

LARGER PARCEL/ APPURTENANT EASEMENTS

Real estate appraisers perform appraisals for a variety of purposes, including financing, portfolio analysis, tax consequences and litigation. Some of these types of assignments, such as appraisals for condemnation purposes, have evolved into specialized fields of practice. This is because the appraiser must have an understanding of the many legal issues involved, and in most cases must be aware of the appropriate case law. When these rules are clouded or in dispute, multi-premised appraisals may be required. In the case of partial takings, two independent analyses are required, one without consideration of the taking and one with consideration given to the taking. Consequently, appraisals prepared in an eminent domain context are often more extensive than appraisals prepared for other reasons. Within this context, a number of unique appraisal problems arise, particularly when the law and accepted appraisal methodology conflict. Following is a brief synopsis of the Colorado Eminent Domain Appraisal Format and one case study where the appropriate valuation methodology would appear to contradict existing case law.

Appraisal Format

The appraisal format will depend upon a number of circumstances. For example, if a condemning authority is a federal agency or if the federal “before and after” rule is invoked, it will likely be necessary to follow the guidelines set forth in the “Guide to Federal Lands Acquisition” (Uniform Appraisal Standards for Federal Lands Acquisition, 1992). If, on the other hand, the Colorado State Rule of Condemnation is to be used, the five-step State Rule will determine the appraisal format.

The legal measurement of just compensation used in Colorado requires more in-depth

analysis than the federal “before and after” rule. This is summarized as follows:

1. Value before taking (Larger Parcel)
2. Value of part taken (as part of whole)
3. Remainder value before taking*
4. Remainder value after taking
5. Damages/special benefits to remainder

*Step 3 relates to the contributory value of the remainder as part of the whole before the taking. It is not a separate estimate of value; rather it is simply a mathematical calculation (Step 1 minus Step 2) (Eaton, 1995).

Larger Parcel

The concept of *larger parcel* is an analytical premise unique to eminent domain valuation and is essential to a determination of the property to be appraised, as well as to a determination of damages or benefits. Two definitions of larger parcel are found in the Dictionary of Real Estate Appraisal:

1. *In condemnation, the tract or tracts of land that are under the beneficial control of a single individual or entity and have the same, or an integrated, highest and best use. Elements for consideration by the appraiser in making a determination in this regard are contiguity, or proximity, as it bears on the highest and best use of the property, unity of ownership, and unity of highest and best use.*
2. In condemnation, the portion of a property that has unity of ownership, contiguity, and unity of use, the three conditions that establish the larger parcel for the

consideration of severance damages in most states. In federal and in some state cases, however, contiguity is sometimes subordinated to unitary use (The Dictionary of Real Estate Appraisal, 2002).

Understanding the concept of the larger parcel is vital in condemnation appraisal because the appraiser cannot determine the highest and best use of a property until a conclusion as to the larger parcel is reached. The larger parcel may be all of one parcel, part of a parcel, or several parcels, depending to varying degrees on unity of ownership, unity of use and contiguity. Some assignments, such as those involving parcels that are inextricably linked by an appurtenant easement, may be approached with the use of multiple larger parcels. The determination of the larger parcel is particularly important in partial takings cases in which compensable damages and/or special benefits accrue to the remainder parcel after the taking. Brief comments on the trinity of larger parcel follow.

Unity of Title

In most jurisdictions, unity of ownership does not necessarily mean that the quality of the title is identical. Unity of title generally requires equal legal control over the ownership and future of the lands in question. Acquisition of the parts of a whole at different times does not destroy unity of title, nor in some cases does the fact that one parcel is owned by an individual and the second parcel is owned by a corporation under the control of that individual. Unity of title is generally a legal question.

Contiguity

Whether a real estate ownership constitutes a single larger parcel as distinguished from separate parcels is best reflected by unity of use and does not preclude a reasonable separation. The question of contiguity is often determined by whether it is reasonably probable that separated tracts would sell as an integrated single entity even with the separation. Only when that level of probability is satisfied can the separated tracts be considered as a single larger parcel. Stated another way, it is generally held that two tracts can be considered as one only when they are so inseparably connected in the use to which they are applied that the taking of one *necessarily* and *permanently* injures the other.

A classic example of separated tracts being considered one larger parcel involved a pineapple plantation. The actual plantation was located on one island and the processing facility was located on another, some 30 miles distant. In this case, the court ruled that the functions were inseparably linked and constituted one larger parcel in spite of the substantial physical separation.

