

**“The Complexities of a Condemnation Appraisal:
Measure of Just Compensation; Discussion of Larger Parcel;
Highest and Best Use (Before and After Condition);
Land Use Regulations; Approaches to Value;
Comparable Sale Selection; Damages; Benefits”**

presented by

Wayne L. Hunsperger, MAI, SRA

Hunsperger & Weston

Greenwood Village

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 and 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. The following material may serve as a guide to preparation of an appraisal prepared for condemnation purposes.

APPRAISAL OUTLINE

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 5-step Stat Rule will determine the appraisal format.

In addition to citing Federal case law and legal rules to be followed, the Uniform Appraisal Standards for Federal Land Acquisitions includes a specific outline to be followed when preparing an appraisal for federal agency. In summary, the major sections of an appraisal to be used by a federal agency are as follows:

Part I – Introduction

Part II – Factual Data – Before Taking

Part III – Data Analysis and Conclusions – Before Taking

Part IV – Factual Data – After Taking

Part V – Data, Analysis and Conclusions – After taking

Part VI – Acquisition Analysis

Part VII – Exhibits and Addenda

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
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).

When using the State Rule, it is advisable to format the appraisal report according to the five steps. This leads the appraiser through a logical sequence and makes the report easier to understand.

PRELIMINARY INVESTIGATION

Before commencing the appraisal report, the appraiser should investigate both the subject and the project in order to identify areas that may be of particular concern. Following are an outline and general comments pertaining to application of the Colorado State Rule of Eminent Domain.

Subject Information

At the time of engagement, it is appropriate to gather as much preliminary information as possible regarding the subject property. This forms the basis of the appraisal and contributes to the factual data of the report. It is necessary at the outset to at least obtain the tax assessor’s data regarding the subject, any plats or PUD’s that may be appropriate, a survey or tax map, zoning status of the property and a title policy particularly for reference to Schedule B (exceptions to title). Usually, a sales history of the property can be established, and under certain circumstances a prior sale of the subject may be a relevant comparable sale. In any event, the Uniform Standards of Professional Appraisal practice (USPAP) requires consideration and explanation of any prior sales as do the Rules for Eminent Domain. Additionally, USPAP recognizes certain jurisdictional exceptions; that is, *if any part of these standards is contrary to the law or public policy of any jurisdiction, only that part shall be void and of no force or effect in that jurisdiction*. The purpose of the jurisdictional exception rule is strictly limited to providing a saving severability clause intended to preserve the balance of USPAP if one or more of its parts are determined to be contrary to law or public policy of jurisdiction (USPAP, 2000).

Scope of the Project

Once the appraiser has at least some initial understanding of the subject, the property can be placed into context within the scope of the public project. Because a condemnation action generally relates to the acquisition of private property for public use, it is necessary to understand the bounds of the project and the property rights taken.

The petition in Condemnation provides much of this information, and if available, must be reviewed by the appraiser. Generally, the Petition in Condemnation will identify the property owner or those who have interests in the property, will provide a legal description for the property to be acquired and will include a sketch of the affected area. It may also mention the use for which the property is being acquired but generally will not define the full scope of the project. The Condemning Authority may be an additional source of information. The petition will also identify any easements to be acquired as well as their purpose and the “rights” that are being taken.

The appraiser should be careful about valuing the entire absolute fee interest in the property not only because he/she must take into account the effect of encumbrances or restrictions on the property but often the Condemning Authority reserves certain rights to the property owner. For example, a property may be acquired today for use in the future but reserving unto the property until some specified time. That reservation, of course, could affect the value of the property.

If available, it is also advisable to review engineering drawings regarding the public improvement in order to determine if the subject’s remainder (if there is one) will be affected by such issues as access, drainage, and proximity to an interchange, among other things. At this stage of the analysis, the appraiser will be able to identify any additional experts that may be needed to assist the appraiser. At times, appraisers may have the need for expert help from land planners, engineers, cost estimators, hydrologists and numerous others.

APPRAISAL REPORT

Following are an outline and general comments primarily pertaining to development of an appraisal report in conformance with the Colorado State Rules of Eminent Domain. The introductory section of an appraisal generally includes definitions to be used in the report the purpose and scope of the appraisal, the property rights appraised, a short description of the property to be appraised, a discussion of the concept of larger parcel, in addition to the date of valuation, a property history for the subject and an appropriate contingent and limiting conditions.

