

Expropriation and Condemnation: The Larger Parcel

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The concept of the larger parcel in appraisal theory has its roots in expropriation and condemnation, but in recent years its application has been expanded to address valuation issues in other areas of law.¹ Sometimes it is a difficult concept to grasp, but it is essential in dealing with the value of a partial taking and an assessment of potential injurious affection or severance damages. It has implications in establishing highest and best use, which is the foundation for every opinion of market value. In terms of parcel size and utility, the larger parcel drives the selection of comparable sales and the comparative analysis of the direct comparison approach (sales comparison approach).

Only the small segment of the appraisal profession that is regularly involved in expropriation and condemnation is likely to be familiar with the concept of the larger parcel. Relatively little appraisal literature is available on the topic, and case law dealing with the larger parcel emanates primarily from the United States.

This paper provides a discussion of the purpose of defining the larger parcel as it relates to expropriation and condemnation appraisals, and the underlying foundational requirements established by the courts in defining the larger parcel. These are

1. In *NRC Corporation v. Amoco Oil Co.*, No. 98-2162 (7th Cir. 03/09/2000) 205 F.3d 1007, the plaintiff succeeded in expanding a damage claim to the larger parcel for the market impact of environmental contamination from the area covered by the lease to Amoco, relying on an "indemnification clause that held Amoco liable for any damages to NRC arising from the operation of the service station." The service station lease, which initially covered a 0.75-acre patch at the corner of the 35-acre NRC parcel at the northwest corner of 96th and Meridian Street in Hamilton County, Indiana, was twice reduced in size through condemnation proceedings, first to 0.36 acres and then to 0.327 acres. Gasoline spills had contaminated the 0.327 acres leased, but there was no evidence that the contamination had spread beyond the leased area. The highest and best use of the leased land was as part of a two-acre parcel on the corner encompassing the 0.327 acres leased. "It provides the only legal and physical access... to a corner location there off of Meridian and 9th Street....[T]he contamination of the leased parcel affected the surrounding 1.673 acres because no one would lease that space without the road access and visibility provided by the corner-location leased parcel. Thus, when Amoco rendered the leased parcel temporarily unusable, it also eliminated NRC's opportunity to lease or sell the surrounding 1.673 acres." According to the appraiser, "the Amoco site in itself... is only important to the appraisal problem... because... it's an integral part of a two-acre site that would be demanded in the market place. Amoco damaged NRC by reducing its opportunities to sell or lease not only the 0.327-acre leased parcel but also the immediately contiguous land [as a unified larger parcel]." The concept of the larger parcel was also applied in *Ravida v. Ravida*, (1995) O.J. No. 4164, a dispute involving a claim for equalization of the parties' net family properties.

abstract

A non-marketable partial taking has no independent highest and best use so its value by necessity is a function of the value of the larger parcel. This research paper explores the concept of the larger parcel in its application to the valuation of non-marketable partial takings in condemnation and expropriation proceedings. The paper also briefly discusses valuation applications of the larger parcel in other areas, with numerous cases presented and analyzed in the context of the foundational requirements of the three unities (ownership, contiguity and use) that typically define the larger parcel, and the valuation implications.

- Unity of ownership
- Unity of contiguity²
- Unity of use (highest and best use)

Both Canadian and American courts on occasion have ruled that the three unities of ownership, contiguity, and use (highest and best use) need not be simultaneously present as of the date of valuation.³

Sometimes the larger parcel can be defined as comprising less than the extent of the boundaries of legal ownership or extending beyond the legal boundaries of ownership through beneficial ownership. Ownership (possession) can be held in fee simple, a lesser estate, a combination thereof or under a partnership agreement for a common purpose. Title and corporate searches are important in establishing ownership and identifying the larger parcel. In the context of highest and best use, factors to be considered in defining the larger parcel should include land use controls, regulatory requirements, development agreements, lease agreements, complementary land uses, land use patterns, economic linkages, and supply and demand.

Some examples of properties that would likely qualify as a larger parcel while not simultaneously meeting the three unities of contiguity, ownership, and use (highest and best use), are

- Contiguous legal lots, each held under separate and unrelated ownership, but subject to a joint development agreement or long-term ground lease.⁴
- Noncontiguous legal lots, held under common ownership, involving complementary land uses and economic linkages.⁵
- Two contiguous farms, one owned in fee simple and the other held under lease, but both operated as an integrated economic unit.

In this paper, a number of Canadian and American cases are summarized to illustrate the practical application of the larger parcel concept in determin-

ing compensation in expropriation and condemnation proceedings. Also presented is a summary of a Canadian case (*Ravida v. Ravida*) involving a claim for the equalization of the parties' net family property, which included the disputed value of development lands in the state of Florida to which was applied the concept of the larger parcel.

Definitions

Under the *Uniform Appraisal Standards for Federal Land Acquisitions* in the United States,

Appraisers must bear in mind that the determination of the larger parcel is required in every appraisal assignment; irrespective of whether the agency has designated an acquisition a *total acquisition* or a *partial acquisition*. This is so because, from a practical standpoint, whether an acquisition is a total or partial acquisition cannot be determined until such time as the appraiser has made a determination of the highest and best use, and the larger parcel⁶

In Canada there is no corresponding appraisal requirement at either the federal⁷ or provincial level to identify the larger parcel. *The Dictionary of Real Estate Appraisal*⁸ provides the following definitions of the larger parcel:

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

In condemnation, the portion of a property that has unity of ownership, contiguity, and unity of use, the three conditions that establish the larger parcel for the consideration of severance damages in most states. In federal and some state cases, however, contiguity is sometimes subordinated to unitary use.

2. "Contiguity" [e]xists where tracks of land [lots] touch or adjoin in a reasonably substantial physical sense, but a line of demarcation between reasonableness or unreasonableness of a "contiguity" must be determined on the facts of each case. *Belmont Fire Protection Dist. v. Village of Downers Grove*, 92 Ill.App.3d 682, 48 Ill. Dec. 261, 264, 416 N.E.2d 292, 295. *Black's Law Dictionary*, 6th ed. (1891-1991), 320.

3. Three contiguous legal lots consecutively labeled A, B, and C, depending on the interrelationship of ownership and of use or probable use, taking into account the test of highest and best use, could result in a larger parcel consisting of (<A), (A), (B), (C), (A & B), (A, B & C), (A & C), or (B & C).

4. In major urban centres it is not uncommon for the lands under major shopping centres and office towers to be in the ownership of a number of unrelated property owners, subject to a common development agreement and ground lease for the improvements.

5. For example, a hotel or office tower on a separate legal lot with parking on another separate, noncontiguous legal lot would have an integrated highest and best use.

6. The Appraisal Institute, *Uniform Appraisal Standards for Federal Land Acquisitions* (Chicago: The Appraisal Institute, 2000) 18.

7. Canada's Public Works and Government Services April 1998 Appraisal Guidelines on Expropriation make no reference to the larger parcel, but under Section 2.12 in respect of "a limited interest or a partial taking," the value assigned to the security interest must be "in the same proportion that the value of the land taken bears to the whole of the land." Further, Section 26(3) states that the part taken "if not marketable on its own, then it is valued at the greater of, the value it contributes to the whole property, or the value of equivalent land", factors that are considered in defining the larger parcel.

8. *The Dictionary of Real Estate Appraisal*, 4th ed. (Chicago: Appraisal Institute, 2002), 160.

Black's Law Dictionary defines the larger parcel as

A term used in eminent domain proceedings, signifying that the parcel taken is not a complete parcel but part of a "larger parcel;" the owner, therefore is entitled to damages from the severance as well as the value of the parcel taken. Unity of ownership, use, and contiguity must be present, although federal courts and some states do not require contiguity where there is a strong unity of use.⁹

The Canadian Glossary of *Principles of Right of Way* describes the larger parcel as

In expropriation, that portion of a property which has unity of ownership, contiguity, and unity of use. These are the three conditions which must be present to establish the larger parcel for the purpose of considering the extent of severance damage. However, in some cases, the matter of contiguity is sometimes subordinated to that of unitary use. "Integrated use, not physical contiguity, is the test of whether land condemned is part of a single tract warranting an award of severance damage."¹⁰

Whenever the larger parcel consists of land with inter-related existing or potential uses (integrated highest and best use) or when the topography, soil bearing quality, or other characteristics of the lands are different in various areas of the larger parcel, only market-driven recognition of differences must be reflected to establish their contribution to the value of the lands as a whole; they should not be treated as separate elements of value.¹¹

Purpose of Defining the Larger Parcel

The concept of the larger parcel has specific application to nonmarketable partial takings in expropriation and condemnation proceedings. In its application to partial takings, the larger parcel, rather than the taking, is the entity for which highest and best use must be established. Only then is it possible to estimate (indirectly) the value of the partial taking, which consists of the value of the land taken and any severance damages, or injurious affection, suffered by the remainder parcel as a consequence of the taking.

Defining the larger parcel in expropriation and condemnation serves many purposes.

- Establishes the scope of the analysis of the appraisal problem in terms of what is to be appraised, the appropriate valuation method(s) to employ, and the type of data to be collected, property-specific and otherwise.
- Establishes the framework for assessing the reasonable and probable highest and best use of a nonmarketable partial taking as part of the larger parcel.¹²
 - Physically possible
 - Legally permissible
 - Financially feasible
 - Maximally productive
- Establishes the unit value (e.g., value per acre, value per square foot,) applicable to a nonmarketable partial taking as a pro rata function of the value of the larger parcel.¹³

9. *Black's Law Dictionary*, 6th ed. (1891–1991), 882.

10. International Right of Way Association, *Principles of Right of Way*, revised and reprinted 1995 (BBW Communications Inc. Torrance, CA), 221.

11. In *Will Farms Ltd. v. Minister of Transportation* (1983), 30 L.C.R. 374 (Alta. L.C.B.), the Alberta Land Compensation Board reconciled the valuation principles articulated in *Bonaventure* and *Kerr*. (See separate discussion of these two cases.) Strips from five quarter sections owned by Wills Farms Ltd. were taken for road widenings. While it was established that portions of the quarter sections had differing soil capacity classifications, all of the land was put to the same use, namely, the growing of cereal grain crops. Both appraisers agreed that the highest and best use of all five quarter sections was for the dry-land production of cereal grain crops and valued the five quarter sections *en bloc* as one larger parcel. In accepting this proposition, the Board commented, in part, as follows: "Presumably it is theoretically possible by using appropriate surveying, testing and assessment methods to determine the precise soil capability class for each square foot of a quarter section. Obviously it is not practical to do so and that is not the approach adopted in the market by willing vendors and purchasers of agricultural land... [V]endors and purchasers arrive at a judgment as to the use of the parcel in a more generalized way and then arrive at a value having regard to sales of land with the same characteristics or apply appropriate adjustments to make the comparison." The Board reached a similar conclusion in *Groten v. The Queen* (1985), 33 L.C.R. 211 (Alta. L.C.B.) finding that the entire 640-acre farm "had a single and clearly recognizable highest and best use" despite the presence of small, scattered, irregularly shaped areas with salinity problems and a natural drainage depression.

