



## 2.8 COMMON APPRAISAL PROBLEMS

### 2.8.1 Highest and Best Use

Highest and best use traditionally has been defined as that use which is most likely to produce the greatest net return. The appraiser must determine the highest and best use of the parcel being appraised in the before condition and in the after condition. There are four tests that must be met by the property to illustrate the highest and best use. The use must be legally permissible, physically possible, financially feasible and maximally profitable. The analysis must be done in a consecutive order. That is, the parcel must meet the physical and legal tests before the other tests are applied. Each of these four tests must be analyzed with respect to the three-part legal test for acceptance of the valuation of a prospective highest and best use.

1. Physically possible:
  - 1) Most advantageous use as permitted by shape, size, soil stability, etc.
  - 2) Reasonably probable with respect to demand, location, market trends, etc.
  - 3) Not speculative or imaginary, but based on reasonably foreseeable future as determined by neighborhood trends, demographics, political decisions, etc.
2. Legally permissible:
  - 1) Most advantageous use as permitted for all land regulations, restrictions, zoning ordinances, environmental remediation orders, government delineations, etc.
  - 2) Reasonably probable use with respect to legal restrictions.
  - 3) Legally permissible must not be conjectural, speculative, etc. Must pass reasonableness test.
3. Financially feasible:
  - 1) Most advantageous use, by definition, when revenue of subject is not a fundamental consideration (for WisDOT purposes). Economic soundness is based on need for and desirability of property for a particular purpose.
  - 2) Reasonably probable use cannot be too speculative but must be based on demographics of region, market analysis and trends in area, etc.
  - 3) Interim use properties must be appraised on basis of projected use as reasonably probable in foreseeable future, not speculative or imaginary.
4. Maximally profitable:
  - 1) Most advantageous use that maximizes position of grantor. Very important when appraising contaminated property. Appraiser is charged with determining damages to condemnee not benefits to condemnor. That is fair market value.
  - 2) Using all above considerations, most reasonably probable use that maximizes condemnee's position.
  - 3) Use cannot be speculative or imaginary.

Where a site has existing improvements that are not consistent with the highest and best use of the land as though vacant, it should be recognized that the existing use will continue until the land value exceeds the total value of the property in its existing use. Although care should always be taken in comparing like to like, it is especially important and critical to be aware of changing uses in transitional areas. Existing improvements in such areas may have value under an interim use concept.

### 2.8.1.1 Interim Use

The definition of "interim use" is an existing but temporary use awaiting transition to highest and best use. One problem an appraiser can experience is the valuation of structures that are not proper improvements for the highest and best use of the land. Their value is based on some "interim use" of the structures pending their removal to allow use of the land at its highest and best use. Example: An older residence situated on land that, if vacant and available, would have a highest and best use of commercial. The valuation of existing buildings on land that has actually attained a higher and better use and where the buildings do not contribute to value is another problem. Such buildings may create a negative effect on value whereby the land, if vacant, would most likely sell for more. This negative contribution may be properly estimated based on the cost of demolition and removal less any salvage value. It is incorrect to base the present value of a property on a highest and best use to be attained in the probable future without discounting for the fact that a prudent buyer would not likely pay as much for a property not yet ready for that use as he would pay for one immediately ready for such use. It would be most appropriate for the appraiser to estimate value from sales which reflect what buyers are currently willing to pay for properties in anticipation of a change in highest and best use at a reasonably foreseeable future time. It is reasonable to conclude that if existing buildings are estimated to have an interim contributory value, then the land will also have an interim value or transitional value. Land should always be valued based on its highest and best use as vacant.

### 2.8.1.2 Zoning and Probability of Rezoning

Value must be based upon a permitted use, or use that is reasonably expected to be permitted. In determining the highest and best use of a parcel, the appraiser should consider only uses that are permitted by existing zoning unless it can be shown that there is a reasonable probability of rezoning and that this reasonable probability is reflected in the market. Existing zoning is not an absolute control over the use of any property. When the market actually reflects an increased price based on a probability that a particular property or area could be rezoned to a higher and more valuable use, the appraiser must recognize this possibility. One of the preliminary steps in appraising is to determine the zoning of the property being appraised and the zoning of all comparable sales that are being considered. Obtain a copy of the current zoning map and zoning laws pertaining to your subject and comparables from the local zoning authority. Existing zoning regulations can seriously affect and control the highest and best use and value of a property when there is no reasonable probability of a zoning change. The lack of adequate enforcement of existing zoning can affect value. Generally, values are maintained or increased in relatively homogeneous and stable type neighborhoods. Zoning, if properly enforced, can provide protection against inharmonious influences. Zoning laws usually limit land to specific land uses or types. These laws usually have two methods of change that do not require new legislation:

