



## 2.0 - GENERAL APPRAISAL POLICY

Appraisals prepared for the Wisconsin Department of Transportation (WisDOT) under Chapter 2 are intended for use in the eminent domain (condemnation) process, and as such they are condemnation appraisals. As condemnation appraisals, the principles, concepts and methods applied to appraisals prepared under Chapter 2 are required to adhere to the regulations, statutes and case law that address the process of developing and reporting condemnation appraisals. These rules may not necessarily affect appraisals prepared for purposes other than eminent domain, but they must be applied to condemnation appraisals prepared for eminent domain in the State of Wisconsin. Appraisals and appraisal reviews performed in compliance with the standards established by Chapter 2 of the Real Estate Program Manual (REPM) are intended to be compliant with the Uniform Standards of Professional Appraisal Practice (USPAP), 49 Code of Federal Regulations (CFR), Part 24, and Wisconsin Statutes.

This section is intended to lay the foundation for WisDOT's appraisal program. When appropriate, text from each source is included to avoid the need for links to external sources within the body of Chapter 2.

- REPM/Section 2.0.1 identifies the rules under which WisDOT operates; the department's authority to act and the responsibilities that come with that authority. It also contains those portions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (Uniform Act), 49 Code of Federal Regulations (CFR), Part 24 and Wisconsin Statutes that address eminent domain appraisals.
- REPM/Section 2.0.2 contains a discussion of just compensation.
- REPM/Section 2.0.3 identifies key terms, which are needed to understand the appraisal process and the preparation of appraisal reports.

The definitions of appraisal and appraisal report are presented below to facilitate an appropriate presentation of REPM/Sections 2.0.1 and 2.0.2.

### Appraisal

- USPAP defines appraisal as:  
(noun) The act or process of developing an opinion of value; an opinion of value.
- 49 CFR Part 24.2(a)(3) defines appraisal as:  
A written statement independently and impartially prepared by a qualified appraiser setting forth an opinion of defined value of an adequately described property as of a specific date, supported by the presentation and analysis of relevant market information.

### Appraisal Report

- The Dictionary of Real Estate Appraisal, Sixth Edition, published by The Appraisal Institute defines appraisal report (report) as:

The final communication, written or oral, of an appraisal or review transmitted to the client. Finality is evidenced by the presence of the valuer's signature in a written report or a statement of finality in an oral report.

**Note:** The reference from the CFR presented above utilizes the term appraisal to represent both the appraisal development process, defined above by USPAP as an appraisal, and the written report, defined above by the Dictionary of Real Estate Appraisal as an appraisal report. The reader must consider the context of the references from the CFR that utilize the term appraisal, or appraise, and determine whether the reference is to the appraisal development process or the written appraisal report. The inconsistent use of the term appraisal is confined to the references from the CFR and are not an issue in the remainder of REPM/Chapter 2.

## 2.0.1 - Federal and State Rules and Authorizations

The United States and Wisconsin Constitutions provide that no private property can be taken for a public use without just compensation. The Uniform Act dictates that just compensation will be established by means of an appraisal. 49 Code of Federal Regulations Part 24 (49 CFR Part 24) sets forth requirements for acquiring agencies when performing an appraisal for property that is to be acquired for projects using federal funds or federal-aid projects. Section 32.05 and 32.09, Wis. Stats. address specific legislative issues associated with an appraisal developed for eminent domain purposes in the State of Wisconsin.

This section addresses Federal rules, as established by The Uniform Act and the resultant 49 Code of Federal Regulations Part 24 (49 CFR Part 24). It also addresses Section 32.05 and 32.09, Wis. Stats. These federal rules and state statutes layout the rules that WisDOT must follow in delivering its appraisal program. The identified federal rules and state statutes also address WisDOT's responsibility to complete appraisals as part of the eminent domain process as well as identifying the department's authority to engage in the activities necessary to complete the needed appraisals.

Later sections of Chapter 2 will set out the specific department policies associated with developing an appraisal report for WisDOT, which have been established by the Bureau of Technical Services – Real Estate (BTS-RE). The BTS-RE will be referred to as the agency throughout REPM/Chapter 2.0 (This reference is consistent with the text of the cited federal regulations).