12. These criteria are often considered sequentially. The tests of physical possibility and legal permissibility must be applied before the remaining tests of financial feasibility and maximum productivity. A use may be financially feasible, but this is irrelevant if it is legally prohibited or physically impossible. Although the criteria are considered sequentially, it does not matter whether legal permissibility or physical possibility is addressed first, provided both are considered prior to the test of financial feasibility. Many appraisers view the analysis of highest and best use as a process of elimination, starting from the widest range of possible uses. The test of legal permissibility is sometimes applied first because it eliminates some alternative uses and does not require a costly engineering study. It should be noted that the four criteria are interactive and may be considered in concert. " *The Appraisal of Real Estate*, 12th ed. (Chicago: Appraisal Institute, 2001), 307.

13. It is a well-established economic principle that a smaller parcel, that which remains after the taking, holding other factors equal, would indicate a unit value higher than the unit value of the larger parcel before the taking. An unsupported appraisal claiming injurious affection or severance damage due solely to a decrease in parcel size, without a change in utility and highest and best use after the taking, is a significant appraisal abuse because the unit value applicable to a nonmarketable partial taking is entirely a pro rata function of the unit value of the larger parcel.

- Establishes whether a claim for injurious affection or severance damages is applicable to the remainder parcel due to a change in utility or highest and best use.¹⁴
- Establishes whether the remainder parcel enjoys special benefits that are not too remote (as distinguished from general benefits) to set off against any claim for injurious affection. In Canada and in most U.S. states, special benefits¹⁵ may be set off only against injurious affection or severance damage to the lands remaining, thus ensuring that the landowner always receives at least the market value of the lands taken.

Special Benefits

As described in the 2000 edition of the *Uniform Appraisal Standards for Federal Acquisitions*,

Benefits, to be special, need not be particular to a single parcel but may accrue to multiple parcels. For instance, lands within all four quadrants of a newly constructed freeway interchange may all be specially benefitted due to their special relationship to the public improvement, whereas general benefits may accrue to all lands in the vicinity due to the reduction in traffic congestion and commuting times. Further illustration in this regard comes from a case involving a river improvement project, in which the Supreme Court opined that an increase in the value of the portion of any parcel of land caused by its frontage on the widened river, carrying a right of immediate access to and use of the improved stream, would constitute a special and direct benefit, as distinguished from

a benefit common to all the lands in the vicinity, although the 11 remaining portions of other riparian parcels would be similarly benefitted.¹⁶ In so deciding, the Court approved, and followed the law of benefits as it had been applied in reference to lands abutting upon a new or widened street, stating:

The benefit is not the less direct and special to the land of the petitioner, because other estates upon the same street are benefitted in a similar manner. The kind of benefit, which is not allowed to be estimated for the purpose of such deduction, is that which comes from sharing in the common advantage and convenience of increased public facilities.... The advantages of more convenient access to a particular lot of land in question, and of having a front upon a more desirable avenue, are direct benefits to that lot, giving it increased value in itself. It may be the same, in greater or less degree, with each and every lot of land upon the same street. But such advantages are direct and special to each lot. They are in no proper sense common because there are several estates, or many even, that are similarly benefitted.¹⁵

Application of Larger Parcel to Partial Takings

The underlying rationale for the concept of the larger parcel is in recognition of partial takings that cannot stand alone as viable economic parcels and whose value is not directly ascertainable. Partial takings that cannot be directly valued must have their value estimated as a function of the value of the larger parcel. That functional relationship of the partial taking to

14. In *Manitoba v. (Roeland Farms Ltd.)*, (1995) M.J. No. 404 DRS 95-20816, the Court of Appeal rejected part of the Land Value Appraisal Commission's award for injurious affection based on the notional "parent parcel" (larger parcel) of 5.95 acres arbitrarily established by the Commission "with no supporting evidence." The property consisted of two contiguous blocks (Block 98 – 24.32 acres and Block 119 – 30.36 acres) comprising 54.6 acres under the same ownership, but for assessment purposes were treated as separate parcels. In 1987, the province expropriated a 1.176-acre triangular piece of arable farmland from the southwest corner of the property for improvement of the Trans-Canada Highway. The taking was confined to Block 98, consisting of 24.32 acres, which both appraisers treated as the "parent parcel" but failed to make clear to the Commission the reasons for doing so. Rejecting the evidence of both appraisers as to the "parent parcel," the Commission arbitrarily defined the "parent parcel" as the front 5.95 acres of Block 98 to a depth of 429 feet, opining that these were the acres that would most likely be developed in the immediate future, with the remaining 48.66 acres in Blocks 98 and 119 to be continued in agricultural use. On this basis the Commission valued the 1.176-acre taking at \$8,000 per acre, and awarded \$7,540 as injurious affection, claiming that the value of the remaining 4.77 acres (5.95 – 1.176) had been diminished by 19.76% from \$8,000 to \$6,419 per acre based on the calculated reduction in the acreage of the notional "parent parcel" of 5.95 acres (1.176/5.95 = 19.76%). Under this formula, the Commission compensated the property owner twice for the taking. The Court of Appeal ruled the award of the Commission for site reduction untenable as an error in law. Another part of the Commission's award of \$7,500 for injurious affection for the "reduction of the Youville Rd. frontage and the loss of access from the Plessis Rd. ramp" was sustained by the Court. A reduction in the Commission's award for the value of the taking may also have been achieved had the Province appealed this part of the decision, arguing that the "parent tract" (larger parcel) was either 24.32 acres (Block 98) or 54.6 acres (Blocks 98 and 119 combined), thus warranting a lower per acre value.

15. "The most satisfactory distinction between general and special benefits is that general benefits are those which arise from the fulfillment of the public object which justified the taking, and special benefits are those which arise from the peculiar relation of the land in question to the public improvement. Ordinarily the foregoing test is a satisfactory one; though sometimes difficult to apply. In other words, the general benefits are those which result from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such enjoyment. The special benefits are ordinarily merely incidental and may result from physical changes in the land, from proximity to a desirable object, or in various other ways....[S]pecial benefits are those which are direct and peculiar to the particular property distinguished from the incidental benefits enjoyed to a greater or lesser extent by the lands in the area of the improvement. A special benefit is nonetheless such because other lands in like situations are similarly benefitted." Quoted from the *Uniform Appraisal Standards for Federal Land Acquisitions*, 2000 Edition, citing *United States v. 2,477.79 Acres of Land, Etc.*, 259 F.2d 23, 28 (5th Cir. 1958). Also see *LaFleche v. Ontario (Ministry of Transportation and Communications)*, (1975) O.J. No. 755 (Q.L.) (Ont. Div. Ct.) for a discussion of set-off of benefits. The reference source for this and all other court citations is the database *Quick Law*.

16. *United States v. River Rouge Co.*, 269 U.S. 411, 415-416 (1926).

the larger parcel exemplifies the principle of contribution which holds that

The value of a particular component is measured in terms of its contribution to the value of the whole property [larger parcel], or as the amount that its absence would detract from the value of the whole.¹⁷

The interdependence of the larger parcel and a partial taking is succinctly expressed by the definition of *partial taking* under Section 30(2) of the Manitoba Expropriation Act, Revised Statutes of Manitoba, 1987.

... It shall be deemed that part of the lands of an owner is expropriated only where the owner from whom land is expropriated retains land contiguous to that expropriated or retains land of which the value was enhanced by unified ownership and unity of use with that expropriated.

This definition explicitly links a partial taking to a larger parcel, which must possess unity of ownership, unity of contiguity, and unity of use and recognizes the enhancement of value to a nonmarketable partial taking forming part of a marketable larger parcel that meets the test of highest and best use.

A partial taking whose value cannot be ascertained directly is one that typically cannot be severed either because of its relation to the whole property (lacking frontage and landlocked) or because (1) it is of a size or shape not in compliance with minimum lot dimensions and area and setback requirements under the prevailing or anticipated land use controls; (2) it lacks the legal entitlement or physical capacity to accommodate any permitted or anticipated land use; and (3) it is of a noneconomic nature, lacking marketable utility as a stand-alone entity.¹⁸

In *GTE Sylvania Canada Ltd. v. British Columbia Transit*,¹⁹ in reference to the valuation methodology recommended for a partial taking not capable of standing alone as a viable parcel, the British Columbia Court of Appeal commented as follows:

If the piece of land that was taken could not have stood alone at the time of the taking as a legal entity, or could not have stood alone at that time as a commercial entity, then it may be that the only proper way to value the land taken would be to value the whole parcel and then to attribute a proportionate part of the value of the whole parcel to the piece taken, on the basis of the proportion that the area of the part taken bears to the area of the whole parcel. [Ref-

erence made to *The Queen v. Bonaventure Sales Ltd.* (1980), 22 L.C.R. 164, A.J. No. 114.]

Examples of partial takings that lack independent utility and economic marketability in the context of expropriation and condemnation, include

- Narrow strips for roads and highways either along the boundary lines of a property or through a property
- Irregular parcels for highway interchanges and daylighting at intersections
- Easements or rights-of-way either along the boundary lines of a property or through a property for water or sewer lines, electric power lines or towers, and gas or oil pipelines.

Partial takings such as those listed lack economic utility and do not trade on the open market. Therefore, any attempt to value such partial takings as stand-alone parcels is an impossible task. The appraiser in *Gallivan v. Alberta Power Ltd.*, (1988) A.J. No. 607 expressed the difficulty of such a task in reference to ten linear parcels forming a 24.38-metre wide right-of-way for construction of a 240 kilovolt (K.V.) tower electric power transmission line. The property owners were entitled to compensation, but there was disagreement as to the manner in which compensation should be determined.

Section 25(1)(a) of the Surface Rights Act allows the Surface Rights Board of Alberta, in determining the amount of compensation, to consider a number of factors, including

The amount the land granted to the operator might be expected to realize if sold in the open market by a willing seller to a willing buyer on the date the right of entry order was made.

