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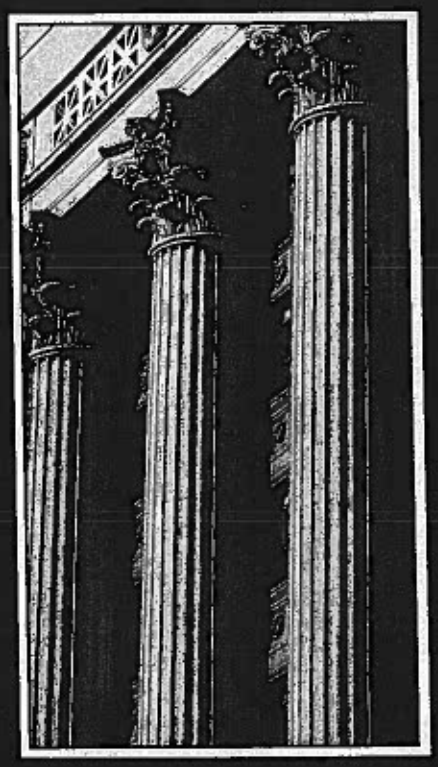
REAL ESTATE VALUATION IN LITIGATION

SECOND EDITION



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APPRAISAL INSTITUTE

CHAPTER 5

The Larger Parcel

The appraiser seldom encounters a valuation or analytical premise in condemnation appraising that cannot also be found in general appraisal assignments. The concept of the *larger parcel*, however, is an exception. It is an analytical premise unique to eminent domain valuation and is often misunderstood and/or misapplied by appraisers, condemnors, lawyers, and the courts.

The term *larger parcel* cannot be found in comprehensive appraisal textbooks such as *The Appraisal of Real Estate*,[1] but two definitions are provided in *The Dictionary of Real Estate Appraisal*. One definition of the larger parcel is

> 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]

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.[3]

The larger parcel is sometimes referred to as the *parent tract*[4] or the *rule of joinder*.[5]

1. *The Appraisal of Real Estate*, 10th ed. (Chicago: Appraisal Institute, 1992).
2. *The Dictionary of Real Estate Appraisal*, 3d ed. (Chicago: Appraisal Institute, 1993), 202.
3. *Black's Law Dictionary*, abr. 6th ed., s.v. "larger parcel."
4. *United States v. 8.41 Acres of Land*, 783 F.2d 1256 (5th Cir. 1986).
5. *People v. Ocean Shore R.R.*, 196 P.2d 570 (Cal. 1948); *M & R Invest. Co. v. Nevada DOT*, 744 P.2d 531 (Nev. 1987).

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A second definition of the larger parcel included in the *Dictionary of Real Estate Appraisal* is more meaningful and useful to appraisers. It reads:

> In condemnation, that tract or tracts of land which are under the beneficial control of a single individual or entity and have the same, or an integrated, highest and best use. 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.[6]

Understanding the concept of the larger parcel is vital in condemnation appraisal because the appraiser cannot determine the highest and best use of a property until a conclusion as to the larger parcel is reached. The larger parcel may be all of one parcel, part of a parcel, or several parcels, depending to varying degrees on unity of ownership, unity of use, and contiguity.

In a typical appraisal assignment, an appraiser is retained to estimate the value of a parcel of land which has specific boundaries and the parameters of the property are known before any in-depth appraisal analysis is made. This is not, or should not be, the case in condemnation appraisals.

It is useful to understand how parcel, or right-of-way, maps are developed by a condemnor. If, for example, a roadway is to be constructed or widened, the condemnor's engineers prepare a survey of the proposed right-of-way limits. This survey is then given to the title department within the condemning agency, or to a title company, with instructions to identify all ownerships within the proposed right-of-way and to determine the property boundaries of each parcel. These boundaries include all land that is contiguous and under the same ownership as the land within the proposed right-of-way. A right-of-way map like the one shown in Figure 5.1 is then prepared. Figure 5.2 shows the typical ownership information included on such a map. The right-of-way map is then usually passed on to the appraiser with instructions to appraise a specific parcel identified on the map.