### 2.0.1.1 - Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. 4601 et seq.) (Uniform Act)

42. U.S.C Sec. 4651(1-3) - Uniform policy on real property acquisition practices states:

In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many federal programs, and to promote public confidence in federal land acquisition practices, heads of federal agencies shall, to the greatest extent practicable, be guided by the following policies:

1. The head of a federal agency shall make every reasonable effort to acquire expeditiously real property by negotiation.

2. Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property, except that the head of the lead agency may prescribe a procedure to waive the appraisal in cases involving the acquisition by sale or donation of property with a low fair market value (Waiver Valuation).
3. Before the initiation of negotiations for real property, the head of the federal agency concerned shall establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property. The head of the federal agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount he established as just compensation. Where appropriate the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

#### **2.0.1.2 - 49 Code of Federal Regulations (CFR), Part 24.102 – Basic Acquisition Policies**

49 CFR Part 24.102(c)(1) – Before the initiation of negotiations the real property to be acquired shall be appraised, except as provided in 49 CFR Part 24.102 (c)(2), and the owner, or the owner's designated representative, shall be given an opportunity to accompany the appraiser during the appraiser's inspection of the property.

49 CFR Part 24.102(c)(2)(i thru ii) – An appraisal is not required if:

- i. The owner is donating the property and releases the agency from its obligation to appraise the property; or
- ii. The agency determines that an appraisal is unnecessary because the valuation problem is uncomplicated and the anticipated value of the proposed acquisition is estimated at \$10,000 or less, based on a review of available data.
  - A. When an appraisal is determined to be unnecessary, the agency shall prepare a waiver valuation.
  - B. The person performing the waiver valuation must have sufficient understanding of the local real estate market to be qualified to make the waiver valuation.
  - C. The federal agency funding the project may approve exceeding the \$10,000 threshold, up to a maximum of \$25,000, if the agency acquiring the real property offers the property owner the option of having the agency appraise the property. If the property owner elects to have the agency appraise the property, the agency shall obtain an appraisal and not use procedures described in this paragraph.

49 CFR Part 24.102(n)(1) – The appraiser, review appraiser or person performing the waiver valuation shall not have any interest, direct or indirect, in the real property being valued for the agency. Compensation for making an appraisal or waiver valuation shall not be based on the amount of the valuation estimate.

49 CFR Part 24.102(n)(2) – No person shall attempt to unduly influence or coerce an appraiser, review appraiser, or waiver valuation preparer regarding any valuation or other aspect of an appraisal, review or waiver valuation. Persons functioning as negotiators may not supervise or formally evaluate the performance of any appraiser or review appraiser performing appraisal or appraisal review work, except that, for a program or project receiving federal financial assistance, the federal funding agency may waive this requirement if it determines it would create a hardship for the agency.

49 CFR Part 24.102(n)(3) – An appraiser, review appraiser, or waiver valuation preparer making an appraisal, appraisal review or waiver valuation may be authorized by the Agency to act as a negotiator for real property for which that person has made an appraisal, appraisal review or waiver valuation only if the offer to acquire the property is \$10,000, or less.

### **2.0.1.3 - 49 Code of Federal Regulations, Part 24.103 – Criteria for Appraisals**

49 CFR Part 24.103(a) – This section sets forth the requirements for real property acquisition appraisals for federal and federally-assisted programs. Appraisals are to be prepared according to these requirements, which are intended to be consistent with USPAP. The agency may have appraisal requirements that supplement these requirements including, to the extent appropriate, the Uniform Appraisal Standards for Federal Land Acquisition (UASFLA) also known as the Yellow Book.

49 CFR Part 24.103(a)(1) - The agency acquiring real property has a legitimate role in contributing to the appraisal process, especially in developing the scope of work and defining the appraisal problem. The scope of work and development of an appraisal under these requirements depends on the complexity of the appraisal problem.

49 CFR Part 24.103(a)(2) – “The agency has the responsibility to assure that the appraisals it obtains are relevant to its program needs, reflect established and commonly accepted federal and federally-assisted program appraisal practice, and at a minimum, complies with the definition of appraisal.....”

