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Dump it Here, I Need the Money: Restoration Damages for Temporary Injury to Real Property Held for Personal Use

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I. INTRODUCTION

After a long day you come home to find that the construction crew at the new homesite next door negligently drove a truck through the back yard of your dream house. The truck left deep ruts in the soil and destroyed all of your prized ornamental Japanese shrubs. The injury is temporary and restorable. Fully restoring the back yard and shrubbery will cost $20,000, but the market value of your property was lowered by just $2000. You are devastated and want nothing but to have your back yard restored to its original condition. Obtaining general damages

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1 Restoration damages generally are available only for temporary injury to real property, as permanent injury is not restorable. DAN B. DOBBS, 1 LAW OF DAMAGES § 5.2(2), at 716–18 (2d ed. 1993). The definition of permanent injury, however, varies from state to state. Compare Millers Mut. Life Ins. Co. of Texas v. Wildish Constr. Co., 758 P.2d 836, 846 (Or. 1988) (en banc) (stating that injury to real property is permanent when it amounts to a "total destruction of value") with Newsome v. Billips, 671 S.W.2d 252, 255 (Ky. Ct. App. 1984) (suggesting that injury to real property is permanent when restoration cost exceeds diminution in market value of the property) and Reeser v. Weaver Bros., 605 N.E.2d 1271, 1274 (Ohio Ct. App. 1992) (stating that injury to real property is permanent if the injury is irreparable). This Comment, however, focuses only on the measure of damages for temporary injury to real property.

2 Damages are "a sum of money awarded to a person injured by the tort of another." RESTATEMENT (SECOND) OF TORTS § 902 (1977). In this Comment, "general damages" means damages awarded to compensate for actual direct injury to real property. See BLACK'S LAW DICTIONARY 391 (6th ed. 1990) (defining general damages as damages "such as the law itself implies or presumes to have accrued from the wrong complained of, for the reason that they are its immediate, direct, and proximate result from the injury, . . . and without reference to
equal to the cost of restoration\textsuperscript{3} would seem fair, and in almost any court in the United States you would be entitled to such recovery.

However, imagine the same situation, but instead of ornamental shrubs, the truck destroyed unattractive yet hard to replace bushes. Furthermore, you never liked the house much anyway and were planning to move. You would appear to have hit the jackpot to the tune of $18,000. If you were to receive an award of general damages equal to the cost of restoration you then could sell the property for $2000 less than its pre-tort market value (i.e., its current market value), pocket the award of damages, and end up with an $18,000 windfall. The purpose of this Comment is to examine varying methods of determining which cases, along the range delineated by the cases described above, are appropriate for awarding restoration damages.

It is important to note that all owners of injured real property are entitled to recover consequential damages in addition to general damages for direct losses.\textsuperscript{4} For example, all landowners can recover for loss of use of the property and owners who reside on the property also can recover for resulting personal annoyance and discomfort.\textsuperscript{5} Recovery of such consequential damages can be significant in a case of injury to real property.\textsuperscript{6} Therefore, the total recovery of damages

the special character, condition or circumstances of the plaintiff’); DOBBS, supra note 1, § 5.2(1), at 713. General damages are contrasted with “consequential damages” for injury suffered by the landowner as a result of, but separate from, the direct injury to real property, such as annoyance and discomfort or loss of use of the property, and “punitive or exemplary damages” imposed to punish the tortfeasor and deter other potential tortfeasors. See BLACK'S LAW DICTIONARY 390-92 (6th ed. 1990); DOBBS, supra note 1, § 5.1(1), at 713; RESTATEMENT (SECOND) OF TORTS §§ 929(1)(b)-(c) (1977). Certainly, consequential, punitive, and other special types of damages are as readily available for injury to real property as in other actions in tort. See RESTATEMENT (SECOND) OF TORTS §§ 929(1)(b)-(c) (1977). See also infra note 52 for full text of Section 929. However, this Comment focuses only on the measure of general damages for injury to real property.

\textsuperscript{3} In this Comment, “restoration damages” means “general damages” measured by the cost of restoring the property to its pre-tort condition. DOBBS, supra note 1, § 5.2(1), at 714. Restoration is intended to be synonymous with “remediation” and “repair,” terms that are used interchangeably by courts in similar situations. Restoration and the like are distinguished from “restitution” damages where a court makes an additional determination that the tortfeasor has been unjustly enriched at the expense of the landowner. See generally DOBBS, supra note 1, § 4.1; RESTATEMENT (SECOND) OF TORTS § 929(2) (1977). For example, in cases where trees are removed unlawfully from real property used for timber purposes, damages can be measured by the market value of the timber removed by the tortfeasor. See generally DOBBS, supra note 1, § 4.1; RESTATEMENT (SECOND) OF TORTS § 929(2) (1977).

\textsuperscript{4} RESTATEMENT (SECOND) OF TORTS §§ 929(1)(b)-(c) (1977).

\textsuperscript{5} Id.

\textsuperscript{6} See Escamilla v. ASARCO, Inc., No. 91-CV-5716 (Colo. Dist. Ct. City and County of Denver Apr. 23, 1993) (order) (awarding $8,000,000 in “annoyance and discomfort” damages to the
by the landowners described in the examples above would not be limited to diminution in market value, but likely would be enhanced by recovery of consequential damages. However, this Comment is limited to discussion of the measure of general damages for direct losses from injury to real property, and will not address consequential damages.

The standard measure of general damages to real property resulting from a temporary tortious injury is the diminution in the market value of the property. According to the United States Supreme Court:

[t]he market value of . . . a piece of property is the price which it might be expected to bring if offered for sale in a fair market; not the price which might be obtained on a sale at a public auction or a sale forced by necessities of the owner, but such a price as would be fixed by negotiation and mutual agreement, after ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled to take the particular . . . piece of property.

Courts typically determine diminution in market value through the use of objective evidence, such as information regarding comparable sales of similar properties with and without analogous injuries or other typical standard property valuation techniques. However, the


Diminution in market value is the difference between the pre-tort and post-tort market values of real property. DOBBS, supra note 1 § 5.2(1), at 713. In this Comment, the term “market diminution damages” means “general damages” measured by the diminution in market value of the injured real property.

E.g., Jackson v. Bohlin, 75 So. 697, 700 (Ala. Ct. App. 1917) (“in actions for injury to real property . . . the measure of damages is the difference in the value of the land before and after the trespass”) (quoting Brinkmeyer v. Bethea, 35 So. 996, 997 (Ala. 1904)); Bangert v. Osceola County, 456 N.W.2d 183, 190 (Iowa 1990) (“[t]he general measure of damages [for injury to real property] . . . is the difference in the value of the realty before and after the [injury]”); Hopkins v. American Pneumatic Servo Co., 80 N.E. 624, 624 (Mass. 1907); Baillon v. Carl Bolander & Sons Co., 235 N.W.2d 613, 614 (Minn. 1975) (“It has long been the rule in [Minnesota] that the measure of damages for the destruction of trees and shrubbery is the difference between the value of the land before and after the damage has been inflicted.”); Hueston v. Mississippi & Rum River Boom Co., 79 N.W. 92, 93 (Minn. 1899).


See Keitges v. VanDerveen, 483 N.W.2d 137, 139–40 (Neb. 1992); see also June Fletcher, How to Price a Property That's Unusual, BOSTON SUNDAY GLOBE, Feb. 25, 1996, at A1 (discussing various property valuation techniques).
use of market diminution damages "does not in all cases afford a correct measure of indemnity, and is not therefore a 'universal test.'"  

Restoration damages are, in appropriate cases, available to owners of injured real property. Restoration damages generally are available when the cost of restoration does not significantly exceed the diminution in market value of the property. Courts grant restoration damages in these cases in an attempt to compensate fully landowners for their losses. Such award of restoration damages recognizes the landowners' right to use their property according to their tastes and wishes, as well as the inability to assess exactly diminution in market value.

This Comment, however, examines particular situations where courts have awarded enhanced recovery of general damages for temporary injury, measured by the cost of restoration, that significantly exceed the diminution in market value of the injured real property. Specifically, this Comment examines situations where courts allowed restoration damages after finding that a particular landowner had "personal reasons" for wanting the property restored, and that market

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12 RESTATEMENT (SECOND) OF TORTS § 929(1)(a) & cmt.b (1977). See infra notes 52-57 and accompanying text for full text and discussion of Section 929.


14 See Thatcher v. Lane Constr. Co., 254 N.E.2d 703, 708 (Ohio Ct. App. 1970) (holding that market diminution damages are "not an arbitrary and exact formula to be applied in every case without regard to whether its application would compensate the injured party fully"); Brereton v. Dixon, 433 P.2d 3, 5 (Utah 1967) (noting that market diminution damages will not always fulfill the goal of full compensation and, therefore, restoration damages are generally available); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 5-6 (5th ed. 1984) (stating that full compensation is the function of tort law). See also infra notes 56-57 and accompanying text.

15 Thatcher, 254 N.E.2d at 708; Brereton, 433 P.2d at 5.

16 Brereton, 433 P.2d at 5 (recognizing the difficulty in exactly assessing the extent of diminution in market value of an injured property); Anderson v. Bauer, 681 P.2d 1316, 1325 (Wyo. 1984) (noting that diminution in market value "cannot be determined with mathematical precision [and] may be inherently uncertain").