Purpose of the Appraisal

As required by the Uniform Standards of Professional Appraisal Practice (USPAP), the appraiser must identify the purpose of the appraisal report, its intended use and the type of report. In a State Rule context, the purpose of the appraisal is three-fold: 1) to estimate the market value of the property to be acquired, 2) to estimate the special benefit, if any, accruing to the remaining land, and 3) to estimate damages, if any, to the remaining land resulting from the acquisition. The net effect of these three estimates will be awarded in accordance with Colorado Law.

The appropriate definition of market value should be stated in the report. In a more traditional appraisal context, the Appraisal Institute’s definition of market value may be appropriate but not for eminent domain appraisal. If the federal rule is used, a U.S. Supreme Court definition of market value is appropriate. In Colorado, “reasonable market value” means the *fair actual cash market value of the property. It is the price the property could have been sold for on the open market under the usual and ordinary circumstances, that is, under those*

circumstances where the owner was willing to sell and the purchaser was willing to buy, but neither was under and obligation to do so (Colorado Jury Instruction, 1998).

Property Rights Appraised

It is not unusual for appraisers to assume and so state that they are appraising the undivided fee simple interest in a property to be acquired. Fee Simple Estate, of course, relates to all the rights in ownership unencumbered by any other interests or estates and is subject only to the four powers of government. This procedure is often referred to as the *unit rule* or the *undivided fee rule*.

However, pursuant to *Montgomery Ward & Co., Inc. v. City of Sterling*, the State of Colorado follows the rule that the property must be valued on an undivided basis, but with some distinctions from the strict undivided fee rule. The undivided basis rule, as applied in Colorado and as distinguished from the undivided fee rule adopted in some states, does not ignore the value which an encumbrance may add to or subtract from the fair market value of the property as a whole. This would include among other things the impact of existing easements and deed restrictions on the property.

The Petition in Condemnation (if available) will generally identify the interest or interests to be acquired in addition to any reservations. For example, certain rights may be reserved to the owner such as the right to use minerals or water. This situation would obviously dictate that a lesser interests than full fee simple value is being acquired.

Description of the Larger Parcel

The concept of *larger parcel* is an analytical premise unique to eminent domain valuation. The concept of larger parcel is important to a determination of property to be appraised and damages or benefits.

Larger parcel is defined as that tract or tracts of land which are under the beneficial control of a single individual or entity and have the same or an integrated highest and best use (The Dictionary of Real Estate Appraisal, 1993). In determining the larger parcel, three elements should be considered: contiguity, unity of ownership and unity of highest and best use.

By definition, a complete acquisition of all the property in a single ownership will result in a larger parcel of the entire property. However, the definition may become a lot more clouded in partial takings cases.

By way illustration, the contiguity requirement may in some cases be met even if all the property in a single ownership is not attached or contiguous. In some circumstances (such as division by a highway), even non-contiguous tracts may be combined to form a larger parcel. Unity of ownership is also a consideration but it may not be the ultimate determinant of larger parcel. For example, some contiguous lands may be held by the same partners in different names. Depending upon the circumstances, these ownerships may be combined into one larger parcel or may be separate and only the land from which the acquisition occurs will be the larger parcel. Unity of highest and best use may be the most important consideration. By way of illustration, a mixed use PUD may contain several types of land uses, and in some circumstances, only one of the land uses may represent the larger

parcel, particularly if it is the affected tract. In other circumstances, the mixed uses may be so interrelated that the entire development plan or concept constitutes a larger parcel.

Consideration of the concept of larger parcel is critical to the appraiser for various reasons. Size alone may affect the value of the larger parcel, and if it is not correctly analyzed, the appraiser may not be able to give adequate consideration to any damages or benefits to remaining land in the ownership.

Date of Value

The date that the condemning authority acquired possession of the property is defined as the appropriate date of value. In some circumstances, the appraiser may be required to value the property before the condemning authority acquires possession or in other cases well after the date of possession.