1. Variances. These grant relief to individual property owners by "varying" minor requirements. It isn't a change of zoning, but requirements can be slightly changed to meet individual situations. An example of a variance is when a smaller set-back is allowed than what is required in the ordinance.
2. Rezoning. This changes a property's zoning classification. An example of rezoning is a change from residential to commercial classification on a property.

Many times the value of a property would be higher if it could be rezoned to a higher and better use than the use allowed by its existing zoning. The best evidence of value is recent land sales in the immediate area where the purchase prices are based on the purchaser's anticipation that the properties can be rezoned to permit a higher and better use of the land. A property with the potential of being rezoned should not be valued as if the rezoning has already occurred, but rather should be evaluated under current zoning giving consideration to the probability of rezoning and the cost, delays and time involved in obtaining such a rezoning.

Documenting probability of a rezoning - In determining that a probability of rezoning exists or does not exist, there are several factors that the appraiser must consider:

- Age of existing zoning ordinance.
- Analysis of specific prior actions of zoning authority in granting changes. Should show specifically the property where zoning change was permitted, original zoning, revised zoning, date action was taken, property location and its neighborhood in relation to subject. Analysis should also include zoning change requests denied and reasons.
- Availability of sewer, water and other pertinent utilities to subject property as opposed to other properties recently rezoned.
- Demand in area for certain types of land uses, particularly use to which subject is proposed to be rezoned.
- Neighborhood changes affecting the highest and best use of subject property.
- Sales in a similar position regarding potential for change in use. Prices of these properties would reflect market value of the probability of rezoning.

Down zoning - A type of rezoning that may, in contrast to the above actions, diminish utility of the property. The appraiser must be sensitive to both increases and decreases in the value of the property that may result from local zoning action.

## 2.8.2 Proximity

Proximity generally refers to the nearness of a property line to a building or improvement. In many cases, a WisDOT project will involve moving the new highway right of way line closer to the front of a residence. Some of the questions resulting from this situation are:

- Do we confuse proximity damages with loss of landscaping, changes in ditch configurations, change of grade, etc.?
- Does a new highway property line closer to a house cause a loss in value to the property if the centerline of the traveled way of the highway remains the same?
- Is it only a perceived loss to the owner because of the change in the property?
- Is there a loss in the market value of the property beyond the loss of the land and land improvements located in that strip?

In an effort to promote more consistent treatment of these issues, the following should be considered in your evaluation:

- A house already close to the right of way will not be damaged as much by a further reduction in setback as compared to a house with a reduction from a normal setback.
- Amenities and aesthetics are a larger or more important part of valuing higher priced homes, and will be damaged more by same acquisition than with lesser priced homes.

- Each house has a basic "shelter" value that will not be damaged.
- Other changes, such as change of grade and landscaping, may be part of after situation.
- Other things being equal, a rural home will tend to suffer more damages than same house in an urban situation.
- Setbacks of existing homes should be examined in effort to discern "normal" setback on that particular highway. Reductions from normal setback may cause damage.

Giving consideration to the above assumptions, we recommend that the appraiser give consideration to and discuss these specific relevant items:

- Analyses as to what setbacks are typical on state trunk highways in area.
- Change of grade or loss of landscaping as contributing factors.
- Does centerline shift or does it remain in same place.
- Setback from right of way line both before and after.
- Value of house.
- Zoning requirements as to setback.

Documentation would require an economic study of the prices of homes in both before and after situations compared to the sales of similar homes in a control group or area where no such physical changes have taken place. When doing the sales study for the project, the appraiser should always watch out for sales of property that have less than the typical setback. In lieu of a complete study, the appraiser should describe both the situation and his/her thought process with specific mention of the above factors. Do not overlook a proximity situation, but on the other hand, do not blow the situation out of all reasonable proportions. Obviously, less discussion is required or warranted if you conclude little or no damage than if you conclude there are considerable damages. However, if the owner has indicated concern over the proximity of the new right of way and you, as the appraiser, conclude there are little or no damages, it would be wise to indicate in detail your logic and reasoning. If change of grade is also involved, it will be part of your overall evaluation of the after situation. If a substantial amount of landscaping is involved, care should be taken that duplication of damages are not being considered. The total damages should be in reasonable proportion to the before value of the property. There is no magic formula in dealing with proximity. What is needed is a fair and honest assessment of the property in the after situation. A full consideration of all the factors affecting the property should lead to consistency in how these situations are handled.