Unity of Use

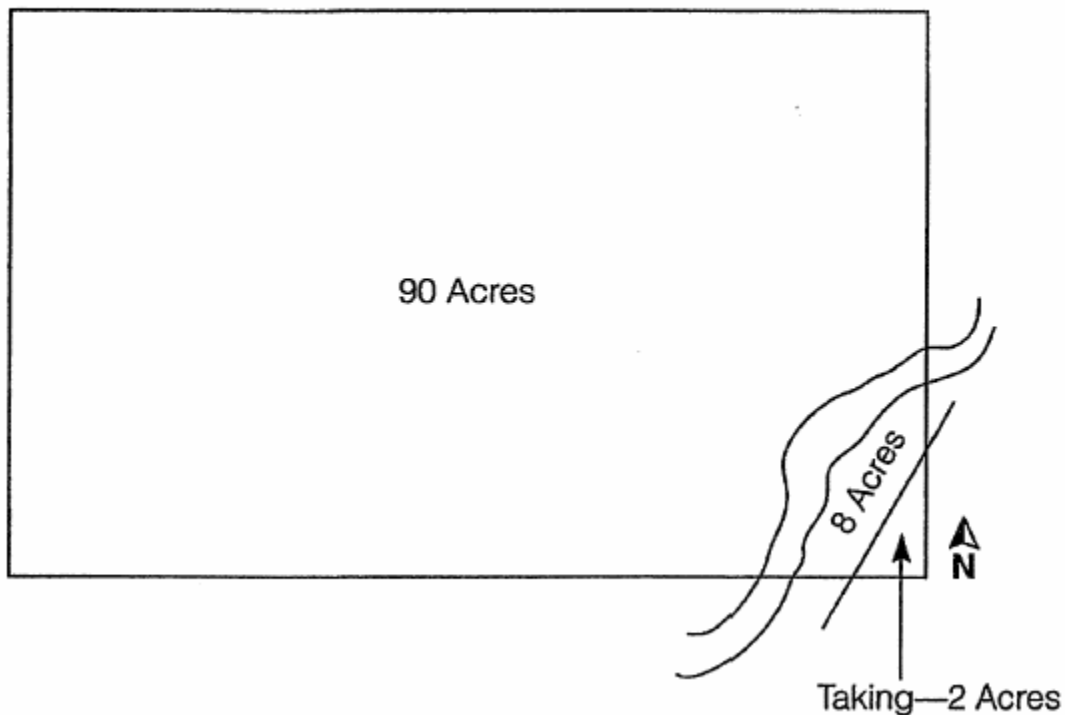
This test of the larger parcel requires that the parcel or parcels of land can be devoted to the same use as or an integrated use with the land from which the taking is made. It is generally not the presence or absence of actual unity of use that is considered; rather, the unity of *highest and best use* is the controlling factor (Eaton, 1995). Generally, stronger proof of unity of use is required when the parcels are not currently being used as a unit, but merely have a common highest and best use. However, it does not necessarily follow that a contiguous body of land in the same ownership constitutes a unit for valuation if the highest and best use for various parts

are different. Thus, parcels that are contiguous and under the same ownership may have independent highest and best uses. Those highest and best uses may be identical, but if the highest and best use of the tracts do not require a common or integrated use, they are separate larger parcels and should be valued as such.

Clearly, many eminent domain disputes arise over the determination or interpretation of larger parcel.

A simple illustration taken from the textbook, Real Estate Valuation in Litigation, published by the Appraisal Institute, illustrates a common dispute.

FIGURE 5.11 PARTIAL TAKING OF 100-ACRE FARM



The situation shown above illustrates the importance of the larger parcel determination even when damages and/or benefits are not at issue. Assume that the physical characteristics of all parts of the 100-acre farm are equal and that sales data show that farms of 75-125 acres sell for \$2,000 per acre. If no damages or benefits are involved and the entire farm is considered a single larger parcel, the indicated compensation for the 2-acre taking would be \$4,000, regardless of whether the “before and after” rule or the taking (as part of the whole) plus damage rule is applied.

However, the situation might be more complicated. Further assume that small acreage sales in the area ranging from 5-15 acres typically sell for \$5,000 per acre for use as real homesites. If the appraiser concluded that the 10-acre parcel separated from the balance of the ownership by the creek had an *independent* highest and best as a homesite, and thus a value of \$5,000 per acre, the indicated compensation would be \$10,000.

Even if the 10-acre tract had the same highest and best use as the 90-acre tract (i.e., farming), the two parcels could constitute separate larger parcels. A conclusion that two larger parcels existed could probably be justified if there were no *actual* unity of use between the parcels and/or no bridge across the creek, physically connecting the two parcels. In such a case, it would not be surprising to find that 10-acre tracts were selling for substantially more per acre than 100-acre tracts because of size regression, even though the tracts had the same highest and best use.

A more complex larger parcel case study may be found at the end of this paper relating to a recent high profile Colorado Supreme Court decision.

