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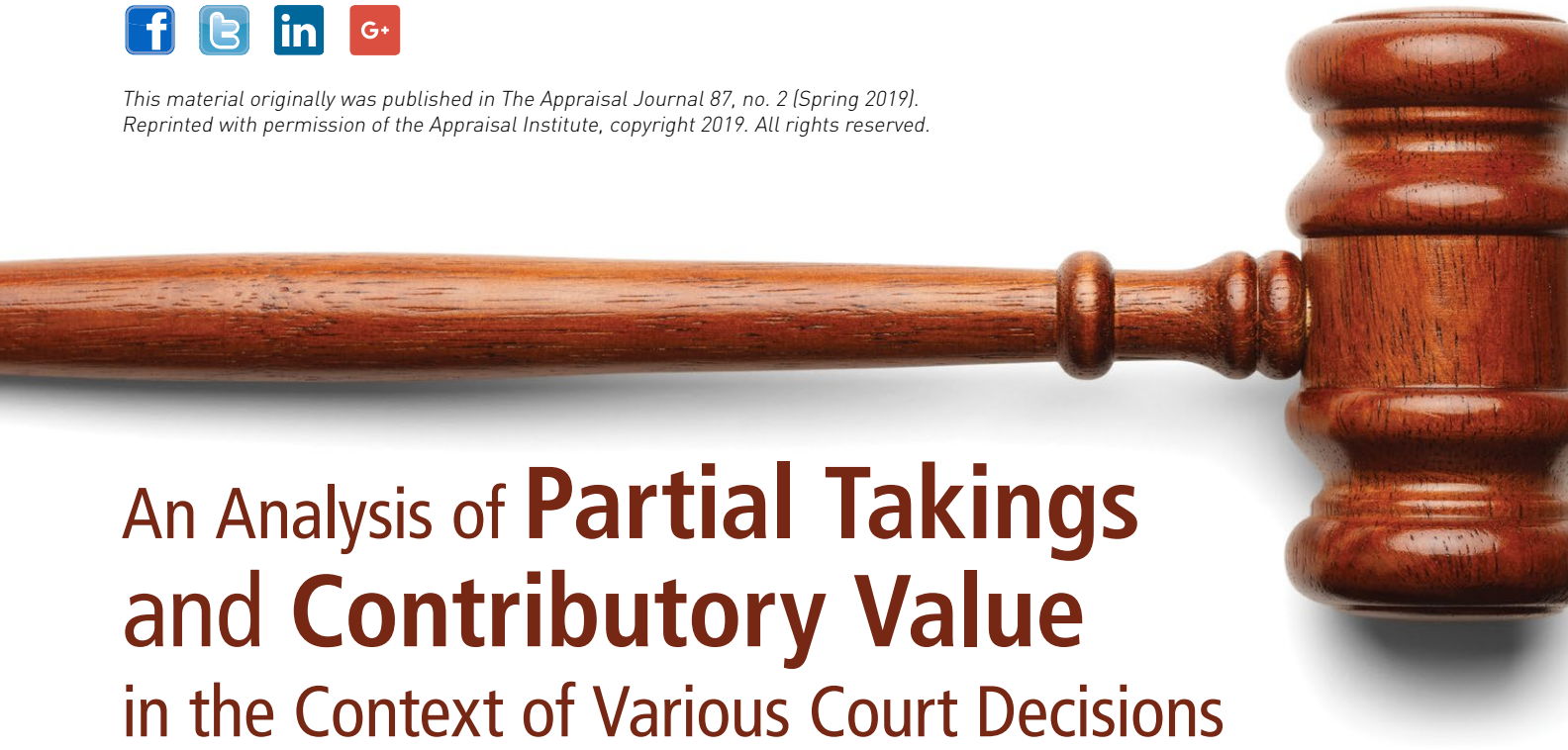

An Analysis of **Partial Takings** and **Contributory Value** in the Context of Various Court Decisions

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ABSTRACT

This article addresses condemnation and expropriation; the tests required to establish the existence of a partial taking; and the methods of calculating the contributory value of land taken when it is impossible or not practical to assign market value directly to the land taken. Measuring the contributory value requires an understanding of the concept of the larger parcel in the context of highest and best use, both before and after the taking. Any damages or benefits occasioned by a taking can be measured by applying the before and after method, with the pre- and post-taking valuations prepared separately and independently of one another. This article offers examples of court analyses in partial takings cases.

INTRODUCTION

The value of a partial taking for public use can be measured in terms of the taken parcel's contribution to the whole or larger parcel in its highest and best use, rather than its value as a separate parcel.[1] A component of real property that cannot be severed and sold on the open market for an economic use is not a viable entity. A partial taking of real property that has no independent highest and best use or that is not part of an integrated highest and best use can only be analyzed by its relationship to the market value of a defined larger parcel in its highest and best use.[2]

Compensation for a nonviable partial taking can be determined by first estimating the market value of the larger parcel, including the nonviable partial taking, followed by an estimate of the market value of the larger parcel, absent the nonviable partial taking. The difference between the two independent estimates of market value reflects the contributory value of the nonviable partial taking or the loss in value occasioned by the partial taking. *The Dictionary of Real Estate*, sixth edition, defines *contributory value* as

1. A type of value that reflects the amount a property or component of a property contributes to the value of another asset or to the property as a whole.
2. The change in the value of a property as a whole, whether positive or negative, resulting from the addition or deletion of a property component.[3] The concept of contributory value applies to both unimproved and improved land and has application in all three approaches to value: (1) sales comparison approach, (2) income capitalization approach, and (3) cost approach.

When analyzing market value, the objective of comparative analysis is to bring the price of each comparable sale, expressed as an appropriate unit of comparison, in line with the subject property by adjusting only for elements (or factors) that deviate from the subject property and for which there is recognition in the marketplace. *The Appraisal of Real Estate*, fourteenth edition, describes comparative analysis as follows:

> Comparative analysis of properties and transactions focuses on similarities and differences that affect value, called elements of comparison, which may include variations in property rights, financing terms, market conditions, and physical characteristics, among others. Appraisers examine market evidence using paired data analysis, trend analysis, statistics, and other techniques to identify which elements

of comparison within the data set of comparable sales are responsible for value differences.[4]

Contributory value is consistent with the unit rule[5] and argues against reliance on the summation method, an additive property component approach that has been frowned upon by the courts in analyzing market value and damages in condemnation proceedings.[6] Contributory value is also consistent with the "principle of contribution," which states "the value of a particular component is measured in terms of its contribution to the value of the whole property or as the amount that its absence would detract from the value of the whole. The cost of an item does not necessarily equal its value."[7] According to the *Uniform Appraisal Standards for Federal Land Acquisitions (UASFLA)*, application of the unit rule as a means of analyzing the value of property is consistent with the principle of contribution. UASFLA states that in the unit rule, "It is the contribution of the improvements (and all of its components) to the market value of the whole that is being measured." [Section 1.5.3.1.4; also Section 4.4.3.1.] *UASFLA* also advises that "Property must be valued as a whole for federal acquisition purposes, with due consideration of all of the components that make up its value. Its constituent parts are considered only in light of how they diminish the value of the whole, with care being exercised to avoid so-called cumulative or summation appraisals." [Section 1.10.1.] Likewise, analyzing the value of a property as a whole under single ownership cannot be based on the summing of separate values for various property components.[8]

TAKING LESS THAN THE WHOLE

An opinion of market value must be predicated on highest and best use of a defined larger parcel. A partial taking that is incapable of being defined as a larger parcel and satisfying the concurrent test of highest and best use includes takings that are less than the property ownership as a whole, such as those listed below:

- A taking of a watercourse traversing a property.
- A taking of embankment land from a property.
- A taking of land to which there is no direct legal access.
- A taking of land for a surface, subsurface or overhead easement, either temporary or permanent.
- A taking of a narrow linear strip of land along the frontage of a property for a road widening.[9]
- A taking of a right-of-way.
- A taking of land which forms part of leased land that extends beyond the part taken.
- A taking of an existing easement with or without embedded infrastructure.
- A taking of one property that impacts the utility or use (i.e., unity of use) of other noncontiguous property, both under the same ownership.[10]