### 2.8.3 Change of Grade

It's necessary to be quite specific when speaking of change of grade. Are you referring to a change in elevation of the centerline, a ditch configuration or the back slope? Many times elevation of the road doesn't change, but because the new right of way line moves closer to a garage or property, restoration of that driveway may require additional work on the owners remaining land to get an acceptable grade. Change of grade can affect value of a property when the change affects the property's access, highest and best use or the view of or from a property. Access to a property is affected when the grade of the driveway is increased beyond acceptable standards (typically a 10% slope) because of an elevation change in the road. When slopes will exceed this standard, it is best to look for a cost to cure, such as extending the driveway grading to reduce the slope, relocating the driveway to a more acceptable location where the grade difference is less severe, or constructing a driveway parallel to the road to attain an acceptable grade. When these types of cost to cure are considered, any additional land required from the owner or any modifications to the remaining property to have the building or site improvements

realigned with the access should also be considered. This could include such items as landscaping, interior driveways, parking, garage doors, asphalt paving to help maintain steeper slopes, etc. A way to document these damages is with itemized contractor estimates. Loss in value due to the appearance of a property is much harder to determine. In these cases, the amount of change must be considered along with blocked views, percent of back slope, and the proximity of the slope to the improvement. In this regard, change of grade damage and proximity are so closely related and intermixed that they should be considered together. Drainage can also be affected by a change of grade and may be a factor to consider. A change of grade itself does not cause damage. Many times safety and entrances to a property are improved by changes of grade. The farther back improvements are located from the R/W line, the less chance any damage will occur. In general, it is more acceptable for an improvement to be located above the grade of the road than below grade. In these cases, the appraiser must use good judgment in assessing possible damages. As with proximity damage, market evidence should be used whenever possible to support damages. The use of "paired sales" is suggested. Paired sales are properties that are similar in all aspects except for the difference being measured, in this case, the grade difference with the road. A before and after evaluation is required when there are damages to the building improvements. Different sales for each approach in the before and after condition should be used to demonstrate the difference in value when a change in highest and best use occurs because of a grade change.

#### 2.8.4 Access Rights

Access changes can affect the value of a property. When access rights are being acquired, the appraiser must consider them in the appraisal. On many highway projects, access rights are included with acquisitions as necessary due to design changes of the highway and as a means to control future access to the reconstructed highway. The appraiser must analyze the effect on the remaining property, and if there is a reduction in value, damages must be included in the appraisal. The effect can range from very minor, such as in the case of restricting a 100 foot wide improved residential site to one access point, to very severe when access is completely restricted and a property becomes landlocked.

Reasonable access - Deprivation or restriction of an existing right of access is compensable under [s. 32.09\(6\), Wis. Stats.](#); however, deprivation of direct access to a highway does not constitute a taking of property provided reasonable access remains. In cases regarding potential compensation for deprivation or restriction of access, there must be a determination whether or not WisDOT has provided "reasonable access" prior to or as part of the valuation process. Any loss of value that occurs or might occur due to the loss of access is non-compensable as long as reasonable access continues to exist. Statutory references:

- [Section 32.09\(4\), Wis. Stats.](#) If a depreciation in value of property results from an exercise of police power, even though in conjunction with the taking by eminent domain, no compensation may be paid for such depreciation except as expressly allowed in [subs. \(5\)\(b\) and \(6\)](#), and in [s. 32.19, Wis. Stats.](#)
- [Section 32.09\(6\)\(b\), Wis. Stats.](#) Deprivation or restriction of existing right of access to highway from abutting land, provided that nothing herein shall operate to restrict the power of the state or any of its subdivisions or any municipality to deprive or restrict such access without compensation under any duly authorized exercise of the police power.