49 CFR Part 24.103(a)(2)(i thru v) identifies the 5 following appraisal requirements:

- i. The appraiser must provide an adequate description of the physical characteristics of the property being appraised (and, in the case of a partial acquisition, an adequate description of the remaining property), including items identified as personal property, a statement of the known and observed encumbrances, if any, title information, location, zoning, present use, an analysis of highest and best use, and at least a 5-year sales history of the property.
- ii. The appraiser must consider all relevant and reliable approaches to value consistent with established federal and federally-assisted program appraisal practices. If the appraiser uses more than one approach, there shall be an analysis and reconciliation of approaches to value used that is sufficient to support the appraiser’s opinion of value.
- iii. The appraiser must provide a description of comparable sales, including a description of all relevant physical, legal, and economic factors such as parties to the transaction, source and method of financing, and verification by a party involved in the transaction.

- iv. The appraiser must provide a statement of the value of the real property to be acquired and, for a partial acquisition, a statement of the damages and benefits, if any, to the remaining real property, where appropriate.
- v. The appraiser must provide the effective date of the valuation, date of appraisal, signature, and certification of the appraiser.

49 CFR Part 24.103(b) - Influences of the Project on Just Compensation. The appraiser shall disregard any decrease or increase in the fair market value of the real property caused by the project for which the property is to be acquired, or by the likelihood that the property would be acquired for the project, other than that due to physical deterioration within the reasonable control of the owner.

49 CFR Part 24.103(d)(1-2) - Qualifications of Appraisers and Review Appraisers.

- (1) The agency shall establish criteria for determining the minimum qualifications and competency of appraisers and review appraisers. Qualifications shall be consistent with the scope of work for the assignment. The agency shall review the experience, education, training, certification/licensing, designation(s) and other qualifications of appraisers and review appraisers, and use only those determined by the agency to be qualified.
- (2) If the agency uses a contract (fee) appraiser to perform the appraisal, such appraiser shall be state licensed or certified in accordance with title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) (12 U.S.C. 3331 et seq.). WisDOT requires that any consultant hired to appraise on a WisDOT project be state licensed or certified, under Chapter 458 of the Wisconsin Statutes.

#### **2.0.1.4 - 49 Code of Federal Regulations, Part 24.104 – Review of Appraisals**

The agency shall have an appraisal review process and, at a minimum:

49 CFR Part 24.104(a) - A qualified review appraiser shall examine the presentation and analysis of market information in all appraisals to assure that they meet the definition of appraisal found in 49 CFR Part 24.2(a)(3), appraisal requirements found in 49 CFR Part 24.103 and other applicable requirements, including, to the extent appropriate, the UASFLA, and support the appraiser's opinion of value.

- The level of review analysis depends on the complexity of the appraisal problem.
- As needed, the review appraiser shall, prior to acceptance, seek necessary corrections or revisions.
- The review appraiser shall identify each appraisal report as recommended (as the basis for the establishment of the amount believed to be just compensation), accepted (meets all requirements, but not selected as recommended or approved), or not accepted.
- If authorized by the agency to do so, the staff review appraiser shall also approve the appraisal (as the basis for the establishment of the amount believed to be just compensation), and, if also authorized to do so, develop and report the amount believed to be just compensation.

49 CFR Part 24.104(b) – If the review appraiser is unable to recommend (or approve) an appraisal as an adequate basis for the establishment of the offer of just compensation, and it is determined by the acquiring agency that it is not practical to obtain an additional

appraisal, the review appraiser may, as part of the review, present and analyze market information in conformance with CFR 24.103 to support a recommended (or approved) value.

49 CFR Part 24.104(c) – The review appraiser shall prepare a written report that identifies the appraisal reports reviewed and documents the findings and conclusions arrived at during the review of the appraisal(s). Any damages or benefits to any remaining property shall be identified in the review appraiser's report. The review appraiser shall also prepare a signed certification that states the parameters of the review. The certification shall state the approved value, and, if the review appraiser is authorized to do so, the amount believed to be just compensation for the acquisition.

### **2.0.1.5 - 49 Code of Federal Regulations, Part 24.105 – Acquisition of Tenant Owned Improvements**

49 CFR Part 24.105(a) - Acquisition of improvements. When acquiring any interest in real property, the agency shall offer to acquire at least an equal interest in all buildings, structures, or other improvements located upon the real estate to be acquired, which it requires to be removed or which it determines will be adversely affected by the use to which such real property will be put. This shall include any improvement of a tenant-owner who has the right or obligation to remove the improvement at the expiration of the lease term.