The Alberta Appeals Court in discussing Section 25(1)(a) made reference to the land, and the importance of considering both its actual and potential uses and how they affect value, stating that

It is almost inconceivable that anyone would want to buy such a strip of land [right of way]. Its only use is for agricultural purposes. No one would buy the parcel to farm it. It would border on the inane for a farmer to sell such a strip of land out of his quarter section as it can only be economically farmed by him—it cannot be economically farmed by another. However, if the “en bloc” lands [larger parcel] could or might in the

17. *The Dictionary of Real Estate Appraisal*, 4th ed. (Chicago: Appraisal Institute, 1993), 63.

18. The use to which the partial taking is to be put by the expropriating or condemning authority must be ignored, as well as all noneconomic uses.

19. *GTE Sylvania Canada Ltd. v. British Columbia Transit*, (1991) B.C.J. No. 2 (Q.L.) (B.C.C.A.).

future, be the subject of higher or more intensive usage such as subdivision, into residential lands or subdivision into 20 or 40 acre parcels then obviously that potential must reflect on the value of the “en bloc” lands, and the value of the lands taken. Purchasers and vendors will attribute value, to potential higher usage even when that potential is speculative, and some considerable period into the future. An example would be farmlands close in reasonable proximity to a city or a town.

As pointed out by the appraiser at the hearing of the Surface Rights Board Section 25(1)(a) “did not make much sense” for land in the configuration that was taken. The Alberta Court of Queen’s Bench cited with approval *Dome vs. Richards et al.* (1986) 34 L.C.R., in which it was found impractical to appraise partial takings as stand-alone parcels, stating that

None of the appraisers called by the operators were prepared to give any consideration to an upward adjustment in their en bloc [larger parcel] values to take into account the smaller parcels involved even though some admitted that a small parcel might attract a larger per acre value than a whole quarter section. In effect, they were prepared to totally ignore s. 25(1)(a) and the explanation for this was that they could not find any comparable sales of small parcels so they were not prepared to use any assumptions, based upon their expertise to attach a premium. However, under other subsections of s. 25 several of the appraisers had no hesitation relying upon their expertise and using several assumptions to arrive at suggested compensation figures.

Section 25(1)(b) of the Surface Rights Act also allows the Board, in determining the amount of compensation to consider

The per acre value, on the date the right of entry order was made, of the titled unit [larger parcel] in which the land granted to the operator is located, based on the highest approved use of the land.

The Surface Rights Board considered and rejected the application of Section 25(1)(a) in favour of Section 25(1)(b) in determining compensation arguing that

There must be at least a semblance of a market for parcels of the nature of the demised area. It cannot be solely a theoretical or fictional concept, absent of any

requirement of at least a potential for a transaction to take place in the open market.... There is no probative evidence that there is any market, or potential market, whatsoever for areas of land of a size, configuration and location similar to the areas granted by the orders.

The Alberta Court of Queen’s Bench summed up this proposition in the following manner:

If there is a market for the small parcels, then you assume the parcels are sold on that market. You assume the sale not the market. *If one assumes a market where none exists and where there is no foreseeable market is to attribute value where there is none. (Emphasis added)*

Alberta’s Court of Queen’s Bench upheld the ruling of the Surface Rights Board which based its compensation for the individual rights-of-way on the value of the larger parcel applicable to ownership of each right-of-way. In effect, this ruling recognizes the unity of ownership, contiguity, and unity of use, the same principles established in *R. v. Bonaventure*.²⁰

In *R. v. Bonaventure* the Alberta Appeals Court, in overturning the award of the Alberta Land Compensation Board, laid down the “*Bonaventure*” Unit Value²¹ principle in dealing with the valuation of strip partial takings that lack marketability as stand-alone parcels. *Bonaventure* does not explicitly articulate the foundational requirements of the larger parcel, but the estimation of the market value of a partial taking under *Bonaventure* looks to the value of the larger parcel for the unit value to be applied to the land taken.²²

At the effective date of valuation, Bonaventure owned most of a quarter section of land (160 acres) in the northwest quadrant of the city of Edmonton in the province of Alberta. The authorities had tentatively approved subdivision plans for intensive industrial use of the entire quarter section. Bonaventure had actually registered a subdivision plan for the southerly tier of the quarter section, and a series of industrial lots along the southern boundary had been created, leaving about 127 acres unsubdivided. The takings for road widenings comprised a 3.43-acre strip along the westerly boundary of the 127 acres and a 0.30-acre strip along one of the industrial lots (Lot 11, containing 1.51 acres) that had been created along the southerly boundary of the

20. *R. v. Bonaventure Sales Ltd.* (1980) A.J. No. 114.

21. Todd, Eric C. E., *The Law of Expropriation And Compensation in Canada*, 2nd ed. (CARSWELL Thomson Professional Publishing, 1992), 355–358.

22. The valuation principles articulated in *Bonaventure* were applied by the Alberta Appeals Court in *Cochin Pipe Lines Ltd. v. Rattray et al.* (1980) 117 D.L.R. (3d) 442. The Court ruled that it was improper to equate strips of land taken for a pipeline easement with saleable acreage of similar configuration that could be valued as a separate entity. The Court valued the 60-foot wide easement, consisting of 5.07 acres, for the proposed underground pipeline through the owner’s farm holding of two quarter-sections (320 acres) “by taking the market value of each quarter-section and then applying the per acre value thereof to the land taken,” subject to adjustment for any residual value in the easement accruing to the landowner, a factor for which the Court was not prepared to arbitrarily adjust. Leave to appeal to the Supreme Court of Canada was denied.

parcel. (See Figure 1.) The Board valued the two strips totaling 3.73 acres as if they were a small, separate holding capable of being sold on the open market and awarded \$280,000 for the taking, relying on comparable sales data of similar-sized parcels that were selling at \$75,000 per acre.

On appeal, the Court rejected the approach taken by the Alberta Land Compensation Board on the basis that what had been expropriated was not a small, stand-alone parcel of 3.73 acres, but rather two strips of 3.43 and 0.30 acres for which there would not have been willing buyers or sellers, and that the takings were from two larger parcels. The Alberta Appeals Court in its judgment outlined the appropriate valuation principles to be followed.

A strip of land was expropriated from the west boundary of two properties owned by the respondent. It was taken for road building. In valuing the strips the Land Compensation Board took the acreage involved in the two properties, 3.43 acres in one case and .30 acres in the other, added them together and proceeded to value the resulting 3.73 acres as if they were a small holding that was being sold to a willing buyer by a willing seller.

We are all of the opinion that under the provisions of the present [Expropriation] Act and on the facts of this expropriation that that treatment is not permissible. What was expropriated were two strips off the boundaries of the two parcels. They were not, of course, willing buyers or willing sellers of those strips. It is not reasonable to convert those strips into a saleable area of land for purposes of evaluation of that land per se. While the Board notes that the configuration is imposed by the Minister [of Transportation] this does not mean that the strips should be treated as something they are not. We are all of the opinion that the only method of arriving at the fair market value was to take a fair market value of the whole of each parcel and then attribute the per acre value to the acreage taken. The fact that the land is classified for light industrial use, and development is taking place, are factors to be weighed in valuing the acreage to get a per acre value which can be applied to the land taken. It does not enable the Board to convert the strips into saleable small parcels and then put a value on to that parcel per se, as if it were something that could be sold as a small [separate] parcel. In the result we are of the opinion that the Board proceeded on a wrong principle in two respects: (a) in treating the land taken from two parcels as one; and (b) in equating strips taken with saleable acreage and treating it as saleable acreage to be valued by itself.

The case was sent back to the Alberta Land Compensation Board and this time the Board found that the market value of the one larger parcel of

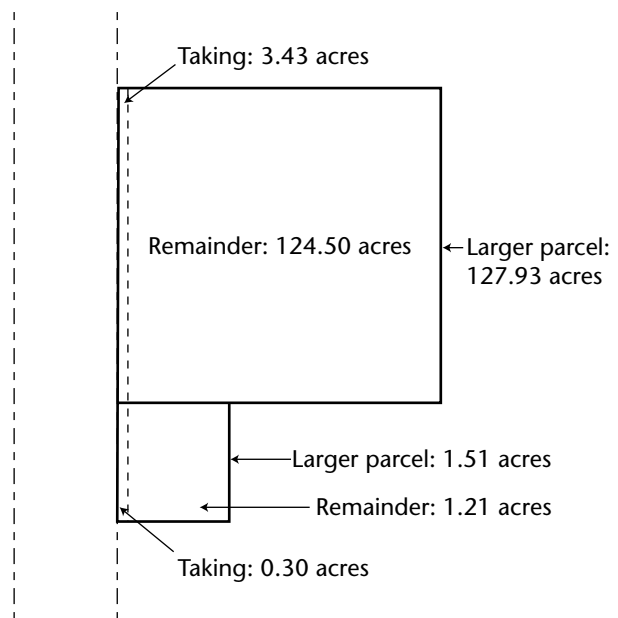
127.93 acres was \$60,000 per acre and the market value of the other larger parcel of 1.5 acres was \$90,000 per acre. Applying the unit rate of \$60,000 per acre to the 3.43-acre strip and the unit rate of \$90,000 per acre to the 0.30-acre strip resulted in compensation of \$205,800 ($3.43 \times \$60,000$) and \$27,000 ($0.30 \times \$90,000$), for a total of \$233,000. By initially erroneously appraising the two strip partial takings as stand-alone parcels and failing to define the larger parcels, compensation had been overstated by \$47,000 ($\$280,000 - \$233,000$), or 20%.

Bonaventure stands for the proposition that the unit value (i.e., value per acre) applicable to the larger parcel before the taking as determined by generally accepted appraisal methods applies equally to the land taken (i.e., the strip partial taking). Thus, it is the size of the larger parcel that exists before the taking, and *not* the size of the taking that determines the unit value to be applied to the taking. Of course, the taking must have the same highest and best use as the whole parcel for the unit value of the larger parcel to apply to it.

Larger Parcel as Unitary Highest and Best Use

Where an existing property enjoys contiguity and unity of ownership but has more than one potential

Figure 1 R. v. Bonaventure Sales Ltd.



- Larger parcel: 127.93 acres, part of original 1/4 section, draft plan approved for industrial uses
- Larger parcel: 1.51 acres, Lot 11, industrial lot in subdivision

use (highest and best use), and severance is an assumed possibility, the value of a partial taking will be based on the unit value attributable to that portion of the property from which the taking occurs.

In *Kerr v. The Queen in Right of Alberta*, (1981) 119 D.L.R. (3d) 386 (Alta. C.A.), the owner held title in fee simple to 147 acres in the northeast quarter of Section 10-8-5-W5M in the Province of Alberta. The 147-acre parcel abutted the north limit of Highway 3, some six miles west of Coleman in the Crowsnest Pass area. On June 24, 1978, the Minister of Highways and Transport for the Province of Alberta expropriated a 7.71-acre narrow strip of land to widen Highway 3. It was somewhat less than a half-mile long, measuring 200 feet at its widest and narrowing to a point at each end. (See Figure 2.)