Whether there is reasonable access depends on the specific facts of the case. No hard and fast rule can be stated as to whether an abutting property owner has been denied access that is

reasonable. In most instances the question is one of fact, not of law, and its determination depends largely upon evidence in the case. Criteria for determining reasonable access:

- Alternative designs.
- Comparability to competing businesses.
- Costs.
- Site suitability.
- Traffic safety.
- Travel distance/travel time.
- Visibility and apparent access route.

The loss of reasonable access is compensable. The determination of whether reasonable access remains can often go to court and go to a jury to decide. Example: In the National Auto Truck Stops case, the Supreme Court remanded the issue of reasonable access to the circuit court for a jury determination whether the change of access was reasonable. The court said that if the jury found that the changed access was reasonable, then no compensation would be awarded to National Auto due to the change in access. However, if the jury found that the changed access was not reasonable, then National Auto would be entitled to just compensation for the deprivation or restriction of its right of access. Access changes to parcels must be discussed as early as possible in the design process. Once an appraiser has been selected for the parcel, the appraiser should be invited to project meetings to discuss the proposed access changes and potential impacts. Regional Real Estate staff should work with planning and design early enough in the project development process to ensure that, if feasible, design changes can be made to leave the parcel with reasonable access. A separate study of reasonableness of access may be required if the appraiser does not feel he/she can answer the question. If WisDOT determines that reasonable access remains on a parcel, this should be discussed with the appraiser, and the appraiser should include this determination in the scope of work. Suggested generic language:

*Design standards implemented with consideration to access changes reflect reasonable access in the after condition. Consideration of damages due to an access change implies the change is not reasonable. It is the opinion of WisDOT that access is reasonable and this should be reflected in the appraisal, unless the appraiser finds evidence to the contrary. If the appraiser finds evidence to the contrary, it should be brought to the attention of WisDOT so the scope of work can be amended if necessary.*

Relevance of police power - As part of the valuation determination, it needs to be decided whether the governmental regulation of private property is a legal "taking" that requires payment of just compensation to the private property owner, or is merely a function of police power.

1. A taking by police power involves the power of government to adversely affect property interests without compensation. Control of access is a police power. The control of access to state highways is a proper exercise of that power. See *Stefan Auto Body v. State Highway Commission*, 21 Wis. 2d 363, 368-69, 124 N.W.2d 319 (1963); *Sippel v. City of St. Francis*, 164 Wis. 2d 527, 533, 476 N.W.2d 579 (Ct. App. 1991) (citation omitted).
2. It is not a taking if owner can still apply for access permit.

These situations are all exercises of "police power" and resulting damages are considered non-compensable:

- Closing of a street or highway intersection.
- Construction of median barriers.
- Creation of a controlled-access highway.
- Placement of a property on a frontage road.

The Wisconsin Department of Justice has also persuaded the trial court that the general rule of law is that there is no compensation due if there has not been a taking, or acquisition of property. *More-Way North Corp. v. State Highway Comm.*, 44 Wis. 2d 165, 169, 170 N.W.2d 749 (1969): The “constitutional term ‘just compensation’ has never been construed as requiring payment for all injuries imposed upon persons or property by acts of government... At the cornerstone of all condemnation proceedings giving rise to a claim for just compensation there must be a taking.”

Other considerations - Each may affect value due to changes in access.

- Change in highest and best use. Is there a change in the highest and best use of the property? Is the change in the highest and best use the result of the change in access? Why? Highest and best use changes do not automatically indicate a loss in value. For example, since the department has minimum requirements and standards for the location of access to properties, a parcel that has 1320 feet of frontage on a highway that has an AADT of greater than 5000 would, based upon driveways on adjacent parcels, only be allowed one access point when applying for a permit. Therefore, if the appraiser says that the highest and best use in the after condition is two acre residential parcels, the owner would not, in the before condition, be able to get more than one access point. Thus, the property is really not being damaged by the acquisition of access rights. When there is a change in highest and best use, the best way to measure the damage is probably with a before and after valuation. This process requires the analysis of recent sales that are comparable to the after situation to quantify the damage. See below for more on before and after appraisals of access changes.
- Cost to cure. If the access changes are not severe, they may be curable and a cost to cure would be the most appropriate measure of damage. For example, in the case of a horseshoe driveway, when only one driveway will be allowed, the cost to remove the second driveway and re-landscape the affected area is the cost to cure. If the owner must construct internal driveways in order for the property to have the same utility as it had before, this is the cost to cure. This situation sometimes occurs in agricultural properties when the number of field entrances is reduced. If the owner has to put in a driveway to the side road to replace one to the main road that will not be reconstructed, the cost for doing this would be the cost to cure.
- Commercial sites. Two driveways on commercial properties are often necessary. If the traffic on the interior of the site is affected and other site improvements must be modified because of access control, a cost to cure to modify the property to conform to the restricted access may be appropriate. If the cost to cure damage is higher than the loss in value of converting the property to a different use, it is not appropriate. This could be the case in extensive realignment of a service station property.
- Vision corners. When access is restricted at vision corners or very close to intersections, usually no damage results, because it is doubtful that an owner would have been able to get a permit for access in this type of location anyway. This is also the case when access is reduced to one point, when the property previously had full width access across the entire frontage. This situation can be handled by police power, ditching, or beam guard to delineate one access point to the frontage.