The physical contiguity of land is an engineering question, while unity of ownership is usually a legal question. The right-of-way map is prepared and the boundaries of the properties to be appraised are determined prior to any consideration of unity of use. Therefore, most appraisal contracts between an appraiser and a condemning agency, and most instructions assigning an appraisal to a staff appraiser, specify that the appraiser is to estimate the value of a parcel which may or may not be the "larger parcel." The ultimate determination of the larger parcel must be made by the appraiser. If it is found that the parcel defined by the right-of-way map and the appraisal contract or assignment does not constitute the larger parcel, the appraiser must insist on a revised contract or assignment. As stated in the *Uniform Appraisal Standards for Federal Land Acquisitions*:

6. *The Dictionary of Real Estate Appraisal*, 202.

FIGURE 5.1 TYPICAL RIGHT-OF-WAY MAP

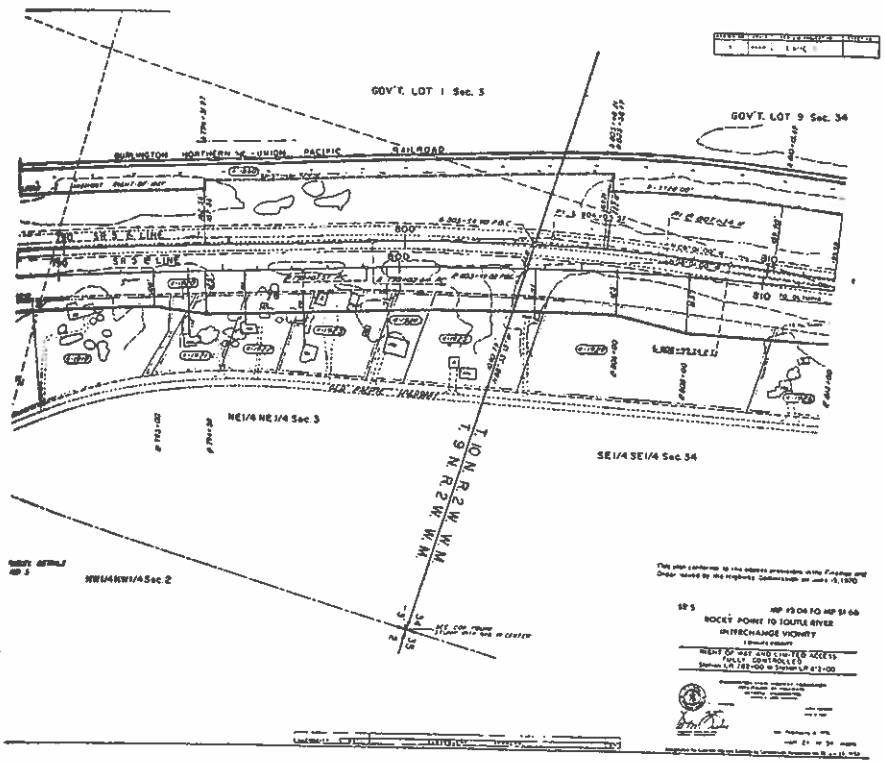


FIGURE 5.2 TYPICAL OWNERSHIP INFORMATION

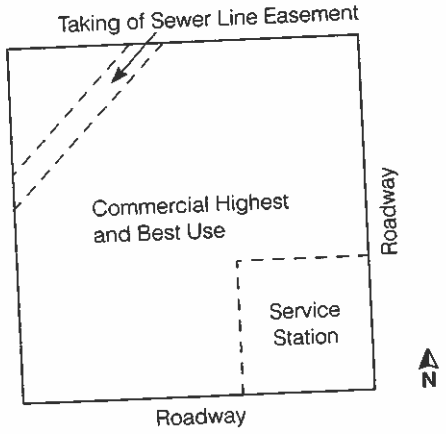
OWNERSHIPS						
PARCEL NO.	NAME	TOTAL AREA	TAKE	LT. REMAINDER	RT.	EASEMENTS
4-1917	J. ALDRICH		SEE	SHEET 20		
4-1918	B.E. TREISCHEL	3.24 AC.	0.32 AC.		2.92 AC	
4-1919	E.A. SOWERS	2.44 AC.	0.38 AC.		2.06 AC	
4-1920	K. DECKERT	0.20 AC.	0.07 AC.		0.13 AC	
4-1921	R.P. SCHUMACHER	0.86 AC.	0.20 AC.		0.66 AC.	
4-1922	R.L. SNAZA	0.92 AC.	0.28 AC.		0.64 AC.	
4-1923	S. LOCKWOOD	1.39 AC.	0.32 AC.		1.07 AC.	
4-1924	E.C. MORRIS	0.65 AC.	0.15 AC.		0.50 AC.	
4-1925	A.R. JANISCH	1.96 AC.	0.36 AC.		1.60 AC.	
1926	D.D. WALSTON	1.14 AC.	0.13 AC		1.01 AC.	
4-1929	A JANISCH	3.88 AC.	0.60 AC.		3.28 AC	
4-1660	BURLINGTON NORTHERN INC.					