Value of the Property to be Acquired

In the event of total takings cases, the appraiser need not go further than the previous step. However, in partial acquisition cases, it is necessary to estimate the value of the property to be acquired based upon its contribution to the value of the larger parcel. In some situations, the value of the take may be pro-rata to the value of the larger parcel; that is, the unit value may be the same but applied against a smaller taking. On the other hand, the property to be acquired may be less valuable or more valuable than the average unit value of the larger parcel. For example, if the property to be acquired relates only to the floodplain portion of the larger parcel, the unit value *may* be substantially less than the unit value of the whole. Conversely, the acquisition may involve the best property within a parcel such as the corner, the most visible land, the land with the best topography, etc. In such a case, the unit value of the part taken may be substantially greater than the average unit value of the larger parcel.

By way of textbook authority, Eaton states, “*however, when valuing a part taken as a part of the whole, the appraiser must carefully determine whether the area taken contributes an equal pro-rata value to the whole or an amount greater or less than its pro-rata value. The courts have ruled that it is improper to use an average unit value (e.g., per-square-foot, per-acre) as developed for the whole tract in valuing the part taken unless each unit in the tract has the same value,*” (Eaton, 1995).

Additionally, in the Colorado case *City of Westminster v. Jefferson Center Associates*, the concept of “pay for what you take” seems to be supported. The court stated, *in our view, the value of the portion taken can be valued as a part of the whole parcel so long as the parcel is sufficiently uniform and that method of valuation is not detrimental to the owner because it does not accurately value the property actually taken at its highest and best use. The determination of*

whether the parcel is sufficiently uniform to be amenable to having a portion of it so valued, and whether such a valuation method is detrimental to the owner by not valuing the portion taken at its highest and best use, are questions of fact for the fact-finder.” A particularly interesting appraisal problem results when an appurtenant easement is acquired. This issue will be discussed later in the paper.

In any event, the appraiser should carefully consider the relationship between the part taken and the larger parcel. The unit values may not necessarily be the same and the appraiser should consult with counsel to avoid misapplication of the law. This concept may, in fact, require two sets of comparable sales. For example, the value of the whole may be based upon sales of similar properties, whereas the value of floodplain land taken may be estimated by using floodplain land sales.

In some cases, rights in easement may also be acquired. The easement document should define the land area under easement and state the purpose and use of the easement. Easements may be temporary or permanent and temporary easements are generally treated as analogous to land rent. In other words, the condemning authority simply rents or leases the property under easement for a period of time. While several techniques may be used to value temporary easements, the general method involves estimating an appropriate return on the land to be acquired over the specified period of time. Permanent easements are generally treated or valued based upon the rights in ownership taken by the condemning authority and those left to the condemnee. For example, in the case of exclusive easements wherein the condemning authority is acquiring virtually total use of the land under easement, the percentage of property rights acquired may approach 100. In the case of non-exclusive easements, the terms of the easement must be examined, and value will be prorated based upon the percentage of rights in the land

area taken versus the percentage of property rights left to the fee holder of the land. In some situations, easement takings may result in damages or even specific benefits to the remaining land.

Remainder Value (Before the Acquisition)

The remainder value as part of the larger parcel before the acquisition is simply the arithmetical difference between the value of the larger parcel and the value of the property to be acquired. Contrary to what some appraisers may think, this does not necessitate a separate valuation of the remainder in the “before” condition. No matter the scenario, the arithmetical difference between the larger parcel value and the value of the part taken will always equal the remainder value before the acquisition.

Remainder Value (After the Acquisition)

Essentially, this part of the analysis constitutes a separate appraisal or opinion of value. This step represents an estimate of the value of the property not taken, considering damages and special benefits to the remainder property by reason of the taking and construction of the public improvement. In other words, this estimate represents the value of the land remaining in the ownership, assuming the public project to be completed.

In some cases, the remainder value in the “after” condition may be equal to the remainder value in the “before” condition. In those instances, there are no damages or special benefits. In other cases, the remainder value in the “after” condition may be less than or greater than the remainder value in the “before” condition. The remainder property may be reappraised using the same comparables, or if appropriate by using comparables more similar to the “after” condition.

For example, a change in highest and best use either up or down may necessitate new comparables. If the remaining land has a potential for higher zoning or is improved with infrastructure at the expense of the condemning authority, value may go up. This may result in the application of special benefits. On the other hand, if the remainder property is affected negatively by such conditions as lost density, drainage issues, access issues or any number of other circumstances, the remainder value may go down. Thus, damages will be at issue. It is important to understand that this is a completely separate analysis from either the value of the larger parcel, the value of the part taken or remainder value in the “before” condition.