TESTING FOR HIGHEST AND BEST USE

A partial taking of a section that has no independent highest and best use or is not part of an integrated highest and best use of a larger parcel is effectively a nonviable partial taking. The highest and best use analysis need go no further than the initial tests of *physical possibility* and *legal permissibility* in order to identify a partial taking. A negative response to any one of the following questions is confirmation of a partial taking:

- **Physical Possibility**
  - Is the area of the taking large enough to support any probable economic use?
  - Is the configuration of the taking sufficient to support any probable economic use?
  - Is the topography of the taking suitable for any probable economic use?
  - Is the soil capacity of the taking capable of supporting any probable economic use?
  - Is the area of the taking physically accessible from a public road?
  - Is the land taken, if encumbered by an easement, capable of accommodating any probable economic use?
- **Legal Permissibility**
  - Is the area of the taking large enough to support any legally permissible use?
  - Is the configuration of the taking sufficient to support any legally permissible use?
  - Is the topography suitable for any legally permissible use?
  - Is the soil capacity of the taking capable of supporting any legally permissible use?
  - Is the soil quality of the taking clean enough to support any legally permissible use?
  - Is the area of the taking legally accessible from a public road?
  - Is the taking, if encumbered by a restrictive covenant, capable of accommodating any legally permissible use?
  - Is the taking, if encumbered by an easement, able to accommodate any legally permissible use?

Furthermore, land taken that bisects buildings or structures or that is encumbered by a lease or life estate encumbering part or all of the land not taken also fails the two initial tests of highest and best use and must be treated as a partial taking.

An analysis of all probable economic uses of the part taken that fails the initial highest and best use test of physical possibility or legal permissibility precludes further analysis of those uses in the context of marketability, supply and demand, and financial feasibility. Accordingly, the highest and best use analysis must be expanded beyond the partial taking to incorporate some or all of the land not taken to define notional boundary limits of a larger parcel or an economic unit and identify economic uses that satisfy the complete spectrum of the four-prong test of highest

and best use: physical possibility, legal permissibility, financial feasibility, and maximum productivity. Some key considerations of highest and best use analysis include the following, as described in "Partial Taking Expropriation."[11]

- Title restrictions: Legal use precluded by restrictive covenant or use limited to a specific legal use.[12]
- Legal permissibility: Use must be legal or capable of being achieved (i.e., rezoning and/or official/master plan amendment) within a reasonable time frame.[13]
- Physical adaptability: Site and/or improvements, including off-site infrastructure, must be capable of supporting the use.[14]
- Externalities: Impact on use by external forces that effect property values.[15]
- Probability of use: Must have a greater than 50% chance of being achieved.[16]
- Timing of use: Must be achieved within a reasonable time frame.[17]
- Demand: There must be an active market for the use.
- Financial feasibility: Prices and/or rents must be sufficient to support the use.
- Sustainability: The use must be maximally productive over a long period.
- Purchaser/user: The most likely purchaser or user must be identified.

In *State ex rel. Ordway v. Buchanan*,[18] the court identified two methods of analyzing the value of a partial taking, either as part of the whole parcel or as a separate economic unit, and it stressed the importance of highest and best use analysis in making that determination:

> In partial taking cases, generally the land taken is valued as part of the whole tract and not as if it stood alone... The rule protects the condemnee by assuring a just award, because in many cases the part taken would be useless and valueless if considered alone. [case citation omitted]

Ultimately, whether a partial taking is a separate economic unit or should be analyzed as part of the whole property is a matter of highest and best use analysis. The *Ordway* court stated:

> [T]he determination of whether the land taken should be valued separately or as part of the whole is based on a determination of the highest and best use of the land. Where the part taken has a market value based on a separate economic use and commands a higher value as a separate entity than as a part of a larger tract, such value has been allowed. Conversely, the highest and best use of the part taken may be so related to its use with the entire property that the value of the part taken is dependent upon the value of the entire tract. [case citations omitted][19]

In addition, the owner or beneficial owner of the land taken must also own contiguous land or land close by, the value of which is enhanced by unified ownership with the land taken to the extent that,

> Such a connection or relation of adaptation, convenience, and actual and permanent use, as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it is used.[20]

Consequently, is it only possible to commence the actual valuation after notional boundaries have been drawn to define the larger parcel as an economic unit, incorporating the part taken and supporting its own highest and best use.

LARGER PARCEL OR PARENT TRACT

When ownership of an entire tract or whole property does not constitute the larger parcel, there must be a determination of the tract that constitutes the larger parcel and a notional redrawing of the boundary limits based on a number of factors. UASFLA notes that the larger parcel has the following attributes:

> That tract or those tracts of land that possess a unity of ownership and have the same, or an integrated highest and best use. Elements of 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.[21]

These attributes – unity of title, unity of use, and contiguity – are referred to as the larger parcel trinity.

> Valuation of a partial taking through expropriation may require consideration of the "larger parcel" and injurious affection (loss in value [or betterment--increase in value] to the remainder).[22] Assemblage establishes the effect, if any, on value of the "larger parcel" [where a separate and contiguous parcel is under the same ownership].[23]

In general, to be considered as the larger parcel, the tract(s) must be owned by the same individual(s). The form of ownership is not the determining factor, as "ownership (possession) can be held in fee simple, a lesser estate, a combination thereof or under a partnership agreement."[24] Ownership can be confirmed through title searches. Ownership maps prepared by the condemning authority also are useful in determining ownership.

Another term that expresses the concept of the larger parcel is *economic unit*. *Black's Law Dictionary* defines *economic unit* as follows:

> In a partial-condemnation case, the property that is used to determine the fair-market value of the portion that is taken by eminent domain. The land taken may be a large or small portion of the entire property. To determine how much property to include in an economic unit, three factors are weighed: (1) unity of use, (2) unity of ownership, and (3) contiguity. Of these, the most important is unity of use.[25]

An economic unit is a self-contained property, the boundaries of which are defined entirely by the partial taking. This distinguishes it from a larger parcel, which encompasses the land taken, is defined as less than the boundary limits of the whole property ownership, and allows for consideration of both the contributory value of the land taken and the prospect of damages or benefits (or neither) to the remainder. An economic unit is a self-sufficient, separate economic unit that is independent of the parent tract with a different highest and best use. Its market value can be determined without reference to the remaining land.[26] Support for a separate and independent economic unit requires that the tract be marketable:

> In order for the land to be valued as a separate unit, the law requires only that the parcel taken be of a size and shape that is capable of a separate and independent use in the market.[27]

Other terms that assist in understanding and applying the concept of the larger parcel include:

- **Parcel** – A tract of land; esp., a continuous tract or plat of land in one possession, no part of which is separated from the rest by intervening land in another's possession.[28]
- **Property** – The right to possess, use, and enjoy a determinate thing (either a tract of land or a chattel); the right of ownership – the institution of private property is protected from undue governmental interference. Also termed bundle of rights.[29]
- **Partial taking**–The acquisition of a part of a real estate parcel or a real property interest for public or quasi-public use under eminent domain; acquisition by Condemnation of only part of the property or some property rights.[30]
- **Remainder** – The portion of a parcel that is retained by the owner after a partial taking.[31]
- **Nonviable remainder** – A nonviable remainder has no independent highest and best use, and has limited marketability. Unless it can be tied to an adjoining property as part of a larger parcel, for which a highest and best use can be established, a nonviable remainder will have nominal or no market value. Only land from an adjoining property that is not part of any other land expropriated [or condemned] can be considered in defining the larger parcel.[32]

Courts in the United States and Canada recognize the concept of the larger parcel or parent tract, a concept that is confined almost exclusively to condemnation and expropriation. Defining the larger parcel is required whether the partial taking of the real property is whole or partial. It matters not that the larger parcel, when it is defined as constituting less than the whole, has no actual legal boundaries, because they are effectively defined by highest and best use analysis.