49 CFR Part 24.105(b) - Improvements considered to be real property. Any building, structure, or other improvement, which would be considered to be real property if owned by the owner of the real property on which it is located, shall be considered to be real property for the purposes of this subpart.

49 CFR Part 24.105(c) - Appraisal and Establishment of Just Compensation for a Tenant-Owned Improvement. Just compensation for a tenant-owned improvement is the amount which the improvement contributes to the fair market value of the whole property, or its salvage value, whichever is greater.

### **2.0.1.6 - Wisconsin State Statutes**

Section 32.05(2)(a) – The condemner shall cause at least one, or more in the condemner's discretion, appraisal to be made of all property proposed to be acquired. In making any such appraisal the appraiser shall confer with the owner or one of the owners, or the personal representative of the owner or one of the owners, if reasonably possible.

Section 32.09(1) – The compensation so determined and the status of the property under condemnation for the purpose of determining whether severance damages exist shall be as of the date of evaluation as fixed by Section 32.05(7)(c) or 32.06(7), Wis. Stats.

#### Section 32.09(1m)(a-b)

a) As a basis for determining value, a commission in condemnation or a court shall consider the price and other terms and circumstances of any good faith sale or contract to sell and purchase comparable property. A sale or contract is comparable

- within the meaning of this paragraph if it was made within a reasonable time before or after the date of evaluation and the property is sufficiently similar in the relevant market, with respect to situation, usability, improvements, and other characteristics, to warrant a reasonable belief that it is comparable to the property being valued.
- b) As a basis for determining value, a commission in condemnation or a court shall consider, if provided by the condemner or condemnee, an appraisal based on the income approach and an appraisal based on the cost approach.

Section 32.09(2) – In determining just compensation the property sought to be condemned shall be considered on the basis of its most advantageous use but only such use as actually affects the present market value. (This section references the appraiser’s highest and best use analysis).

Section 32.09(2m) – In determining just compensation for property sought to be condemned in connection with the construction of facilities, any increase in the market value of such property occurring after the date of evaluation but before the date upon which the lis pendens is filed shall be considered and allowed to the extent it is caused by factors other than the planned facility.

Section 32.09(3) – Special benefits accruing to the property and affecting its market value because of the planned public improvement shall be considered and used to offset the value of property taken or damages under Sec. 32.09(6), Wis. Stats., but in no event shall such benefits be allowed in excess of damages described under Sec. 32.09(6), Wis. Stats.

Section 32.09(4) –“If a depreciation in value of property results from an exercise of the police power, even though in conjunction with the taking by eminent domain, no compensation may be paid for such depreciation.....”

Section 32.09(5)(a-b)

- a) “In the case of a total taking the condemner shall pay the fair market value of the property taken....”
- b) Any increase or decrease in the fair market value of real property prior to the date of evaluation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, may not be taken into account in determining the just compensation for the property.

Section 32.09(6)(a-g) - In the case of a partial taking of property other than an easement, the compensation to be paid by the condemner shall be the greater of either the fair market value of the property taken as of the date of evaluation or the sum determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the following items of loss or damage to the property where shown to exist:

- a) Loss of land including improvements and fixtures actually taken.
- b) 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.
- c) Loss of air rights.
- d) Loss of a legal nonconforming use.
- e) Damages resulting from actual severance of land including damages resulting from severance of improvements or fixtures and proximity damage to improvements remaining on condemnee's land. In determining severance damages under this paragraph, the condemnor may consider damages which may arise during construction of the public improvement, including damages from noise, dirt, temporary interference with vehicular or pedestrian access to the property and limitations on use of the property. The condemnor may also consider costs of extra travel made necessary by the public improvement based on the increased distance after construction of the public improvement necessary to reach any point on the property from any other point on the property.
- f) Damages to property abutting on a highway right-of-way due to change of grade where accompanied by a taking of land.
- g) Cost of fencing reasonably necessary to separate land taken from remainder of condemnee's land, less the amount allowed for fencing taken under par.(a), but no such damage shall be allowed where the public improvement includes fencing of right-of-way without cost to abutting lands.

Section 32.09(6g) - In the case of the taking of an easement, the compensation to be paid by the condemnor shall be determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the items of loss or damage to the property, where shown to exist.