> Often essential in the appraiser's consideration of highest and best use is the conclusion concerning the larger parcel. Because the ultimate determination of highest and best use is the appraiser's to make, and that determination cannot be made until after considerable investigation and analysis has been completed, the appraiser's conclusion as to the larger parcel is sometimes different from the specific parcel he or she was requested to appraise by the agency. In such an instance, the appraiser shall inform the agency of his or her determination of the larger parcel and the agency shall amend the appraisal assignment accordingly.[7]

The determination of the larger parcel is particularly important in partial taking cases, in which compensable damages and/or special benefits accrue to the remainder parcel after the taking. Like many other elements in condemnation appraisal, the tests to determine the larger parcel (i.e., unity of ownership, unity of use, and contiguity) cannot be applied universally and blindly. The federal courts and some state courts have ruled that all three tests need not be met in every instance.

A situation in which a right-of-way map may not correctly depict the larger parcel is illustrated in Figure 5.3. In this case, the entire parcel meets the tests of unity of ownership and contiguity, but it fails the test of unity of use. Therefore, the service station is not a part of the larger parcel[8] and cannot suffer compensable damage or receive a special benefit.

FIGURE 5.3 NO UNITY OF USE



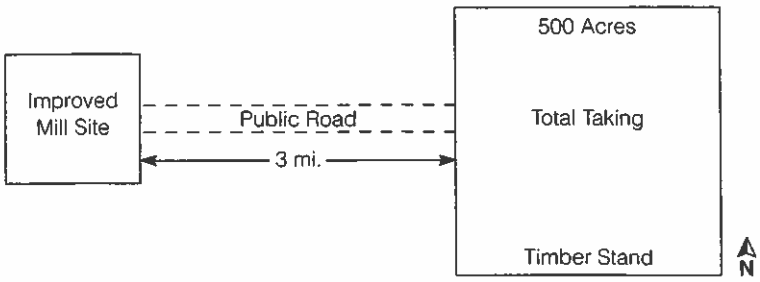
Another situation is depicted in Figure 5.4. In this instance, the two sites have unity of ownership, but they are certainly not contiguous or put to the same use. However, unity of use has often been defined to include an integrated use.[9] The mill may have been constructed for the sole purpose of processing logs harvested from

7. *Uniform Appraisal Standards for Federal Land Acquisitions* (Washington, D.C.: U.S. Government Printing Office, 1992), §B-1 - 14, p. 73.

8. *O'Brien v. City of New York*, 32 A.D.2d 1059 (N.Y. 1969).

9. *United States v. Mattox*, 375 F.2d 461 (4th Cir. 1967).