When ownership involves only one property in the highest and best use test of the larger parcel analysis, the larger parcel functions as a separate economic unit. "An economic unit may be defined as the smallest, marketable, and sustainable portion of a property," according to the Texas Department of Transportation's *ROW Appraisal and Review Manual*.[33]

Where a partial taking does not possess the same physical characteristics or highest and best use of the land as a whole, the unit rule is modified to reflect the disproportionate contribution of the partial taking to the value of the property as a whole. As noted by the Illinois appellate court in *Department of Transportation v. Kelley*, it is recognized that

> "[n]ot every part of a tract will be as valuable as other parts, and different highest and best uses may be used in valuing the tract as a whole," [case citations omitted] and "[i]t may be proper to assign a highest and best use for one portion of the property and a different highest and best use for another." [case citations omitted] [34]

In *Kelley*, the property in question was acquired for the purpose of widening an intersection. The two appraisers representing the landowner valued different portions of the land separately, claiming that the partial taking should not be subject to the unit rule. The court decided it was not appropriate to deviate from the unit rule,[35] and expressed concern over the arbitrariness of delineating the "zones of value."

> [T]he facts in this case do not provide... clearly delineated boundaries. Even the defendants' appraisers could not agree as to where one "'zone of use" began and another ended... [The appraisals] bring into focus the import and intent of the unit rule, that is, to prevent misrepresentation of the value of condemned property.

In another Illinois case, *Illinois Dept. of Transp. v. Raphael*,[36] there was a partial taking of land from a parcel improved with a two-story, single-family dwelling and attached three-car garage. The taking consisted of an 871-square-foot strip across the frontage that included portions of the front lawn, the driveway, and the turnaround area. The valuation method applied by both the property owner's appraiser and the condemnor's appraiser were found to be improper for failing to properly account for the contributory value of improvements. The property owner's appraiser valued the whole property at $475,000. He then proceeded to address the value of the partial taking, stating "[t]he value of the take lies in its contribution to the whole property, functioning as an integral part of the whole" valuing the part taken as follows:

> In calculating the value of the part taken, the whole property value of $475,000 divided by the whole land area of 13,175 square feet=[$]36.05 per square foot of land improved. Applying the unit value to the part taken is calculated as 871 square feet × $36.05=$31,402, rounded to $31,000.

The appraiser then turned his attention to the remainder, and concluded that the remainder had suffered a diminution in value of $34,000, based on the following reasoning:

> He opined that the "road-widening project will have a significant impact on the subject property's remainder."... [He] explained that Route 53 will be closer to the residence and that the paved parking and turnaround area will be restricted to a one-car parking area or a turnaround area, but not both... [The appraiser] wrote: "This loss results in a diminution in the value of the remaining property." He valued that loss at $34,000, based on comparable sales.

The appeals court ruled that the appraiser's valuation method was improper for failing to distinguish characteristics of the partial taking that contributed disproportionately to the value of the property as a whole, commenting as follows:

> To determine the value of the part taken,...[the appraiser] assigned a uniform square-foot value to the entire property... [He] assumed that every part of the property was as valuable as every other part, despite the fact that the remainder contained a single-family home and the part taken was a 10-foot strip containing only parts of a lawn, an asphalt-paved driveway, and an asphalt-paved turnaround area. Because the part taken could not be used for any other purpose, i.e., it was non-buildable,...[The appraiser's] valuation method misrepresented the value of the "specific land portion to be taken."' [case citations omitted] [He] assumed, without basis, that the part taken was as valuable as the remainder... The owner's claim that the unit rule requires a determination based upon a uniform square-foot valuation misapplies the unit rule in this case. Such a calculation would be appropriate were the entire property, the part taken and the remainder, homogeneous.

Appraisal evidence presented by the condemnor was also rejected as improper for failing to consider the contributory value of the improvements contained in the remainder.[37]

> Similarly,... [the condemnor's appraiser] failed to consider the contributory value of the improvements within the remainder when valuing the part taken. Contrary to her own opinion that the highest and best use of the whole property was residential,...[the appraiser] estimated the value of the part taken as vacant....then valued the part taken on a per acre basis, based only on comparable vacant-land sales... [The condemnor's appraiser] added $1.50 per acre [sic] for the contributory value of the improvements contained only on the part taken: asphalt and grass. She testified that, when she valued the part taken, she did not consider the contributory value of the single-family home, because it was "not part of the acquisition." Thus, ...[the] valuation method was improper.

In *State v. Chana*, the Texas appeals court affirmed the "separate economic unit" methodology advanced by the landowners' appraiser.[38] The case involved a dispute over the market value of partial taking acquired for the purpose of constructing a detention pond. The landowners' property consisted of a rectangular 7.765-acre tract. It was bounded by FM 529 to the north, by Dinner Creek to the east, and a subdivision to the south. Originally, the state planned to take 2.385 acres for a detention pond, but at the request of the landowners the state agreed to shift the back boundary of the partial taking thirty feet forward to the north. This allowed the landowners to connect the remainder of the property to Dinner Creek, allowing for future drainage and water detention, and reduced the partial taking to 2.072 acres. The court accepted the landowners' appraiser's opinion that the highest and best use of the 7.765-acre tract was division into three separate, independent parcels or economic units for commercial development, and the taking would be part of a 2.385-acre self-sufficient unit (the same land the state originally planned to take) with a high probability of severance to which the appraiser confined his estimate of value.

COMINGLING VALUATION METHODS – SEPARATE ECONOMIC UNIT AND DAMAGES

At times, the courts have comingled valuation methods, improperly applying methods for valuation of the partial taking and larger parcel; the following presents some examples.

In *State ex rel. Ordway v. Buchanan*,[39] a partial taking adjacent to the road was part of a five-acre rectangular interior parcel with a frontage of 330 feet. Before the partial taking, the five-acre parcel was flat, undeveloped acreage, physically homogenous throughout. The property was vacant and unused, with no turnouts from the street.

> [Buchanan's appraiser] testified that the land taken was capable of being used independently for some use, possibly a gas station, although earlier he also testified that it was not probable that the land taken had an independent value by itself in the market. The State's expert testified that the property taken was "probably usable," but that it was "not a rational, marketable size property in this market" because of the frontage-to-depth ratio. Essentially, the State's expert agreed that the square footage of the property was sufficient to support an independent use, but questioned its usability because of the shape of the land taken.

In upholding the lower court's award of $110,000 for the partial taking based on Buchanan's appraiser's larger parcel theory, the appeals court ruled there was sufficient basis for the trial court to admit evidence on the value of the parcel taken as a separate and independent unit. Yet, the appraiser testified that it was not probable that the land taken had an independent value by itself in the market. The two positions adopted by the appraiser were incompatible with each other, as a partial taking that cannot be marketed on its own is not a standalone parcel, a critical factor disregarded by the majority in upholding the award for the partial taking as a separate economic unit. As noted by the majority in the appeals court's ruling addressing the value of the partial taking:

> Determination of whether the land taken should be valued separately or as part of the whole is based on a determination of the highest and best use of the land. Where the part taken has a market value based on a separate economic use and commands a higher value as a separate entity than as a part of a larger tract, such value has been allowed. [case citations omitted] Conversely, the highest and best use of the part taken may be so related to its use with the entire property that the value of the part taken is dependent upon the value of the entire tract.

As for the remainder property, the lower court's award of $37,000 for severance damages was reversed as the appraiser had comingled two mutually exclusive approaches recognized in valuing a partial taking, thus resulting in double compensation. The appeals court said:

> Using the proper valuation process, severance damages may be appropriate even though the part taken is valued as a separate unit. In a partial taking where the land taken is valued separately, severance damages to the remainder also should be determined by considering only the before and after value of the remaining property as a separate unit and not its value as a part of the larger parcel. [case citation omitted] Thus, the before value of the remainder should not be dependent in any way upon the remainder's use as a part of the larger parcel. This method of valuation will protect against duplicative damage awards where the land taken is valued as a separate unit.

It is axiomatic that a party must be consistent in the valuation method it utilizes for valuing both the part taken and the severance damages to the remainder. A party is not precluded from arguing the "whole parcel" and "separate unit" values as alternative theories. However, he cannot attempt to combine the methods and value the land taken separately but then consider the remainder as part of the larger parcel for the determination of severance damages.

The claim for severance damages was based on:

1. damage to the remainder resulting from the inability to develop the front in conjunction with the back of the property (underutilization);
2. reduced visibility as a result of being set back 80 feet from the main street; and
3. damages caused by altered traffic flow as a result of the change in the street on the land taken.