## 2.0.2 - Rules of Just Compensation

The Appraisal Institute's Real Estate Valuation in Litigation 2<sup>nd</sup> Edition states that the term just compensation is not defined in the U.S. Constitution or in any state constitution. It has been up to the courts to interpret and define the term, and they have generally held that just compensation is measured by market value. Infrequently, the courts have deviated from this concept, most notably when the property has no ascertainable market value.

The Yellow Book states that just compensation is measured by the owner's loss, not the government's gain.

### Just Compensation

- The Appraisal Institute's Dictionary of Real Estate Appraisal 6th Edition defines just compensation as:

In condemnation, the amount of loss for which a property owner is compensated when his or her property is taken. Just compensation should put the owner in as good a position pecuniarily as he or she would have been if the property had not been taken.

An appraisal is not a statement of just compensation. An appraisal measures the market value of an acquisition (value of the part taken), or a change in market value resulting from an acquisition (before and after). The Appraisal Institute's Real Estate Valuation in Litigation 2<sup>nd</sup> Edition states that market value is not necessarily the equivalent of just compensation, but rather a useful and generally sufficient tool for arriving at this (determination of just compensation). Appraisers do not determine just compensation. They estimate value and the agency determines just compensation for the initial offer. 49 CFR Part 24.103(d) states that before the initiation of negotiations, the agency shall establish an amount which it believes is just compensation for the real property. The amount shall not be less than the approved appraisal of the fair market value of the property, taking into account the value of allowable damages or benefits to any remaining property. An agency official must establish the amount believed to be just compensation. In the case of condemnation, the courts will determine just compensation.

In all matters involving the determination of just compensation in eminent domain proceedings, Section 32.09, Wis. Stats. must be followed. For a partial taking other than an easement, Section 32.09, Wis. Stats. requires WisDOT to pay the greater of either the fair market value of the property taken or the sum determined by the difference in the before and after values. Section 32.09, Wis. Stats. also recognizes the potential for special benefits accruing to the property and affecting its market value as a direct result of the planned public improvement. Special benefits are included in REPM/Section 2.0.2, because, as stated in the Yellow Book, direct and special benefits are a form of just compensation, no different than a monetary award or payment.

### 2.0.2.1 - Before and After Rule Versus the Value of the Part Taken

As stated in REPM/Subsection 2.0.1.6, Section 32.09(6), Wis. Stats., in the case of a partial taking of property other than an easement, the compensation to be paid by the condemnor shall be the greater of either **the fair market value of the property taken as of the date of evaluation or the sum determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation,** (emphasis added) assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the following items of loss or damage to the property where shown to exist:

#### Damages

- The Dictionary of Real Estate Appraisal, Sixth Edition, published by the Appraisal Institute defines damages as:

In condemnation, the loss in value to the remainder in a partial taking of property. Generally, the difference between the value of the whole property before the taking and the value of the remainder after the taking is the measure of the value of the part taken and the damages to the remainder.

### Severance Damages

- The Appraisal Institute's Real Estate Valuation In Litigation 2nd Edition defines severance damages as:  
The diminution of the market value of the remainder area, in the case of a partial taking, which arises (a) by reason of the taking, and/or (b) the construction of the improvement in the manner proposed.

#### **2.0.2.1.1 - Before and After Rule (Appraisal Method)**

##### Before and After Rule

- The Dictionary of Real Estate Appraisal, Sixth Edition, published by the Appraisal Institute defines the before and after rule as:  
In eminent domain valuation, a procedure in which just compensation is measured as the difference between the value of the entire property before the taking and the value of the remainder after the taking.
- The Yellow Book says the following about the before and after rule:  
In partial acquisitions, these standards require application of the before and after rule, also known as the federal rule, in which the appraiser estimates both the market value of the larger parcel before the government's acquisition and the market value of the remainder property after the government's acquisition. Requiring this method of valuation allows acquiring agencies, the Department of Justice, and the courts to calculate a reasonable measure of compensation by deducting the appraiser's estimated remainder or after value from the appraiser's estimate of the larger parcel's before value. The result of this procedure is a figure that includes the value of the property acquired as well as any compensable damages and/or special benefits to the remainder property.