History of Title

In accordance with USPAP and Rules of Eminent Domain, the appraiser has an obligation to determine what the owner previously paid for the property. A historical sale of the property in dispute is universally admitted as direct evidence of the value of the property as long as the sale was recent and voluntary, there were no changes in property's condition, and no material fluctuations have occurred in the property's value since the date of sale (Eaton, 1995). In other words, in some situations prior sale of the subject property may be come the best comparable.

Contingent and Limiting Conditions

All real estate appraisals identify several general assumptions relative to the appraisal. These include among other things an assumption that the legal description is correct that there are no hazardous substances on the property that would affect its value and that the appraiser is competent to perform this particular type of analysis. However, appraisers should also specifically identify any "material" assumptions that form the basis of their conclusions. For example, if access issues are uncertain, the appraiser should identify the position taken and reserve the right to amend conclusions if the assumption proves to be invalid. This should apply to any and all legal instructions given to the appraiser.

Area Description

Appraisers are required by the Uniform Standards of Professional Appraisal practice to describe the general area in which the subject property is located and if appropriate narrow that down to a specific neighborhood. This information often times is for information only and may or may not be material to the analysis. However, it may provide fodder for cross examination. In other instances, the neighborhood may be undergoing a change (other than from the public project) that may be influencing property values. By way of illustration, the relocation of companies such as Sun Microsystems and Level 3 Communications to the Broomfield area created additional demand for housing, retail support facilities and influenced development along the U.S. Highway 36 corridor between Denver and Boulder. Such circumstances may be come the basis for a location adjustment.

Property Description (Larger Parcel)

For purpose of this discussion, the subject property is assumed to be vacant land. Were the subject improved property, the discussion would be expanded to include a description of the salient characteristics of the improvements.

Many of the site characteristics such as size and shape are relatively straightforward, but many other characteristics such as zoning , access and availability of utilities may require much more analysis. This section provides most of the basis for comparison between the subject and comparable sale properties. Even provided that the individual site characteristics are straightforward, any unusual circumstance should be explained. Site characteristics vary from property to property and at a minimum those that contribute to the value of the subject should be identified and explained. For example, traffic counts may be appropriate to retail land but may not be relevant to industrial property.

Those site characteristics that are often of dispute in condemnation appraisals include but are not limited to Access, Availability of Utilities and Zoning. The “before” condition status of these attributes must be investigated, particularly if they are affected either adversely or positively by the public project. To appraise the property in the before condition, the appraiser must understand how the property is likely to be developed including how access will be provided, how utility services will be mad4 available (who will pay for them), and if a zoning change is necessary.

By way of illustration, assume that the subject property is a 10-acre unzoned tract of land adjacent to but not incorporated into existing city limits. Assume further that the property cannot be zoned or obtain public utility services until it is annexed. The value of the property then obviously depends upon the likelihood of annexation and zoning in addition to the cost of extending existing utility lines to the property. If these circumstances are highly probable, the land has much higher value than if they are unlikely or at least can be expected to be delayed a number of years. It is important to understand that the property cannot be appraised based upon the likelihood or reasonable probability of such occurrences. A reasonably informed purchaser of the property would base the purchase price upon his expectation of the costs and effort required to get the property to a developable stage.

This investigation by the appraiser will also determine to a large extent the comparable sale properties that can be used. Simply stated, the appraiser typically should not use sales of subdivided properties for comparison to unsubdivided properties. In recent times, this concept is not so simple because jurisdictional authorities have expanded the entitlement process. That is, most jurisdictions by one name or another require submission of a preliminary development plan, final development plan, a preliminary plat, a “single-lot” plat and a final plat. Consequently, it is often difficult to determine whether a property has actually been subdivided or platted as of the date of value. But in any event, the value of the property is relative to its stage in the entitlement process.

Relative to the above example, although the property is unzoned, it may or may not be part of a jurisdictional Comprehensive Plan. In some cases jurisdictions contemplate expansion or annexation and expand the

Comprehensive Plan boundaries to include lands outside existing city limits. A Comprehensive Plan for the unincorporated area may also be in existence. In either event, the Comprehensive Plan is typically not meant to be a zoning document. Rather, it is a guide to land uses which are not necessarily cast in stone. The validity and degree of enforceability of Comprehensive Plans are often central issues to a condemnation dispute.