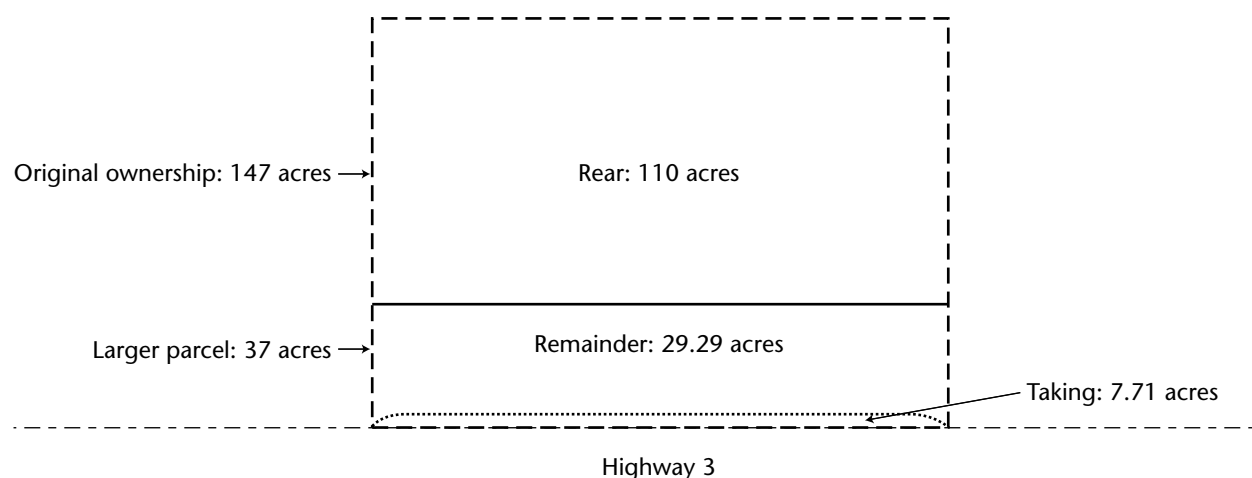
The Alberta Land Compensation Board accepted appraisal evidence indicating that the highest and best use of the 147-acre parcel prior to the partial taking was twofold, thus implying two theoretical zones of value: highway commercial adjacent to the highway to a depth of 1,000 feet (encompassing approximately 37 acres) and open space recreational to the rear of the parcel (encompassing approximately 110 acres) even though the lands were not presently zoned for such uses.

Because different portions of the land were capable of different uses (non-unitary highest and best use), a valuation of the whole parcel and an attribution of a pro rata value to the taking were deemed

inappropriate. The unit values assigned by the Board to the two theoretical zones of value were \$1,000 per acre for the rear 110 acres of open space for future recreational use and \$4,000 per acre for the front 37 acres for future highway commercial use. Since the expropriated strip fell within the 37 acres deemed to have a unitary highest and best use as future highway commercial land, only the 37 acres of the parcel fronting Highway 3 were considered to constitute the larger parcel. This finding formed the basis of the award for the partial taking at a unit value of \$4,000 per acre. The Alberta Appeals Court upheld the valuation approach adopted by the Board, concluding the extent of the larger parcel premised on a unitary highest and best use under an inherent assumption of severance. The decision of the Alberta Land Compensation Board reads, in part, as follows:

Where, as is the case here, it is found that the front portion of the Owner's land (which includes the subject land) has a separate, distinct and different use from the remainder of that land it is not appropriate or correct to use the value of such remaining land as part of the determinant for the value of the subject land. While it is possible that the Owner's land may be sold as an entire parcel, it is equally possible that, under the circumstances here present, it may be sold in more than one separate parcel. In the Board's opinion the proper approach is to establish the unit value of the 37 acres of land found to have commercial potential and the unit value so found is the value to be attributed to the... subject land. Thus,

Figure 2 *Kerr v. The Queen in Right of Alberta*



- Original ownership: 147 acres
 - Highest and best use of rear 110 acres—open space recreational
 - Larger parcel: front 37 acres with highest and best use—future highway commercial
 - Remainder: 29.29 acres (37.00 – 7.71)

the value of the remaining land, found to be of use for recreational purposes, is extraneous to determination of the market value of the subject land...

The Court acknowledged the Minister's position that in this particular instance the property owner may have been overcompensated for the taking on the theory that it was only rear land with potential for future recreational use that was expropriated.

The [Minister's] submission may be illustrated by considering that all of the owner's land is topographically suitable for highway commercial and that the highway commercial property is a block, the front of which is contiguous with the highway and running back 1,000 ft. perpendicularly from the highway. Any land more than 1,000 ft. back from the highway is not considered saleable as highway commercial for it is too far away from the highway. If the highway commercial block is considered as overlaid on the total property then as the highway is widened the block simply moves back and occupies recreational land which before the widening was more than 1,000 ft. from the highway; the acreage of highway commercial property remains constant. Another way to illustrate the concept is that the strip of land expropriated for the highway is taken from the front of the block and added to the back thus converting the land at the back which was formerly recreation property into highway commercial property.

In reference to the Minister's submission, the Alberta Appeals Court pointed to Section 53 of the Alberta Expropriation Act.

Where only part of an owner's land is expropriated and as a result of the expropriation the value of the remaining land is increased, the owner shall nevertheless be entitled to the market value of the land expropriated.

Although acknowledging the correctness of the Minister's argument, the Court concluded that Sec-

tion 53 of the Act did not permit recognition of an increase in the value of the lands remaining after the taking as a means of reducing the amount of compensation for the land taken.

This section provides for expressly the situation which has occurred in this case. Part only of the owner's land was expropriated and as a result the back part of the 1,000 ft. which could be used for highway commercial and which had been formerly only useable as recreational now became more valuable as highway commercial. In effect the owner was losing 7.71 acres of recreational land, for the effect of the expropriation was that the back part of the 1,000-foot strip which could now be used as highway commercial and which had formerly been recreational had increased in value. Notwithstanding, the section expressly provides that the owner shall nevertheless be entitled to the market value of the land expropriated.²³

Because the larger parcel in this case was defined as the front 37 acres to a depth of 1,000 feet, assuming possible severance, under the concept of the larger parcel any claim for injurious affection, or severance damages, would have to be confined to the 37 acres. While the Board noted that the appraiser's selection of 37 acres was arbitrary, and the acreage amount could well be somewhat more or less, the Board concluded that such minor variation has no effect on the valuation principle adopted.²⁴

Larger Parcel as Plottage Lands and Beneficial Ownership

As a determinant of the larger parcel and highest and best use, plottage is an important factor as an increment of value. *Plottage* is

A term used in appraising land values and particularly in eminent domain proceedings to designate the addi-

23. The valuation procedure described is variously referred to as the *backland theory*, *slide back theory*, or *front land-rear land concept*. Had this valuation procedure been applied, the amount of compensation for the taking would have been considerably less than that awarded.

24. In *Marian v. Alberta* (2001) A.J. No. 24 (ABQB), Alberta Court of Queen's Bench purportedly applied the valuation principle adopted in *Kerr*. A 2,000-foot strip to a depth of 184 feet, comprising 8.43 acres [amended from 8.16 acres], was expropriated from a 119.46-acre parcel as part of an infrastructure program to upgrade and twin Highway 60. The taking was from the eastern boundary of the parcel parallel to Highway 60. Most of the parcel was considered to have a highest and best use as "a residential homestead, pending long-term industrial/commercial development as market conditions dictate." However, it was thought that the front portion of the parcel directly fronting Highway 60 could very well provide commercial uses that would be in keeping with the commercial ventures that already existed along the roadway. Without establishing the precise area of the parcel that would offer the potential for short term commercial or light industrial use, the conclusion was reached that "the area of the taking involving eight to ten acres is considered the prime property for this utility." Accordingly, the taking was valued on the basis of its "immediate potential for highway commercial or light industrial development." However, as the entire parcel of 119.46 acres was uniformly zoned "Direct Control Industrial" with a consistent undulating topography throughout, and as the 8.43-acre taking could not stand alone as a marketable entirety, it was inappropriate to have the value of the taking fixed on the basis of sales of marketable, small, comparable, discrete legal lots to end-users. On the basis of the *backland theory*, after the taking the rear "residential homestead" lands (now fronting the widened highway) would become more valuable. Since the rear lands were not diminished in value, as acknowledged by the Court, the expropriating authority's guarantee to pay an additional \$40,000 in respect of all "damages" may not have been prudent – damages which the Court increased to \$50,000 to replace the tree buffer that existed between the highway and the residence prior to the taking. Disturbance damages are not typically awarded when compensation for the land taken is based on the highest and best use rather than the existing use. The judgment lacks clarity and soundness for its failure to identify the larger parcel in the context of the three unities of ownership, contiguity and use and misapplication of the valuation principle enunciated in *Kerr*. See *Province of Alberta v. Madison Development Corp. Ltd.* (1980) Alta. D. 1444 – 03 (Alta. C.A.) involving a partial taking of 15.56 acres for highway purposes with compensation based on highest and best use for residential subdivision "well into the future" at the price "a speculator would pay," with the claim for injurious affection "in respect of a probable buffer zone required in respect of the establishment of the highway" rejected as a form of double compensation.

tional value given to city lots by the fact that they are contiguous, which enables the owner to utilize them as large blocks of land. Plottage is a recognized concept in the field of eminent domain, referring to an added increment of value which may accrue to two or more vacant and unimproved contiguous parcels of land held in one ownership because of their potentially enhanced marketability by reason of their greater use adaptability as a single unit; simplistically stated, an assemblage of vacant and unimproved contiguous parcels held in one ownership may have a greater value as a whole than the sum of their values as separate constituent parcels and, hence, plottage value may be considered in determining fair market value. State ex rel. *State Highway Commission of Missouri v. Armacost Motors, Inc., Mo. App.* (May 31, 1977), 552 S.W.2d 360, 364.²⁵