Appraisers should note that these are two separate appraisal analyses that must take place during the development phase of the appraisal process of the appraisal assignment. The first addresses the before condition value of the larger parcel with a second analysis that addresses the value of the remainder after the acquisition. The level of documentation, and depth of analysis presented in the reporting phase of the appraisal process will be determined by the complexity of the appraisal problem and the nature of the impacts to the remainder of the larger parcel. If the appraiser is unsure of the level of analysis, or documentation, that is appropriate to a specific appraisal assignment, they should consult with the assigned review appraiser.

The difference between the before value and after value will include the contributory value of the property acquired together with any potential severance (compensable) damages and/or special benefits to the remaining property (after value). The analysis performed under the before and after rule will not specifically identify what portion of the resultant value consists of contributory value and what portion of the value consists of severance damages or special benefits. WisDOT, however, is required to identify what the contributory value of the property taken is and how much the severance damages/special benefits to the remainder are. To meet this requirement, the appraiser will be required to estimate the value of the part taken to cover the contributory value of the property acquired, and then subtract it from the before and after findings to determine the amount of severance damages or special benefits. If

subtracting the value of the part taken from the sum of the difference between the before and after value results in a positive amount, this will indicate a severance damage. If the result is a negative amount (the sum of the difference between the before and after values is less than the value of the part taken) then this will indicate a potential special benefit.

### 2.0.2.1.2 - Value of the Part Taken

Prior to 1978, compensation for a partial taking, under Section 32.09(6) Wis. Stats. was based solely on the before and after appraisal method, which includes the value of the property acquired as well as any severance damages/special benefits. Chapter 440 of the Laws of 1977 added the following language (underlined below) to recognize an alternate method of computing compensation, the Value of the Part Taken:

“[T]he compensation to be paid by the condemnor shall be the greater of either the fair market value of the property taken as of the date of evaluation or the sum determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement ...”

A legislative support agency accompanying the bill that became law states:

“This section of the bill modifies the current before and after rule for determining the just compensation in a partial taking of property other than an easement. The added language allows a greater recovery if the fair market value of the property taken exceeds the before and after value. This reduces the possibility of an award of zero, which can occur under the current statute if the remainder is worth as much or more than the whole property before the taking....”

The value of the part taken lies in its contributory value (REPM/Subsection 2.4.2.1) to the larger parcel (REPM/Subsection 2.4.1). The value of the larger parcel determines a unit value (per acre, square foot, etc.) that is applied to the part taken. The unit value of the part taken is the same as the unit value of the larger parcel in the before condition. The value of the part taken does not apply only to the land that is acquired. The concept of the value of the part taken applies to any and all site improvements (landscaping, fencing, driveways, etc.) that fall within the area of the taking.

The value of the part taken does not include severance damages. To determine severance damages a before and after analysis must be performed.

### 2.0.2.2 - Benefits

The Yellow Book states that federal acquisitions and the projects they serve can also enhance properties' market value, often raising complicated valuation questions. Under federal law, compensation for a partial acquisition must reflect any direct and special benefits to the remainder due to the government project. Indirect and general benefits, on the other hand, are not considered because they are enjoyed by the public as a whole rather than arising from an acquisition's particular impact on a specific property. As with damages, appraisers must be aware that the legal rules regarding what

constitutes indirect (general) benefits and what constitutes direct (special) benefits may differ between state and federal rules. The extent of a benefit to a remainder parcel is a fact question that must be well supported by the appraiser. Whether the benefit is general or direct (special) is a mixed fact/law question. Distinctions between these types of benefits are discussed in more detail below.

#### **2.0.2.2.1 - General Benefits**

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.

Example: A new street with parking, and curb and gutter replaces the original street that had shoulders and ditches.

Section 32.09(6), Wis. Stats. “In the case of a partial taking of property other than an easement, the compensation to be paid by the condemnor shall be the greater of either the fair market value of the property taken as of the date of evaluation or the sum determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication....”

#### General Benefits

- The Appraisal Institute’s Dictionary of Real Estate Appraisal 6th Edition defines general benefits as:  
In eminent Domain takings, the benefits that accrue to the community at large, to the area adjacent to the improvement, or to other property situated near a taken property.

As stated in Section 32.09(6), Wis. Stats. general benefits cannot be used to offset severance damages or any portion of the value of the real estate acquired. Even though the after value may be higher, the owner should still receive the value of the part taken.