Additionally, it is appropriate to describe the encumbrances or restrictions relative to the subject. As previously noted, in Colorado the effect on the property of various encumbrances and restrictions such as existing easements, certain deed restrictions and reservations of mineral rights, etc. must be taken into account in the valuation of the subject. Any relevant restrictions may typically be found in Schedule B of the title policy attached to the deed or in the development plan/plat.

Description of the Property to be Acquired

The previous section related to a description of the entire property or larger parcel. The property to be acquired may consist of the entire larger parcel or a portion of the entire property. It may also consist of a representative part of the larger parcel, or the area to be acquired may involve the most desirable part of the property, the least desirable part of the property or any combination in between.

This section of the report should provide enough information to set-forth a highest and best use analysis of the property in its after condition, which will ultimately become the basis for an opinion of damages or benefits. As previously noted, most of this descriptive information may be found in the petition in Condemnation or other condemnation related documents.

Remainder Ownership

If the condemnation action results in only a partial taking of rights in ownership, a brief description of remaining property should be provided.

According to Colorado Jury Instructions, Remainder or "Residue" means that portion of 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 (Colorado Jury Instruction, 1998).

Highest and Best Use (Before Condition)

As noted in the Colorado Jury Instructions at 36:6, highest and best use is defined as, *the most advantageous use or uses to which the property might reasonably and lawfully be put in the future by persons of ordinary prudence and judgement* (Colorado Jury Instructions, 1998)."

Even under the Colorado Jury Instruction definition, it is still appropriate to use the four essential criteria for determination of highest and best use as specified by the Appraisal Institute. These, of course, relate to Legally permissible uses, Physically possible uses, Financially feasible uses and Maximally productive use.

Legal considerations relate not only to zoning restrictions, PUDs and plats but also to such additional items as deed restrictions and environmental regulations. Physical considerations relate to the various physical characteristics of the property, including but not limited to size, shape, access and availability of utilities and more particularly to limitations on the property posed by these attributes. After legal and physical restrictions are considered, those uses still possible on the property are narrowed to those that are economically feasible. By definition, all uses that are expected to produce a positive return are regarded as financially feasible. Aside from physical and legal considerations, financial feasibility, may be relative to the current state of the market. For example, some land uses that are appropriate in an “up” market may not be financially feasible in a “down” market. In theory then, these financially feasible uses are narrowed to that use from those financially feasible uses that provides the highest rate of return or value usually over the long term. This is not meant to imply that every land use combination should be appraised in order to determine which one yields the highest return. That is simply not possible particularly in the case of “mixed use” properties. Often an appraiser will select a highest and best use concept but not necessarily a single use. This conclusion (although that of the appraiser) may be augmented by other experts such as land planners, and in fact, the appraiser may reasonably rely upon a land planner.

The highest and best use of the subject property in the before condition then forms the basis of Larger Parcel value. If it does appear that certain portions of the property contribute a greater or lesser proportion to the value of the whole, some additional analysis may be necessary.

Highest and best use analysis necessarily requires consideration of several issues beyond the four previously described. For example, condemnation blight is a diminution in the market value of a property due to pending condemnation actions; project enhancement is an increase in a property’s market value in anticipation of a public project requiring condemnation action. As a general rule, the appraiser cannot properly consider either of these factors in the before situation when estimating highest and best use of value (Eaton, 1995). However, definition of the project and date of its inception are often controversial issues. This same “rule” is reiterated in Colorado jury Instructions 36:3 as follows: *In determining the market value of the property actually taken, you are not to take into account any increase or decrease in value caused by the proposed public improvements* (Colorado Jury Instruction, 1998). However, the property owner may be entitled to any increase in value due to speculation or anticipation of the project.

The operative phrase in highest and best use analysis is “reasonable probability.” Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable should be excluded from consideration. On the other hand, if prospective events are shown to be in fact reasonably probable, the property cannot be appraised as if those occurrences have actually taken place.

Highest and Best Use (After Condition)

If the condemnation action results in a partial acquisition of the larger parcel, it is appropriate to separately analyze the highest and best use of the remainder property assuming the project to be in place. This analysis will set the stage for the value of the residue or remainder property and will identify any issues leading to an opinion of damages or benefits.