- Circuity of travel. There are at least two different kinds of "circuity of travel" situations. There is "internal circuity," which occurs when a partial acquisition cuts off one or more pieces from the remainder. In this situation, access is restricted causing increased travel to get from one part to another part of the same property. Such a situation will usually result in a diminution in value to the severed tract that may or may not be measurable with a cost to cure. Such loss is a compensable damage. The second situation could be called "external circuity of travel" whereby a property, which has direct access to a main highway, is placed on a frontage road or some secondary location in the after situation. In this case, the property may or may not suffer a decrease in value. The right of access does not include the right to the flow of traffic on a particular highway. If there is a compensable damage, it must be because of the loss of access, not traffic.
- Medians. The decision to build a median in front of a commercial driveway is not a compensable taking. WisDOT's decision to build a median is made in lawful exercise of its police power. Holding otherwise would lead to absurd results. Nobody disputes that the WisDOT and other authorities that build, maintain, and regulate roads have the power to convert roads to one-way streets or limit the ability of drivers to make turns or u-turns. If a court were to conclude that construction of a median strip constitutes a compensable taking, then it opens WisDOT, counties, and municipalities to an endless array of takings claims based on decisions to convert two-way streets to one-way streets or to restrict left turns at certain times of the day.

Research an appraisal with access changes - First, examine the language of recorded documents carefully (deeds, permits and similar). Next, ask:

- Does property have access to a highway in before condition?
- Is access reasonable in after condition?
- Is existing access point legal?
- Is existing access reasonable?
- Is parcel on a controlled access highway?
- What is the nature of right, if any, to existing access?

Ways to collect this information, search for:

1. Chain of title for highway as well as for affected property owner. Previous deeds/awards may indicate whether public has acquired all access rights or if property owner retains a right of access by deed. Some are silent. Some are clear. Sometimes there are recorded restrictive covenants that deny any future right of direct access to a highway.
2. Current jurisdiction over highway may also have some effect on extent of any abutting owner right of access.
3. Freeway or expressway designation. [Sections 84.29\(4\)](#) and [84.295\(5\), Wis. Stats.](#)
4. Local ordinances, development agreements, and conditions of permit.
5. Official mapping. Including, WisDOT under [s. 84.295\(10\), Wis. Stats.](#)
6. Permits for existing access. Permits generally are not recorded. Check current and past maintenance jurisdiction. Find permits that allowed work on highway that provided access. Terms of permit are important and may indicate existing access was subject to modification or revocation by maintaining authority as circumstances change. May also limit nature of use, of existing access, or be term limited. Because a permit was issued once, does not mean a new permit will be issued.

7. Recorded controlled access highway designation -- Wis. Stats. [s. 84.25\(6\)](#) [WisDOT], [s. 83.027\(6\)](#) [counties], local ordinances – police power – no compensation. Don't be wasteful. *Narloch v. DOT*, 115 Wis.2d 419, 432, 340 N.W.2d 542, 549 (1983).
8. Restrictions on access recorded on subdivision plat or certified survey map. May also be in form of dedication. Subdivision plat may contain restrictions or prohibitions on access on its face.

Other sources for collecting information on the nature of the existing access include:

- Field visits, photo inventory at site and at competitive sites.
- Interview owners regarding site conditions, market, and competition.
- Local planning departments, zoning and land use regulations.
- Local police departments and/or WisDOT's accident history records.
- Roadway project plat map and project plan.
- RPC/county, current and historical aerials/maps.
- WisDOT environmental studies, needs analyses.
- WisDOT regional office files on existing access rights.
- WisDOT traffic volume data (historic and projected).