The value of the separate unit included the ownership's frontage, its access to traffic flow, and its ability to be developed separate and apart from the rest of the parcel. In this instance, the so-called damages to the remainder were artificially created as a consequence of the separate unit selected by the appraiser. The court found severance damages would have been a relevant consideration only if the "whole parcel method" of valuation had been adopted by the appraiser:

> Under the "separate use" method of valuation, neither the utilization of the remainder, its visibility from the road, nor the traffic flow around it were affected by the taking. Viewed as a separate parcel, the remainder could not be used in conjunction with the condemned land before the taking. Consequently, the ways in which the remainder could be used did not change after the taking. Similarly, visibility was not affected by the taking. Before the taking, the northern boundary of the remainder was 80 feet from the main street. After the taking the visibility of the remainder was unaffected—the boundary was still 80 feet back from the main road. If anything, the visibility of the remainder was enhanced by the taking because the frontage road brought traffic closer to the remainder. Finally, in this case the remainder, considered as a separate unit, had no traffic flow in front of it before the taking. After the taking, the frontage road bordered the remainder so that the remainder actually benefitted from increased traffic flow.

The dissent in *Buchanan* rejected the "separate use" method of valuing the land taken, concluding the result "defies common sense" for failing to recognize the practical effect of the partial taking that simply replaced old frontage with new frontage. The dissent noted, "That frontage still will have the same use which Buchanan claims was acquired by the state. ...By the magic of the majority's valuation process, Buchanan has been paid for the taking of valuable commercial frontage, but still has the same frontage and will profit from the same commercial value."

In *City of Phoenix v. Wilson*, the Arizona appeals court awarded remainder damages and reversed the lower court's finding that defined a larger parcel as less than the whole property. The Wilsons owned a 23.24-acre parcel from which a 1.4-acre parcel was taken from the corner. At the time of the partial taking, the entire 23.24-acre parcel was being used for farming but was residentially zoned to permit one house per acre. The city's General Plan indicated that the area should be developed for high-density uses such as apartments. The trial court awarded $80,000 for the partial taking and $99,000 in severance damages based on the testimony of the landowner's appraiser.

The landowner's appraiser opined that the highest and best use was to hold the property as though vacant for future investment with the anticipation of splitting the property into two economic units. According to the appraiser, a 5-acre portion around the corner, which included the 1.4-acre partial taking, could form a separate economic unit commanding a price proportionately higher than the remaining property. He thought the 5-acre separate economic unit was suitable for various institutional uses such as a school or place of worship, or for nonresidential but residential-compatible economic uses such as mini-storage, offices, bank branch, dependent care facility, mortuary, and hotel or motel. The latter economic uses would require rezoning, but the landowner's appraiser thought rezoning

would be reasonably possible. Based on comparable sales, which included a school site, and a church and school site, he estimated the market value of the 5-acre economic unit at $272,250 ($1.25 per square foot), with the 1.4-acre partial taking assigned a proportionate value of $80,000, rounded. He then concluded that the remaining 3.6 acres of the (hypothetical) 5-acre separate economic unit had lost its economic advantage due to the impact of the partial taking on access, visibility, and frontage to the adjoining 18.24 acres, claiming severance damages of $99,000.

At trial, the landowner's appraiser acknowledged that his hypothetical 5-acre parcel could have been drawn in other ways and that his selection of the precise size and location of the parcel was a matter of judgment. According to the appeals court, the boundaries and size of the hypothetical 5-acre parcel selected for analysis were arbitrary. In reversing the lower court's judgment, the appeals court ruled that,

> no authority sanctions a method of evaluation that would allow the part taken [1.4 acres] to be valued as part of a hypothetical [5-acre] parcel within a whole parcel. The [1.4-acre taking] should have been valued either as a separate [economic] unit or as part of the whole parcel [consisting of 23.24 acres]. Only after one of these approved methods was selected could it then be determined whether there were severance damages to be calculated.

On further appeal, the Arizona Supreme Court in City of Pheonix v Wilson reinstated the trial court's decision, finding the facts were materially different in this case and did not support a rigid rule that "the property taken [1.4 acres] should have been valued either as a separate unit or as part of the whole parcel 923.24 acres]." The court said that, premised on a proper foundation

> The jury concluded that a 5-acre intersection corner, which could probably be rezoned for [a] different and higher use than the rest of the tract, would have a different and higher value than the remainder of the property. Once that is accepted, the owner is entitled to that higher value when the property is taken, whether the taking is all or only a part of the more valuable [5-acre] portion [a separate economic unit]. [40]

In *Russell Inns Ltd. v. Manitoba*,[41] a Canadian appeals court upheld a commission's ruling that the larger parcel did not extend to include an abutting lot, where the partial taking was confined to only one of two contiguous lots on a registered plan of subdivision held under the same ownership.

The appeals court concluded the province had not provided sufficient evidence justifying application of the larger parcel theory. The commission awarded damages confined strictly to an analysis of Lot 2 (the presumed partial taking). However, the commission conceded situations can arise where the partial taking approach would be appropriate, without apparently realizing that by confining the partial taking analysis to Lot 2, the commission effectively determined Lot 2 to be the larger parcel.

At the commission hearing, the owner testified that Lot 1 was purchased because it was the only way to obtain Lot 2. Presumably, the purchaser as a knowledgeable developer, acted in his best interests when he chose to acquire both lots simultaneously. The ruling in this case did not consider a larger parcel analysis in the after-taking scenario, as there is no post-taking highest and best analysis of the balance of Lot 2 combined with part or all of Lot 1, which is underimproved with a forty-year old, 1,000-square-foot residence occupied as a rental.

Both the balance of Lot 2 and Lot 1 have the same commercial zoning, are physically contiguous and under the same ownership, and were purchased at the same time. On this new potential larger parcel a highest and best use analysis should have been conducted to determine whether the existing use or a use permitted under the commercial zoning represented the highest and best use. The partial taking reduced the frontage of Lot 2 from approximately 147 feet to 87 feet, but when combined with adjoining Lot 1 could be increased to a maximum of 387 feet, which, in effect, reestablished the diminished commercial potential of Lot 2 occasioned by the partial taking. The absence of a comprehensive post-taking analysis incorporating part or all of Lot 1 resulted in compensation being paid twice: once for the partial taking and again as remainder damages.

The property owner was awarded a total of $145,000, which at $3.50 per square foot represented the market value of Lot 2 before the partial taking[1/m]—yet the owner retained ownership of the remaining portion of Lot 2, which could be combined with part or all of his adjoining ownership of Lot 1. Even if adjoining Lot 1 were under different ownership, the market would still attribute some value to the remainder of Lot 2 in contribution to Lot 1, with the owner of Lot 1 being the most likely purchaser in a bilateral market.[42]ftnt

In *State v. Silver*,[43] the New Jersey appeals court was confronted with a unique situation involving a partial taking for road widening that involved a taking from each of two contiguous properties under the same ownership. Each property had an independent highest and best use and was treated as a separate larger parcel before the partial taking. One property had been operated as a clothing store, and the other property was improved with gas pumps, a shed, and a bungalow. The clothing store had a 70-foot frontage, and the abutting gas station had a frontage of 100 feet, with a secondary frontage along a side street.

The partial taking consisted of a 45-foot-wide strip along the frontage of each property, and a 3-foot-wide strip along the side street. Virtually all the clothing store parking area was taken, substantially reducing the functional utility of the parcel as a clothing store. The partial taking also effectively destroyed the use of the other parcel as a gas station by eliminating its gasoline pumps, storage tanks, and structures. Based on the before and after rule, the trial court awarded $80,000 for the partial taking

from the clothing store, and $26,200 for the partial taking from the gasoline station. Combined, the total awarded for the two partial takings was $106,200. The awards were affirmed by the appellate division.

Having ruled that each of the two parcels must be valued separately, their common ownership was considered irrelevant and disregarded in the award of severance damages attributed to each property. On appeal, the condemning authority successfully argued the larger parcel theory in relation to the two contiguous remainders under common ownership, a position it was precluded from advancing at trial:

> [T]he ''unity of use" test was not for the purpose of determining whether the taking of all or a part of one parcel can be considered a 'partial' taking in relation to the other parcel... Here, we are concerned with the valuation of property remaining after the...[taking].