For this section of the report, the previous definition of highest and best use continues to be appropriate including a separate analysis of Legally permissible uses, Physically possible uses, Financially feasible uses and the Maximally productive use.

Valuation Methodology

In the valuation of improved properties, one of more of three techniques are commonly used. These include the Cost Approach, the Sales Comparison Approach and the Income Approach. Some variations of these approaches may be applicable in certain circumstances. For example, some improvements may not represent the highest and best use of the property. In such cases, the improvements may contribute to the value of the land even though they do not represent the maximally productive use. The improvements then may represent an interim or transitional use which is defined as “that existing and relatively temporary use where the transition to highest and best use is deferred” (Eaton, 1995). A building or other improvement on land which has a higher use may have a number of years of remaining life yet may not enhance the value of land, except as an interim-use tax payer while the land is in transition (ibid, 1995). In these circumstances, the improvements may be valued based upon the present worth of their interim income stream plus the present worth of the value of the land reversion.

On the other hand, the Appraisal Institute recognizes several additional techniques for valuing vacant land. These include Sales Comparison, Allocation, Extraction, Income Capitalization and Yield Capitalization Techniques (such as Discounted Cash Flow Analysis). This latter technique may also be called the Subdivision of Development Approach.

While these techniques are appropriate in some types of appraisals, most are not usually used in an eminent domain context. Assuming adequate sales information are available, the most relevant technique for valuing land is usually the Sales Comparison Approach. Most courts prefer to see evidence of actual sale prices of properties similar to the subject, and in many cases they consider the other techniques to be hypothetical or speculative. In fact, Colorado Case Law (sometimes variously interpreted) seems to preclude altogether use of the Development Approach. This ruling may have resulted from misapplication of the approach, but nonetheless, the preferred method is to compare a nonsubdivided sale to nonsubdivided subject. From an appraiser’s perspective, the difficulty in this “rule” is exacerbated by inconsistent terminology among the various zoning jurisdictions and expansion of the entitlement process.

In conclusion, when valuing vacant land, the desired technique is the Sales Comparison Approach whether the land is raw and unzoned or (final) platted. Many times these issues become gray or subject to interpretation. In these instances, the appraiser should seek guidance or even legal instruction from counsel.

Comparable Sales

It is an appraisal axiom that comparable sales should be similar to the subject. However, the work “similar” is not specifically defined. The Colorado courts have addressed this issue at least to some extent, and according to *City of Westminster v. Jefferson Center Associates*, “in determining whether comparable sales are similar to the subject property, a court should look to whether the properties sold are similar in locality and character and the sales not so removed in time to make any comparison unjust. “ Additionally, *State Department of Highways v. Town of Silverthorne* states that, “similarity does not mean identical, but having a resemblance.” No general rule can be laid down regarding the degree of similarity that must exist to make such evidence admissible. It must necessarily vary with the circumstances of each particular case. In the end, the appraiser uses comparable sales that he/she believes to be similar to the subject; “whether the properties are sufficiently similar to have some bearing on the value under consideration, ...must necessarily rest largely in the sound discretion of the trial court” (Colorado Jury Instruction, 1998).

Even though an appraisal may be prepared subsequent to the date of value, it does not necessarily follow that a sales search must be confined to those properties that occurred prior to date of sale. In fact, the aforementioned *State Department of Highways v. Town of Silverthorne* case addresses the issue with respect to Colorado law. The court determined that “after” sales may be admitted when sufficiently *comparable in character, close in time, and in location* (emphasis added) to be probative of the value of the property being appraised. These three criteria are not defined in the case; therefore, the rule appears to be applied on a case-by-case basis and the trial court will make the ultimate determination. The point is, however, that the appraiser should not automatically disqualify sales believed to be comparable just because they occurred subsequent to the date of value.

Once comparable sales have been selected, it is incumbent upon the appraiser to confirm the details of these transactions by reviewing the deed and discussing the transaction with either the buyer or seller. Confirmation with a broker or other representative of the grantor or grantee is not adequate in the State of Colorado. If this has not been done, the appraiser may not be able to testify to the sales.

