damages should be valued from the standpoint of what the condemnee had lost.<sup>238</sup> However, the supreme court rejected the court of appeals’ determination that the district court did not award an objective standard for the measure of damages in awarding lost profits.<sup>239</sup> The supreme court determined that the district court had not intended to award consequential damages, but rather, had awarded lost profits as a measure of the actual loss that Primetime suffered as a direct result of the taking.<sup>240</sup> Additionally, because the lost profits were characterized as non-consequential damages based on the unchallenged direct result finding, the lost profits were a permissible award to the condemnee.<sup>241</sup> Therefore, the supreme court determined that the district court had properly compensated Primetime for the taking, and there was no reason to remand the case.<sup>242</sup>

The supreme court limited its holding by stating that it did not intend to determine the recoverability of lost profits, nor whether they will accurately reflect the value of a temporary taking in other circumstances.<sup>243</sup> However, the holding does remain from *Primetime* that lost profits are recoverable when they can be shown to be the best measure of the loss of the use and enjoyment of a temporarily condemned property.<sup>244</sup> Ultimately, the court affirmed the principle that consequential

232. *Id.*

233. *Id.* ¶ 33, 206 P.3d at 122–23.

234. *Id.*

235. *Id.*

236. *Id.* ¶ 28, 206 P.3d at 121 (discussing *Wheeler v. City of Pleasant Grove*, 833 F.2d 267 (11th Cir. 1987), and the adoption of its valuation measure in *PDR Dev. Co. v. City of Santa Fe*, 120 N.M. 224, 900 P.2d 273 (Ct. App. 1995), in which a double recovery would have resulted by awarding lost profits because the “market rate of return measure” already takes into account fluctuations in market expectations).

237. *Id.* ¶ 33, 206 P.3d at 122.

238. *Id.* ¶¶ 21–22, 206 P.3d at 119.

239. *Id.* ¶¶ 23, 34–35, 206 P.3d at 119, 123.

240. *Id.* ¶ 35, 206 P.3d at 123 (stating that the award of lost profits and excess construction costs was “intended as a measure of the lost use and possession of the property . . . a[n actual] measure of rental value.”).

241. *Id.* ¶ 34, 206 P.3d at 123.

242. *Id.* ¶ 23, 206 P.3d at 119.

243. *Id.* ¶ 36, 206 P.3d at 123.

244. *Id.* ¶ 2, 206 P.3d at 114.

damages should be precluded in takings. However, the court held that when lost profits are the best measure of the loss of the use and enjoyment, they can be used as the measurement of the direct award so long as they are not independently awarded.

#### IV. ANALYSIS OF THE *PRIMETIME* DECISION AND ITS IMPACT ON NEW MEXICO LAW

*Primetime* effectively settled that lost profits may be available as a measurement of damages in inverse condemnation cases in New Mexico.<sup>245</sup> However, the extent to which the holding is usable remains to be seen. The court greatly limited its holding, and it seems likely that *Primetime* will be limited to its facts.

##### A. *Primetime Effectively Adhered to a Flexible Approach of Valuing Damages in Takings Law*

Although the holding of *Primetime* may not be particularly usable in other contexts, the court nonetheless benefited New Mexico takings law by adhering to a flexible approach to valuing takings. It is important for New Mexico courts to preserve the flexibility in takings law because one strict measure of damages would likely result in windfalls to some plaintiffs and deprivation of just compensation to others.<sup>246</sup> Although flexibility does not provide plaintiffs with a great deal of certainty regarding their potential award, this uncertainty is offset by the benefits provided. Condemnation law is not suited for bright line rules and the flexible approach towards the valuation of takings affords greater policy considerations in ensuring accurate awards to individual plaintiffs while protecting the balance between apportioning the burden of loss between the public and the individual condemnee.<sup>247</sup> The court in *Primetime* wisely adhered to this rule, while slightly expanding the measurement of takings.

##### B. *Lost Profits in the Valuation of Takings Damages*

Using lost profits as a valuation method in determining rental value can result in vastly different awards for condemnees.<sup>248</sup> *Primetime* would have received inadequate compensation had the market value been assessed using a before and after approach.<sup>249</sup> Additionally, a market rental value award would not have reflected the value of the property to *Primetime*.<sup>250</sup> Neither of these methods would have accurately measured *Primetime*'s substantial loss of profits that in fact resulted from the delay of the hotel project that it had undertaken.