FIGURE 5.4 NONCONTIGUOUS LARGER PARCEL



the 500-acre timber stand. Thus, while the two tracts do not have identical uses, they certainly have an integrated use. In some jurisdictions, the larger parcel would be defined as the mill site plus the timber stand. In such a case, damages accruing to the mill site due to the taking of the timber stand would be compensable.

In an often-cited landmark case, a federal court ruled that two parcels located 17 miles apart, on two different islands, constituted a single larger parcel. In this ruling the court said:

> The first question before us here, therefore, and the basic one in all severance damage cases, is what constitutes a "single" tract as distinguished from "separate" ones. The answer does not depend upon artificial things like boundaries between tracts as established in deeds in the owner's chain of title, nor does it depend necessarily upon whether the owner acquired his land in one transaction or even at one time. Neither does it wholly depend upon whether holdings are physically contiguous. Contiguous tracts may be "separate" ones if used separately, and tracts physically separated from one another may constitute a "single" tract if put to an integrated unitary use or even if the possibility of their being so combined in use "in the reasonably near future" "is reasonably sufficient to affect market value."
>
> ...Integrated use, not physical contiguity, therefore, is the test. Physical contiguity is important, however, in that it frequently has great bearing on unity of use... [S]eparation still remains as evidentiary, not an operative, fact.[10] [Citations omitted]

Note that in the above case the court recognized that separate parcels do not have to be put to the same use on the date of valuation; rather, if the highest and best use of the properties requires a unity of use, they constitute a single larger parcel. However, the mere fact that two parcels constitute a single larger parcel does not necessarily mean that the remainder property is damaged. On remand of the above case, the court found that the remaining lands had not suffered any compensable damages.[11]

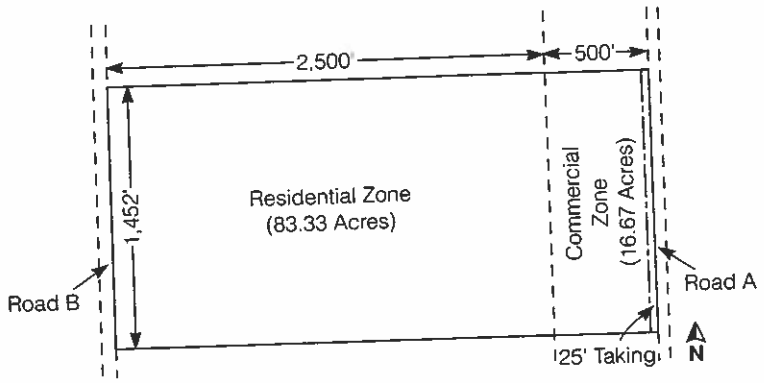
By defining the larger parcel, the appraiser can confine his or her judgments to those parcels, or parts of a single parcel, that are affected by condemnation.

10. *Baetjer v. United States*, 143 F.2d 391, 394–395 (1st Cir. 1944) *cert. denied* 323 U.S. 772 (1944).

11. *United States v. 7936.6 Acres of Land*, 69 F. Supp. 328 (P.R. 1947).

Figure 5.5 shows a 100-acre farm that is subject to two zoning classifications. The proposed widening of Road A necessitates the acquisition of the easterly 25 feet of the tract. The highest and best use of the property coincides with its current zoning. The property is owned by a single individual and is contiguous, but there is no unity of highest and best use. Thus, the larger parcel in this case is the easterly 500 feet of the ownership and only this part of the tract is subject to compensable damages and/or special benefits.

FIGURE 5.5 NO UNITY OF USE



This determination of the larger parcel eliminates the application of the *backland theory* described in Chapter 3. The backland theory would be used, and misused, far less frequently if appraisers and others involved in condemnation proceedings had a better understanding of the larger parcel premise. Once the appraiser has identified the larger parcel, the scope of the analysis required is narrowed substantially. In the above case, only the easterly 500 feet need to be appraised, so only comparable commercial land sales have to be investigated and analyzed. Residential land sales need not be studied.