In most instances, sales confirmations for eminent domain purposes must be much more thorough than confirmations from some other types of real estate appraisals, such as for lending purposes. For example, when valuing vacant land, among other things, the appraiser should determine the degree of entitlements obtained by the sale property as of the date of sale, location of utility lines and extent of infrastructure, zoning designations and relationship of the property to any comprehensive plan, any additional costs to either the grantor or the grantee, relevancy and extent of water rights, and if the consideration involves anything other than real estate, among other things. Of course, the relevant considerations are selected on a case-by-case basis, but by way of illustration: assume that the subject property is a raw undeveloped parcel of vacant land, and a two year old otherwise similar

sale comparable to selected. It is important to know the entitlements (if any) that made up the sale price. It is one thing if the comparable was platted at the time of its sale but another if it was platted two years subsequent to its sale date. In the first scenario, it may not be admissible whereas in the latter scenario, the comparable may be used.

During the investigation of the comparable sales, it is desirable to assemble a sale packet for each comparable. That is, all appropriate documents in effect at the time of sale may be considered. If a property were purchased subject to plat approval, that may be tantamount to purchase of a platted site. The confirmation process is used to clarify these issues. Typical documents might include the deed, zoning regulations in effect at time of sale, any plats or PUDs and even proposed plans. In addition to confirmation of some of these more ambiguous items, the appraiser must also confirm the size of the property, date of sale and all other relevant issues that are a part of any confirmation.

Comparable Sales Analysis

Once the sales data have been collected and verified, the first step in the application of the State Rule is to estimate the value of the larger parcel with no consideration to the project. In this analysis, the appraiser considers and compares all discernable differences between the comparable properties and the subject property that could affect its value. Adjustments for differences are made to the (unit) price of each comparable property to make the comparable equal to the subject on the effective date of value estimate. There are 10 basic elements of comparison that should be considered in Sales Comparison Analysis (The Appraisal of Real Estate, 1996).

- Real Property Rights Conveyed
- Financing Terms
- Conditions of Sale
- Expenditures Made Immediately After Purchase (This may also be taken into account by using an effective sale price rather than an actual sale price.)
- Market Conditions (or time)
- Location
- Physical Characteristics (Those selected may be determined on a case-by-case basis.) Economic Characteristics (Usually applied to income properties.)
- Use (Zoning)
- Non-Realty Components of Value

Most of these differences are relatively straightforward. However, the category for Zoning/Use is worthy of some comment. For example, some properties may not be zoned for their present use or may have what is tantamount to no zoning. In other words, any difference between highest and best use and existing zoning must be explained and considered. Many situations involve consideration of the probability of rezoning. Colorado Case Poudre School District v. Stark and McGarvey identifies several factors that may be considered in eminent domain cases including:

- 1) rezoning of nearby property, 2) growth patterns, 3) changes of use patterns and character of neighborhood,

4) demand within an area for certain types of land use, 5) sales of related or similar properties at prices reflecting anticipated rezoning, 6) physical characteristics of subject and of near by properties, and, under proper circumstances, 7) age of zoning ordinance.

Another issue that often arises under the Zoning/Use adjustment category relates to legal but non-conforming uses. This situation can result when the improvement of a property pre-dates the applicable zoning ordinance, or when the ordinance has been changed since the improvements were constructed. Zoning nonconformity may or may not have a detrimental or beneficial effect on a property's market value. This concept may be applicable in valuing the larger parcel or in assessing the effect of the acquisition. In any event, the situation must be considered and accounted for in the comparison of the sale comparables to the subject. Various analytical techniques may be used to identify and measure adjustments. Comparative analysis includes the consideration of both quantitative and qualitative factors. Quantitative adjustments are developed as either dollar or percentage amounts. Factors that cannot be quantified are dealt with in a qualitative analysis (The Appraisal of Real Estate, 1996). When adequate data are available, a common technique used in quantitative analysis is "paired data analysis." On the other hand, qualitative analysis involves relative comparisons. This is the study of the relationships indicated by market data without recourse to quantification. Many appraisers use this technique because it reflects the imperfect nature of real estate markets (ibid).