*Primetime* lost the value of time when it could have been constructing its hotel. *Primetime* was not interested in using the property as a vacant construction lot and had very real plans that were underway in developing the hotel. In addition, *Primetime* undoubtedly lost profits in the 142 days that the hotel was delayed in

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245. *Id.* (“[L]ost profits may be recovered when they are the best measure of the use and enjoyment of the condemned land.”).

246. See 3 NICHOLS, *supra* note 10, § 8.06(1); see also discussion *supra* Part II.B.

247. See 3 NICHOLS, *supra* note 10, § 8.06(1).

248. See *supra* Part II.E.

249. See *supra* Part III.D.1.

250. See *id.*

opening. Under the circumstances in this case, valuing the loss of use by market rental value determined from an award of lost profits was a fair measure of loss that resulted from the condemnation.

### C. *The Nature of the Limited Holding in Primetime*

*Primetime* held that lost profits can be awarded when they are the best measure of the loss to the condemnee. However, based on the court's reasoning, it seems that lost profits will rarely be considered the best measure of valuation in future condemnation cases. The court's determination that the award of lost profits was permissible in *Primetime* relied heavily on two factors: (1) the unchallenged finding of the district court that the lost profits were a direct result of the taking, and (2) the unique circumstances of the taking involved in the case.<sup>251</sup> The reliance on these factors limits the value of *Primetime* as precedent in the future.

The repeated reliance on the unchallenged direct loss finding does not change the general aversion to awarding consequential damages in takings law.<sup>252</sup> The court found that it was required to affirm the award of the district court because they were a direct result, and therefore could not be defined as a consequential damage.<sup>253</sup> The court did not actually award lost profits as consequential damages; it merely used them as a full measurement of the rental value, clearly intending to characterize the damages as non-consequential.

### D. *Should Consequential Damages Be Precluded in Condemnation?*

Consequential damages should no longer be precluded in takings cases. The courts have gone to great lengths in attempting to adhere to the doctrine of consequential damages' preclusion in eminent domain, but the distinction is meaningless today. Fair market value measures have been diluted by the court's need to "justly compensate" the condemnee while not awarding consequential damages. There is no longer any real distinction between awarding general and consequential damages in condemnation because of this dilution.<sup>254</sup> The circumstance is unavoidable that certain condemnee's losses will best be measured by using consequential and incidental losses, particularly when the taking is of a business. In all practicality, consequential damages should be allowed so courts will no longer need to bend the rules, using consequential damages to "measure" market value, merely because of an antiquated aversion to consequential damages in condemnation.<sup>255</sup>

Additionally, consequential damages awarded in takings would be subject to normal damages limitations and therefore would not pose a risk of exaggerated awards to condemnees. Recoverable damages for condemnation must be direct and certain, and cannot be remote or speculative.<sup>256</sup> General damages rules will

251. *Primetime Hospitality, Inc. v. City of Albuquerque*, 2009-NMSC-011, ¶¶ 12, 20, 206 P.3d 112, 116, 119.

252. *See supra* Part III.D.2.

253. *See id.*

254. *See Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, *supra* note 87, at 84–85.

255. *Id.* at 96 ("Separate appraisal of incidental losses would also make the basic market valuation a more operable standard. Manipulation of that formula to include such losses would no longer be necessary; thus the objectivity originally justifying its use would be restored.")

256. *See supra* Part II.D.1.

prevent the condemnee from securing a double recovery and prevent the taxpayer from paying more than the actual loss of the condemnee. The condemnee is entitled to be compensated for the full amount of his loss under both the U.S. and New Mexico Constitutions, and this compensation should include consequential damages. Adhering to the limitations on the recoverability of damages could allay any fears that the consequential damages would exceed a condemnee's loss and result in a windfall.

The *Primetime* court could have better benefited New Mexico takings law by stating what it was actually doing: awarding consequential damages. The court went through the limitations on consequential damages, finding that there was no double recovery and that the damages were not speculative, but vehemently insisted that the lost profits awarded in the case were non-consequential.<sup>257</sup> In order to justly compensate *Primetime*, the court had to award lost profits, and rather than broadening takings law to include consequential damages when they are necessary for "just compensation," the court masked the lost profits award as a measurement of market value and thus, defined it as a non-consequential award. Instead, the court should have taken the extra step in allowing awards of lost profits as a consequential damage when lost profits will most accurately reflect just compensation, not just when there is a finding that the profits were a direct result of the taking, and non-consequential.