17 See infra notes 56-57 and accompanying text.

diminution damages would fail to compensate fully the landowner for his or her losses.\textsuperscript{19} In other words, these courts recognize the presence of idiosyncratic\textsuperscript{20} value that enhances the actual value of a parcel of real property to its owner.\textsuperscript{21}

Section II of this Comment examines the historical use of market diminution damages and restoration damages, and the development of the personal reasons exception allowing restoration damages that significantly exceed the diminution in market value of the injured real property. Section III investigates the types of temporary real property injury cases that courts have found to qualify for the personal reasons exception. Section III continues by examining whether such restoration damages must be accompanied by a determination that the damages are likely to be spent on restoration. Finally, section III outlines what, if anything, is the upper limit on the magnitude of restoration damages in these cases and how such an upper limit is determined. Section IV analyzes different applications of the personal reasons exception, with a special emphasis on applications from California and Colorado, and discusses the relative merits of the different applications.

\section*{II. \textbf{Historical Use of Market Diminution Damages and Restoration Damages for Temporary Injury to Real Property}}

\textbf{A. The Primary Purpose of Tort Damages and the Traditional Methods of Measurement}

The primary purpose of damages in tort law is "compensation of individuals, rather than the public, for losses which they have suffered within the scope of their legally recognized interests."\textsuperscript{22} Thus, al-

\textsuperscript{19} See infra sections II.B & III.
\textsuperscript{20} Idiosyncratic means something “peculiar to the individual.” \textsc{Webster’s Third New International Dictionary of the English Language, Unabridged} 1124 (1986). Idiosyncratic value in the context of injury to real property is value recognized by the owner of the property but not by the market. See \textsc{Restatement (Second) of Torts} § 911 cmt.e (1977); \textsc{Dobbs, supra note 1, § 5.2(1)}, at 715; see also Keitges v. VanDermeulen, 483 N.W.2d 137, 143 (Neb. 1992) (“[o]ne person’s unsightly jungle may be another person’s enchanted forest”).
\textsuperscript{21} See Watson v. Jones, 36 So.2d 788, 789 (Fla. 1948); Keitges, 483 N.W.2d at 143; Gilman v. Brown, 91 N.W. 227, 229 (Wisc. 1902).
\textsuperscript{22} \textsc{Keeton et al., supra note 14, § 1, at 5–6; accord Dealers Hobby, Inc. v. Marie Ann Realty Co., 255 N.W.2d 131, 134 (Iowa 1977)} (stating that the purpose of tort damages is to “place the injured party in as favorable a position as though no wrong had been committed”); \textsc{Samson Constr. Co. v. Brusowankin, 147 A.2d 430, 434 (Md. 1958)} (stating that the purpose of tort
though public policy arguably often supports property restoration without regard to cost, such as in cases involving serious environmental injury, common law tort plaintiffs may recover only for injury to their individual interests.\textsuperscript{23}

The standard measure of general damages considered sufficient to compensate a landowner fully for injury to real property is, and long has been, the diminution in market value of the property.\textsuperscript{24} Market diminution damages tend to compensate landowners fully for direct, not consequential, losses because courts presume that the owner values the property exactly as much as the market would value the property, regardless of how the owner uses the property.\textsuperscript{25} Therefore, courts generally presume that the diminution in market value of injured property is equal to the extent of direct injury to a landowner.\textsuperscript{26} The market diminution damage award has the simple effect of restoring the total personal net worth of the landowner to its pre-tort level.\textsuperscript{27}


\textsuperscript{24} E.g., Jackson v. Bohlin, 75 So. 697, 700 (Ala. Ct. App. 1917); Bangert v. Osceola County, 456 N.W.2d 183, 190 (Iowa 1990); Hopkins v. American Pneumatic Serv. Co., 80 N.E. 624, 624 (Mass. 1907); Balloon v. Carl Bolander & Sons Co., 235 N.W.2d 613, 614 (Minn. 1975); Hueston v. Mississippi & Rum River Boom Co., 79 N.W. 92, 93 (Minn. 1899).

\textsuperscript{25} See BFP v. Resolution Trust Corp., ___ U.S. ___, 114 S. Ct. 1757, 1761 (1994) (indicating that the value of a piece of property to its owner is equal to its market value); United States v. North Carolina Granite Corp., 288 F.2d 232, 234 (4th Cir. 1961) (finding that actual value of goods is the price of the goods at the point of sale); State Highway Comm'n v. Vaughan, 470 P.2d 967, 970 (Mont. 1970) (holding that "actual value" means "market value" in statute requiring that property owners in eminent domain proceedings be compensated in the amount of the actual value of the property taken); \textit{Black's Law Dictionary} 35 (6th ed. 1990) ("actual value, 'market value, 'fair market value,' 'just compensation' and the like may be used as convertible terms").

\textsuperscript{26} See North Carolina Granite Corp., 288 F.2d at 234; Vaughan, 470 P.2d at 970. See also supra note 24 (citing cases that hold that the standard measure of damages for injury to land is the diminution in market value).

\textsuperscript{27} While this restores the net worth of the landowner to its pre-tort level, the component parts of this net worth now include a lower amount of equity in land and a higher amount of liquid assets, such as money, as the result of a money damages award.
However, the market diminution measure of damages is not always used because it sometimes does not provide full compensation for a landowner’s losses. Courts recognize that the right of landowners to use their property according to their own tastes and wishes, and not necessarily according to the property’s highest and best economic use, is a significant right worthy of compensation. The 1902 Wisconsin Supreme Court case of Gilman v. Brown recognized the significance of this right, stating:

[i]t must not be forgotten that recovery in trespass is always based upon a wrongful invasion of the plaintiff’s rights, and that the rule of damages adopted should be such as to more carefully guard against failure of compensation to the injured party than against possible overcharge upon the wrongdoer. An owner of real estate has the right to enjoy it according to his own taste and wishes, and the arrangement of buildings, shade trees, fruit trees, and the like may be very important to him, may be the result of large expense, and the modification thereof may be an injury to his convenience and comfort in the use of his premises which fairly ought to be substantially compensated, and yet the arrangement so selected by him might be no considerable enhancement of the sale value of the premises, it might not meet the taste of others, and the disturbance of that arrangement, therefore, might not impair the general market value. Hence it is apparent that while the owner may be deprived of something valuable to him, for which he would be willing to pay substantial sums of money, yet he might be wholly unable to prove any considerable damages merely in the form of depreciation of the market value of the land. The owner of property has a right to hold it for his own use as well as to hold it for sale, and if he has elected the former he should be compensated for an injury wrongfully done to him in that respect, although that injury might be unappreciable to one holding the same premises for purposes of sale.

Therefore, damages equal to the cost of restoration enabling the landowner to return the injured property to its pre-tort condition are justified in some cases.

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29 E.g., Watson v. Jones, 36 So.2d 788, 789 (Fla. 1948); Gilman v. Brown, 91 N.W. 227, 229 (Wisc. 1902).
30 Gilman, 91 N.W. at 229.
Any award of restoration damages must be reasonable under the circumstances.\textsuperscript{31} Specifically, there exists a principle that prohibits damage awards that are economically wasteful or constitute a windfall to the injured landowner.\textsuperscript{32} In general, restoration damages are considered reasonable if they are less than or do not significantly exceed the diminution in market value.\textsuperscript{33} In determining the reasonableness of restoration costs, courts consider the inability to assess property values exactly in some situations.\textsuperscript{34} This reasonableness condition mirrors the principle purpose of tort damages—to compensate a plaintiff fully for injury while avoiding economically wasteful awards.\textsuperscript{35} Therefore, as a general rule, a plaintiff in a tort action for injury to real property cannot enhance recovery by insisting on restoration damages that significantly exceed the diminution in the market value of the property.\textsuperscript{36}

Historically, courts have awarded restoration damages for injury to real property in cases where the cost of restoration was less than the diminution in market value,\textsuperscript{37} or where the cost of restoration was

\textsuperscript{31} \textsc{Restatement (Second) of Torts} § 929(1)(a) (1977).

\textsuperscript{32} See \textit{Board of County Comm'rs v. Slovcek}, 723 P.2d 1309, 1317 (Colo. 1986) (en banc); \textsc{DoBBS}, \textit{supra} note 1, § 5.2(1), at 714–15.

\textsuperscript{33} See \textsc{Restatement (Second) of Torts} § 929 cmt.b (1977).


\textsuperscript{35} See \textit{McKinney v. Christiana Community Builders}, 280 Cal. Rptr. 242, 245 (Cal. Ct. App. 1991) (“Courts normally will not award costs of repair which exceed diminution in value because the basic objective of compensatory damages is to make an injured party whole, but no more than that.”); \textit{Slovcek}, 723 P.2d at 1317. See also \textit{supra} note 22 and accompanying text (outlining purpose of tort damages).

\textsuperscript{36} \textit{E.g.}, \textit{Orndorff v. Christiana Community Builders}, 266 Cal. Rptr. 193, 197 (Cal. Ct. App. 1990) (“[T]he owner of a unique home or automobile cannot insist on its reconstruction where the cost to do so far exceeds the value of the home or automobile. Nor are repair costs appropriate where only slight damage has occurred and the cost of repair is far in excess of the loss in value.”); \textit{Newsome v. Billips}, 671 S.W.2d 252, 255 (Ky. Ct. App. 1984) (“[R]epair is unreasonable when its cost exceeds the difference in the before and after values [of the injured property].”); \textit{Enid & Anadarko Ry. v. Wiley}, 78 P.96, 99 (Okla. 1904) (“[T]he rule of avoidable consequences [requires] that . . . plaintiff[s] shall diminish the loss as much as possible.”).