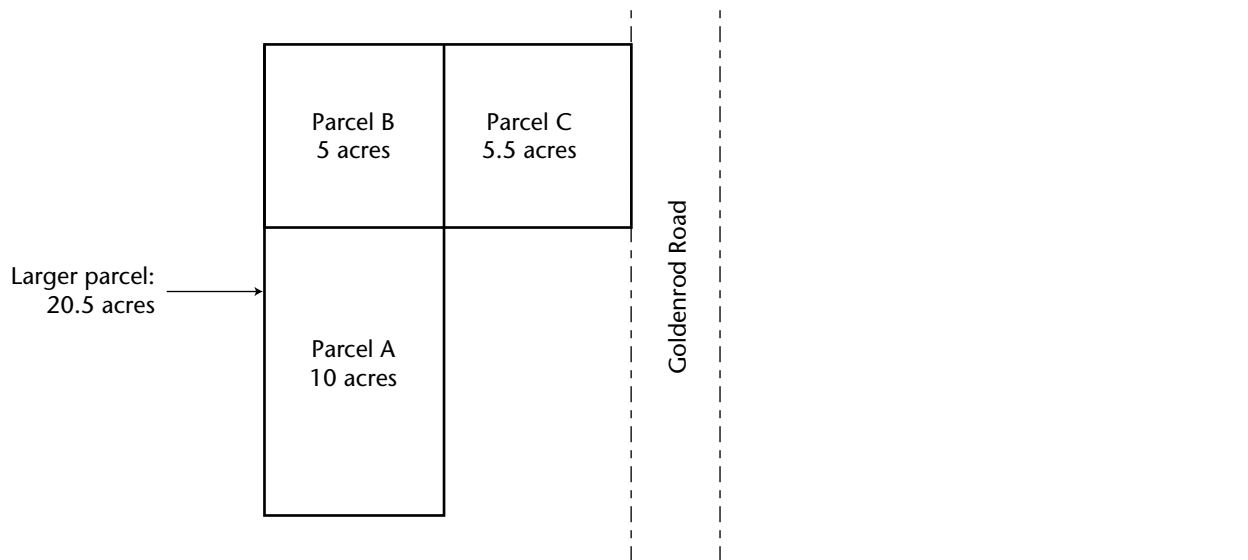
When viewed in the context of plottage,

... Separate legal parcels may be aggregated and considered as one "larger parcel" when the owner establishes a reasonable probability that all of the contiguous commonly owned lots will be available for devel-

opment or use as an integrated economic unit in the reasonably foreseeable future.²⁶

An example of plottage in the context of the larger parcel is illustrated in *Ravida v. Ravida*,²⁷ a case in which the Ontario Court of Justice equalized the parties' net family properties, including the value of development land in the state of Florida. (See Figure 3.) The property consisted of three contiguous parcels totaling 20.5 acres on the west side of Goldenrod Road, a main north-south road approximately one mile north of the East-West Expressway in Orange County, Florida. The combined acreage was about grade level to the street, about 88 feet above sea level, and not in a flood zone area. The land sloped from the southeast towards the northwest corner. A large drainage canal owned and maintained by Orange County ran along the west side of the property, and the property had a positive outfall to the canal. Utilities and services available to the property included water, sewer, electricity, tele-

Figure 3 Ravida v. Ravida



- Larger parcel (A, B & C): 20.5 acres zoned multifamily dwelling district (15 UPA)
 - Highest and best use of larger parcel: 307 dwelling units
 - Available utilities and services of larger parcel: water, sewer, electricity, telephone, and police and fire protection
- Ownership of larger parcel (A, B & C)
 - Parcel A: 10 acres, Ancaster Properties Ltd. (Mr. Ravida held 98.775% of shares.)
 - Parcel B: 5 acres, Grimsby Orchard Properties Ltd. (Mr. Ravida held 100% of shares.)
 - Parcel C: 5.5 acres, A & T Investments Inc. (Mr. Ravida held 50% of shares.)

25. *Black's Law Dictionary*, 6th ed. (1891-1991), 1154.

26. *City of San Diego v. Neumann*, 6 Cal. 4th 738, 863 P.2d 725, 25 Cal. Rptr. 2d 480 (Cal. 12/20/1993).

27. *Ravida v. Ravida*, (1995) O.J. No. 4164 (Q.L.) (Ont. G.D.).

phone, and police and fire protection. As part of the development process there had been the purchase of sewer capacity reservations, which at the valuation date consisted of 83.30 Equivalent Residential Units (ERUs) valued at \$133,280.

The three parcels formed an irregular *flag* shape and each parcel was owned by a different corporate entity.

Parcel A	Ancaster Properties Ltd.	10 acres
Parcel B	Grimsby Orchards Properties Ltd.	5 acres
Parcel C	A & T Investments Inc.	5.5 acres

The property contained organic soils, referred to as *muck* or *peat*, ranging in depth from one half foot to six feet. Muck is very damp, wet soil that does not carry weight very well. Before building, it must be removed and replaced with other suitable material, a process termed *demucking*. Aside from the strip of access land zoned C-1, retail commercial district, over Parcel C, the three parcels were zoned R-3, multifamily dwelling district, which permitted a maximum of 15 dwelling units per acre. A request to remove this density restriction was approved on April 21, 1988. Parcel C was the controlling parcel. Its eastern portion comprised a 90-foot frontage along the west side of Goldenrod Road and a depth of some 300 feet. It served as the only means of access from Goldenrod Road to the rear Parcels A and B. A boundary survey, soil and muck survey, and demucking cost estimate were prepared for the entire 20.5 acres as part of the development process.

Both appraisers agreed that the highest and best use of the property was for medium density, multifamily residential development but differed in their opinion of what constituted the larger parcel. On the valuation date (September 12, 1989), Mr. Ravida held 98.775% of the shares in Ancaster Properties Ltd. (Parcel A), and this company held 100% of the shares of Grimsby Orchards Properties Inc. (Parcel B). Mr. Ravida also owned a 50% interest in A & T Investments Inc. (Parcel C). Mr. Ravida, when asked during cross-examination by the Ontario Court of Justice to describe the ordinary business of each of the companies in which he had an interest, responded:

The ordinary business of the companies have (sic) been from day one locating a piece of property either through contacts and through real estate agents, inspecting, looking at the property or properties and if suitable, preparation of contracts for the properties

and if accepted, then the process of rezoning those properties will begin. The owners of the property will be requested to sign the application because they're still the owners and the applicant would be the company who would be applying for the rezoning of the property.

Once the zoning is in place, then in comes the process of getting preliminary plans approved, in other words, draft plans approved and then, of course, comes the process of reselling it. The companies have not been sort of able to hold the land if possible for too long because it takes a lot of money to carry the land once the closing has taken place, so the company has been—as soon as a piece of property has been purchased, the zoning in place, draft approval, then the companies would turn around and try to sell that piece of property.

Because of interrelated ownerships, interest, and control, one appraiser estimated the value of the entire 20.5 acres as one parent tract—the larger parcel—even though different corporations held title to Parcels A, B, and C. In Court, the appraiser described his reasoning:

It was land planned as one parcel. The 90-foot access strip (over Parcel C) that provided access to the rear land (Parcels A and B), was owned partly by Sam Ravida and the rear lands, here certainly wouldn't jeopardize his value of the rear land by selling off the front portion, so I considered it as one parcel. It had the same zoning, it was contiguous and had unity of use. The property was also listed for sale as one property. It was land planned with an approved plan for the entire 20.5-acre tract and I have the plans... showing that you could get 307 units on the 20.5 acres, which would have a density of 15 units to the acre and in this plan here, they have got the water retention ponds, the tennis courts, the pool, the typical building footprint, the location of all the buildings, which was a conceptual engineering plan for this 20.5-acre tract.

The other appraiser prepared two separate appraisals based on his position that there was a separation of ownership and control, effectively viewing the three parcels as two distinct larger parcels for valuation purposes. Parcels A and B, owned respectively by Ancaster Properties Ltd. and Grimsby Orchards Properties Inc., were treated as one parcel since Mr. Ravida held 98.775% of the shares in Ancaster Properties Ltd., a company which held 100% of the shares in Grimsby Orchards Properties Inc. Parcel C, owned by A & T Investments, Inc., was treated as a separate parcel because Mr. Ravida held a nonmajority 50% interest. Parcel C, the only

property with street frontage, was the controlling property for access to Parcels A and B, which, because of the position taken by the appraiser, were deemed to be landlocked.

In reference to the inappropriateness of treating Parcels A and B as one property and Parcel C as a separate property for valuation purposes, the opposing appraiser made the following comments to the Court:

It's listed as one property, for sale as one property. It's all under the same interest and control. Now, if you look at the textbook of what is called a larger parcel or the parent tract, right out of the textbook they talk about control and interest. If interests are the same on the property, it should be considered the same. If a parent tract, the consideration is congruity [sic], unity of ownership, and unity of use, and basically if you look at the textbook and whether in fact it should be considered separate, you've got an interrelated ownership interest and control by the three corporations. It has been land planned as one. The 90-foot access strip provides access to the rear land (Parcels A and B). Without that front parcel (Parcel C), the rear parcel wouldn't have any value because you couldn't get a building permit. It has the same zoning. It's contiguous. Its unity of use is the same. It's listed as one property. Certainly you'd have to consider it as one property and after reaching the value, you would then divided (sic) it up proportionately as to each interest.

Both appraisers relied on the direct comparison approach (sales comparison approach) but arrived at conflicting value opinions due primarily to their differences in defining the larger parcel and their perspective on the value of the prepaid sewer capacity reservation of 83.30 ERUs valued at \$133,280.

The appraiser who treated Parcels A, B, and C as the larger parcel concluded with a single value opinion of \$1,039,350, including the \$133,280 attributable to the 83.30 ERUs. This estimate indicated values of \$50,700 per acre and \$3,385 per unit based on a potential of 307 residential units. Each parcel was treated equally and assigned a proportionate share of the value opinion.

The other appraiser, who valued Parcels A and B as one parcel, assigned a potential of 222 residential units and a value of \$340,000, equal to \$1,532 per potential residential unit, which reflected a 20% discount because the parcel was deemed to be landlocked. Adjusting this figure by \$96,693, the proportionate value of the 83.30 ERUs attributable to Parcels A and B ($222/306 \times \$133,280$), increases the value to \$436,693 and the unit rate from \$1,532

to \$1,968 per potential residential unit. Parcel C was assigned a potential of 84 residential units and valued at \$260,000, equivalent to \$3,095 per potential residential unit. Making a similar adjustment, the proportionate value of the 83.30 ERUs to Parcel C would be \$36,587 ($84/306 \times \$133,280$), increasing the value to \$296,587 and the unit rate from \$3,095 to \$3,531 per potential residential unit. The combined value of the entire 20.5 acres as two distinct properties under this premise is \$733,280, some \$306,070 less than the value of \$1,039,350 indicated by the appraisal that treated all three parcels as one larger parcel. Treating Parcels A, B, and C as the larger parcel rather than as two separate larger parcels reflects a significant enhancement in value due to plottage.