Doing a before and after appraisal to determine if access changes are compensable and the amount (if any). When doing a before and after appraisal to determine damages due to access changes (if any), the appraiser must try to isolate the physical characteristics of access from other characteristics to determine its contribution to the overall value of the parcel. When appraisers value the impact of acquiring access rights, they should support their analyses by data developed from the market. Sales of comparable properties in the before condition and in the after condition should be found and used. Ideally, the appraiser would find the sale of a parcel of land like the subject without access, and then find the sale of an identical parcel with access. However, it is not likely two identical parcels, one with access and one without, will be found. Therefore, adjustments will be necessary. Adjustments to the comparable sales should follow the same criteria as for any narrative appraisal. The appraiser should lay out the analysis and the value conclusion in a logical manner that would lead the reader to the same conclusion. The analysis should also include whether there are any special benefits from the project that may offset compensable damages, including access restrictions. That is standard procedure in all appraisals when dealing with compensable damages.

Appraisers must recognize when doing a before and after appraisal that identifying and measuring a loss in value due to access restriction/changes by this method may also include non-compensable damage items. Examples of non-compensable damages are: loss of business, circuitry of travel or changes in traffic patterns. Likewise, when doing a before and after appraisal for other types of compensable damages, such as proximity issues, non-compensable damages due to access restrictions (when reasonable access remains, etc.) may also be identified. A careful analysis of the comparable sales used to establish the before value and those establishing the after value is needed. Any non-compensable damage components included in the before and after comparison should be identified and quantified in the appraisal narrative, but they are to be segregated out and not included in the final value conclusion. The final value is the basis for just compensation and by law can only include compensable damages. Since there is no inherent value for access, the loss in value to the larger parcel is the measurement that is used for valuing compensable access restriction damages. When considering damages for loss of access rights, existing access locations should be shown on the site sketch or R/W plat sheet in the appraisal. Include photos of the driveways to show the use and need for the driveways.

### 2.8.5 Circuity of Travel

There are at least two different kinds of "circuity of travel" situations. There is "internal circuity," which occurs when a partial acquisition cuts off one or more pieces from the remainder. In this situation, access is restricted causing increased travel to get from one part to another part of the same property. This situation will usually result in a diminution in value to the severed tract that may or may not be measurable with a cost to cure. Such loss is a compensable damage. The second situation could be called "external circuity of travel" whereby a property that has direct access to a main highway is placed on a frontage road or some secondary location in the after situation. In this case, the property may or may not suffer a decrease in value. The loss of reasonable access is compensable. Although any property is entitled to reasonable access, the right of access does not include the right to the flow of traffic on a particular highway. If there is a compensable damage, it must be because of the loss of access, not traffic.

### 2.8.6 Special Benefits

Definition: An enhanced value that occurs to a specific property because of a public improvement. [Section 32.09\(6\) Wis. Stats.](#), requires that compensation for a partial taking be based on the greater of the difference between the before and after value or the value of the part taken. In cases where there are likely to be increases in the after value for any reason, a before and after appraisal shall be done. The formula to determine damages is the before value minus after value. If the after value increases, total damages by this method will decrease. The difference between this amount should be compared to the value of the part taken as a part of the whole to determine correct compensation. If the unit value increases due only to a reduction in size, the before and after damages will be less than the value of the part taken as a part of the whole and compensation should be based on the part taken calculation. The principle is that you cannot assess benefits to a property just because land was taken from it. If the after unit value increases because of a change caused by the project or construction outside of the site being considered, then a benefit to the remaining property has occurred.

A "general benefit" is an increase in the value that is common to many properties in the area that may be either on or off the project. Examples: A new street with parking, curb and gutter instead of ditches, etc. Increase in the after value should not be used to offset damages. Even though the after value may be higher, the owner should still receive the value of the part taken.