\textsuperscript{37} Jackson v. Bohlin, 75 So. 697, 700 (Ala. Ct. App. 1917) (stating that cost of restoration is appropriate where “the cost of restoring the property is less than the depreciation in the value of the land”); \textit{City of Globe v. Rabogliatti}, 210 P. 685, 688 (Ariz. 1922); \textit{Salstrom v. Orleans Bar Gold Mining Co.}, 96 P. 292, 295–96 (Cal. 1908); \textit{City of Covington v. Berry}, 87 S.W. 317, 318–19 (Ky. 1905); \textit{Wright v. City of Butte}, 210 P. 78, 80 (Mont. 1922); \textit{Smith v. City of Kansas City}, 30 S.W. 314, 316 (Mo. 1895); \textit{Barberi v. Bochinsky}, 128 A.2d 1, 4 (N.J. Super. Ct. App. Div. 1956) (finding that landowner is entitled to restoration “so long as such cost is not in excess of the diminution in value of the land resulting from the wrong”); \textit{Hartshorn v. Chaddock}, 31 N.E. 997, 998 (N.Y. 1892) (“when . . . the cost of restoring the land to its former condition, is less than what is shown to be the diminution in the market value of the whole property by reason of the
considered strong evidence of diminution in market value.\textsuperscript{38} In such cases, courts have reasoned that restoration damages were reasonable and appropriate.\textsuperscript{39} Courts also have awarded restoration damages in cases where the property was of such a specialized nature that the property's market value was not ascertainable, specifically because the property was not of a type typically bought or sold.\textsuperscript{40}

For example, in \textit{Trinity Church v. John Hancock Mutual Life Insurance Company}, the plaintiff sought restoration damages for injury to its church building in the Back Bay section of Boston.\textsuperscript{41} Excavation for the construction of the adjacent Hancock Tower had undermined the church's foundation.\textsuperscript{42} In awarding the plaintiff a version of restoration damages,\textsuperscript{43} the Massachusetts Supreme Judicial Court noted

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  \item 38 E.g., \textit{Jackson}, 75 So. at 699 (“[T]estimony showing the cost of replacing the fence was admissible for the purpose of shedding light upon the amount of damage plaintiff suffered in the depreciation in the value of his lands.”); \textit{Worthington} v. Roberts, 803 S.W.2d 906, 909–10 (Ark. 1991) (noting, in dictum, that cost of restoration “could possibly be of some help in guiding the jury to determine the difference in the value of the land immediately before and immediately after the [injury]”); \textit{Bangert} v. Osceola County, 456 N.W.2d 183, 190–91 (Iowa 1990) (finding evidence of the value of injured trees “competent as indicative of the diminution in the value of the land”); \textit{Delay Mfg. Co. v. Carey}, 13 A.2d 152, 153 (N.H. 1940); \textit{Clay v. Jersey City}, 181 A.2d 545, 549 (N.J. Super. Ct. Ch. Div. 1962) (stating that reasonable restoration costs may be considered to determine extent of market diminution), aff’d, 200 A.2d 787 (N.J. Super. Ct. App. Div.), cert. denied, 205 A.2d 717 (N.J. 1964); see Stratford Theater, Inc. v. Town of Stratford, 101 A.2d 279, 280–81 (Conn. 1953) (finding cost of repairing a small sewer line to abate a nuisance indicative of diminution in market value); \textit{Tortolano v. DiFilippo}, 349 A.2d 48, 52 (R.I. 1975) (finding restoration damages appropriate for damage to residential property, but denying inflation adjustment that would bring total damages to current cost of restoration).
  \item 39 E.g., \textit{Jackson}, 75 So. at 699; \textit{City of Globe}, 210 P. at 688; \textit{Worthington}, 803 S.W.2d at 909–10; \textit{Salstrom}, 96 P. at 295–96; \textit{Bangert}, 456 N.W.2d at 190–91; \textit{City of Covington}, 87 S.W. at 318–19; \textit{Wright}, 210 P. at 80; \textit{Smith}, 30 S.W. at 316; \textit{Delay Mfg. Co.}, 13 A.2d at 153; \textit{Barberi}, 128 A.2d at 4; \textit{Clay}, 181 A.2d at 549; \textit{Hartshorn}, 31 N.E. at 998; \textit{Enid & Anadarko Ry.}, 78 P. at 100; \textit{City of Fort Worth}, 22 S.W. at 1060; see \textit{Stratford Theater, Inc.}, 101 A.2d at 280–81; \textit{Newsome}, 671 S.W.2d at 255; \textit{Tortolano}, 349 A.2d at 52.
  \item 41 \textit{Id.} at 533.
  \item 42 \textit{Id.} at 534.
  \item 43 \textit{Id.} at 536–37. The court specifically awarded damages equal to a percentage of the depre-
that "[f]or certain categories of property, termed 'special purpose property' (such as the property of nonprofit, charitable, or religious organizations), there will not generally be an active market from which the diminution in market value may be determined."\(^{44}\) Thus, the court could not measure damages on the basis of diminution in market value.\(^{45}\)

In addition, restoration damages have been awarded for injury to property caused by willful or malicious conduct on the part of the defendant.\(^{46}\) Some courts also have stated that cases where there is no diminution, or even an increase in market value, are unique situations justifying restoration damages because otherwise the landowner would be left without a remedy.\(^{47}\) On closer examination, however, this particular exception is really just a situational application of the personal reasons exception discussed in the following section.\(^{48}\) In such cases, courts appear to be making an implicit determination that to deny restoration damages for a tort inflicted on a property, a plaintiff would not be compensated fully for the direct loss incurred.\(^{49}\) In other words, the injury resulted in loss of value idiosyncratic to the landowner and thus not recognized by the market. Without this implicit finding of idiosyncratic value, an award of restoration damages in such a case would go beyond simply compensating a plaintiff for the direct loss incurred, as a landowner who holds property solely for economic gain has experienced no direct loss if there was no diminution in market value of the property.\(^{50}\) Of course, recovery for any consequential damages such as annoyance and discomfort or loss

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\(^{44}\) Id. at 535–36.

\(^{45}\) \textit{Trinity Church}, 502 N.E.2d at 536.

\(^{46}\) \textit{See} Raide v. Dollar, 203 P. 469, 471 (Idaho 1921) (awarding cost of restoring meadow damaged by agents of defendant while retrieving logs owned by defendant deposited on meadow by a flood); Marks v. Culmer, 24 P. 528, 528 (Utah 1890) (awarding cost of rebuilding a dwelling because the defendants had "unlawfully, with force and arms, and with a multitude of people, broke and entered ... and forcibly ejected said plaintiff ... and broke the doors and windows of, and tore down and destroyed [the property]").


\(^{48}\) \textit{See infra} section II.B.


\(^{50}\) \textit{See supra} notes 24–27 and accompanying text.
of use would still be available, but are a separate issue not discussed in this Comment.  

B. The Development of the Personal Reasons Exception and Section 929 of the Restatement (Second) of Torts

Although as a general rule damages for direct injury to real property may not significantly exceed diminution in market value, an exception has evolved in cases where a landowner has personal reasons for desiring restoration. Section 929 of the Restatement (Second) of Torts (Section 929) attests to this development and in many cases is cited as persuasive authority for the personal reasons exception. Section 929 echoes the general rule that the standard measure of damages for direct injury to real property is the diminution in market value. In the alternative, Section 929 allows for recovery of restoration damages that are not “disproportionate” to the diminution in market value. However, Comment b to Section 929 outlines the personal reasons exception to the above general rule and allows for restoration damages that significantly exceed the diminution in market value.

During the past century, courts increasingly have awarded restoration damages under the personal reasons exception despite the fact that the diminution in market value is known and is significantly less than the cost of restoration. These courts have justified such awards,

51 See supra notes 4-6 and accompanying text.
52 Restatement (Second) of Torts § 929 (1977); see, e.g., Dixon v. City of Phoenix, 845 P.2d 1107, 1116 (Ariz. Ct. App. 1992); Henniger, 162 Cal. Rptr. at 106-07; Board of County Comm'rs v. Slovek, 723 P.2d 1309, 1315 (Colo. 1986).
53 See Restatement (Second) of Torts § 929(1)(a) (1977). The full text of Section 929 is as follows:

Harm to Land from Past Invasions

(1) If one is entitled to a judgement for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for

(a) the difference between the value of the land before the harm and the value after the harm, or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred,

(b) the loss of use of the land, and

(c) discomfort and annoyance to him as an occupant.

(2) If a thing attached to the land but severable from it is damaged, he may at his election recover the loss in value to the thing instead of the damage to the land as a whole.

Id. § 929.
54 See id. § 929 cmt.b.
55 See id.
in general, by noting that in certain cases market diminution damages will fail the primary objective of tort damages—to compensate an injured landowner fully—when the landowner has significant personal reasons for desiring that the property be restored. Because the actual value of a parcel of real estate to its owner is presumed to be equal to its market value, such courts implicitly recognize loss of value idiosyncratic to the particular landowner as compensable through an award of restoration damages.