In ruling that Parcels A, B, and C were subject to the same controlling mind and constituted the parent tract (larger parcel), the Ontario Court of Justice (General Division) observed

- The knowledge and experience of Mr. Ravida as a land developer
- The preliminary shallow soil investigation including muck survey report, dated February 14, 1984, prepared by Jammal & Associates Inc., Consulting Engineers... and addressed to A & T Investments Inc. to the attention of Mr. Ravida. The report covered the entire twenty-acre tract....
- The preliminary muck survey, dated March 24, 1989, prepared by Universal Engineering Sciences... related to the 20.5-acre parcel....
- The demucking cost estimate prepared by DeWitt Excavating Inc., dated July 30, 1990... addressed to Mr. Ravida and related to the 20.5-acre parcel....
- The extract from the minutes of a public hearing of the Planning and Zoning Commission held on April 21, 1988. The party named in the request to remove the specified density restriction was Mr. Ravida, and the request related to a tract size of 20.5 acres.
- The sewer capacity reservation of December 13, 1984... was made by A & T Investments, Inc., and the reservation related to the entire 20.5-acre parcel.
- The open listing for sale... at the effective date of the appraisal, September 12, 1989... related to the entire 20.5 acres.
- The letter of transmittal in each of the appraisal reports... (from the appraiser who valued the three parcels as two separate properties) was addressed to Mr. Ravida.
- The boundary survey prepared by Harling Locklin & Associates, Inc... was ordered by Mr. Ravida and prepared for A & T Investments, Inc. and related to the entire 20.5-acre parcel.

On the basis of these observations, the Ontario Court of Justice held that the entire 20.5-acre parent track (larger parcel) was treated as one parcel for the purpose of engineering studies, planning, and zoning. The Court determined the value of the property to be \$1,000,000, consistent with the opinion of the appraiser who valued Parcels A, B, and C as a single larger parcel at \$1,039,350.

Larger Parcel as Unassembled Lands (Separate Corporate Entities)

The issue of the parent parcel (larger parcel) was dealt with by the Ontario Municipal Board in *Barbay Holdings Inc. v. Barrie (City)*²⁸ in connection with the appropriate adjustment for size in the sales comparison approach. (See Figure 4.) On January 2, 1990, the city of Barrie expropriated a partial taking from two adjoining properties on the west side of Bayfield Street, at the north end of the city of Barrie. Some 0.17 acres were taken from the 4.3-acre north parcel (580 Bayfield Street) and about

0.92 acres from the 4.93-acre south parcel (550 Bayfield Street). Together, the two partial takings formed a strip about 85 feet wide for the creation of a future local collector road for the subdivision behind the two properties.

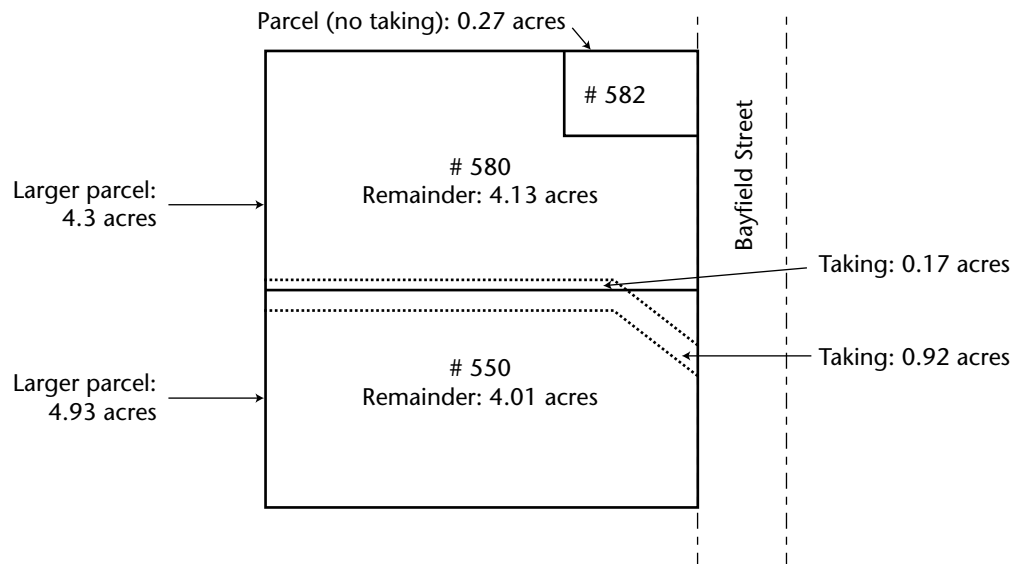
Ownership of the two contiguous properties at the date of expropriation was as follows:

580 Bayfield Street	683728 Ontario Limited	4.3 acres
550 Bayfield Street	Barbay Holdings, Inc.	4.93 acres

Both property owners were closely held corporations owned by Paul Sadlon. Barbay Holdings Inc. also owned a third abutting parcel at 582 Bayfield Street (a 0.27-acre single-residence building lot). Taken together, the three parcels formed a block of land comprising 10.5 acres, with contiguous frontage of 770 feet along Bayfield Street.

The appraisers for both parties used the sales comparison approach,²⁹ but, as noted by the Board,

Figure 4 Barbay Holdings v. Barrie



- # 582—Barbay Holdings Inc. (ASO: Paul Sadlon)—0.27-acre single-family building lot (no taking)
- # 580—683728 Ontario Limited (ASO: Paul Sadlon)—4.30-acre parcel (250'± fr × 750'± dp) improved with L-shaped multiple occupancy commercial building (less taking 0.17 acre = 4.13-acre remainder)
- # 550—Barbay Holdings Inc. (ASO: Paul Sadlon)—4.93-acre parcel (425'± fr × 505'± dp) improved with car dealership with showroom, body shop, service garage, etc. (less taking 0.92 acre = 4.01-acre remainder)
- All three properties zoned C4—general commercial

28. *Barbay Holdings Inc. v. Barrie (City)*, (1996) O.M.B.D. No. 1883 (Q.L.). By agreement of the parties, the Ontario Municipal Board dealt only with the market value of the taking. The landowners would not be able to calculate the injurious affection, if any, until the road was actually in place.

29. A set of procedures in which a value indication is derived by comparing the property being appraised to similar properties that have been sold recently, applying appropriate units of comparison, and making adjustments to the sale prices of the comparables based on the elements of comparison. Comparative analysis is the general term used to identify the process in which quantitative and/or qualitative techniques are applied to derive a value indication in the direct comparison approach.

a proper comparative analysis to derive an indication of value could not be undertaken without defining the larger parcel. In reference to adjusting the comparable sales for size, the issue before the Board and affecting the market value of the taking was the determination of the larger parcel. Whether the adjustment for size should be upward or downward depended on what constituted the larger parcel, which was framed in the following context:

If the taking is from an initial parcel of 10.5 acres instead of two parcels of approximately 4.5 acres each, a comparable... (similar to) 580 Bayfield has to be adjusted upwards, because a smaller block of land is worth proportionately more per acre. However, if the taking is from two parcels treated as separate blocks, there should be no size adjustment.

The Ontario Municipal Board concluded that each property (580 Bayfield Street – 4.3 acres and 550 Bayfield Street – 4.93 acres) constituted a separate larger parcel for the purpose of establishing the market value of the taking based on the following findings. The two parcels are separate legally and functionally. When Barbay acquired the third (northernmost residential) lot (582 Bayfield Street), it was careful to take title in a name other than 683728 Ontario to prevent merger. The two larger properties are developed with quite different uses—one is a commercial building occupied by several tenants and the other is the body shop and main sales building for the Paul Sadlon Chev Olds dealership. Although “Paul Sadlon Truck and RV Centre” is one of the tenants of the commercial building, there is no vehicular access from 550 to 580 (Bayfield Street). Separate ownership means separate rights; one property could be sold and the other retained; one could accept the offer of compensation and the other refuse it; one could have one rate of depreciation, and the other a different rate and so on.

Because the unit value applied to each partial taking was determined on the basis of the size of the corresponding individual larger parcel rather than on an assembled basis, the partial takings had a higher market value.

Larger Parcel as Subdivided Lots

Holditch v. Canadian Northern Ontario Railway Co. (1916) 27 D.L.R. 14 (Privy Council), is one of the earliest Canadian cases dealing with the concept of the larger parcel. This case involved a partial taking of a right-of-way within a registered plan of subdivision. The railway had expropriated a right-of-way that passed through 20 lots, all of which were acquired outright and for which *Holditch* received compensation.

At issue, however, was whether 49 other lots owned by *Holditch* within the subdivision sustained a loss in value as a result of the partial taking of a right-of-way. On July 13, 1912, the date of expropriation, *Holditch* was the owner of a block of land in the town of Subdury, which had been subdivided into lots laid out on a registered plan. The registered plan contained upwards of 500 lots fronting on thirteen streets, and more than 200 lots had been sold to purchasers prior to the expropriation. A detailed description of the property was provided by the Judicial Committee of the Privy Council.

There was originally one large tract of land of very irregular contours, intersected by a winding creek and broken in places by an outcrop of rock. Some time ago the Manitoulin and North Shore Railway was constructed roughly following the direction of this creek, and only a little further off a portion of the C.P.R. approached and eventually joined the Manitoulin and North Shore Line. The respondents' railway was plotted to cut across the bend formed by the latter line and would also run in the neighbourhood of the creek. Independently of the respondents' line the land suffered some of the disadvantages of the proximity of railways.

The whole property had been surveyed and divided into building lots, and a plan showing the layout had been duly registered. The roads and streets had thus become public highways by force of the surveys and registry statutes applicable, but had not been made up. The total number of building lots was great, and many, if not all of them, had been staked out on the ground. The streets were numerous; they all intersected at right angles and the several lots were nearly always of the same dimensions.

With one or two exceptions they were all rectangular parallelograms. All had access to a street, some to two streets. In the area in question there was no land not subdivided into lots of this kind, none consisting of fields or market-gardens or agricultural backland. From time to time a great many lots had been sold by Mr. Holditch or his father, his predecessor in title, but they were scattered all over the property at haphazard. They had been bought for speculation. They had little individuality. They were chiefly distinguished by the numbers assigned to them and the name of the street on which they fronted. They were sold out and out. No restrictive covenants were taken. There was no building scheme, other than the layout shown on the registered plan, and this derived its fixity from the legislation affecting it, and not from any notice to the purchaser or any private obligation entered into by him. It is plain that, so far as in them lay, the proprietors of this building estate had parceled it out in lots, made an end of its unity (other than bare unity of ownership), and elected once for

all to treat this multitude of lots as a commodity to trade in.