Damages

Damages can only result from a partial taking and may be defined as, *in condemnation, the loss in value to the remainder in a partial taking of a property. Generally, the difference between the value of the whole property before the taking and the value of the remainder after the taking is the measure of the value of the part taken and the damages to the remainder,*” (The Dictionary of Real Estate Appraisal, 1993).

According to Colorado Jury Instructions, *any damages or benefits are to be measured by the effect, the acquisition of, and expected uses of, the property actually taken has on the reasonable market value of the residue. [Residue means that portion of the any property which is not taken but which belongs to the respondent and which has been used by, or is capable of being used by the respondent, together with the property actually taken as one economic unit]. Any damages are to be measured by the decrease, if any, in the reasonable market value of the residue; that is, the difference between the reasonable market value of the residue before the property actually taken is acquired and the reasonable market value of the residue after the*

property actually taken has been acquired. Any damages which may result to the residue from what is expected to be done on land other than the land actually taken from the respondent and any damages to the residue which are shared in common with the community at large are not to be considered.”

The Colorado Jury Instructions’ definition clearly indicates that damages are to be measured by the difference between the remainder value before and the remainder value after the taking. Damages are not to be represented as the difference in the unit value between the larger parcel and the remainder in the “before” condition (if any), and they are not to be represented as the decrease from the value of the larger parcel (unless using the federal rule).

Additionally, damages may be estimated based upon the aforementioned diminution in property value concept or cost to cure. The lesser of these two estimates is generally the appropriate measure. An appraiser who uses the cost to cure method to estimate a proper adjustment must take care to include all the costs that will be incurred. The appraiser must remember that the property is being appraised in its uncured condition. Thus, a purchaser of the property in the “after” situation will acquire it recognizing the need to cure the damage and incur the direct costs of correction. In addition, the typical purchaser will demand an incentive to acquire the damaged parcel. Many appraisers make the mistake of not considering this incentive or entrepreneurial profit in estimating a cost-to-cure adjustment (Eaton, 1995).

Damages are not to be presumed and they will likely not be allowed if based on speculation or conjecture. Unless the alleged damage has a demonstrable impact on the market value of the remainder property being appraised, it should not be considered by the appraiser. At that, some elements of damage that would be apparent to an appraiser are not necessarily compensable. For example, in Colorado a taking that results in “circuitry of access” may not be

compensable even though a purchaser may pay less for the property. Similarly, a taking that diminishes a full-movement access from a property to right-in/right-out access may also not be compensable. The appraiser should always consult with counsel regarding these issues because, for example, the definition of circuity of access may be subject to interpretation, as might be the loss of one point of access. In Colorado, damages for loss of access are compensable only when remainder access is shown to be “substantially impaired,” which also may be subject to interpretation.

In any case, the rationale for damages must be explained and supported. Specific market evidence is not always available from which an actual estimate can be based but the appraiser is obligated to support any opinions.

Benefits

Unlike damages, benefits may be defined as either general or specific. General benefits are those that benefit the community at large and have a beneficial effect on the value of the properties which have not been taken or damaged, as well as on the value of properties which have been directly affected by the taking (Eaton, 1995). General benefits may not be used as an offset against damages or the value of the property taken. An example of a general benefit may relate to regional accessibility enjoyed by everyone in the city by virtue of construction of a new highway.

Specific benefits are those of concern in condemnation cases. For anything to constitute a specific benefit, however, it must result directly in a benefit to the residue and be peculiar to it (Colorado Jury Instructions, 1998). The damages and benefits are calculated as separate, independent items; the two should not be balanced. Like damages, any (special) benefits to the

residue are to be measured by the increase, if any, in the reasonable market value of the residue due to the proposed improvement. Eaton defines special benefits as those that arise because of the particular relationship between the remainder parcel and the public improvement. The fact that more than one property receives the benefit from a public project does not mean that the benefit cannot be classified as special (Eaton, 1995).

The classification and analysis of special benefits is a complex task for the appraiser and it may be necessary to seek assistance from counsel. Special benefits must be determined on a case-by-case basis, but examples of benefits that may be identified as special include construction of an interchange and proximity of the residue to it, higher zoning created as a result of the project and physical improvements to the residue, such as installation of utility lines or drainage improvements. Benefits that may be determined to be special in one case are not necessarily special in another case. While the concept may be similar, the circumstance may not.

Like damages, special benefits must result from the construction of the public improvement for which the land is taken. Unlike general benefits, special benefits arise or accrue from the property's position or its relationship to the improvement. Because of the property's relationship to the improvement, the benefit which may accrue is unlike or is different in kind from those accruing to other properties in the area. They do not accrue to or cannot be shared by those whose property is not taken. They are therefore special and peculiar to the owner.