For example, in *Worthington v. Roberts*, the plaintiff landowners sued to recover restoration damages for injury to trees surrounding their residence. Herbicide sprayed on an adjacent field during a wind storm had injured trees on the plaintiffs' property. At trial, the plaintiffs testified that they had purchased their property in large part because of the number and location of trees on the plot and that they had located their residence on the plot so as to displace as few

(holding reasonable $243,539.95 in restoration damages in light of diminution in market value of $171,000); Henniger v. Dunn, 162 Cal. Rptr. 104, 109 (Cal. Ct. App. 1980) (stating that restoration cost of $19,610 as damages for injury that increased value of land by $5,000 may be found reasonable upon remand to trial court); Escamilla v. ASARCO, Inc., in *Plater et al.*, *supra* note 6, at 41 (awarding $20,125,000 in restoration damages, for a diminution in market value injury of $4,159,000 to residential property with a pre-tort value of $17,500,000).

The *Escamilla* case was settled out of court prior to appeal. *Plater et al.*, *supra* note 6, at 50. The settlement included an increased “annoyance and discomfort” award of $11,000,000 and an agreement by ASARCO itself to restore the land. *Id.*

57 Roark v. Musgrave, 355 N.E.2d 91, 94 (Ill. App. Ct. 1976) (stating that restoration damages appropriate where landowner held land for use, not sale, according to his tastes and wishes even if market value is not diminished); Huber v. Serpico, 176 A.2d 805, 813 (N.J. Super. Ct. App. Div. 1962) (recognizing that market diminution damages often will fail to compensate landowner for injury to property with “peculiar value to the owner”); Denoyer v. Lamb, 490 N.E.2d 615, 619 (Ohio Ct. App. 1984) (“If an owner is to be fully compensated for temporary (repairable) damage to his property, then what he expects from the use of it is a vital factor.”); Thatcher v. Lane Constr. Co., 254 N.E.2d 703, 708 (Ohio Ct. App. 1970) (“Where the presence of trees is essential to the planned use of property for a homesite in accordance with the tastes and wishes of its owner, where not unreasonable . . . the owner may be awarded as damages the fair cost of restoring his land . . . without necessary limitation to diminution in market value of such land.”); Gilman v. Brown, 91 N.W. 227, 229 (Wisc. 1902); Anderson v. Bauer, 681 P.2d 1316, 1324 (Wyo. 1984) (recognizing personal reasons exception in Wyoming); cf. Elowsky v. Gulf Power Co., 172 So.2d 643, 645 (Fla. Ct. App. 1965) (awarding landowner who worked the night shift damages for “loss of enjoyment,” but not specifically cost of restoration, of tree which had shaded his bedroom window, negligently cut-down by defendant).


A large number of restoration damages cases decided under the personal reasons exception have involved injury to trees or shrubbery. See generally Kristine C. Karnezis, Annotation, *Measure of Damages for Injury to or Destruction of Shade or Ornamental Tree or Shrub*, 95 A.L.R.3d 508 (1979).

59 *Worthington*, 803 S.W.2d at 907-08.
trees as possible. The Arkansas Supreme Court upheld jury instructions allowing consideration of the cost of replacement or repair of the trees when determining the amount of the damage award. The court found such consideration proper under the personal reasons exception because of the idiosyncratic value that the plaintiffs attached to the injured trees.

Likewise, Arizona courts, in certain cases, have allowed for recovery of restoration damages that exceed diminution in market value. In Dixon v. City of Phoenix, for example, construction of a city waterline had destroyed vegetation on property that the plaintiff had planned to use as a homesite. The Arizona Court of Appeals held that because the destroyed vegetation "had intrinsic value to the owners for aesthetic reasons," an award of reasonable restoration costs was appropriate.

In Ohio, courts have awarded restoration damages in cases where "the owner intends to use the [injured] property for a residence or for recreation or for both, according to his personal tastes and wishes ..." For instance, in Denoyer v. Lamb, the defendant had destroyed trees on parcels on which the plaintiffs intended to build residences. The trial court had excluded testimony regarding the cost of cleanup and restoration of the property. Thus, the jury awarded damages based on a stipulation as to the "timber" value of the destroyed trees. The Ohio Court of Appeals reversed and remanded the case, ruling that testimony regarding the cost of restoration was excluded wrongfully because the plaintiffs had personal reasons for desiring restoration.

In general, only individuals may recover restoration damages under the personal reasons exception. However, entities not motivated by

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60 Id. at 907.
61 Id. at 910.
62 Id.
64 Id. at 1110.
65 Id. at 1116–17.
67 Denoyer, 490 N.E.2d at 617.
68 Id.
69 Id. at 618.
70 Id. at 620.
71 See Regal Constr. Co. v. West Lantham Hills Citizen’s Ass’n, 260 A.2d 82, 86 (Md. 1970) (suggesting that restoration damages awards under the personal reasons exception are limited to actions by individuals).
economic gain, such as churches and governments, also have qualified for restoration damages awards under the exception. 72

When awarding restoration damages that significantly exceed the diminution in market value, courts often have cited favorably to Section 929, specifically Comment b to subsection (1), clause (a).73 Comment b qualifies the language of Section 929 that allows, in appropriate cases, for restoration damages "that have been or may reasonably be incurred."74 Comment b states, _inter alia:_

if a building such as a homestead is used for a purpose personal to the owner, the damages ordinarily include an amount for repairs, even though this might be greater than the entire value of the building. So, when a garden has been maintained in a city in connection with a dwelling house, the owner is entitled to recover the expense of putting the garden in its original condition even though the market value of the premises has not been decreased by the defendant's invasion.75

Although Comment b outlines situations that may qualify as "appropriate cases" under the personal reasons exception, it sheds little light on what magnitude of damages will qualify as reasonable under this exception.76

Choosing figures against which to compare the cost of restoration when determining reasonableness is a more specific problem courts face. In other words, courts must determine the objective dollar amount

72 See United States v. Sullivan, 1 F.3d 1191, 1195–96 (11th Cir. 1993) (holding, under Georgia law, that cost of replacing wrongfully destroyed trees was the only appropriate measure of damages where the trees were on federally owned parkland as part of a larger ecosystem held, not for sale, but for the benefit of the general public); Davey Compressor Co. v. City of Delray Beach, 639 So.2d 595, 596–97 (Fla. 1994) (allowing recovery of restoration damages by city government under the personal reasons exception for injury to city water supply where alternative water sources were both speculative and more costly); Roman Catholic Church v. Louisiana Gas Serv. Co., 618 So.2d 874, 879 (La. 1993) (holding that restoration damages under the personal reasons exception were appropriate where church held the injured property not for profit, but for purpose of providing low-income housing); Rector of St. Christopher's Episcopal Church v. C.S. McCrossan, Inc., 235 N.W.2d 609, 610 (Minn. 1975) (en banc) (finding restoration damages for negligent destruction of trees appropriate under personal reasons exception where church maintained the trees for aesthetic purposes).


74 See RESTATEMENT (SECOND) OF TORTS § 929(1)(a) & cmt.b (1977); cf. Newsome v. Billips, 671 S.W.2d 252, 255 (Ky. Ct. App. 1984) (holding in a case not under the personal reasons exception that "[t]he option for restoration is nevertheless limited by what is 'reasonable'").


76 See id.
benchmark to be used for this comparison. Possibilities include the diminution in market value (the quantifiable injury), the pre-tort market value of the entire parcel, or both.77

Another problem courts face is deciding whether a landowner actually must spend a restoration damages award on repairs. Section 929 and its comments do not state specifically that a restoration damages award must be used for restoration or even be accompanied by a determination that the award is likely to be spent on restoration.78 Do courts have to make such a determination? If not, is there potential for an unjustified economic windfall in favor of a landowner at the expense of a tort defendant?79

A restoration damages award may appear fair and reasonable in the typical case involving a relatively minor injury to real property used for homestead80 purposes and not for simple economic gain, because landowners’ right to use their property according to their tastes and wishes is a significant right worthy of protection.81 Today, however, this line of reasoning has been used to justify restoration damages for environmental cleanup costs that greatly exceed the diminution in market value of the real property.82

III. When are Restoration Damages That Exceed the Diminution in Market Value Justified Under the Personal Reasons Exception?83

Although no state has rejected the personal reasons exception specifically, the determination of when an award of restoration damages is proper is a subject of significant controversy.84 All states that have considered this matter utilize some variation of a three-part test to determine whether a landowner qualifies for the personal reasons exception.85 This test essentially boils down to the following three

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77 See infra section III.C.
78 See RESTATEMENT (SECOND) OF TORTS § 929(1)(a) & cmt.b (1977).
79 See infra section III.B.
80 In this Comment, “homestead” means real property used as the personal residence of the owner.
81 See supra notes 28–30 and accompanying text.
82 Escamilla v. ASARCO, Inc., in PLATER ET AL., supra note 6, at 41.
83 This section of this Comment owes much to a law review article on construction contract damages, a section of which surveyed real property injury cases decided under Section 929. Carol Chomsky, Of Spoil Pits and Swimming Pools: Reconsidering the Measure of Damages for Construction Contracts, 75 MINN. L. REV. 1445, 1480–90 (1991).
84 See infra sections III.A–III.C.
85 Orndorff v. Christiana Community Builders, 266 Cal. Rptr. 193, 196 (Cal. Ct. App. 1990);
inquiries: 1) Does the landowner have personal reasons for desiring
restoration? 2) Is an award of restoration damages likely to be spent
on restoration? 3) Is the cost of restoration reasonable? However,
states vary significantly in the application of this test, specifically as
to the evidence required to show the existence of personal reasons,
the likelihood that damages will be spent on restoration, and the
method for determining the reasonableness of a restoration damages
award.