A "special benefit" would be unique to the subject property and caused by the project or construction off the site, such as: a change in the highest and best use to a more valuable use, improved access that increases value, or an interchange location that creates a commercial site on land that was previously farmland. In these cases, the benefits would be considered to be special benefits and can be used to offset damages or even to the value of the land acquired as per [s. 32.09\(3\) Wis. Stats.](#) Special benefits cannot be charged in excess of the value of the land acquired and damages to the remainder. CAUTION: The assessment of special benefits should not be speculative. The benefit should be obvious and well supported because there is an increased chance of litigation and an exposed risk because of the 15% rule for payment of owner's litigation expenses.

### 2.8.7 Determination of Larger (Entire) Parcel

The term "larger parcel" means the entire property that should be appraised in the before situation and in the after situation. It is important in eminent domain to include all the owner's lands that qualify in order to establish the tracts that may be damaged or benefited by the acquisition. Historically the concepts of "unity of use" and "unity of ownership" have been the primary considerations in making this determination. These concepts generally mean that the parcels must be devoted to the same use and must be held under the same quality of ownership to be considered as one property. As usual, exceptions and variations abound. Courts have held that diversity of ownership is not necessarily preclusion to considering tracts as part of a larger parcel where the tracts abut and are used in common by the owner's pursuant to some sort of agreement. Also, a situation where one parcel is held by a corporation solely owned by a single person, and the same single person owns the adjoining tract, does not preclude consideration as one parcel. Unity of use means that the parcels must be used in connection with each other. The criterion generally is the highest and best use of the parcels involved rather than their existing use. The fact that parcels are not contiguous does not necessarily mean they are not part of the same larger tract. The region should, as far as they are able, review each project for potential problems in this regard prior to a project management conference so that a final decision can be made at said conference.

### **2.8.8 Carve-Outs**

Allocated values of parts of larger properties are often needed to establish the basis for a relocation payment. These allocations are referred to as carve-outs and may include such items as the value of a residence and with a typical site for the area, the value of living quarters that is part of a tavern, etc. If these types of value estimates are needed, the appraiser will be informed as a part of the appraisal assignment. Carve-outs can be included in the appraisal if they do not conflict with appraisal premise. The allocation of the various components of the property is normally required and this allows relocation specialists to make their own carve-outs.

### **2.8.9 Easement Valuation**

#### **2.8.9.1 Highway Easements**

Occasionally land for highways is acquired by easement rather than fee title. This may be done for a contaminated property where it is desirable to keep the owner in the chain of title because of liability for cleanup costs. This is also an alternative in some cases to avoid severance damages due to minimum site size requirements. Highway easements usually convey all of the rights of ownership except for taxation and the right of reversion if sometime in the future the land is no longer needed for highway purposes. Since the owner loses all control of the property, this type of acquisition is generally valued in the same manner as a fee title acquisition.

#### **2.8.9.2 Permanent Limited Easements**

An easement is an interest in real property that conveys limited use, but not ownership of a portion of the owner's property. Each easement document contains specific controls and restrictions and must be carefully analyzed to determine how it affects the encumbered property. The partial interest burdens the real property estate and the property owner is entitled to just compensation. The acquisition of an easement through eminent domain does not give an appraiser a license to guess. The same logic and reason must be applied

to appraising easements as would be to any other partial acquisition. The appraiser should always keep in mind the before and after concept when valuing an easement. The appraiser should use sound reasoning and logic to determine what percentage of the total ownership interest is affected. A before and after analysis using comparable sales affected by permanent easements may be helpful if the data is available. If sales with easements are used, the easements should be having similar affects on the sales properties as the easement being considered affects the subject. The most common type of easements found on comparable sales includes easements for access, utilities, overhead electric transmission lines, and pipelines. The appraiser should be aware of the amount paid by private utilities for easements; however, the compensation is often not based on market value because of the utilities lack of the power or use of eminent domain. If there is no sales data to support the valuation of the easement, the appraiser's justification should include an analysis of how the easement will affect the use of the property. Any percentage of loss of value for an easement should be proportionate to the loss of use of the property by the owner. It is possible that a permanent easement could also cause a severance damage or benefit to the property remaining. Either of these would be evident if the value of the remainder is permanently changed as a result of the easement.