In an analysis of either damages or special benefits, it is important for the appraiser to consider the property rights being taken. For example, it matters little what the condemning authority proposes to do with the property taken; it matters a great deal what the condemning authority has the right to do with the property being taken.

In summary, the difference between the value of the remainder property in the "after"

condition and the remainder property in the “before” condition may be the result of either damages or special benefits. It is important to consult with counsel if these areas become gray as they almost always do. Only damages that are considered to be compensable will be considered and at times those matters are subject to dispute. Similarly, only benefits that are considered specific or special may be considered. This requires careful analysis and the rules do not appear to be clear-cut.

Larger Parcel Case Study

Having set forth the procedure for valuation in Colorado for eminent domain purposes, it is appropriate to put the theory into context with a case study. One particular case, *Arvada Urban Renewal Authority vs. Columbine Professional Plaza Association, Inc.* is interesting not only because it addressed the timely issue of an urban renewal authority’s power to condemn private property for private development, but also because it addressed a valuation model that was seemingly inconsistent with existing Colorado law. The valuation issue related to definition of larger parcel.

In this case (popularly known as Arvada Lakes), the court was asked to consider whether an urban renewal authority retains the power to condemn a portion of a parcel situated within an area that was determined to be blighted at the outset of an urban renewal project, even though the entire parcel had been sold by the authority, developed in accordance with its urban renewal plan, and formerly released by the authority. To this end, the court ultimately held that once a parcel within a redevelopment area has been sold, developed and released in this manner, an urban renewal authority may not exercise its condemnation power over any part of that parcel absent renewed finding of blight by the appropriate authority.

The issue of larger parcel was briefly addressed in the court's decision when it referenced the Trial Court's finding that the lake property and the office plaza were owned separately, but found that the lake property "is a subservient estate and the office buildings a dominant estate." This finding will be developed more fully as follows.

The Arvada Urban Renewal Authority (AURA) was created in 1981 with the purpose of facilitating redevelopment of a blighted 500-acre tract near Wadsworth Boulevard and Interstate 70. The intent of AURA was to provide "commercial, office, retail, and residential development opportunities to serve the needs of the City of Arvada and the regional area." In the mid 1980s, in accordance with the plan approved by AURA, the Arvada Marketplace shopping center was constructed on a 35-acre parcel adjacent to an 8-acre parcel containing a quarry lake. The marketplace housed four anchor stores (Sam's Club, Gart Sports, Office Depot and Home Base), as well as several other stores and restaurants. Upon completion of the shopping center, AURA issued a "Certification of Completion of Improvements and Renunciation of a Right of Re-Entry for Condition Broken," which covered both the 35-acre Arvada Marketplace and the quarry lake parcel.

Subsequent to completion of the Arvada Marketplace, Parker Ojala purchased a 13-acre parcel immediately east of and adjacent to the quarry lake. Ojala's intent was to develop a high quality office park incorporating the natural amenity of the adjacent lake, and at about the same time purchased the quarry lake from the owner of Arvada Marketplace.

Parker Ojala then submitted a development plan illustrating the Columbine Professional Plaza office park integrated with the lake property by adding walking paths, landscaping, picnic areas and fountains. The west facade of the signature office building was actually designed to function with the aesthetics of the lake and walking paths. The plan was approved by the City of

Arvada and the office park was constructed in accordance with the uses specified in the Arvada Urban Renewal Plan.

Approximately three years after the office park was completed, the Arvada Marketplace lost one of its anchor tenants when Home Base went bankrupt and closed its store. Subsequently, Wal-Mart became interested in the property, but in order to accommodate them, several of the surrounding businesses, including the Office Depot and Gart Sports, would be required to relocate. In addition, Wal-Mart would have to acquire some portion of the adjacent lake property for expansion of the old Home Base facility. On behalf of Wal-Mart, AURA attempted to exercise its condemnation power to acquire the lake property. The respondents to the condemnation action sought to dismiss the AURA condemnation action, arguing that AURA had no authority to condemn the lake property because the blight that originally affected the lake parcel had been cured. The trial court rejected the motion and found that “nothing has happened since the 1981 blight finding to change the character of the quarry pond itself,” but that “some very attractive amenities have been constructed all around the lake and it has been a great asset to the Columbine Office Plaza.” The court also opined that Parker Ojala “built and utilized the pond very effectively.” The fact that the lake property was incorporated into the office park as an amenity was critical to determination of the larger parcel.