A. When Does a Landowner Qualify for the
Personal Reasons Exception?

The only use of land mentioned in the comments to Section 929
qualifying a landowner for the personal reasons exception is use for
homestead purposes. Injury to real property used for commercial
purposes generally cannot qualify for restoration damages under the
personal reasons exception. In actual cases, homestead use is the
primary use of real property that supports the idiosyncratic value
that justifies landowners receiving restoration damages under the
personal reasons exception. In some cases, planned future use as a
homesite or use for personal recreational purposes has justified res­

toration damages under the personal reasons exception.
However, the evidentiary burden placed on landowners to show the existence

Moulton v. Groveton Papers Co., 323 A.2d 906, 911 (N.H. 1974); see, e.g., Dixon v. City of Phoenix,
1991); Board of County Comm’rs v. Slopek, 723 P.2d 1309, 1316-17 (Colo. 1986).

86 Orndorff, 266 Cal. Rptr. at 196; Moulton, 323 A.2d at 911; see, e.g., Dixon, 845 P.2d at 1117;
Worthington, 803 S.W.2d at 910; Slopek, 723 P.2d at 1316-17.

87 See infra sections III.A-III.C.


89 See, e.g., Clark v. J.W. Conner & Sons, 441 So.2d 674, 676 (Fla. Ct. App. 1983) (holding that
intention to build residential duplexes on injured real property does not qualify as a personal
reason), review denied, 449 So.2d 264 (Fla. 1984); Reeser v. Weaver Bros., 605 N.E.2d 1271, 1278
(Ohio Ct. App. 1992) (denying restoration damages for injury to real property used for commercial
granting restoration damages, without separate determination of diminution in market value,
because of landowner’s plans to use the property both for profit and as an arboretum to benefit
the general public).

90 See, e.g., Worthington, 803 S.W.2d at 910; Orndorff, 266 Cal. Rptr. at 196; Moulton, 323 A.2d
at 911. But see McKinney v. Christiana Community Builders, 280 Cal. Rptr. 242, 246 (Cal. Ct.

91 Board of County Comm’rs v. Slopek, 723 P.2d 1309, 1315 n.5 (Colo. 1986) (en banc); Samson
Constr. Co. v. Brusowankin, 147 A.2d 430, 437 (Md. 1958) (“It would seem to be enough [to
qualify for restoration damages] if the land injured is suitable and available for a homesite, and
of idiosyncratic value justifying an award of restoration damages under the personal reasons exception varies from state to state.

To qualify for the personal reasons exception, several states require that landowners make an evidentiary showing, beyond simple personal use, that the value of their property is enhanced by idiosyncratic value. For example, in *Henniger v. Dunn*, the defendant had bulldozed a road seven-tenths of a mile onto the plaintiff's property, destroying 225 non-ornamental trees and vegetative undergrowth. The injury was to an area of unimproved land that was part of a larger plot that the owner used for homestead purposes. As a result of the new road, the entire parcel actually increased in market value from $179,000 to $184,000. The plaintiff sued to recover the cost of restoration and presented evidence that it would cost more than $221,000 to restore the lost trees and vegetative undergrowth. Alternatively,
the plaintiff presented evidence that the cost of restoring the vegetative undergrowth alone would cost $19,610.97

In its ruling in Henniger, the California Court of Appeal, First District, Division 4 stated that the measure of damages for injury to land generally is the lesser of the cost of restoration or the diminution in market value.98 The court did note, however, that other jurisdictions have awarded restoration costs exceeding the diminution in market value, even if there is no diminution but an appreciation in value, if "there is a reason personal to the owner for restoring the original condition [of the property]."99 Thus, the court required a showing that the property is enhanced by idiosyncratic value in order to qualify for restoration damages.100 The court outlined a three-part test to determine whether to award restoration damages in a particular case.101 The test first requires the landowner to present evidence that the landowner has personal reasons for desiring restoration.102 Next, a court must determine whether a damage award will be used for restoration, and whether the cost of restoration is reasonable under the circumstances.103

The California Court of Appeal, Fourth District, Division 1 recently applied this test in Orndorff v. Christiana Community Builders104 and McKinney v. Christiana Community Builders.105 These cases each involved injury to homestead property developed by the defendant as part of larger subdivisions.106 Despite the many similarities in the two cases,107 the court held that the plaintiffs in Orndorff were eligible for restoration damages under the personal reasons exception, while the McKinney plaintiffs were not.108 The plaintiffs in Orndorff tes-

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97 See id.
98 Id.
99 Henniger, 162 Cal. Rptr. at 107 (quoting RESTATEMENT (SECOND) OF TORTS § 929 cmt.b (1977)).
100 See id. at 109.
101 See id.
102 See id.
103 See id. See also infra sections III.B & III.C for further discussion of the latter two inquiries of this test.
105 280 Cal. Rptr. 242 (Cal. Ct. App. 1991). McKinney v. Christiana Community Builders was not officially reported in California Appellate Reports and, therefore, may not be cited according to the California Rules of Court. See CAL. R. CT. 976, 977, 979.
106 McKinney, 280 Cal. Rptr. at 243; see Orndorff, 266 Cal. Rptr. at 194.
107 Including the fact that both sets of plaintiffs were represented by the same law firm. See McKinney, 280 Cal. Rptr. at 243; Orndorff, 266 Cal. Rptr. at 194.
108 McKinney, 280 Cal. Rptr. at 246; Orndorff, 266 Cal. Rptr. at 196.
tified that they had purchased the home because of adjacent open space and also expressed a desire to restore their land and continue to live in their home.109 The court in Orndorff stated that to qualify for the personal reasons exception, "all that is required is some personal use by [the owner] and a bona fide desire to repair or restore."110 The plaintiffs in Orndorff satisfied this requirement.111

In McKinney, by contrast, the plaintiffs did not present substantial evidence to qualify them for the personal reasons exception justifying an award of restoration damages.112 In fact, there was evidence that the plaintiffs' primary purpose for holding the property, beyond use as a residence, was to realize profits from rising property values, thus eliminating the possibility of significant compensable idiosyncratic value.113 In denying restoration damages in McKinney, the court implicitly determined that market diminution damages compensated the plaintiffs fully for the injury to their land and that the property was not enhanced by idiosyncratic value.114

In some states, the use of real property for homestead purposes, without any additional evidentiary showing of idiosyncratic value, appears to be sufficient to trigger the personal reasons exception.115 This line of cases switches the presumption from one that the market value equals the actual value of the property to the owner, to one that property used for homestead purposes is enhanced by idiosyncratic value.116 In other words, the cases switch the presumption to one that the actual value of the property to the owner exceeds its market value.

109 Orndorff, 266 Cal. Rptr. at 194–95.
110 Id. at 196.
111 Id.
112 McKinney, 280 Cal. Rptr. at 246.
113 Id. at 243.
114 See id. at 246.
115 See Escamilla v. ASARCO, Inc., in PLATER ET AL., supra note 6, at 44 (Colorado case); Matich v. Gerdes, 550 N.E.2d 622, 626 (Ill. App. Ct. 1990) ("[W]hen the damaged property gains its principal value from personal use, rather than that for pecuniary gain, the loss in market value is a poor gauge of damage."); Myers v. Arnold, 403 N.E.2d 316, 321 (Ill. App. Ct. 1980) (finding that where real property is held for personal use, not economic gain, reasonable restoration costs are appropriate); Zosky v. Couri, 397 N.E.2d 170, 171 (Ill. App. Ct. 1979) (holding that where defendant's truck left tire ruts on plaintiff's front lawn, restoration damages award is justified); Denoyer v. Lamb, 490 N.E.2d 615, 618 (Ohio Ct. App. 1984) (holding that "when the owner intends to use the property for a residence or for both, according to his personal tastes and wishes, the owner is not limited to the diminution in value").
116 See Escamilla v. ASARCO, Inc., in PLATER ET AL., supra note 6, at 44; Matich, 550 N.E.2d at 626; Myers, 403 N.E.2d at 321; Zosky, 397 N.E.2d at 171; Denoyer, 490 N.E.2d at 618.
Illustrative of this line of reasoning is *Escamilla v. ASARCO, Inc.*, a Colorado class action suit brought by 567 neighborhood residents against a nearby industrial plant.\(^{117}\) Pollution from the plant caused soil in the neighborhood to be contaminated with arsenic and cadmium.\(^{118}\) In awarding restoration damages in *Escamilla*, the Colorado District Court for the City and County of Denver discussed no evidence beyond simple residential use to suggest that the property involved had any idiosyncratic value to the landowners individually or as a group.\(^{119}\) The *Escamilla* court applied the restoration damages rules defined by the Colorado Supreme Court in two prior cases.\(^{120}\) The test expressed in *Board of County Commissioners v. Slovek* and *Zwick v. Simpson* does not explicitly require that a landowner show that injured property used for homestead purposes is enhanced by idiosyncratic value to qualify for restoration damages.\(^{121}\) Thus, Colorado courts may presume that such a landowner qualifies for the personal reasons exception without any further evidence.

**B. Must an Award of Restoration Damages Be Spent on Restoration?**

The second inquiry of the standard three-part test for the personal reasons exception is whether a restoration damages award is likely to be spent on restoration.\(^{122}\) The text and comments of Section 929, upon which an award of restoration damages under the personal reasons exception often relies, do not explicitly state whether such an award must be spent on restoration.\(^{123}\) However, one can read Section 929 to require a finding that restoration damages are likely to be spent

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\(^{117}\) See *Escamilla v. ASARCO, Inc.*, *in Plater et al.*, supra note 6, at 43–44; *Colorado Court to Decide Amount of Damages After City Residents Prevail Against ASARCO*, 23 Env't Rep. (BNA), No. 48, at 3052 (Mar. 26, 1993).