#### **2.0.2.2.2 - Special Benefits**

Special Benefits arise because of the unique relationship between the remaining property, in a partial acquisition, and the completed public project.

Section 32.09(3), Wis. Stats. states special benefits accruing to the property and affecting its market value because of the planned public improvement shall be considered and used to offset the value of property taken or damages under Section 32.09(6), Wis. Stats., but in no event shall such benefits be allowed in excess of damages described under 32.09(6), Wis. Stats.

#### Special Benefits

- The Appraisal Institute’s Dictionary of Real Estate Appraisal 6th Edition defines special benefits as:

In condemnation, the benefits that arise from the peculiar relation of the land in question to the public improvement, usually resulting from a change in its highest and best use. Special benefits may accrue to multiple parcels (such as all four quadrants of a newly constructed freeway interchange) because the parcels are directly benefitted in a similar manner, if not to the same degree.

- The Yellow Book provides the following guidance for special benefits in a before and after analysis:

Appraisers should give the same consideration to benefits as they do to damages in developing an opinion of the market value of remainder properties. Benefits can take many forms, such as when the project has caused the remainder to have lake frontage, frontage on a better road, more convenient access, improved drainage, irrigated land, and an improved view. An upward shift in highest and best use of the remainder property is often an indication of direct (special) benefits, and direct benefits must be considered when appraisers develop an opinion of the value of remainder properties, even though other lands may have the same benefits from the project.

Before an appraiser can find that special benefits have accrued to the remaining property, they must first find that the benefit is peculiar to the remaining property. As with severance damages a before and after analysis must be performed to identify the effects of special benefits.

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-condition unit value increases, total damages by this method will decrease. The difference between the before and after values 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-condition 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.

**Note:** If the appraiser is contemplating the potential for identifying special benefits in their appraisal they must consult the assigned review appraiser and WisDOT legal counsel first.

### 2.0.2.3 - Non-Compensable (Consequential) Damages

#### Non-Compensable Damage

- A damage or loss in value, to a property, for which a property owner is not entitled to compensation.

The term Consequential Damages describes the kind of damages that are typically considered non-compensable. Definitions for consequential damages are provided below.

**Note:** It was necessary to include definitions from multiple sources, because no single source provided adequate clarification or direction on the issue of what is considered non-compensable. Ultimately non-compensability is determined by statute and the courts and appraiser's need to seek the advice of WisDOT's legal counsel when addressing issues of potential non-compensability.

### Consequential Damages

- The Appraisal Institute's Dictionary of Real Estate Appraisal 6th Edition defines consequential damages as:  
In condemnation, damages to a property resulting from governmental actions (such as a taking) or the actions of property owners (such as construction) on other lands. Consequential damages may be considered non-compensable in certain jurisdictions.
- The Appraisal Institute's Real Estate Valuation in Litigation 2nd Edition defines consequential damages as:  
A damage to property arising as a consequence of a taking and/or construction on other lands.

The consequential damages defined above are primarily related to the actions taken on one property that affects the value of another property. If the state acquires Property A and this affects the value of Property B this would be a consequential damage to Property B and would likely be non-compensable. The above definitions are not designed specifically for use in eminent domain; however, the following information provided by the Yellow Book provides more appropriate guidance.

The Yellow Book states the following about Non-Compensable (Consequential) Damages:

Because the compensability of a particular aspect of damage stems from its treatment in the open market between willing buyers and sellers, losses that are not reflected in sales prices in the private market cannot be considered in federal acquisitions. Applying this principle, federal courts have determined that the following losses are not compensable under the Fifth Amendment. The following is only a partial list of the non-compensable items provided in the Yellow Book. Some of the items excluded from the list included relocation issues that are reimbursable under the relocation program, and some items were not of a sufficient clarity to include in a list of this sort. The items listed below are tied to the real estate or the owner's activities on the real estate:

- loss of business value or going concern value;
- loss of or damage to goodwill;
- future loss of profits;
- frustration of plans;
- frustration of contract or contractual expectations;
- loss of opportunity or business prospect;
- frustration of an enterprise;

- loss of customers;
- increased production or management costs;
- and interference with development agreements

Such losses must be disregarded—even if proved—because by law, they are not compensable under the Fifth Amendment.