As the preceding examples illustrate, the appraiser must consider more than single ownership and parcel size to define the scope of the assignment. Because the tests of the larger parcel can be applied in a variety of ways, it is necessary to study each element of this *trinity*—unity of ownership, unity of use, and contiguity—in some depth. Although most of the rulings pertaining to the larger parcel involve the question of compensable damages, the rulings are equally applicable to special benefits.

It generally has been held that determination of the larger parcel is a matter of fact, not a matter of law. Therefore, when a question of the larger parcel arises in a condemnation trial, it is a question to be answered by the jury (or trier of fact), not by the court.[12] However, some confusion exists in this regard in the federal court system because all federal condemnation cases are conducted under

12. *Arkansas State H'way Comm. v. Arkansas Real Estate Co.*, 471 S.W.2d 340 (Ark. 1971); *Sharp v. United States*, 191 U.S. 341 (1903).

the *Federal Rules of Civil Procedure*, which provide that just compensation will be determined by the trier of fact, but that "[t]rial of all issues shall otherwise be by the court."[13] The U.S. Supreme Court has said that "[t]he Rule [71(h)] thus provides that, except for the single issue of just compensation, the trial judge is to decide all issues, legal and factual, that may be presented."[14]

Because determination of the larger parcel is intertwined with the question of highest and best use, strict adherence to the above rule would result in the court, rather than the trier of fact, making the finding of highest and best use. The *Reynolds'* decision quoted above dealt with the issue of the *scope of the project* rather than the question of highest and best use or the larger parcel. (See Chapter 6 for further discussion of the scope of the project rule.) Several federal circuit cases decided after *Reynolds* have interpreted that decision narrowly and have ruled that the question of highest and best use, and thus the larger parcel, rests with the jury.[15]

It is suggested that "it is safe for the practitioner to prepare and present the case upon the assumption that the theory of unity of use [the larger parcel] is a factual question for the trier as it relates to the ultimate issue of value, damage and just compensation. If there is a question, the *Motion in Limine* is available to preliminarily resolve questions, particularly in the federal courts where judges and magistrates have broad powers available to them at the pretrial stage of litigation."[16]

As the examples presented demonstrate, determination of the larger parcel is critical. The appraiser should discuss this issue with legal counsel in the early stages of the appraisal assignment if the larger parcel determination is in question.

UNITY OF TITLE

It is generally held that for one or more parcels to be considered a single larger parcel, it is essential that they be owned by the same individual or group of individuals.[17] In a few cases, however, the courts have held otherwise. In a Kansas case, for instance, the court held that three contiguous parcels of land, owned by three different individuals and being used as one farm operation by mutual agreement, were a single larger parcel and, therefore, "... injury to each [parcel] resulting from the whole taking may be considered."[18] Most cases that have allowed consideration of lands owned by others have done so under the theory of the highest and best use of an assemblage. (The highest and best use of an assemblage is further discussed in Chapter 6.)

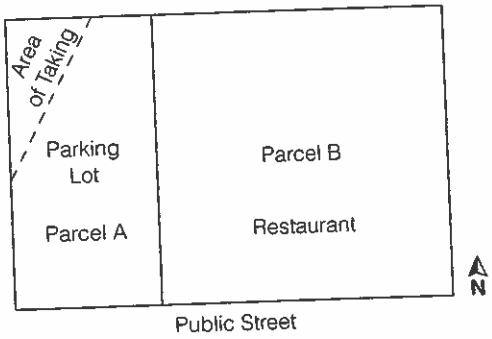
On the other side of the coin, there is case law that supports the proposition that the quality of the title to all parcels must be identical for the tract to be