\(^{118}\) See *Escamilla v. ASARCO, Inc.*, *in Plater et al.*, supra note 6, at 41.

\(^{119}\) See *id.* at 43–44. Another problem not addressed by the court in *Escamilla* is that, even presuming the presence of idiosyncratic value on the part of owners who resided in these residences, the personal reasons exception under Section 929 presumably would not have applied to any of the 567 class members who may have owned property for rental income purposes in the injured area. *See Newsome v. Billips*, 671 S.W.2d 252, 255 (Ky. Ct. App. 1984) (denying restoration damages to owner of rental property not held for personal use).

\(^{120}\) See *Escamilla v. ASARCO, Inc.*, *in Plater et al.*, supra note 6, at 42–44; *see Board of County Comm'rs v. Slovek*, 723 P.2d 1309, 1315–16 (Colo. 1986) (en banc); *Zwick v. Simpson*, 572 P.2d 133, 134 (Colo. 1977).

\(^{121}\) *See Slovek*, 723 P.2d at 1315–16; *Zwick*, 572 P.2d at 134.

\(^{122}\) See *supra* note 86 and accompanying text.

\(^{123}\) *See Restatement (Second) of Torts § 929(1)(a) & cmt.b* (1977).
on restoration as the language of the text and comments refers to "costs for repair." In addition, nearly every court that has considered the matter will not award restoration damages if there is evidence that the landowner will not use the damages for restoration.

Many courts adhere to this general position and require evidence that restoration damages are likely to be spent on restoration before a plaintiff can qualify for restoration damages under the personal reasons exception. If such enhanced damages were not likely to be spent on restoration, courts reason, restoration damages would be an unjustified windfall to the landowner at the defendant's expense.

For example, California courts apparently require that a landowner present evidence that a restoration damages award will be spent on restoration. Illustrative of this rule are the California cases of Orndorff v. Christiana Community Builders and McKinney v. Christiana Community Builders. In Orndorff, the court found evidence that restoration was likely and awarded restoration damages under

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124 See id.

125 These courts are making an implicit determination that such a landowner has no claim to damages equal to the cost of restoration, only a claim to the monetary means to effect restoration of the land. See Puerto Rico v. SS Zoe Colocotroni, 628 F.2d 652, 676-77 (1st Cir. 1980) (denying $5.5 million in restoration damages based on the replacement cost for 92 million sea creatures destroyed in an oil spill because the plaintiff did not contemplate actual replacement and, thus, the award would be an unjustified windfall), cert. denied, 450 U.S. 912 (1981); McKinney v. Christiana Community Builders, 280 Cal. Rptr. 242, 245 (Cal. Ct. App. 1991) (denying restoration damages because landowner presented no evidence of personal reasons and there was evidence that the property was held for profit); Zwick v. Simpson, 551 P.2d 216, 218 (Colo. Ct. App. 1976) (finding restoration damages inappropriate because plaintiff already had sold the injured property and, thus, restoration by plaintiff was not possible), aff'd in part and rev'd in part on other grounds, 572 P.2d 133 (Colo. 1977); RESTATEMENT (SECOND) OF TORTS § 929(1)(a) & cmt.b (1977). But see Reliance Ins. Co. v. Armstrong World Indus., 625 A.2d 601, 609 (N.J. Sup. Ct. Law Div. 1993) (stating, in dictum, in an insurance coverage case that a tort claimant who receives restoration damages under Section 929 is not obliged to restore the injured property).

126 SS Zoe Colocotroni, 628 F.2d at 676-77; see Henniger v. Dunn, 162 Cal. Rptr. 104, 109 (Cal. Ct. App. 1980) (stating that landowner qualified for personal reasons exception because there was evidence that restoration was likely to occur). But see Trinity Church v. John Hancock Mut. Life Ins. Co., 502 N.E.2d 532, 535-37 (Mass. 1987) (holding that church was entitled to a percentage of total future reconstruction cost, despite no immediate plans for reconstruction of the church, because injury to the property had hastened the day when reconstruction would be necessary).

127 See SS Zoe Colocotroni, 628 F.2d at 676-77; McKinney, 280 Cal. Rptr. at 245; Zwick, 551 P.2d at 218.


129 McKinney, 280 Cal. Rptr. at 242; Orndorff, 266 Cal. Rptr. at 193.
the personal reasons exception. However, in McKinney, the court found that the property was held primarily for profit and implicitly held that restoration likely would not occur.

Courts in other states also suggest, but do not explicitly state, that they must determine whether restoration damages are likely to be spent on restoration. However, these courts do not discuss whether a party seeking restoration damages must present affirmative evidence that actual restoration is intended. For example, in Colorado, unless there is evidence to the contrary, courts apparently presume that a landowner who qualifies for the personal reasons exception is likely to spend restoration damages on restoration.

C. Upper Limits to an Award of Restoration Damages Under the Personal Reasons Exception

A court will award restoration damages, whether or not under the personal reasons exception, only if the award is reasonable under the circumstances. In a case not under the personal reasons exception, the reasonableness of the cost of restoration is determined by comparison to the diminution in market value. In such a case, the cost of restoration is unreasonable if it significantly exceeds the pre-tort market value of the property, as total diminution in market value can never exceed the pre-tort value. As a result, an award of restoration damages in such a case is subject to an upper limit of the pre-tort market value of the property. Courts reason that it would be unjust to allow landowners to recover damages that exceed the amount they

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130 Orndorff, 266 Cal. Rptr. at 194–96.
131 McKinney, 280 Cal. Rptr. at 243–45.
132 See Board of County Comm’rs v. Slovek, 723 P.2d 1309, 1315 (Colo. 1986) (en banc); Keitges v. VanDermeulen, 483 N.W.2d 137, 143 (Neb. 1992).
133 See Slovek, 723 P.2d at 1315; Keitges, 483 N.W.2d at 143.
135 See supra notes 31–36 & 73–77 and accompanying text.
138 See, e.g., Jackson, 75 So. at 700; Bangert, 456 N.W.2d at 190; Hopkins, 80 N.E. at 624; Baillon, 235 N.W.2d at 614; Hueston, 79 N.W. at 93.
would receive if their property were completely destroyed or taken by eminent domain.\textsuperscript{139}

However, landowners who qualify for the personal reasons exception are not subject to this mechanical upper limit and may recover restoration damages that exceed the pre-tort market value of their property.\textsuperscript{140} Where a landowner qualifies for the personal reasons exception, many states require only that a restoration damages award be reasonable in relation to some objective benchmark associated with the property.\textsuperscript{141} In other words, these states require that restoration damages not unreasonably exceed the chosen objective benchmark. For example, some states require that the cost of restoration be reasonable in relation to the pre-tort market value of the land.\textsuperscript{142} Others utilize the diminution in market value (i.e. the extent of direct injury) as the objective benchmark.\textsuperscript{143} Other states look to both figures when determining the reasonableness of the restoration cost.\textsuperscript{144} Still other states do not explicitly utilize a specific objective benchmark, but simply require that an award be “practical” or “reasonable.”\textsuperscript{145}

Comment b to Section 929, which establishes the personal reasons exception, does not state what, if anything, is the upper limit of a restoration damages award under the exception.\textsuperscript{146} Although there is no stated mechanical limit to a restoration damages award, any award

\textsuperscript{139} See, e.g., Jackson, 75 So. at 700; Bangert, 456 N.W.2d at 190; Hopkins, 80 N.E. at 624; Baillon, 235 N.W.2d at 614; Hueston, 79 N.W. at 93.

\textsuperscript{140} RESTATEMENT (SECOND) OF TORTS § 929 cmt.b (1977).


\textsuperscript{142} See Slovek, 723 P.2d at 1317 (holding that cost of restoration must not be “wholly unreasonable” in relation to pre-tort value); Escamilla v. ASARCO, Inc., in PLATER ET AL., supra note 6, at 45–46; Louisiana Gas Serv. Co., 618 So.2d at 879–80; Keitges, 483 N.W.2d at 143 (“evidence relating to the land's diminution in value has no relevance” to a restoration damages award under the personal reasons exception).

\textsuperscript{143} Dixon, 845 P.2d at 1117; Moulton, 323 A.2d at 911.

\textsuperscript{144} Henniger, 162 Cal. Rptr. at 109.

\textsuperscript{145} Maloof v. United States, 242 F. Supp. 175, 183 (D. Md. 1965) (stating that under the personal reasons exception diminution in market value is “wholly inapplicable” and the measure of damages is simply “the reasonable cost of restoring the property as nearly as reasonably possible to [its pre-tort condition]”); Thatcher v. Lane Constr. Co., 254 N.E.2d 703, 708 (Ohio Ct. App. 1970) (stating that restoration must be “practical” and costs not unreasonable).

\textsuperscript{146} See RESTATEMENT (SECOND) OF TORTS § 929 cmt.b (1977).
is still bound by the language of Section 929 that requires that the cost of restoration be reasonable under the circumstances of the case. Comment b to Section 929 specifically states that if a personal dwelling is injured, an award of restoration damages may exceed the pre-tort market value of the dwelling. Thus, because a restoration damages award under Section 929 always must be reasonable, the personal reasons exception only expands the range of what is reasonable, allowing recovery that significantly exceeds diminution in market value and even the pre-tort market value of the property.