Office buildings within the Columbine Professional Plaza were subject to a declaration of covenants, conditions and restrictions, and bylaws of the Columbine Professional Plaza Association, Inc. The association was established by articles of incorporation dated April 3, 1997. In April of 2003, the quarry lake (identified as Lot 2, Block 1, Arvada Marketplace Filing No. 1) was deeded to the Columbine Professional Plaza Association, Inc., *subject to the rights and easements set forth in that certain Declaration of Covenants, Conditions and Restrictions for*

Columbine Professional Plaza recorded at Reception No. F0399617, as the same as being amended substantially, contemporaneously with the recording of this deed (the Declaration); and the rights of the owners of Lot 1A, Lot 1B, Lot 2A, Lot 2B and Lot 3, Columbine Professional Plaza minor subdivision Amendment 1, recorded in Book 141, Page 20, Reception No. F0166123 (the Plat) to use the property for drainage and detention pond areas as contemplated in said Plat and the Declaration. By acceptance of this deed, Grantee acknowledges that the Property is a Common Element and Limited Common Element transferred to Grantee pursuant to, and in furtherance of the rights and easements granted and recognized in the Declaration and the Plat.

The original Declaration of Covenants, Conditions and Restrictions for Columbine Professional Plaza was recorded in April 1997. In that document, Common Area was defined as, *all real and/or personal property which the Association and/or Declarants owned for the non-exclusive common use and enjoyment of the Owners of Lots shown on a recorded subdivision plat for the Property.* Significantly, Article 2, Paragraph B of that document addressed the Owner's Easements of Enjoyment. More specifically, *every owner of a Lot shall have a non-exclusive common right and easement of enjoyment and ingress and egress in and to the Common Areas which shall be appurtenant to and shall pass with a title to such Lot subject to [several enumerated provisions].* The Declaration was subsequently amended to identify the properties subject to the Declaration and to identify the Limited Common Elements as including the quarry lake and surrounding land and facilities located on Lot 2, Block 1.

The effect of the amendments to the Articles of Incorporation and bylaws to the Declaration of Covenants, Conditions and Restrictions was to establish an ownership interest in the limited common elements by virtue of owning a lot within the office park. In particular, three

office buildings were adjacent to the quarry lake and were physically and legally linked to it by an appurtenant easement. While the Petitioner's real estate appraiser simply argued that the quarry lake itself constituted a larger parcel, establishment of the appurtenant easement became the basis for the Respondent's argument that the larger parcel actually consisted of the quarry lake/common area, the appurtenant easement and the adjacent office buildings.

Valuation Model

The Respondent expert's approach to the valuation problem was taken from the textbook, Real Estate Value in Litigation, written by J.D. Eaton, chief review appraiser for the United States Department of Justice. Eaton recognizes that an easement held as an appurtenance has no independent utility; it is useful only in conjunction with other property. He cites the example of an easement across a tract of land for access to and from an abutting tract that is held in fee by the owner of the easement. This easement would have no material value to its owner if he did not also own the tract of land that the easement serves. This example is analogous to the Arvada Lakes property. That is, the office building owners belong to an association that owns the adjoining lake which in turn is linked to the office building by virtue of an appurtenant easement created through the Declaration of Covenants, Conditions and Restrictions.

Eaton also recognizes that many jurisdictions require a tract of land encumbered with an easement to be appraised, considering the easement's negative effect on the property's market value. This seems to be consistent with existing Colorado law, which requires that property for eminent domain purposes be appraised according to the undivided basis rule rather than the undivided fee rule. In other words, Colorado law dictates that real estate must be appraised subject to easements and restrictions. When an appurtenant easement exists, the fee parcel is appraised considering the beneficial effect of the easement across the other land. It seems to follow that if a taking has the effect of extinguishing an appurtenant easement, then the property must be appraised taking into account the lost benefit of the easement. Nichols' on eminent domain uses the following language to express the concept.

Ordinarily, an easement is appurtenant to a parcel of property known as the dominant tenement. Such dominant tenement will naturally be worth more with the appurtenant easement than without it. Thus, if there is a destruction of the easement, either by a direct taking of the easement itself, or by a taking of the servient estate, it has been said that the owner of the easement is damaged to the extent that the value of his dominant tenement has been impaired by such taking.

Given this understanding, Eaton then cites, *Matter of City of New York (West 10th Street)*, 196 N.E. 30, 33 (New York 1935) as authority for the position that the appurtenant easement and the dominant tenement constitutes a single entity.

Eaton's textbook illustrates an example of a taking that is on point to the Arvada Lakes case. The example is illustrated on the following page.