13. *Federal Rules of Civil Procedure*, 71A(h).
14. *United States v. Reynolds*, 397 U.S. 14, 17 (1970).
15. *United States v. 320.0 Acres of Land, More or Less in Cty.*, 605 F.2d 762 (5th Cir. 1979); *United States v. 100 Acres of Land, Etc., Marin Cty., Cal.*, 468 F.2d 1261 (9th Cir. 1972), *cert. den.*, 414 U.S. 822 (1973); *United States v. 141.45 Acres of Land*, 633 F.2d 108 (8th Cir. 1980), *cert. denied* 451 U.S. 958 (1981).
16. *Nichols' The Law of Eminent Domain*, rev. 3d ed. (New York: Mathew Bender Co., Inc., 1992), vol. 4A, §14B.04[2].
17. *Commonwealth, Dept. of Highways v. Dennis*, 409 S.W.2d 292 (Ky. 1966); *United States v. 429.59 Acres of Land*, 612 F.2d 459 9th Cir. (1980).
18. *County of Smith v. Labore*, 15 P. 577 (Kan. 1887).

considered a single larger parcel. For example, if Parcel A in Figure 5.6 is owned by Mrs. Jones, as her sole and separate property, and Parcel B is owned by Mr. and Mrs. Jones jointly, some courts would rule that the larger parcel is Parcel A only and that no compensable damages can accrue to Parcel B, even though the two tracts have contiguity and unity of use.[19] The federal government has historically supported the proposition that the form of title must be identical.

> To satisfy the requirement as to *unity of ownership*, title to all parts of the whole must be vested to the same extent in the same person(s). Unity of ownership is lacking when the owner has different interests in the two or more tracts, as, for example, where he owns one tract in fee simple, has a leasehold interest in another, and owns in entirety the stock of a corporation which owns another tract. Likewise, unity of ownership is lacking between two tracts when one is owned by the husband and the other by the wife, or where one is owned by the father and the other is owned by the son.[20]

FIGURE 5.6 NO UNITY OF TITLE



The federal government most often cites *United States v. Honolulu Plantation Co.*[21] in support of identical ownership. The court in that case said (at page 178, 179) "[t]he rule requiring compensation for loss in market value of the remainder of the tract is applied strictly only where there is but a single parcel owned by one party in fee simple. . . . If, therefore, the fee owner of one tract holds a lesser tenure in the tract taken, there can be no additional compensation for this reason. The explanation is that the fee is the integer." However, it is clear that the foregoing is dicta. In introducing this issue the court said (at page 178) "[a]lthough disposition has thus been made of the erroneous claims and theories of the experts, it behooves us to consider whether Plantation is entitled to compensation, without regard to the clauses of the respective leases."

Nevertheless, the same court later ruled in two different cases that identical title was not required to find a single larger parcel. In one case the larger parcel

19. *Glendenning v. Stahley*, 91 N.E. 254 (Ind. 1910).
20. *Uniform Appraisal Standards for Federal Land Acquisitions*, §A-11, p. 29.
21. *United States v. Honolulu Plantation Co.*, 182 F.2d 172 (9th Cir. 1950) *cert. den.*, 340 U.S. 820 (1950) at 178, 179.

was found to be ownership of an easement in one parcel and a leasehold interest in a second parcel. The court said "Honolulu Plantation is inapposite, however, because the party seeking severance damages in that case had no interest whatsoever in the land which had been condemned."[22] In the second case, the court found that three tracts of land constituted a single larger parcel, even though the tracts were owned by three different corporations, because ownership of all three corporations was held by the same individuals. In making this ruling the court said that "[t]he fact that land thus treated [as a single entity] is owned by different entities does not destroy the unity concept."[23] In a footnote the court distinguished this case from *Honolulu Plantation* "because the plaintiff sugar refinery in that case had no compensable interest in sugar cane fields taken from a third party."

These rulings suggest that the policy stated in the *Uniform Appraisal Standards for Federal Land Acquisitions* with regard to unity of ownership is not without its weaknesses. Any appraiser involved in a federal condemnation assignment concerned with multiple tracts that have a unity of highest and best use, but lack identical ownership, should seek the advice of legal counsel, whether the client is the property owner or the government.