Illustrative of cases that utilize both the pre-tort market value and the extent of injury when determining the reasonableness of the cost of restoration is Henniger v. Dunn. In Henniger, the California Court of Appeal, First District, Division 4, stated that a court may award restoration damages under the personal reasons exception only if such an award is “not unreasonable in relation to [both] the damage inflicted and the value of the land prior to the [injury].” The Henniger court held that the $241,000 cost of restoration was a “manifestly unreasonable expense in relation to the value of the land prior to the trespass [$179,000].” However, the court did not so rule as to the $19,610 cost of restoring the vegetative undergrowth and remanded the case to the trial court to determine if such an award would be reasonable and just.

The California Court of Appeal, Fourth District, Division 1, considered the same issue in the Orndorff case. In that case, the court examined whether restoration damages totaling $243,539.95 were reasonable under the personal reasons exception for a diminution in market value injury of $171,000 to property with a pre-tort market value of $238,500. The court first determined that the total cost of restoration was “well within reason” because the cost was just 2.5% more than the pre-tort market value of the property. The Orndorff

147 See Denoyer v. Lamb, 490 N.E.2d 615, 620 (Ohio Ct. App. 1984) (stating, after a multi-state survey of restoration damages awards under the personal reasons exception, “[a]ll cases, it is to be noted, stress the overall limitation of reasonableness, a concept well established in American jurisprudence”); RESTATEMENT (SECOND) OF TORTS § 929(1)(a) (1977).
149 See Denoyer, 490 N.E.2d at 620; RESTATEMENT (SECOND) OF TORTS § 929 cmt.b (1977).
151 Id. at 109.
152 Id. at 106, 109.
153 Id. at 109.
155 Id.
156 Id. at 197–98.
court then compared the cost of restoration with the diminution in market value injury. The court, however, did not make a numerical comparison between the cost of restoration and the extent of injury. The court simply stated that “where, as here, the damage to a home has deprived it of most of its value, an award of substantial repair costs is appropriate.” Thus, although California courts require that the restoration cost be reasonable in relation to both the pre-tort market value of the property and the diminution in market value, the comparison to the pre-tort market value apparently is the most significant inquiry.

In contrast to California, Colorado courts assess the reasonableness of a restoration damage award only in relation to a property’s pre-tort market value. For example, in Escamilla v. ASARCO, Inc., the injury inflicted diminished the market value of all of the property involved from $17.5 million to $13.4 million—a total diminution of $4.1 million. When considering reasonableness, the Escamilla court only compared the $20 million cost of restoration with the $17.5 million pre-tort market value of the land and did not consider the diminution in market value. The court determined that, based on this single comparison, such an award of restoration damages was reasonable.

On the other hand, Arizona and New Hampshire courts, in cases under the personal reasons exception, utilize diminution in market value as the objective benchmark for determining the reasonableness of a restoration damages award. This is the same benchmark used by all states in real property injury cases not under the personal reasons exception. In Dixon v. City of Phoenix, for example, the Arizona Court of Appeals held that in real property injury cases under the personal reasons exception, restoration damages are recoverable when the “cost [is] not unreasonable in relation to the dam-

157 Id. at 198.
158 Id.
159 Orndorff, 266 Cal. Rptr. at 198.
160 See id.
161 See Board of County Comm’rs v. Slovek, 723 P.2d 1309, 1317 (Colo. 1986) (en banc) (holding that cost of restoration must not be “wholly unreasonable” in relation to pre-tort market value); Escamilla v. ASARCO, Inc., in Plater et al., supra note 6, at 45–46.
162 Escamilla v. ASARCO, Inc., in Plater et al., supra note 6, at 45.
163 Id. at 45–46.
164 Id.
166 See supra notes 24–27 and accompanying text.
Likewise, the New Hampshire Supreme Court specifically has adopted Section 929, allowing for restoration damages under the personal reasons exception and requires that such damages not be "disproportionate to the actual injury." 168

IV. ANALYSIS OF THE VARYING STANDARDS FOR THE AWARD OF RESTORATION DAMAGES UNDER THE PERSONAL REASONS EXCEPTION

A. Of Course I Have Personal Reasons for Desiring a Larger Damages Award. Who Doesn't?

As a threshold test under the personal reasons exception, California requires a landowner to present evidence that the landowner has personal reasons for desiring restoration. 169 This requirement works to provide full compensation for losses while avoiding undue windfall. Essentially, the California approach maintains the standard presumption in real property injury cases that diminution in market value equals the actual extent of direct injury to the landowner. 170 Thus, the actual value of real property to its owner is presumed not to be enhanced by value idiosyncratic to the owner regardless of the owner's use of the property. 171 In California, however, this is a rebuttable presumption. 172 To rebut this presumption, a landowner must present evidence that the landowner has "bona fide" personal reasons for desiring restoration. 173

In contrast, the Colorado approach automatically presumes the existence of idiosyncratic value when real property is used for homestead or personal recreation purposes. 174 Thus, Colorado courts presume that owners of such property possess personal reasons for desiring restoration. 175 In Board of County Commissioners v. Slovek, the Colorado Supreme Court hinted that a tort plaintiff may rebut

167 Dixon, 845 P.2d at 1117.
168 Moulton, 323 A.2d at 911.
170 See id. at 106, 109.
171 See id.
172 See id. at 109.
174 See Board of County Comm’rs v. Slovek, 723 P.2d 1309, 1315 n.5 (Colo. 1986) (en banc); Escamilla v. ASARCO, Inc., in PLATER ET AL., supra note 6, at 44.
175 See Slovek, 723 P.2d at 1315 n.5; Escamilla v. ASARCO, Inc., in PLATER ET AL., supra note 6, at 44.
this presumption, but did not articulate the amount of evidence that would be required.\textsuperscript{176}

The Colorado cases do not provide any justification for switching the presumption that diminution in market value of an injured property is equal to the actual extent of injury to the landowner.\textsuperscript{177} This switch appears unjustified when one considers that existing single-family homes in the United States have an annual turnover rate of approximately 4.35\%.\textsuperscript{178} In other words, one out of every twenty to twenty-five single-family homes is sold each year. A significant portion of these homes presumably is sold on a voluntary basis.\textsuperscript{179} It must be presumed that landowners who voluntarily sell their homestead land were compensated fully by the market price of their property.\textsuperscript{180} Otherwise, a rational voluntary seller would refuse to sell at the current market price. Because the Colorado approach does not provide any reason for switching this presumption, the California approach regarding the applicability of the personal reasons exception appears to be the more rational approach.

B. Trust Me. On What Else Would I Spend My Restoration Damages Award?

As discussed, the second inquiry for the standard three-part test under the personal reasons exception is whether the restoration award is likely to be spent on restoration.\textsuperscript{181} This inquiry goes hand-in-hand with the inquiry into whether the landowner has personal reasons for desiring restoration. Both inquiries work to prevent the possibility of an undue windfall while granting landowners who intend to restore property the means to do so.\textsuperscript{182}

The California approach requires that a landowner present evidence that restoration damages granted under the personal reasons

\textsuperscript{176} See Slovek, 723 P.2d at 1315–16.
\textsuperscript{177} See id.; Escamilla v. ASARCO, Inc., in Plater et al., supra note 6, at 43–44.
\textsuperscript{178} More than 3.2 million existing single-family homes (not new construction) were sold in the United States during 1990. U.S. Bureau of the Census, Statistical Abstract of the United States 732 (1994) (table no. 1208). The total single-family housing stock, including mobile homes, was 73.4 million in 1990. \textit{Id.} at 735 (table no. 1214).
\textsuperscript{179} In this context, voluntary is meant to mean homes sold for reasons other than financial hardship or other immediate necessity. See BFP v. Resolution Trust Corp., ___ U.S. ___, 114 S. Ct. 1757, 1761 (1994). See also \textit{supra} note 9 and accompanying text which relates to \textit{BFP}'s discussion of the relationship between a voluntary sale and market price.
\textsuperscript{180} \textit{BFP}, 114 S. Ct. at 1761.
\textsuperscript{181} See \textit{supra} notes 122–34 and accompanying text.
\textsuperscript{182} See \textit{supra} notes 31–36, 56–57, 126–27 and accompanying text.
exception will be spent on repair. This is not an undue burden when one considers that such a landowner has no claim to damages equal to the cost of restoration, only a claim to the monetary means to effect restoration of the land.

In contrast, the Colorado approach does not appear to require an affirmative showing that restoration damages likely are to be spent on repair. However, the Colorado Supreme Court has acknowledged that an award of restoration damages has the potential to provide an undue windfall to the landowner and that courts must guard against this occurrence. Colorado creates, in effect, a rebuttable presumption that a landowner will spend restoration damages on restoration if that landowner has personal reasons for desiring restoration in the first place. Apparently, the amount by which the cost of restoration exceeds the diminution in market value does not affect this presumption. In *Escamilla v. ASARCO, Inc.*, for example, the Colorado District Court for the City and County of Denver made no inquiry into whether a restoration damages award was likely to be spent on repair. Thus, the *Escamilla* court appears to have adhered to a presumption that such an award was likely to be spent on repair. The *Escamilla* decision granted the injured landowners slightly more than $20 million in restoration damages for an injury that resulted in slightly more than a $4 million diminution in market value. It is questionable whether this was a justifiable award when one considers that if the landowners were to sell their property and simply retain the restoration damages, the landowners would realize a collective windfall of nearly $16 million.