The Appellate Division of the Supreme Court of Ontario had awarded *Holditch* \$4,800 for injurious affection to 49 other lots in the subdivision in addition to the compensation paid for the 20 lots actually expropriated, the value of which was not in dispute. The Railway Company was successful in its appeal to the Supreme Court of Canada to have the award for injurious affection overturned by a divided court. *Holditch* appealed the decision of the Supreme Court of Canada to the Judicial Committee of the Privy Council.

In upholding the majority decision of the Supreme Court of Canada, which dismissed the claim for injurious affection, the Judicial Committee of the Privy Council applied the concept of the larger parcel to its ruling.

The basis of a claim to compensation for lands injuriously affected by severance must be that the lands taken are so connected with or related to the lands left that the owner of the latter is prejudiced in his ability to use or dispose of them to advantage by reason of the severance. The bare fact that before the exercise of the compulsory power to take land he was the common owner of both parcels is insufficient, for in such a case taking some of his land does no more harm to the rest than would have been done if the land taken had belonged to his neighbour... In the present case the appellant's relation to the property had been definitely fixed before any notice to take land was served at all. He had parceled out the entirety of his estate and stereotyped the scheme (subdivision), parted with numerous plots in all parts of it without retaining any hold over the use to be made of them, and converted what had been one large holding into a large number of small and separate holdings with no common connection except that he owned them all. There was one owner of many holdings (individual lots), but there was not one holding, nor did his unity of ownership "conduce to the advantage or protection" of them [the lots] all as one holding.

Only one of the 49 lots owned by *Holditch* for which injurious affection was claimed was contigu-

ous to any of the 20 expropriated lots within the subdivision. Each of the remaining 48 lots was separated from the expropriated lots either by a street³⁰ or by an intervening lot under different ownership, which *Holditch* had sold sometime prior to the expropriation.

Larger Parcel as Part of Phased Development Lands

In *Double Alpha Holdings Corp. v. Pacific Coast Energy Corporation*,³¹ the British Columbia Compensation Board was confronted with defining the larger parcel in connection with the taking of a 9-metre wide strip of land along the edge of a 650-hectare (1,600 acres) development property in Coquitlam called Westwood Plateau. Double Alpha Holding Corp. purchased the property in 1989 for the purpose of developing it as a large residential community in accordance with the existing Official Community Plan (OCP) and Development Agreement.³²

The development agreement made between the previous owner and the District of Coquitlam on August 23, 1988, was registered against title and provided for the development of the lands in phases, dividing Westwood Plateau into eight large development blocks. The development agreement also provided for amendment of the phasing and the boundaries of the eight development blocks, subject to Coquitlam's final approval. When fully developed, Westwood Plateau was expected to accommodate about 4,500 houses in a number of separate subdivisions, complete with a golf course and other recreational and park areas.

After the purchase, the developer began to work with Coquitlam to refine the OCP for the first phase of development, Stage One. All 1,600 acres of Westwood Plateau were designated in the OCP for residential development and associated services. The intent was to rezone the development blocks when deemed appropriate, with subdivision and installation of services undertaken in accordance with the rezoning. Coquitlam adopted an Amended OCP on March 12, 1990, and rezoning was finalized for Development Blocks 2, 3, and part of 4 in Stage One on April 9, 1990. By this time, the developer had already begun site preparation work and servicing

30. "It is generally held that parcels of land separated by an established city street, in the use by the public, are separate and independent as a matter of law. 'When land is unoccupied and not so devoted to use of any character, and especially when it is held for purposes of sale in building lots, a physical division by wrought roads and streets creates independent parcels as a matter of law... (but) [i]f the whole estate is practically one, the intervention of a public highway legally laid out but not visible on the surface of the ground is not conclusive that the estate is separated.' *Nichols on Eminent Domain* (3rd edition), sec 14.31 (1), Vol. 4, pp. 437-8. Lots separated by a public alley but in a common enclosure have been held to be a single property. Mere paper division, lot or property lines and undeveloped streets and alleys are not sufficient alone to destroy the unity of land...." *Department of Transportation v. Joe C. Rowe et al.* (June 20, 2000) No. COA97-1470 (N.C. App.).

31. *Double Alpha Holdings Corp. v. Pacific Coast Energy Corporation* (1998) E.C.B. Control No. 33/91/163 (65 L.C.R. 99).

32. The Development Agreement was *not* entered as evidence at the British Columbia Compensation Board hearing.

for the first new subdivisions. These subdivisions were registered between September and November 1990, and the sales program for lots in Stage One began at the end of November 1990.

In May 1990, Pacific Coast Energy Corporation expropriated a 9-metre wide, 1.6-acre strip along the western boundary of the Westwood Plateau development lands, an insignificant amount of land taken relative to the entire 1,600-acre holding. Two of Double Alpha's claims for compensation in respect of the taking were

- The market value of the land taken, based on its highest and best use at the date of expropriation.
- The reduction in market value to the remaining land that was directly attributable to the taking.

The two claims were interrelated, with Section 30 of the British Columbia Expropriation Act dealing with the market value of the land taken, and Section 40 providing the necessary framework for qualifying a partial taking. Section 40(6) of the Expropriation Act states

For the purposes of this section, expropriation of part of the land of an owner occurs only if

- (a) He or she retains land contiguous to the expropriated land, or
- (b) He or she owns land close to the land that was expropriated, the value of which was enhanced by unified ownership with the land expropriated.

In reference to Section 40 and its linkage to Section 30, the British Columbia Expropriation Board commented

Since compensation under s.40 is based partly on the reduction in market value to "the remaining land" it must be clearly defined what constitutes the area of land before the taking, or what we are referring to here as the larger parcel. Obviously, where the requirements of s.40(6) are satisfied, the definition of the larger parcel will determine the identification of the remaining land.

The Board in defining the larger parcel of the Westwood Plateau development lands considered three possibilities.

- The entire Westwood Plateau (1,600 acres)
- Part of Stage Two Development referenced as Block A (630 acres)
- Part of Stage Two Development Block 6A (25.56 acres)

At the time of the expropriation, it was projected that Stage One (Development Blocks 2, 3, and part of 4) would satisfy approximately two to three years of market demand for housing. Stage Two (Development Blocks 5 and 6) was to consider a range of alternatives, looking at such items as a golf course and appropriate densities. Apparently, the golf course and related density problems raised troublesome issues for the development of Block 5, causing the developer to conclude that Blocks 6E and 6A would probably be the first portions of Stage Two slated for development.

The minor strip taking of 1.59 acres did not impact the entire Westwood Plateau lands, and the Board concluded that

it is neither necessary nor desirable to view the larger parcel... as being the whole of Westwood Plateau or the whole of [referenced] Block A....[I]t would make more sense to define the larger parcel as Development Block 6A. This is because of the natural boundaries caused by the roads, the creek and the municipal border and the fact that it is a discrete parcel intended for development separate from the other areas of Block A and Westwood Plateau as a whole. In addition, there was no evidence that persuaded us that costs outside of Development Block 6A would have varied because of the taking. Finally, the only expert evidence before us was done on the basis that Development Block 6A should be viewed as the larger parcel from which the 9-metre strip was taken.

Accordingly, Block 6A (25.56 acres), with potential for residential development in three years, was defined as the larger parcel for the purpose of estimating the market value of the land taken and any diminution in value to the remaining portion (23.97 acres) of the larger parcel as a result of the partial taking of 1.59 acres. In calculating compensation, the Board relied on the before and after method³³ of valuation. Both the before and after values were estimated on the basis of the subdivision development method,

33. If part of the land is expropriated, the amount of compensation payable may be established by determining the market value of the area of all of the land (larger parcel) before the date of expropriation and subtracting from it the market value of the land remaining after the expropriation occurs. In no case, however, subject only to setoff of special benefits, must compensation be less than the amount determined by multiplying the ratio of the area of the land taken to the area of all of the land before it was taken, times the value of the land before it was taken.

reluctantly accepted by the Board because it was the only acceptable means of valuation before it.³⁴

The Board determined the market value of the larger parcel (25.56 acres) as \$3,042,879, which on a pro rata basis indicates a unit value of \$119,048 per acre, equivalent to \$189,287 for the 1.59-acre taking. The Board fixed the market value of the remaining portion (23.97 acres) of the larger parcel after the taking at \$2,673,973, reflecting a reduction in value of \$368,906 from the before value of \$3,042,879. On the basis of the before and after method of valuation, the Board awarded \$368,906, implying that \$179,619—the difference between the total award and the pro rata value applied to the taking (\$189,287) as a function of the value of the larger parcel—was attributable to injurious affection. There was no change in the highest and best use of the property (future residential) after the taking, and, in the decision of the Board, there was no evidence to suggest that the property sustained any loss beyond the market value of the land taken. One appraiser's evidence, presented in the form of eight comparable acreage sales on a before taking basis only, indicated a unit value of \$115,000 per acre, consistent with the Board's finding of \$119,048 per acre, implying a value of \$189,287 for the taking on a pro rata basis. Therefore, the residual amount of \$179,619 (\$368,906 – \$189,287) attributable to injurious affection was unwarranted. It is the illusion of the precision of the subdivision development method that is responsible for the unsupported award for injurious affection.

Reliability of Valuation Approach (Admissibility of Evidence)

In *Guadalupe-Blanco River Authority v. Kraft*, No. 01-0150 (Tex. 2002) the Authority condemned a permanent easement across the landowner's 272-acre unimproved tract to lay part of a 20-mile underground water pipeline. (See Figure 5.) The 3.21-acre easement consisted of a strip 30 feet wide and 4,600 feet long, cutting diagonally across the property, which was being used as grazing land for cattle. The portion of the parent tract fronting Highway 123 had access

to water and electricity. At its closest point, the permanent easement was 3,900 feet from that highway.

The landowner's appraiser described for the Court the three methods appraisers use to estimate the value of property: the income capitalization, cost and sales comparison approaches. In estimating the market value of the permanent easement, the appraiser explained that he had used the sales comparison approach, a process he described in the following manner:

Where you search the market for what's considered to be... sales comparable to the subject and then make (the) decision as to what the subject is worth based on these current sales.