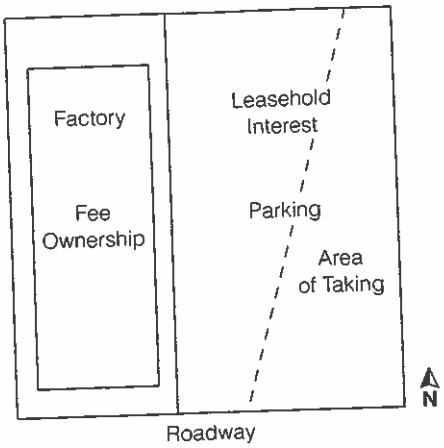
In most jurisdictions, unity of ownership does not necessarily mean that the quality of the title is identical. Two parcels, one owned in fee and one owned equitably by a vendee's interest in a real estate contract, could be considered to have unity of title.[24] One California case held that unity of title existed where an individual owned one parcel in fee and was the equitable owner of an abutting parcel because he had exercised an option to purchase the second parcel.[25] In another California case, however, where the interest in the second parcel existed only in the form of an unexpired, but unexercised option, the court held that there was no unity of title.[26]

Unity of title generally requires equal legal control over the ownership and future of the lands in question. Acquisition of the parts of a whole at different times does not destroy unity of title,[27] nor, in some cases, does the fact that one parcel is owned by an individual and the second parcel is owned by a corporation under the control of that individual.[28] Some courts, however, have ruled conversely.[29]

A fee interest in one parcel and a leasehold interest in an abutting parcel, as depicted in Figure 5.7, can operate as one larger parcel for the remaining term of the lease.[30] Similarly, if three individuals independently own separate parcels of land and lease them to a fourth individual, there could be unity of title during the term of the lease of all the parcels,[31] and the compensation would flow to the lessee.

22. *United States v. 57.09 Acres of Land*, 706 F.2d 280, 281 (9th Cir. 1983).
23. *United States v. 429.59 Acres of Land*, 612 F.2d 459, 464 (9th Cir. 1980).
24. *State Highway Comm. v. Miller*, 155 N.W.2d 780 (S.D. 1968).
25. *County of Santa Clara v. Curtner*, 54 Cal. Rptr. 257 (Cal. 1966).
26. *People v. Hemmerling*, 58 Cal. Rptr. 205 (Cal. 1967) reversed on other grounds, *Hemmerling vs. Jombeau* 432 P.2d 697 (Cal. 1967).
27. *Baetjer v. United States*, 145 F.2d 391 (1st. Cir. 1944), *cert. denied* 323 U.S. 772 (1944).
28. *M.T.M. Realty Corp. v. State*, 261 N.Y.S.2d 815 (N.Y. 1965); *United States v. 429.59 Acres of Land*, 612 F.2d 459 (9th Cir. 1980).
29. *Sams v. Redevelopment Authority*, 244 A.2d 779 (Pa. 1968).
30. *Chicago, etc., R. Co. v. Dresel*, 110 Ill. 89 (Ill. 1884).
31. *Berman v. Urban Redevelopment Authority of Pittsburgh*, 324 A.2d 811 (Pa. 1974).

FIGURE 5.7 LEASEHOLD LARGER PARCEL



UNITY OF USE

The second test of the larger parcel requires that the parcel or parcels of land can be devoted to the same use as, or an integrated use with, the land from which the taking is made. It is generally not the presence or absence of actual unity of use that is considered; rather the unity of *highest and best use* is the controlling factor.[32] If a property is not being put to its highest and best use, but has a common highest and best use, the current use of the land does not generally destroy the unity of use.[33] Some courts that have ruled conversely, however.[34] These decisions, which seem to contradict the well-established premise that property is appraised at its highest and best use, are generally based on the reasoning that the unity of use has to exist because potential unity of use is too speculative and conjectural to be considered.[35] A careful reading of many of these cases (e.g., the case cited above) suggests that the court may well have found that the proffered highest and best use of the property would have been too conjectural and speculative to be considered by the jury, even if the larger parcel were not at issue.