The condemning authority sought to demonstrate the optimum use of the remainder of the gas station parcel as a parking area for the remainder of the store parcel because without parking, the economic value of the store property as a retail store would be severely diminished. The appraiser for the condemning authority calculated that the combined use of the two remainders would reduce damages by $26,400.

The New Jersey Supreme Court acknowledged that statutorily each parcel required a separate award, but it ruled that there was no legal requirement to disregard market factors such as potential combined use and common ownership of two contiguous remainders in reaching appropriate awards for each separate parcel.

PARTIAL TAKING VALUATION METHODOLOGY

Regardless of the methodology applied in analyzing the value of a partial taking, barring unique situations, independent pre-taking and post-taking appraisals are mandatory.[44] The two methods relied on to analyze the impact of a partial taking in the context of the pre- and post-taking market values of the property can be summarized as follows:

- In one group of cases, it has been held that the measure of damages is the market value (contributory value)[45] of the part taken as a function of the whole plus the difference before and after the taking in market value of the remainder area. This concept of the measure of damages to the remainder is illustrated by the following equation:
  Value of land taken + (Value of remainder area before taking – Value of remainder area after taking) = Damages
- The second rule enunciated by some courts is the before and after rule, wherein damages are computed as the difference between the value before the taking and the value of the remainder area after the taking. This approach is illustrated in the following formula:
  Value of entire parcel before taking – Value of remainder area after taking = Damages[46]

It is the difference between the pre-taking value (uninfluenced by the project or scheme) and post-taking value (influenced by the project or scheme) that effectively determines what, if any, monetary impact the partial taking has had on the property, and whether the property owner has sustained a financial loss or gain. In those jurisdictions in which a property owner is always entitled to at least the contributory value of the part taken, further analysis of the pre-taking value (uninfluenced by the project or scheme) is required. Analyzing the contributory value of the part taken in relation to the pre-taking value of the property as a whole unaffected by the post-taking value of the remainder or residue ensures that the property owner always receives at least the contributory value of the part taken. Some of the difficulties encountered in analyzing the value of a partial taking in conformity with the unit rule include the presence of improvements on the part taken and the lack of direct comparables.

In *City of Chicago v. Anthony,*[47] the testimony of an appraiser concerning future rental income that could be derived from a portion of the subject property leased to a billboard company was rejected as violating the unit rule. The Illinois Supreme Court stated:

> The motion judge found the property must be valued as a whole, and a lease may not be separately valued as one part to be added to another part. This ruling is consistent with the unit rule of valuation in eminent domain cases, which requires that property be valued as a whole. Because the "measure of recovery for damage to private property caused by a public improvement is the loss which concerns the property itself...the fair market value of improved property is not the sum of the value of the building and the value of the land computed separately."[48] The unit rule is applied in eminent domain cases to avoid misleading the jury.

A failure to conduct an independent post-taking appraisal can result in a gross overstatement of damages, double compensation, errors in logic, failure to expose questionable appraisal practices.

An independent post-taking appraisal serves many practical purposes in partial taking assignments:

- Eliminates any preconceived notion of a damage-oriented mindset that the remainder must have sustained damages, i.e., suspicion without proof.
- Compels an appraiser to analyze the remainder as a new property, in a post-taking environment, and to repeat all the steps of the valuation process.[49]
- Guards against intentionally or unintentionally overlooking a change in highest and best use or diminished highest and best use, or disregarding a post-taking larger parcel analysis.
- Compels an appraiser to consider comparable sales (or comparable rentals) that reflect the post-taking characteristics of the remainder in a changed environment.

- Provides insight into the reasonableness of the contributory value of the part taken, and the reasonableness of any claimed damages. (Not all physical property characteristics contribute to value, and some contribute disproportionately to the value of the whole.).[50]
- Provides insight as to whether, overall, the taking has damaged or enhanced the value of the remainder property. If there is an overall enhancement in the value of the remainder, any alleged damages would be invalidated. As observed by the appeals court in *State v. Silver*,

  Because there is property remaining subsequent to the taking that must be valued, an examination of all of the characteristics of such remaining property *after* the time of the taking, as opposed solely to facts in existence at or immediately before condemnation, is inescapable. Therefore, in the case of a partial taking, the market value of property remaining after a taking should be ascertained by a wide factual enquiry into *all* material facts and circumstances – both past and prospective – that would influence a buyer or seller interested in consummating a sale of the [remainder] property. [Emphasis in original]

Appraisers are professionally obligated to complete valuations in a meaningful, relevant, comprehensive, understandable and transparent manner. "In developing a real property appraisal, an appraiser must be aware of, understand, and correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal."[51]

Most jurisdictions allow or mandate application of the before and after method in the analysis of a partial taking.[52] According to *Utah Department of Transportation v. Target Corporation*, prior to the state supreme court ruling in *Admiral Beverage*,[53] appraisers could not simply state their conclusions in straightforward before-and-after terms of market value. Instead, they had to attempt to assign a specific value to each of the numerous factors affecting market value:

> [The Utah] supreme court noted that this task was "extreme[ly] difficult[], if not impossibl[e]," for appraisers to accomplish without resorting to "rank speculation."...Ever since Admiral Beverage, condemnation claimants have been able to assert claims to a full complement of severance damages, measured using a simple before-and-after-metric, and limited only by general notions of causation and evidentiary proof.

In a Kentucky case, the court[54] bemoaned the fact that no appraisal witness for either party sought to undertake a post-taking valuation analysis of two noncontiguous remainders, each its own larger parcel, and occasioned by the land taken. The court stated,

> It is unfortunate that no witness on either side was asked to express an opinion as to the market value of the two remainder tracts if sold separately...[I]n the absence of evidence to the contrary it may be assumed that the highest and best use of a farm cut in two by a condemnation remains the same after the taking as before, and that its highest and best use is still as a single unit, [but] this case is different....The case presents a classic instance in which the remainder tracts should have been evaluated separately.

In *United States v. 2.33 Acres of Land*,[55] the appeals court found that the property owner had been overcompensated for a partial taking because a separate allowance for severance damages for the part taken was inappropriate when the diminution in market value was reflected by the difference in the pre-taking and post-taking market value estimates. There the court stated,

> [If the before and after method of valuation] is properly employed when there is a partial taking, severance damages should not be allowed. This is so because if the fair market value of the property after the taking is subtracted from its fair market value before the taking, presumably the fair market value of the taking would reflect any diminution in value by reason of the taking so that a separate allowance for severance damages is unnecessary in order for the landowner to recover just compensation.

Presumably, any entitlements, costs, and entrepreneurial effort associated with developing the land would have been reflected in the value estimate before the taking, as well as in the after-situation, had a valuation been undertaken.

In *United States v. 9.20 Acres of Land in Polk County*,[56] the court explained that it was incorrect to think of severance damages as a separate item to be treated in isolation without regard to the pre- and post-taking market values of the property:

> It is incorrect to think of "severance damages" as a separate and distinct item of just compensation apart from the difference between the market value of the entire tract immediately before the taking and the market value of the remainder immediately after the taking. In the case of a partial taking if the "before and after" measure of compensation is properly [applied], there is no occasion...to talk about "severance damages" as such, and indeed it may be confusing to do so. The matter is taken care of automatically in the 'before and after' submission.

Analyzing damages as separate components of a property rather than in relation to the value of the property as a whole is analogous to the ruling in *Department of Public Works & Buildings v. Lotta*,[57] which rejected testimony based on a cost approach that combined land and building components without regard to the value of the property as a whole.