The California approach, which requires a showing that restoration damages are likely to be spent on repair, is a more sound approach than that used in Colorado. The California requirement is not a sig-

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184 *See* supra notes 28–30, 124 and accompanying text.
186 Board of County Commissioners v. Slovek, 723 P.2d 1309, 1317 (Colo. 1986).
187 *See* Zwick, 551 P.2d at 218; *see generally* *Escamilla v. ASARCO, Inc., in* PLATER ET AL., *supra* note 6 (failing to discuss issue).
188 *See generally* *Escamilla v. ASARCO, Inc., in* PLATER ET AL., *supra* note 6 (failing to discuss issue).
189 *See generally id.*
190 *See generally id.*
191 *See* id. at 41. In addition, the order granted the landowners $8 million in consequential damages for "annoyance and discomfort." *Id.*
192 *See* id.
significant evidentiary burden when one considers that landowners have no claim to restoration damages under the personal reasons exception unless the damages are to be spent on restoration. In addition, this simple inquiry has the effect of reducing the likelihood of undue windfall to landowners who recover restoration damages and do not undertake restoration.

C. Everything is Relative, Just Make Sure You Use the Larger Numbers!

The third and most complicated inquiry of the three-part test for the personal reasons exception is the determination of whether a restoration damages award is reasonable under the circumstances. Section 929 states that the reasonableness of a restoration damages award for real property injury cases not under the personal reasons exception must be assessed in relation to the objective benchmark of the diminution in market value. Currently, there are a variety of approaches to the reasonableness determination under the personal reasons exception in different states using different objective benchmarks. Use of different objective benchmarks has the potential of producing dissimilar results in similar situations in different states. A damage award that appears reasonable when compared to one

193 See supra notes 28–30, 124 and accompanying text.
194 See McKinney v. Christiana Community Builders, 280 Cal. Rptr. 242, 246 (Cal. Ct. App. 1991) (denying restoration damages to landowners who presented no evidence of personal reasons or that repairs would be made, and there was evidence that the landowners held the property primarily for economic gain).
195 See supra section III.C.
198 See infra discussion section IV.C (paragraph giving examples of this proposition).
objective benchmark could appear entirely unreasonable when compared to a different objective benchmark.

The California approach requires that the cost of restoration under the personal reasons exception be reasonable in relation to both the diminution in market value and the pre-tort market value of the land. The first requirement, that the cost of restoration be reasonable in relation to the diminution in market value, is the same requirement imposed in cases not under the personal reasons exception. The personal reasons exception simply adjusts the range of what is a reasonable cost of restoration under the circumstances.

The second requirement in California, that the cost of restoration be reasonable in comparison to the pre-tort market value of the property, is troublesome. Pre-tort market value has no relationship to the measurable injury sustained by the landowner (i.e., diminution in market value). Pre-tort market value never is used as an objective benchmark for determining reasonableness in cases not under the personal reasons exception. California courts give no justification for the addition of this objective benchmark under the personal reasons exception, nor do they give any explanation for the relevance of the pre-tort market value of the property in determining reasonableness. In addition, California courts enhance the significance of this second requirement by making it the primary of the two comparisons.

In Orndorff v. Christiana Community Builders, the California Court of Appeal, Fourth District, Division 1, applied the third inquiry of the personal reasons exception—the reasonableness of the award—to a case involving injury to homestead property enhanced by idiosyncratic value. In Orndorff, the court first found the cost of restoration to be reasonable after a numerical comparison with the pre-tort market value of the property. This comparison would have been less significant if followed by a meaningful numerical comparison between the cost of restoration and the diminution in market value. The Ornd-

200 See Restatement (Second) of Torts § 929(1)(a) & cmt.b (1977).
201 See id.
202 See supra notes 24–27 and accompanying text.
203 See Henniger, 162 Cal. Rptr. at 109.
205 Id.
206 Id.
dorff court, however, made only a cursory comparison and simply determined that, in cases of significant injury, substantial restoration damages are justified. 207 This leaves the comparison between the pre-tort market value and the cost of restoration as the only meaningful objective comparison in California—again, a comparison that has no relation to the plaintiff's measurable injury (i.e., diminution in market value). 208

This focus on the pre-tort market value of the property and the relative insignificance of the extent of injury is even more apparent under the Colorado approach. 209 In *Board of County Commissioners v. Slovek*, the Colorado Supreme Court stated that the reasonableness of a restoration damages award under the personal reasons exception must be assessed in relation to the pre-tort market value of the land. 210 The court made no mention of diminution in market value as being a meaningful figure for use as an objective benchmark. 211 The Colorado Supreme Court gave no justification for switching the objective benchmark of the reasonableness inquiry from the diminution in market value to the pre-tort market value of the property. 212

The Colorado District Court for the City and County of Denver applied the *Slovek* rule in *Escamilla v. ASARCO, Inc.* 213 In *Escamilla*, the court determined that a $20 million restoration cost was reasonable in relation to a $17.5 million pre-tort market value of the property. 214 The court made no inquiry into whether the $20 million restoration damages award was reasonable in relation to the approximately $4 million diminution in market value. 215 *Escamilla* is a good example of how this switch in focus of the reasonableness inquiry from diminution in market value to the pre-tort market value of the property has the potential to give dissimilar results in similar situations. Awarding restoration damages that exceed the objective benchmark by 14.29%, as was the case in *Escamilla*, when using pre-tort market value as the benchmark, appears to be reasonable. 216 However, considering

207 Id. at 198.
208 See id. at 197-98.
209 See *Board of County Comm'rs v. Slovek*, 723 P.2d 1309, 1317 (Colo. 1986) (en banc);
*Escamilla v. ASARCO, Inc.*, in *Plater et al.*, supra note 6, at 45-46.
210 *Slovek*, 723 P.2d at 1317.
211 See id.
212 See id.
214 Id.
215 See id.
216 See id. at 41.
that the cost of restoration in *Escamilla* exceeded the diminution in market value by nearly 500%, for a total potential windfall of approximately $16 million, such an award appears less reasonable.\(^{217}\) Thus, if the *Escamilla* court had applied the test used in Arizona or New Hampshire,\(^ {218}\) or perhaps even that used in California,\(^ {219}\) it might have found the cost of restoration unreasonable and therefore refused to grant restoration damages.

Focusing on the pre-tort market value of real property in cases under the personal reasons exception could work to the detriment of owners of smaller parcels and parcels with a lower total market value. For example, consider a situation where two landowners own side-by-side parcels with similar market value per acre, with one owning a two-acre parcel and the other a one-acre parcel. If both landowners were to receive similar injuries to their property with equal cleanup costs, under both the California and Colorado approaches, the owner of the two-acre parcel might be entitled to receive twice the amount of damages of the owner of the one-acre parcel because of the higher pre-tort market value of the two-acre parcel—the objective benchmark used to determine reasonableness. This would also be the result in a case involving two otherwise substantially similar parcels where one parcel has a per-acre market value of twice that of the other. In other words, what might appear to be a reasonable award of restoration damages for a larger or more expensive parcel could be unreasonable for a smaller or less expensive parcel. Despite similar injuries, the objective benchmark used to determine the reasonableness of a restoration damages award for the larger or more expensive parcel is twice that of the smaller or less expensive parcel.

Thus, the California approach to this third inquiry, modified by the removal of any reference to the pre-tort market value of the property, like the approach used in Arizona and New Hampshire, is most likely to lead to more consistent results to the benefit of all landowners. The

\(^{217}\) See id.


purpose of tort damages is to compensate injured landowners for their losses.\textsuperscript{220} Of course, this is also the purpose of restoration damages under the personal reasons exception.\textsuperscript{221} Under the personal reasons exception, courts must determine whether, given the landowner's personal reasons for desiring restoration and the diminution in market value resulting from the injury, the cost of restoration is reasonable under the circumstances.\textsuperscript{222} In determining reasonableness, however, there is no justification for switching the objective benchmark from the diminution in market value to the pre-tort market value of the property, as is done in Colorado.

V. Conclusion

The personal reasons exception to the general rule for measuring damages by the diminution in market value of injured real property is well established. The personal reasons exception allows landowners, in appropriate cases, to recover damages measured by the cost of restoring the injured property. The personal reasons exception protects landowners who utilize their property according to their tastes and wishes and compensates for loss of value idiosyncratic to the landowner. To deny restoration damages in an appropriate case would force landowners either to use their property not according to their tastes and wishes, sell their property, or absorb significant restoration expenses.

However, different tests for determining when a case is appropriate for the personal reasons exception, such as those in California, Colorado, Arizona, and New Hampshire run the risk of producing dissimilar results in similar situations in different states, as well as in cases involving similar injuries to different parcels within the same state. The Colorado test, as applied in \textit{Escamilla v. ASARCO, Inc.}, creates a significant risk of producing an undue windfall in favor of a landowner because it assesses the reasonableness of the restoration cost only in comparison to the property's pre-tort market value. The California test reduces this risk somewhat by mandating a comparison to the diminution in market value in addition to the pre-tort market value of the property. However, this additional comparison does not

\textsuperscript{220} See \textit{supra} note 22 and accompanying text.
\textsuperscript{221} See \textit{supra} notes 56--57 and accompanying text.
\textsuperscript{222} See \textit{Restatement (Second) of Torts} § 929(1)(a) & cmt.b (1977).
eliminate the significance of the pre-tort market value of the property in determining the reasonableness of a restoration damages award. A three-part test similar to that used in Arizona and New Hampshire would balance more appropriately the countervailing tort damages goals of full compensation for losses and the avoidance of an undue windfall.