In either method, an adjustment grid may be used to compare the comparable sales to the subject property in terms of elements of comparison previously identified. The adjustments are sequential and the grid is formatted accordingly. The sequence of adjustments generally follows the order of the 10 basic elements of comparison previously listed. After this process, a net adjustment for each comparable is derived (either quantitatively or qualitatively) in order to arrive at a range of adjusted sales or unit prices for the subject property. The net adjustments of all the comparables are arrayed according to those that are superior to the subject, those that are similar and those that are inferior to the subject. This process will result in a bracket of values identifying those comparables that are superior to the subject and those that are inferior.

Based upon the array of net adjustments, a value conclusion can be developed for the subject larger parcel. If quantitative adjustments have been used, the appraiser should be able to provide a foundation for those adjustments and if qualitative analysis has been used, the appraiser should explain the rationale for selection of an appropriate unit value for the subject larger parcel.

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 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.*

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, easements 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. For example, if the unit value of the property taken is greater than the average unit value of the whole, the remainder value in the before condition will necessarily be at a lesser value than either the part taken or the whole. 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. By virtue of the math, if the unit value of the remainder in the before condition is less than the unit value of the part taken, the difference does not constitute damage as some allege.

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 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* (Dictionary of Real Estate Appraisal, 1993).

According to Colorado Jury Instructions, *any damages or benefits are to be measured by the effects, 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 (emphasis added)** 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 Instruction's 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) . It is the author's view that the unit of the remainder value in the before condition can be less than the unit value of the larger parcel, and further that the unit value of the remainder property in the after condition can be less than the unit value of the remainder property in the before condition.

Additionally, damages may be estimated based upon the aforementioned diminution in property value concept or cost to cure. The lesser of these two estimates may be admissible. 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 circuitry 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 be.

Special benefits like damages 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 clearcut.

Rules of Setoff

In Colorado, just compensation is determined by the court after considering the value estimates derived in the State Rule. Technically, the appraiser does not determine just compensation but provides the basis for it. The estimate of just compensation will ultimately reflect the value of the part taken plus damages to the remainder, if any, less special benefits, if any, to the extent they offset damages or a portion of the value of the acquisition in accordance with Colorado law.

By statute, Colorado has two offset rules: one involving highway projects and the other involving all other types of properties. In a highway taking, special benefits may be used to offset damages and/or the value of the part taken not to exceed 50% of the value of the part taken. In all other condemnation cases, special benefits may be used to offset only damages.

In some ways appraising for eminent domain purposes is no different than appraising for any other purpose. For any valuation assignment, the appraiser must adhere to USPAP as well as accepted and recognized appraisal methodology. The valuation for eminent domain purposes expands the appraisal process by combining traditional appraisal rules with appropriate statutory and case law. The issues are often quite complex. The appropriate legal rules are often subject to dispute. Thus, appraisals for eminent domain purposes typically take longer to prepare than appraisals for other purposes and are much more stringently critiqued, particularly by opposing counsel. Typically, appraisals are not submitted into evidence, so the court will make its decision based upon presentation and testimony. For these reasons, appraisal fees associated with eminent domain assignments are typically higher than for many other types of appraisal work.

After completion of the appraisal report, the appraiser is often asked to prepare a rebuttal report which is a review or critique of the opposing appraiser's opinions. This is done in order to disclose in the discovery process any opinions that may be given at trial through direct testimony or rebuttal testimony. The appraiser then will likely be subject to a deposition wherein the appraiser will be asked about every aspect of his/her report. Ultimately, these opinions may be expressed at trial. Consequently, it is apparent that an appraisal prepared for condemnation requires much more diligence and thoughtfulness than for many other types of assignments.

BIBLIOGRAPHY

Colorado Supreme Court Committee on Civil Jury Instructions.(1998).Colorado Jury Instruction, Civil 4th (1990)
36:3. San Francisco, CA: Bancroft-Whitney.

Eaton, J.D. (1995). Real Estate Valuation in Litigation (2' ed.). Chicago, IL: The Appraisal Institute.

Uniform Appraisal Standards for Federal Lands Acquisitions (1992). Interagency Land Acquisition Conference.

Uniform Standards of Professional Appraisal Practice (2000). Washington, DC: The Appraisal Foundation.