#### *E. Where Should the Line be Drawn in Awarding Lost Profits?*

Both the court of appeals and the supreme court in *Primetime* were careful to prevent the creation of a measure to be used in all takings cases and to avoid setting a precedent for the common use of lost profits in the future.<sup>258</sup> The courts were prudent in adhering to the flexible approach to valuation of condemnation damages, while not endorsing lost profits as a common method of valuation.<sup>259</sup> However, lost profits should be available under certain limitations. Lost profits can reflect the best measurement of the value of the property to the owner, especially in cases in which the market for a property fails to adequately measure its value.

In circumstances such as *Primetime*, in which the rental value of the property in the market would never equal its worth to the condemnee, lost profits should be a permissible award. Although the courts are rightfully mindful of attempting to achieve a fair balance between the condemnee and the public, when it is a close call, the public should bear the loss.<sup>260</sup> Condemnees should not suffer inadequate compensation merely because their actual loss is characterized as "consequential."<sup>261</sup> Individuals whose property is condemned should be placed in as good a

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257. See *supra* Part III.D.1.

258. *Primetime Hospitality, Inc. v. City of Albuquerque*, 2009-NMSC-011, ¶ 36, 206 P.3d 112, 123.

259. *Primetime Hospitality, Inc. v. City of Albuquerque*, 2007-NMCA-129, ¶ 22, 168 P.3d 1087, 1094.

260. See 3 NICHOLS, *supra* note 10, § 8.01(2) ("[B]alancing the benefits to the public against the right of the owner does not serve to qualify the latter's right to compensation. The owner is not required to subsidize a public project."); *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, *supra* note 87, at 96 ("Ultimately, the public which benefits from improvements should bear the incidental losses occasioned by any condemnation for which just compensation is required; no reason appears for placing an inordinate burden on the individuals whose property is appropriated for the public benefit.").

261. See *Primetime*, 2009-NMSC-011, ¶ 24, 206 P.3d at 120 (citing Spies & McCoid, *supra* note 90, at 449) ("Fundamental fairness dictates that individuals who suffer consequential loss ought to be compensated.

position as they would have been had the taking not occurred, and when lost profits can be proven with a reasonable degree of certainty and reflect the best measure of the condemnee's loss, they should be recoverable.

Lost profits should be precluded in condemnation cases when they fail to meet the limitations on consequential damages. This would occur when they cannot be proven with reasonable certainty, result in a double recovery, or are too speculative. The taxpayer should not be forced to pay for damages that do not adhere to these limitations, and would therefore result in a windfall to plaintiffs. However, if the condemnee can prove his lost profits under the strict limitations to consequential recovery, the damages should be awarded.<sup>262</sup> This strategy would provide the adequate balance in justly compensating the condemnee, while protecting the taxpayer from compensating unfounded damages.

## V. CONCLUSION

Although *Primetime* is an interesting case in remedies and property law, it likely will not drastically change takings awards in New Mexico. The market rental value and before and after approaches to valuing temporary takings will prevail, with arguments for lost profits generally being denied as speculative and remote. The decision was just, providing *Primetime* a fair award of its loss and placing it in the position it would have been had the taking not occurred, but the case will likely be limited to its facts as a precedent for future cases.

Nonetheless, the availability of lost profits as a measurement of value for condemnation is an important theory to be recognized in New Mexico takings law. This measurement provides an alternative to the standard methods of valuation should they fail to justly compensate plaintiffs in future cases. Although it is likely that the lost profits valuation measure will rarely be used, *Primetime* was a valuable development in this area of the law, and reflective of the courts' efforts to extend greater protection to constitutional goals of preventing condemnation without just compensation. Perhaps in the future, consequential losses will be recoverable to fully compensate condemnees in takings cases, and they will no longer have to be masked as a "direct award" in adherence to the antiquated aversion to consequential damages.

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In disallowing recovery for many such losses the law is unfair in two different but related respects. First, it discriminates between those on whom loss from eminent domain falls. Some are compensated; some are not. Secondly, it requires those who suffer uncompensated injuries to bear directly and in undue proportion the economic expense of projects designed to benefit the public.").

262. See *supra* Part II.D.1.