### 2.8.9.3 Temporary Limited Easements (TLE)

A Temporary Limited Easement (TLE) (RE1577) is an interest in land that is limited in purpose and time. It must be acquired and compensation paid to the owner when the department has a need to temporarily use a portion of the property owner's land to construct the highway project. TLEs must be shown on the R/W plat and schedule of interests and identified and cleared as part of the project's R/W certification. The value of a temporary easement shall be estimated based on the damages caused to the property. This is similar to the way compensation for a permanent easement is estimated with the added dimension of a time period. A TLE is not the same as a land lease. The value of compensation for a TLE will typically be something less than for a land lease. Factors that need to be estimated in order to value a TLE are:

- Amount of land affected (stated in plat's schedule of interests).
- Amount of time property will be impacted (determined by project engineer).
- Degree/extent of impact (loss to owner from "bundle of rights").
- Rate of return/rental rate (determined by market).

The general formula for determining compensation for a TLE (assuming area of impact is one acre) is:

- 1 acre x economic rate of return x degree of Impact (between 0 – 100%) x number of years impacted = value of TLE taking.

Extent of impact: The appraiser must determine the degree/extent of impact to the property owner's land. The appraiser must explain their reasoning as to the degree/extent of impact. Compensation for a TLE will vary depending on the impact to the property. If the work involves minor aesthetic blending or reconstruction work, there may be no payment. In this case, the words "one dollar and other good and valuable considerations" will be entered in the instrument's compensation link. Where the impact is more substantial, a percent must be applied. The degree of impact will be based on the extent of limitation of use placed on the land by project-related activities.

Amount of land affected: This is stated in the plat's schedule of interests. There can be many different applicable methods used to determine damages due to acquisition of a TLE. One method, the return on investment, is shown below an example of how to apply the method in agricultural areas. Return on investment may not be the applicable method in every case and the valuation expert must give consideration to the purpose of the TLE as well as the affect of construction limits on the TLE area when determining the most applicable method to use in the valuation of the specific TLE.

Rate: Damages that result from temporary limited easements are usually based on economic return on investment. For example, in agricultural areas land rental rates are available in the market. Rental rates can also be estimated by establishing the relationship between rent and value for other properties in the area. If a parking lot valued at \$100,000 is being rented for \$500/mo, the rental rate in relation to value can be estimated as:  $\$500/\text{mo} \times 12 = \$6,000 \text{ yr.}; \$6,000/\$100,000 = 6\%$  as the rental rate for the property. If a TLE is one acre, then:  $1 \text{ acre} \times 6\% \text{ rate} \times \text{fee value/acre} \times \text{degree/extent of impact} \times \text{number of years impacted} = \text{value of TLE taking}$ . If rental data is not available, it is acceptable for the appropriate rate of return to be estimated. Land could be compared to a monetary asset through the principle of substitution and an appropriate rate of return based on risk could be estimated. This is done using the fee value of the land from market sales and the term for the easement period as described by the region. An example of this technique for a two-year temporary easement would be to use the rate for a two-year certificate of deposit and the fee value of the land to estimate the value of a temporary interest.

Time: Compensation for a TLE is paid from the effective date of the appraisal to completion of the project. To determine the appropriate length of time for which compensation is to be paid, the appraiser must find out how long the property owner will be inconvenienced by project-related activities. The appraiser must find out: when will construction start; when will it end; and, will other activities of the department prior to or after construction affect the owners' use of their land? The appraiser is attempting to determine how long the owner will be prevented from full use of the property. The appraiser needs to discuss these questions with regional Real Estate and Engineering staff and/or management. The document should state the purpose of the temporary interest and include a statement that "This TLE expires at the completion of the construction project for which this instrument is given." If the department is asked by a bank, attorney, etc. to qualify if a TLE has been released, a Release of Temporary Limited Easement (RE1019) can be provided. This document may be modified as appropriate. Every TLE parcel on a particular plat can be included in this document if necessary.

#### **2.8.9.4 Construction Permits**

There can be uncertainty about if to use a Construction Permit Recommendation and Approval (RE1732) or acquire a TLE. A Construction Permit, which is not an interest in land, can only be used if the temporary need to use the land is for the benefit of the owner and not needed for the project.

#### **2.8.9.5 Consistency**

If there is more than one appraiser on a project or if there is a mixture of nominal/waiver parcels on a project, the negotiator and/or review appraiser shall discuss the various methods and the supporting data available prior to the start of the appraisals or acquisition

of the nominal parcels. Appraisers are required by USPAP to support their valuations and should not be asked to use arbitrary unsupported percentages or lump sum payments. Minimum parcel payments for a project can be handled administratively.