FIGURE 16.5 TAKING OF AN APPURTENANT EASEMENT

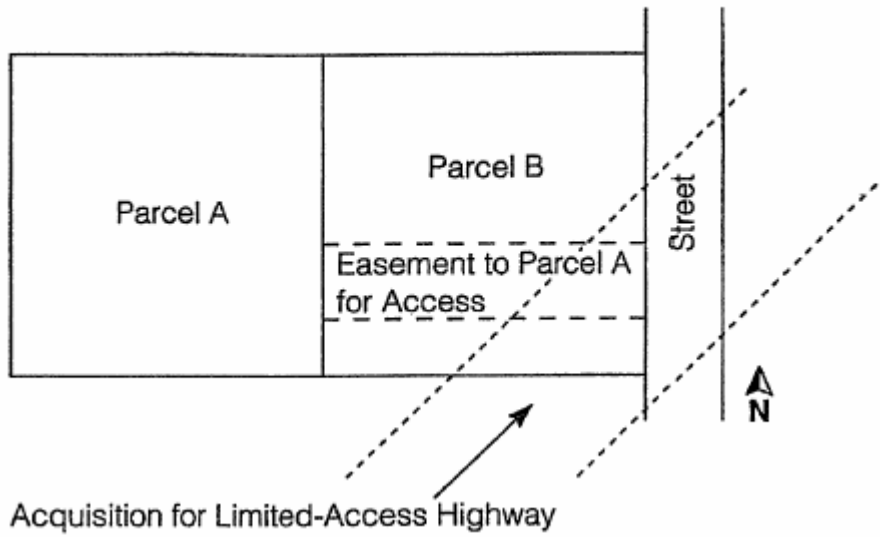
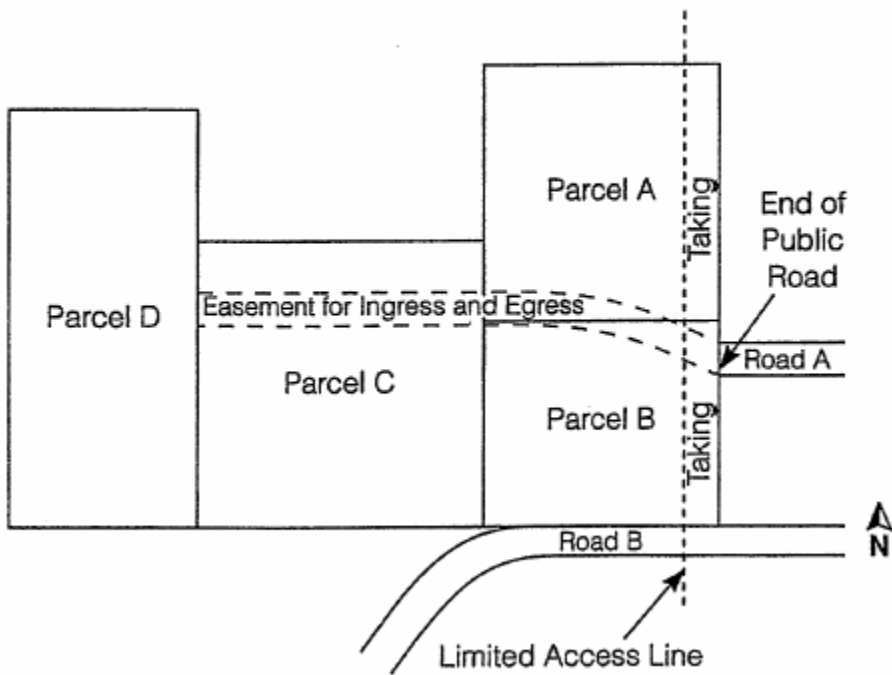


FIGURE 16.6 APPURTENANT EASEMENTS





<p>WWE WRIGHT WATER ENGINEERS, INC. 2490 W 26TH AVE 100A DENVER, CO. 80211 (303) 480-1700</p>		<p>COLUMBINE LAKE GENERAL LOCATION MAP</p>	<p>FIGURE 1</p>
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In the above example, Parcel B would be directly affected by the highway acquisition and would need to be appraised. However, the larger parcel is not limited to the unencumbered fee ownership of Parcel B. Rather, it is the fee ownership of Parcel B encumbered by the easement. The application of the undivided basis rule then would also require appraisal of Parcel A, even though no portion of it is being acquired. Thus, the larger parcel then could be defined as the fee estate of Parcel A plus the easement interest in Parcel B or there could be two larger parcels. In the example, the taking could result in greater damage to Parcel A than to Parcel B.

In the example of the Arvada Lakes case, recall that at least the three buildings adjacent to the lake were designed to function with the aesthetics of the lake. That is, walking paths, picnic areas and general aesthetics were taken into account in the design of the buildings. Moreover, west facing tenants overlooking the lake and its amenities were paying a rent premium for their location in the buildings. This solidified the Respondent's position that the lake and the buildings were inextricably linked. The physical linkage was the view amenity and the legal linkage was the appurtenant easement created in the Declaration of Covenants, Conditions and Restrictions.