Numerous condemning authorities have explicit appraisal policies that mandate post-taking appraisals whenever there is a partial taking. Typical appraisal requirements for partial taking assignments prepared on behalf of condemning authorities are quoted below:

> Merely subtracting the value of the part acquired from the estimate of before value to arrive at the after value renders the [appraisal] report unacceptable [Section 5.219].[58]
>
> The appraiser develops two opinions of value: (1) valuing the pre-acquisition scenario and (2) valuing the post-acquisition scenario [Chapter 11].[59]
>
> **No comparison of the "remainder after" to the "remainder before" will be made for determining the "remainder after's" value [emphasis in original].[60]**
>
> In Texas, the general rule for determining fair-market value is the before-and-after rule. However, when only part of the land is taken for an easement, the before-and-after rule still applies, but compensation is measured by the market value of the part taken plus any diminution in value to the remainder of the land.[61]
>
> The valuation of the remainder after the acquisition cannot be valued by a mathematical process of deducting the value of the part acquired from the whole property.[62]

A scholarly paper[63] describing application of the two methods employed in analyzing a partial taking concludes that the before-and-after method (BAA) better reflects the monetary impact of a taking:

> Although at least one theorist has stated that BAA may simply be another way of expressing the VPD (Value Plus Damages Method) without any actual difference, he later noted that the application seems to take a more realistic value of the damages, rather than the artificial nature of the VPD. With the VPD method, 'an appraiser is more prone to exaggerate both elements of compensation...
>
> [T]he formula encourages him to make allowances for damages though none in fact may have been sustained. Instead the BAA method, by definition, efficiently incorporates any damages into the final valuation, leaving less room for human error. As a result, BAA ensures more accurate and fair results. [citations omitted]

When the before-and-after method is properly applied by making provision for the contributory value of the part taken as an interim step in the pre-taking valuation of the property as a whole, the property owner is assured of receiving at least the amount that the partial taking contributes to the market value of the property as a whole.

PROJECT INFLUENCE

Project influence in condemnation or influence of the scheme in expropriation refers to a positive or negative impact on the pre-taking value of a property as a result of the same public project for which all or part of a property is taken. Project influence is often apparent in advance of the government's acquisition, and usually starts to materialize when the project is publicly announced or when it becomes public knowledge, sometimes years in advance of the acquisition. Depending on the nature and scale of the public improvement, the magnitude of a positive or negative impact on real estate prices will be reflected by the market's view of the public project.

In analyzing the pre-taking value of a property as a whole (larger parcel), project influence or influence of the scheme must be ignored. The rationale for ignoring the project or scheme in analyzing the pre-taking value is one of fundamental fairness to both the property owner and the condemning or expropriating authority. The US Supreme Court noted that the dual purpose of the scope of the project rule is "to protect a property owner who has had real property condemned or expropriated from being penalized by receiving less compensation than would have been warranted but for the fact that property prices within the area had been depressed by the government's planned project, and to safeguard a condemning or expropriating authority (i.e., taxpayer) against overcompensating a property owner whose real property has been enhanced in value, when property prices within the area have been inflated by the government's planned project."[64]

Once a government project is announced or becomes public knowledge, the property or property owner ought not be exposed to either negative or positive impacts flowing from the anticipated public works. Until government funds are actually appropriated for an announced public project and design and engineering details completed, impacted lands ripe for development remain temporarily sterilized. Property owners caught in this situation are likely to incur retrospective costs (sunk costs), unanticipated holding costs, and missed marketing opportunities.

As more time passes between the announcement of the planned public project and the actual partial taking for the project, it may become increasingly difficult to distinguish between the influence of the planned government project and market conditions that are strictly a function of supply and demand, and inflationary and deflationary trends.

When analyzing the pre-taking value, the influence over time of the project, scheme, or public improvements or works must be screened out, except for items of physical deterioration. According to *Principles of Right of Way*,[65]

> With only the rarest of exceptions, in valuing the larger parcel "before" a taking, the appraiser must disregard decreases or increases in value due to the public improvement project. The exception is for items of physical deterioration within the reasonable control of the property owner.

And, according to the Uniform Appraisal Standards for Federal Land Acquisitions, screening out the influence of the project applies when valuing the larger parcel pre-taking, and excludes value-influencing factors unrelated to the project, except for items of physical deterioration within the control of the owner (Section 1.2.7.3.3.):

> In partial acquisitions, the scope of the project rule typically excludes consideration of government project influence on the value of the larger parcel before the acquisition, and includes consideration of government project influence on the value of the

remainder after the acquisition. [See UASFLA Sections 4.5 and 4.6 (especially 4.6.1, 4.62, and 4.63)]

The extent of the impact of an announcement of a public project on value pre- and post-taking can vary significantly depending on the type and scale of the public works, which are to be ignored pre-taking and accounted for post-taking.

A Washington appeals court upheld a jury instruction to disregard any value enhancement prior to the taking due to the scope of the project and confirmed the setoff of special benefits against both the value of the taking and the remainder,[66] which resulted in a condemnation award of zero:[67]

> Any increase in the fair market value of the real property to be acquired prior to the date of valuation caused by the public improvement for which such property is acquired will be disregarded in determining the compensation for the property.... There was considerable testimony regarding the annexation, rezone, and city plans to extend utilities to the property, all taking place after 1975 [when the property was purchased], and that these events were a direct result of the proposed highway project. [The landowner] may have "lost" its [1975] purchase price per acre for the 66.73 acres taken, but the after value of its land [$3,226,700] had increased sevenfold due to the State's improvement....[The appeals court ruled that] [i]f... the... market value of the...[remainder is enhanced as a result of the project], then that increase is a special benefit.

REMAINDERS AND BENEFITS

A partial taking that disproportionately enhances the value of the property that remains (remainder or residue) in comparison to the contributory value of the part taken as a function of the pre-taking value of the property as a whole enjoys benefits.

Benefits result from the construction of public improvements for which property is taken and fall into two categories:

- General benefits
- Special or specific benefits

The recognition and treatment of benefits differs from one jurisdiction to the next,[68] and appraisers operating in different jurisdictions must be aware of how the governing statutes apply to property taken in a specific jurisdiction. The current status of benefits is summarized in a scholarly paper by Harrison.[69]

While the characterization of special benefits is fact-specific, there is a growing consensus among a number of states and legal scholars that all benefits should be considered in estimating the market value of a remainder, effectively moving to a strict adherence of the concept of market value, and that nonspeculative increases in value should be acknowledged.

In *Borough of Harvey Cedars v. Karan*,[70] the New Jersey Supreme Court overturned an appellate court ruling that had affirmed a jury award of $375,000 in damages, premised mostly on the loss of oceanfront view. A portion of the landowner's beachfront property was taken as part of a massive public works project to construct a dune that connects with other dunes running the entire length of Long Beach Island in Ocean County. The dunes serve as a barrier wall, protecting the beachfront homes and businesses from the "destructive fury of the ocean." The trial court had prohibited the jury from considering the project-related benefits.

In overturning the lower courts' decision, the New Jersey Supreme Court adopted an approach that allows all non-conjectural factors, positive and negative, to be considered in analyzing the market value of a remainder. In its decision, the state Supreme Court reasoned as follows:

> In a partial-takings case, homeowners are entitled to the fair market value of their loss, not to a windfall, not to a pay out that disregards the home's enhanced value resulting from a public project. To calculate that loss, we must look to the difference between the fair market value of the property before the partial taking and after the taking.

The Supreme Court found that the trial court had erroneously instructed the jury on the calculation of just compensation, and consequently it remanded the case for a new trial.

CONCLUSION

Partial takings continue to present appraisers with unique valuation challenges,[71] especially when a taking requires a larger parcel determination pre-taking or post-taking. Nonviable takings have no market value per se and must always be analyzed in the context of contributory value as part of a defined larger parcel, consisting of ownership of the property as a whole or less than the whole, but including the land taken, with notional boundaries defining the larger parcel. Attempting to directly value a nonviable partial taking piecemeal by arbitrarily assigning a value to each property component or element identified in the partial taking can lead to an estimate of value lacking credibility and reasonableness. Whether a taking is of the larger parcel itself or only part of a larger parcel can only be determined by conducting a highest and best use analysis. A failure to satisfy the initial tests of legal permissibility and physical possibility is indicative of a partial taking.

The damages or benefits in a nonviable partial taking are best measured by the before and after method, which requires a pre-taking market value estimate and a post-taking market value estimate, each prepared independently.[72] A partial taking that results in a nonviable remainder can be tied to a contiguous property that is under the same ownership as part of a post-taking larger parcel determination. If jurisdictionally permitted, a nonviable remainder may also be attached to other ownership, if there is adjoining property and its value can be enhanced,[73] with the contributory value of the remainder discounted, if appropriate, to reflect a bilateral market.[74]

An appraisal report should be comprehensive, prepared in compliance with recognized appraisal standards and meet statutory

requirements, and be conveyed in a straightforward and easy to understand format. Moreover, sound appraisal theory and practice should be applied in every appraisal assignment, whether it is prepared for condemnation or expropriation or for any other function regardless of the jurisdiction in which the real property is situated. Often the trier of fact will have little or no understanding of the valuation process, and that is an extremely important consideration in the preparation and presentation of the appraisal report.