If the appraiser is unsure about the compensability of a specific taking from, or impact to, a property they should consult with the assigned review appraiser and WisDOT legal counsel.

### **2.0.2.3.1 - Police Power and Its Effect on Just Compensation**

A non-compensable item of damage that does not fall within the realm of consequential damages is any damages resulting from an exercise of police power. Any loss in value, or damage, experienced by an affected property, resulting from an exercise of police power is non-compensable. See Section 32.09(4), Wis. Stats. in REPM/Subsection 2.0.1.6.

#### Police Power

- The Dictionary of Real Estate Appraisal 6th Edition published by the Appraisal Institute defines police power as:  
The inherent power of government to regulate property in order to protect public health, safety and general welfare.

A government's authority to exercise police power is not established by the constitution. It is an inherent power of the sovereign (government), along with the power of eminent domain, the power of taxation and the power of escheat. Police power includes the power to make laws governing safety, health, welfare, and morals. State legislatures exercise their police power by enacting statutes, and they also delegate much of their police power to counties, cities, towns, villages, and large boroughs within the state. Police power does not specifically refer to the right of state and local government to create police forces, although the police power does include that right. Police power is also used as the basis for enacting a variety of substantive laws in such areas as the establishment of zoning ordinances, land use, fire and building codes, discrimination, parking, licensing of professionals, liquor, motor vehicles, bicycles, nuisances, schooling, and sanitation. The primary areas of concern, for the purposes of appraisals prepared for WisDOT are, access control (REPM/Subsection 2.4.5.4), issues associated with zoning and other land use regulations.

Under most circumstances, any real property value loss resulting from an exercise of police power is considered to be non-compensable. However, if the exercise of police power deprives an affected property owner of all, or practically all use of the affected property, then the non-compensable police power action may become a regulatory taking, requiring compensation.

#### Regulatory Taking

- The following definition has been created for the WisDOT REPM:  
A regulatory taking is a situation in which a government regulation limits the uses of private property to such a degree that the regulation

effectively deprives an affected property owner of all, or practically all use of the affected property, even though the regulation does not formally divest them of title to it.

**Note:** If the appraiser is involved in appraising a partial acquisition on a property where police power is also being exercised, they should consult with WisDOT legal counsel to determine the compensability of specific changes to the subject of the appraisal.

### 2.0.3 - Definitions

The definitions provided in this section relate to the broader practice of preparing appraisals under the eminent domain process.

#### Condemnation

- The Appraisal Institute's Dictionary of Real Estate Appraisal 6th Edition defines condemnation as:  
The act or process of enforcing the right of eminent domain.

#### Eminent Domain

- The Appraisal Institute's Dictionary of Real Estate Appraisal 6th Edition defines eminent domain as:  
The right of government to take private property for public use upon the payment of just compensation. The Fifth Amendment of the US Constitution, also known as the takings clause, guarantees payment of just compensation upon appropriation of private property.

UASFLA – Uniform Appraisal Standards for Federal Land Acquisitions – Standards developed by the Interagency Land Acquisition Conference, an organization composed of representatives of federal agencies engaged in the acquisition of real estate for public uses, for appraisals prepared for federal land acquisitions. These standards are recognized as guidelines for appraisals prepared under 49 CFR Part 24.103(a) provided in REPM/Subsection 2.0.1.3 above. WisDOT does not require that appraisers specifically adhere to the standards presented in the Yellow Book; however, the Yellow Book does represent a widely recognized and respected source of information for the preparation of eminent domain appraisals. So, in those instances where clear guidance is not available from USPAP on an eminent domain appraisal issue, Chapter 2 will often cite the Yellow Book as a reference.

USPAP – Uniform Standards of Professional Appraisal Practice – Appraisal standards developed by the Appraisal Standards Board of the Appraisal Foundation, an organization that sets the congressionally-authorized standards and qualifications for real estate appraisers, and provides voluntary guidance on recognized valuation methods and techniques for all valuation professionals. These standards are recognized under 49 CFR Part 24.103(a) provided in REPM/Subsection 2.0.1.3. USPAP provides standards for the general practice of appraisal; however, it does not provide any significant guidance for the preparation of eminent domain appraisals. So, while USPAP must be adhered to in the development and reporting of an eminent domain appraisal, guidance as to the methodologies and specific requirements for an eminent domain appraisal must be sought elsewhere.