Colorado Case Law

Notwithstanding the facts of the case and accepted valuation methodology, Colorado case law (other than that supporting the undivided basis rule) does not seem to support the theory that the dominant estate can be devalued by virtue of extinguishment of an appurtenant easement. The Colorado case, *Bear Creek Development Corporation vs. The Genessee Foundation* addresses the issue in context of larger parcel. In this case, the condemnee argued that the trial court erred in not instructing the commissioners that residual damages include both diminution in

value of all parcels within the Genessee development, as well as the present value of future development of all parcels. The condemnor argued that all parcels must be included in the residue because all PUD property owners are represented by the condemnee; that is, the Genessee Foundation - the Homeowners Association for the development - which owns Parcel D as part of the common open space of the Genessee PUD. The Colorado Court of Appeals disagreed. While the court recognized that both contiguous and non-contiguous properties of the condemnee may be treated as residue if the property is considered part of a single unit of operation with the taken property, it adopted a previous Supreme Court finding suggesting the need to limit residual damage awards to persons who have property actually taken. The court's rationale for this position was: "*Absent recognized and narrowly defined legal wrongs, such as nuisance, a land owner has no legal right and therefore no expectation to control or limit activities on lands other than his own,*" (*LaPlata Electric Association vs. Cummins*).

The court of Appeals went on to say that in the Genessee case, this rationale limits residual damages to property owned by condemnee, i.e., the common areas of the PUD, excluding from the residue both properties adjacent to Parcel D and all other privately held properties in the PUD. The court also disagreed with the condemnee that the principle of treating as residue all of a condemnees property used as a "single unit of operation" with the taken land, established in *Board of County Commissioners vs. Noble* should be extended under the circumstances to properties held by several land owners. The court reasoned that all of the property of the Genessee PUD is "one economic unit" only to the extent that it is governed by a set of covenants established by the articles of incorporation and bylaws of the foundation. While the Genessee PUD covenants provide that all PUD property owners can use and possess the common areas, private covenants resolve the rights and duties among the residents of a PUD, but

do no less nor more than traditional covenants. Based upon that reasoning, the court determined that the covenants did not create any additional rights in condemnee, the foundation, or homeowners as against a condemnor.

The court ultimately opined that “*even the Genessee PUD covenants recognize that all of the properties within the development are not, as condemnee contends, ‘one economic unit.’ Specifically, while common areas of the Genessee PUD are maintained for the common benefit and through fee assessments on all of the member homeowners, individual properties are privately held and maintained. Under the covenants any maintenance or private properties by condemnee is done at the expense of the individual property owners.*” Consequently, the court concluded that the private property of all the homeowners who form the Genessee Foundation is not “one economic unit” for purposes of calculating condemnation residual impacts. The extension of the argument was to conclude that “*while the condemnation award must compensate for damages to the easement itself, there is no basis in Colorado law for extending the damage award to include impacts to the entire dominant estate to which the easement is appurtenant.*”

Of course, like all cases resulting in law, the opinion was based upon a specific fact pattern in a specific case. Part of the reasoning in the Genessee case probably revolves around the fact that in excess of 100 residences belong to the Genessee Homeowners Association (which held title to the common area). Thus, it may not have been practicable to find damages to each of the residences. Even so, in a literal sense, there is an argument that the case is flawed. Clearly, one can conceive of particular situations where properties would be adversely affected by destruction of the common area. It seems illogical to categorically exclude the dominant estate from the larger parcel when an appurtenant easement is acquired or extinguished. In his

textbook, Eaton cites contradictory federal cases for the valuation methodology that requires consideration of the dominant estate.

It is recalled that in the Arvada Lakes case, several office buildings located east of the lake belonged to the homeowner's association that, in turn, owned the lake. However, for valuation purposes, only those three properties that actually faced the lake were included in the larger parcel, as the balance of the buildings suffered no actual harm.

Conclusion

The Respondents in the Genessee case made their valuation argument in the Immediate Possession Hearing. Even though a previous court had determined that, "*there is no basis in Colorado law for extending the damage award to include impacts to the entire dominant estate to which the easement is appurtenant,*" to the contrary, there is also no basis in the law to *preclude* a damage award to the three lake-facing office buildings. The fact is, had the lake been taken for a Wal-Mart, rent levels could not have been sustained. In this instance, the trial court found it was proper to consider the textbook valuation model (which itself is not without foundation), a fact seemingly not disputed by the Colorado Court of Appeals.

Any number of taking situations could have the same result. For example, the taking or extinguishment of a conservation easement could result in the devaluation of the very property it was designed to enhance or protect. The point is that while real estate appraisers must be cognizant of existing case law, there are any number of situations that require challenge to convention.

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