END NOTES

1. See for example, Illinois Pattern Jury Instructions, 300.44, "In arriving at the fair cash market value of the property taken, you should determine its value considered as a part of the whole tract before the taking and not its value as a piece of property separate and disconnected from the rest of the tract." http://bit.ly/IPI-300. The specific legal requirements in jurisdictions vary.
2. Appraisers do not estimate just compensation in takings, but *market value* is a measure of just compensation. Appraisers must utilize the definition of *market value* relevant to taking of the subject property. The Uniform Appraisal Standards for Federal Land Acquisitions (UASFLA), 2016 edition, defines market value as "the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the property would have sold on the effective date of value, after a reasonable exposure time on the open competitive market, from a willing and reasonably knowledgeable seller to a willing and reasonably knowledgeable buyer, with neither compelled to buy or sell, giving due consideration to all available economic uses of the property." Interagency Land Conference, *Uniform Standards for Federal Land Acquisitions*, 2016 ed. (Washington, DC: US Government Printing Office, 2016), available at http://bit.ly/UASFLA.
3. *The Dictionary of Real Estate Appraisal*, 6th ed. (Chicago: Appraisal Institute, 2015), s.v. "contributory value."
4. *The Appraisal of Real Estate*, 14th ed. (Chicago: Appraisal Institute, 2013), 378.
5. The *unit rule* in condemnation is "a valuation rule with two aspects, the first dealing with ownership interests and the second dealing with physical components. The first aspect of the rule, also referred to as the *undivided fee rule*, requires that property be valued as a whole rather than by the sum of the values of the various interests into which it may have been carved (such as lessor and lessee, life tenant and remainderman, and mortgagor and mortgagee, etc.). This is an application of the principle that it is the property, not the interests, that is being acquired. The second aspect of the rule is that different physical elements or components of a tract of land (such as the value of timber and the value of minerals on the same land) are not to be separately valued and added together." *The Dictionary of Real Estate Appraisal*, 6th ed., s.v. "unit rule."
6. See for example, the Supreme Court of Kansas opinion in *Pener v. King* (Kan. 2017), quoting *Rostine v. City of Hutchinson*, 219 Kan. 320 (1976) stating, "The 'summation method' denotes a process of appraisal whereby each of several items that contribute to the value of real estate are valued separately and the total represents the market value thereof. Use of this method of appraisal has generally been rejected since it fails to relate the separate value of the improvements to the total market value of the property."
7. *The Appraisal of Real Estate*, 14th ed., 32[1/n]-33.
8. See UASFLA Section 1.2.7.3.2., and the Uniform Standards of Professional Appraisal Practice (USPAP), 2019[1/n]-2019 ed., Standards Rule 1-4(e) and its related Comment, which states "The value of the whole must be tested by reference to appropriate data and supported by an appropriate analysis of such data." Lines 547[1/n]-548.
9. Strip takings for road widenings are the most common nonviable takings where it is self-evident that the takings have no economic utility and are incapable of being sold in the open market.
10. See for example, *Barton v. City of Norwalk*, 326 Conn. 139, 161 A.3d 1264 (2017), where the city condemned a privately owned surface parking lot that had been used by tenants in a commercial building not taken by the city. Both properties were under the same ownership, and the owner was awarded $310,000 for the taking of the parking lot, and $899,480 in damages for the loss of income sustained by the commercial building.
11. Tony Sevelka, "Partial Taking Expropriation: The Remainder," *Canadian Property Valuation* 58, no. 1 (2014), available to Appraisal Institute members through the Y. T. and Louise Lee Lum Library's External Resources.
12. *Burmont Holdings Ltd. v. Chiliwack (District)*, 1994 CanLII 3326 (BC SC), recognizing that use restriction negatively impacts market value.
13. *Farlinger Developments Ltd. v. Borough of East York* [1975] Ont. C.A. In considering the prospect of rezoning, the appeals court ruled that "highest and best use must be based on something more than a possibility of rezoning...[P]robability denotes something higher than 50% possibility."
14. *Guido v. Ontario Ministry of Transportation* (1977) Ont. H.C.J. The Divisional Court upheld the rejection of motel use as the highest and best use of the legally permitted uses, as motel use was considered physically impossible, financially imprudent, and lacking tourist demand.
15. A nearby airport or crematorium would likely have a negative impact and preclude residential development even it were a legally permissible use.
16. *Farlinger Developments Ltd.*
17. In *Higgins and Tuddenham v. Province of N.B.*, 2005 NBQB 237, the court recognized that "while residential development was possible for the road frontage,...there was little, if any, demand for it at the time of this expropriation...."
18. *State ex rel. Ordway v. Buchanan*, 154 Ariz. 159, 741 P.2d 292 (1987).
19. *Ordway v. Buchanan*
20. *Commonwealth Transp. Comm'r v. Glass*, 270 Va. 138, 148, 613 S.E.2d 411, 417 (2005).
21. Section § 1.2.7.3.1, footnote 27, Uniform Appraisal Standards for Federal Land Acquisitions, 2016 ed.
22. Canadian Uniform Standards of Professional Appraisal Practice (August 1, 2018), Section 18.21.2.
23. Canadian Uniform Standards of Professional Appraisal Practice (August 1, 2018), Section 7.19.2.
24. Tony Sevelka, "Expropriation and Condemnation: The Larger Parcel," *The Appraisal Journal* (January 2003): 76.
25. *Black's Law Dictionary*, 9th ed.(2009), s.v. "economic unit."
26. See for example, discussion in *State v. Chana*, 464 S.3d 769 (TX Ct of Appeals 2015), quoting *Zwahr*, 88 S.W.3d at 628.
27. *Ordway v. Buchanan.*
28. *Black's Law Dictionary*, 9th ed., "parcel."
29. *Black's Law Dictionary*, 9th ed., "property."
30. *Principles of Right of Way*, 4th ed. (Gardena, CA: International Right of Way Association, 2012), 355.
31. *Principles of Right of Way*, 4th ed., 362.
32. Sevelka, "Partial Taking Expropriation," *Canadian Property Valuation.*
33. Texas Dept. of Transportation, *ROW Appraisal and Review Manual*, updated November 2018, Chapter 3-27. "The existence of an economic

unit should be justified by market sales of similar properties that defines the size and shape of the subject parcel and have the same highest and best use. The existence of economic units may also be justified by the presence of similar tracts in the market area and by physical divisions in the property such as roads, streets, creeks, rivers, and topographical differences. It must be remembered that in the valuation of a property with separate economic units, that the sum of the values of the parts of a property cannot exceed the market value of the whole property."