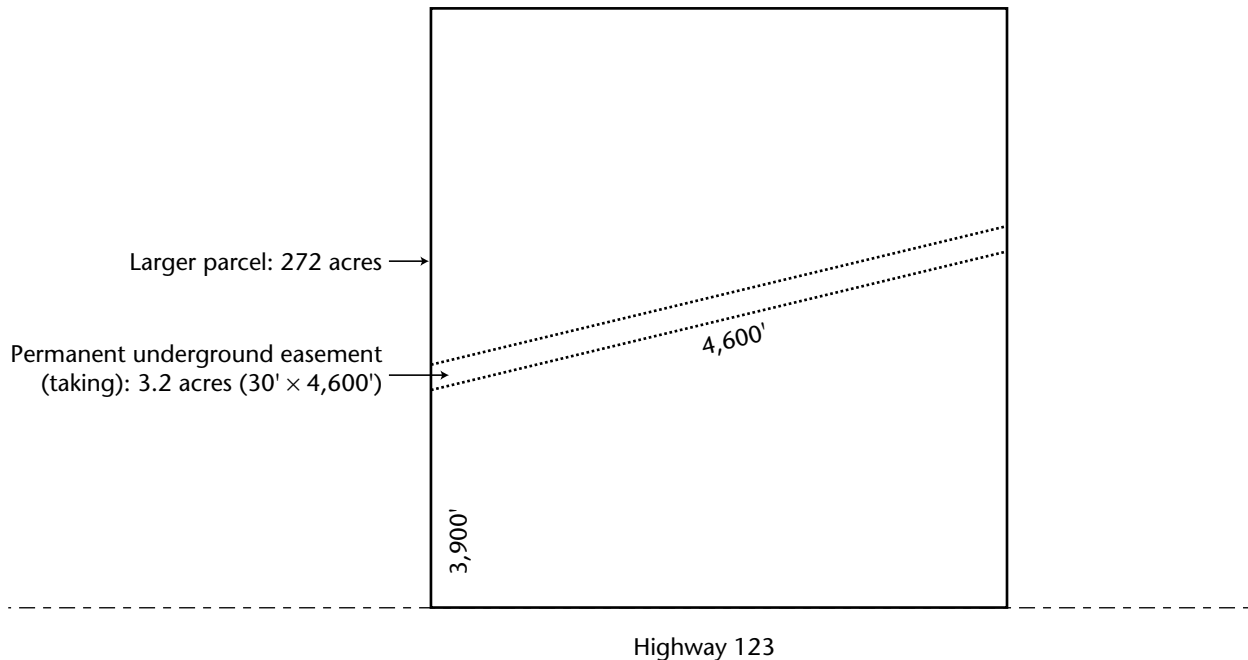
However, because there were no comparable sales of narrow easements in the local market... (between willing buyers and willing sellers, the landowner's appraiser) reconfigured the actual 30 by 4600-foot strip into a hypothetical rectangular tract of 3.2 acres to facilitate his comparison analysis. He also relocated the hypothetical tract to front on Highway 123 with direct utilities access... (H)e then found two recent and local land sales with characteristics similar to his hypothetical property: small, roughly rectangular tracts with utilities on site; one (208' × 418') located in a commercial area fronting on Highway 123 and the other (144' × 302') in a residential subdivision with frontage on a county road. As the final step in his analysis, (the appraiser) made adjustments to these "comparable sales" to determine the value of his hypothetical tract, which he equated with the value of the condemned easement.

On this hypothetical basis, the landowner's appraiser concluded that the market value of the taking of the permanent easement, including two temporary easements and damage to the remainder, was \$64,400. The trial court, County Court of Hays County, ignored the Authority's objection to the appraiser's evidence.

The Authority's appraiser testified that comparing an easement that is not a usable tract with sales of two tracts that are usable is improper. He stated that an appraiser should look at the entire 272 acres (the larger parcel) and then take a portion or pro rata part of that to value the property taken. He explained that in comparing the entire property, an

34. One appraiser asserted that there were "no direct market comparables" for "a large, on-going development project," yet curiously restricted use of his residual method (subdivision development method) to 25.56 acres, representing only a fraction of the 1,600 acres in Westwood Plateau. The other appraiser selectively employed both the direct comparison approach (only before the taking) and the subdivision development method (only after the taking) on the same 25.56 acres, but concluded that the compensation due is the difference between his before and after subdivision development approach. As neither appraiser proffered an appraisal report that estimated the loss occasioned by the taking on the basis of comparable sales, the direct comparison approach was not available to the Board. The Board noted that "[a]t the time of the taking, the appropriate zoning was not in place, the OCP had not been amended as required, and no subdivision application had yet been made. Only the main trunk services were in place (that is, sanitary and storm sewers and water), and the evidence shows that a pumping station and reservoir would have to be constructed because of water pressure problems created by the topography. The evidence about the probable number of lots was conflicting, and was based on plans that were prepared for this hearing and not for the development itself. In addition, the two appraisers were separated by the considerable sum of \$1,874,688 in their estimates of the development costs."

Figure 5 Guadalupe-Blanco R. Auth. v. Kraft



- Larger parcel: 272 acres of grazing land
 - Permanent underground easement (taking) not an economic unit under highest and best use. Therefore, Court rejected property owner's reconfiguration of the linear taking without frontage to a rectangular 3.2-acre parcel as if it fronted Highway 123 with immediate access to utilities.

appraiser should find similar tracts—for example, economic units that are usable—for comparison. By this method, the Authority's appraiser sought to compare sales of large tracts (275 to 300 acres) with the easement being taken. On this basis, the Authority's appraiser estimated the value of the taking at \$7,630.

The jury awarded compensation in the amount of \$64,400, the amount estimated by the landowner's appraiser, and the award was sustained by a majority decision of the Court of Appeal of Texas, Third District, Austin, TX. However, the dissenting opinion of the appeals court included the following observations:

The landowner's expert (appraisal) evidence should be measured by the standard articulated in *Gammill v. Jack Williams Chevrolet, Inc.* [972 S.W.2d 713, 726 (Tex. 1998)]: Does the expert's opinion comport with applicable professional standards outside the courtroom, and does it have a reliable basis in the knowledge and experience of the discipline? On appeal, the landowner does not argue that he established the reliability of the expert's opinion or his underlying methodology. Instead he ar-

gues that "there is very little authority in Texas or elsewhere applying (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*) to opinion testimony as to value in an eminent domain case" and then asserts in a summary fashion that he employed a comparable sales approach. That the expert had a theory of valuation does not make it admissible without a further showing. "Whether an expert's testimony is based on 'scientific, technical or other specialized knowledge,' *Daubert*³⁵ and Rule 702 (Texas Rule of Evidence) demand that the district court evaluate the methods, analysis, and principles relied upon in reaching the opinion."

On further appeal by the Authority, the Supreme Court of Texas vacated the ruling of the appeals court, which had accepted the claim of the landowner's appraiser that he had used the judicially accepted sales comparison approach. The Supreme Court, while recognizing the legitimacy of the sales comparison approach, rejected the hypothetical premise of the valuation and the data on which the opinion of value of the landowner's appraisal was

35. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993), followed by *Kumho Tire v. Co., Ltd. v. Carmichael* in 1999, the Supreme Court confirmed that the standard for admissibility of evidence in *Daubert* applied to all expert testimony. *Daubert* requires the court to consider whether the theory or technique can be and has been tested; whether the theory or technique has been subjected to peer review and publication; whether, in respect of a particular technique, there is a known or potential rate of error, and whether there are standards controlling the techniques operation; and whether the theory or technique is generally accepted in the relevant community.

based. The Court argued that absent any statutory requirement or jurisdictional exception, what is not a sound professional appraisal practice outside of the courtroom cannot find legitimacy in the courts.³⁶

The Supreme Court of Texas ruled that the landowner's appraisal evidence did not meet the requirements for admissibility, and the manner in which the sales comparison approach was applied made the value opinion of the taking unreliable. In sending the case back to the trial court and noting that the strip taken was not independently marketable (i.e., has no independent highest and best use), the permanent easement taken was to be valued pro rata as part of an economic unit (the larger parcel).

Conclusion

A heightened awareness within the appraisal community of the concept of the larger parcel is important in applying sound appraisal methods in the valuation of both a nonmarketable partial taking and the remainder lands to establish any possible injurious affection or severance damage and any possible value enhancement. Defining the larger parcel has a significant impact as a determinant of highest and best use, and, in terms of utility and parcel size, the larger parcel drives the comparable sales selection and the comparative analysis in the direct comparison approach.

While the cases presented here are intended to illustrate the practical applications of applying the concept of the larger parcel, they are by no means all-encompassing. There will always be exceptions to the three unities of ownership, contiguity, and use (highest and best use) that typically define the larger parcel. Where there is some doubt as to what lands constitute the larger parcel, it may be preferable to prepare more than one valuation scenario and to seek competent legal counsel.

Although the primary focus of this paper has been on the larger parcel and its application to valuation issues involving expropriation and condemnation, the courts in other areas of law have shown a willingness to embrace the concept of the larger

parcel in appropriate *fact* situations where the value of land has a bearing on the dispute.

Appraisal reports prepared for the purposes of expropriation and condemnation should always include a section devoted to defining the larger parcel and clearly explaining the valuation principles and value impacts in the context of highest and best use. Absent any statutory requirement or jurisdictional exception, the courts will reject appraisal approaches and methodologies that do not meet the admissibility requirements for expert evidence such as those identified in the *Daubert* test.

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36. While using comparable sales to find market value in condemnation proceedings is an approved methodology, (the appraiser's) "bald assurance" that he was using that widely accepted approach was not sufficient to demonstrate that his opinion was reliable... In *Merrell Dow Pharmaceuticals, Inc. v. Havner*, we rejected the "view that courts should not look beyond an averment by the expert that the data underlying his or her opinion are the type of data on which experts reasonably rely."... Instead, we held that the "underlying data should be independently evaluated in determining if the opinion itself is reliable."... Although (the appraiser) claimed to be using comparable sales to find the condemned easement's value, a review of (the appraiser's) "underlying data" reveals that the local sales he relied on were not comparable to the condemned easement. (The appraiser's) methodology ignored the central requirement of any reliable appraisal technique: that it first seeks to determine the "fair market value of the strip actually taken."... In short, (the appraiser's) comparison of current sales to a hypothetical tract vastly dissimilar from the easement taken was not the judicially accepted method for finding the value of the easement. Thus his opinion based on that comparison was not reliable....

(The appraiser's) analysis was not designed to find the market value of the easement actually condemned; it was designed to find the market value of a piece of land the Authority did not take: a 3.2 acre rectangular tract with frontage on Highway 123 and direct utilities access. The comparable sales method fails when the comparison is made to sales that are not, in fact, comparable to the land condemned... The two sales (the appraiser) used as comparables may have had characteristics similar to his hypothetical tract, but they were not comparable to the easement actually taken... The easement condemned ran through undivided grazing land 3,900 feet from the highway and utilities access; the sales (the appraiser) used were commercial and subdivided residential tracts with road frontage and utilities directly on site. These sales were not comparable to the condemned easement as a matter of law.