34. *Department of Transportation v. Kelley*, 352 Ill. App.3d 278, 815 NE 2d 1214 (2004).
35. According to Section 1.2.7.3.2. of the Uniform Appraisal Standards for Federal Land Acquisitions, "The unit rule requires valuing property as a whole rather than by the sum of the values of the various interests into which it has been carved."
36. *Illinois Dept. of Transp. v. Raphael*, 381 Ill. Dec. 1, 2014 IL App (2d) 130029, 9 NE 3d 1120 (2014).
37. See *Department of Transportation v. Zabel*, 47 Ill. App.3d 1049, 1056, 6 Ill. Dec. 52, 362 N.E.2d 687 (1977).
38. "Texas law permits landowners to introduce testimony that the condemned land is a self-sufficient separate economic unit, independent from the remainder of the parent tract with a different highest and best use and different value from the remaining land. In this situation, the market value of the severed land can be determined without reference to the remaining land. But when the portion of the land taken by eminent domain cannot be considered as a separate economic unit, the before-and-after method requires determining market value by evaluating the taken land as a proportionate part of the remaining land." *State v. Chana*.
39. *Ordway v. Buchanan*.
40. Arizona Court of Appeals decision, *City of Phoenix v. Wilson*, 4 P.3d 999 (1999) 197 Ariz. 456; Arizona Supreme Court decision, *City of Phoenix v. Wilson*, 21 P.3d 388 (2001) 200 Ariz. 2.
41. *Russell Inns Ltd. v. Manitoba*, 2016 MBCA 43 (CanLII) – 2016-04-25.
42. When estimating the contributory value of a nonviable remainder to an adjoining property, value in contribution is based on the highest and best use of the larger parcel. See Ontario Ministry of Transportation, *Real Property Appraisal Guidelines* (December 2008, 26). Also, in *Gilbert v. State of New York*, 2009-013-502, Claim No 107457, the judge found "the subject property's highest and best use after the taking to be for sale to adjoining owners, noting that that may include a multitude of purposes consistent with the zoning at the time of the taking which…allow[ed] commercial and residential development."
43. *State v. Silver*, 92 N.J. 507 (1983) 457 A.2d 463.
44. See chapter 11, "The Appraisal of Partial Interests," in *Principles of Right of Way*, 4th ed., 205[1/n]-214. Regardless of which appraisal procedure is followed, a second post-taking appraisal is always required. "Because this [second post-taking] appraisal is new, it is important for the appraiser to consider a possible change in highest and best use, and data that are different from that which was previously considered [in the pre-taking appraisal]."(page 208). "Appraisers should note that these are two separate appraisals within the same assignment and require the appraiser to perform a new analysis and valuation of the remainder after the acquisition," *Uniform Appraisal Standards for Federal Land Acquisitions*, 2016 ed., 17. See also *United States v. 2.33 Acres of Land, More or Less*, 704 F.2d 728, 732 (4th Cir. 1983) (dissenting opinion), in describing the two appraisal procedures, "although the two methods differ, it is important to note that, in any given case, if both methods are applied correctly, they will yield the same result." In *Gardiner Burton Agencies Ltd. v. N.S. Power Corp.*, 1986 Carswell NS 136, the Nova Scotia Trial Division, ruled that the Expropriation Compensation Board erred by applying a percentage reduction from the before-taking value to derive an after-taking value while relying on the "before-and-after-method" to calculate a loss in property value.
45. It is not possible to estimate the market value of the part taken when it is has no independent highest and best use, and allocating a value to the part taken as a function of the whole property is akin to estimating contributory value.
46. *Nichols on Eminent Domain*, 3rd ed. 1975, 4A §14.23.
47. *City of Chicago v. Anthony*, 136 Ill.2d 169, 554 N.E.2d 1381 (1990).
48. *Department of Public Works & Buildings v. Lotta*, 27 Ill.2d 455, 189 N.E.2d 238, 240 (1963).
49. See Figure 4.1, "The Valuation Process," in *The Appraisal of Real Estate*, 14th ed., 37.
50. *State, Dept. of Transp. v. Grathol*, 158 Idaho 38, 343 P.3d 480 (2015). Grathol paid $1,450,000 in May 2008 for the entire 56.8 acres, with the market subsequently declining until November 11, 2010, the date of the taking. Yet he sought $2,295,360 for the 16.314-acre taking and severance damages of $3,527,140.32 for increased cost of future development. As noted by the state supreme court, "[j]ust from a fairly plain common sense standpoint…the compensation award of $675,000 for less than one-third of the property…purchased for $1,450,000…just before the collapse in real estate prices, was eminently reasonable."
51. USPAP, 2018-2019, Standards Rule 1-1, Lines 428[1/n]-431.
52. See discussion in *United States v. 33.92356 Acres*, 585 F.3d 1 (1st Cir. 2009). Also see *Nichols on Eminent Domain*, rev. 3d. ed. 1981, 4A § 14.02[4], "Virtually all jurisdictions allow the use of the before and after methodology, and many of them mandate its use or even its sole use. The before and after method is particularly advantageous where either it is difficult to value fairly the condemned tract as a separate parcel or one of the parties contends that the remainder was harmed or benefitted by the condemnation."
53. *Utah Dept. of Transp. v. Target Corp.*, 2018 UT App 24, 414 P.3d 1080 (UT Ct. App. 2018); *Utah Dept. of Transp. v. Admiral Beverage*, 2011 UT 62, 275 P.3d 208 (2011).
54. *Commonwealth, Dep't of Highways v. Rowland*, 420 S.W.2d 657, 600 (Ky. 1967), cited in J. D. Eaton, *Real Estate Valuation in Litigation* (Chicago: Appraisal Institute, 1995), 305[1/n]-306.
55. *United States v. 2.33 Acres of Land*, 704 F.2d 728 (4th Cir. 1983), citing *United States v. 38.60 Acres of Land*, 625 F.2d 196, 201 (8th Cir. 1980).
56. *United States v. 9.20 Acres of Land in Polk Cty.*, 638 F.2d 1123, 1127 (8th Cir. 1981), quoting *United States v. 91.90 Acres of Land in Monroe Cty. (Cannon Dam)*, 586 F.2d 79, 86 (8th Cir. 1978); see additional cases cited in *Uniform Appraisal Standards for Federal Land Acquisitions*, 2016 ed., 155.
57. *Lotta*, 240.
58. North Carolina Dept. of Transportation, *Real Estate Appraisal Standards and Legal Principles*, revised 2018.05.31.
59. New York State Dept. of Transportation, *Appraisal Manual*, revised November 2015.
60. Texas Dept. of Transportation, *ROW Appraisal and Review Manual*, revised November 2018, Chapter 5-11.
61. *State of Texas v. Chana*, 464 S.W.3d 769 (2015).
62. Texas Dept. of Transportation, *ROW Appraisal and Review Manual*, revised November 2018, Chapter 3-28.
63. Scott Salmon, "Necessary Change: Re-Calculating Just Compensation for Environmental Benefits," *Washington and Lee Journal of Energy, Climate, and the Environment* 6, no. 2 (March 2015): 552[1/n]-591, available at http://bit.ly/2YZJPFJ.

64. See *United States v. Miller*, 317 U.S. 369 (1943) at 376-377, 379, available at http://bit.ly/2Ib8CQx.
65. *Principles of Right of Way*, 4th ed., 195.
66. The Washington Pattern Jury Instructions provide, "Special benefits are those that add value to the remaining property as distinguished from those arising incidentally and enjoyed by the public generally. Benefits may be special even though other owners received similar benefits. [WPI 150.07.01] See also, *State v. Green*, 90 Wn.2d 52, 578 P.2d 855 (1978); *State v. Kelley*, 108 Wash. 245, 182 P. 942 (1919); *Spokane Traction Co. v. Granath*, 42 Wash. 506, 85 P. 261 (1906). In *Spokane Traction*, the court held that a new bridge and highway improvements could constitute a special benefit to an abutting owner, regardless of whether there are several abutting owners enjoying like benefits. Only special benefits need be defined for the jury; it is not necessary to define general benefits and then instruct the jury to disregard them.
67. *State v. Templeman*, 39 Wn. App. 218, 221, 693 P.2d 125 (Div. 3 1984).
68. See *Real Property Valuation in Condemnation* (Chicago: Appraisal Institute, 2018), Table 3.3 "Benefit Offset Rules," for treatment of benefits in each jurisdiction.
69. Brittany Harrison, "The Compensation Conundrum in Partial Takings Cases and the Consequences of Borough of Harvey Cedars," *Cardozo Law Review De Novo* (2015), 31[1/n]-56, available at http://bit.ly/2XmqFcK.
70. *Borough of Harvey Cedars v. Karan*, 214 N.J. 384, 70 A.3d 524 (2013).
71. For a discussion of the challenges in valuation of condemned rural property, see Kirk Corson, "Rural Settings Valuation of Partial Takings and Damages," *Right of Way* (May/June 2008): 18[1/n]-22, available at http://bit.ly/30Y76Kh.
72. Sevelka, "Partial Taking Expropriation," *Canadian Property Valuation*.
73. Sevelka, "Partial Taking Expropriation," *Canadian Property Valuation*, recommends a "title search of each abutting property that has the potential to form part of a larger parcel, in concert with a nonviable remainder, to identify any legal constraints (title restrictions on use) and physical constraints (registered easements) relating to highest and best use analysis."
74. A bilateral market is one with a single seller and single buyer. Transactions under this circumstance do not meet the *market value* requirement of a competitive market. See *The Dictionary of Real Estate Appraisa*l, 6th ed., s.v. "market value."

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