Appraisers must recognize that stronger proof of unity of use is required when the parcels are not currently being used as a unit, but merely have a common highest and best use. "The question of unity of use of two or more tracts is a question of fact to be determined upon the facts and circumstances of the particular case, and is not to be based upon fanciful claims, speculation or conjecture, and in such cases the burden of proof is upon the landowner to prove his claim."[36]

Political boundaries do not interrupt the continuity of use if the government's land-use controls permit a continuous highest and best use. [37] Moreover, unity of use does not require physical adjacency. There may be physical separation by

32. *Baetjer v. United States*, 143 F.2d 391 (1st Cir. 1944), *cert. denied* 323 U.S. 772 (1944).
33. *United States v. Mattox*, 375 F.2d 461 (4th Cir. 1967).
34. *Cole Investment Co. v. United States*, 258 F.2d 203 (9th Cir. 1958).
35. *City of Washington v. Koch*, 456 S.W.2d 628 (Mo. 1970).
36. *Ives v. Kansas Tpke. Authority*, 334 P.2d 399, 407 (Kan. 1959).
37. *Northeastern, etc., v. Frazier*, 40 N.W. 604 (Neb. 1888).

barriers such as streets, railroads, and creeks, but again this type of separation requires stronger proof of unity.[38]

CONTIGUITY

The third element of the larger parcel trinity, contiguity, normally requires that physical contiguity be present for a larger parcel to exist. However, this condition is not always mandatory and jurisdictions have ruled differently on this issue. Most courts hold unity of title and unity of use as the most important tests of the larger parcel.[39] For this reason, the *Uniform Appraisal Standards for Federal Land Acquisitions* states:

> To constitute a "whole" for purposes of assessing severance damages, the law requires the property to meet *two* tests. First, there must be a unity of ownership in all parts of the whole. Second, there must be a unity of use as to all parts of the whole.[40]

Whether a real estate ownership constitutes a single larger parcel as distinguished from *separate* parcels is best reflected by unity of use, and does not preclude a reasonable separation. Such a separation does, however, require study. The appraiser must be able to answer "yes" to the question: "Is it probable that the separated tracts would sell as an integrated single entity, even with the separation?" Only then can the separated tracts can be considered as a single larger parcel. As a Rhode Island court put it:

> Quite a different situation is presented when, as here, the two parcels in question are unequivocally separated from each other by fixed and definite boundaries, such as a highway. In such a case it is generally held that the two tracts can be considered as one only when they are so inseparably connected in the use to which they are applied that the taking of one *necessarily* and *permanently* injures the other.[41]
>
> An important factor to bear in mind, particularly (but not only) where the taking involves non-contiguous parcels devoted to a unitary use (e.g., a mill site and one or more parcels providing raw material for the mill) is the availability of replacement property for the parcel taken, since a reasonable buyer and seller would consider the availability of a replacement."[42]

The greater the separation between the parcels, the more likely it is that suitable replacement property will be available.

Sometimes a larger parcel exists in the before situation but, in the after situation, the parcel has been severed by the taking and becomes two separate parcels. Such a situation is illustrated in Figure 5.8. Although the property had unity of ownership, unity of use, and contiguity in the before situation, it is no longer contiguous in the after situation. Quite probably, one or both of the tracts will have a different highest and best use after the taking than they did before. It is

38. *Tucker v. Massachusetts C.R. Co.*, 118 Mass. 546 (Mass. 1875); *State v. Hoblitt*, 288 P. 181 (Mont. 1950).

39. *Barnes v. North Carolina State Highway Comm.*, 109 S.E. 2d 219 (N.C. 1959); *Baetjer v. United States*, 143 F.2d 591 (1st Cir. 1944), *cert. denied* 323 U.S. 772 (1944).

40. *Uniform Appraisal Standards for Federal Land Acquisitions*, §A-11, pp. 28–29 (emphasis added).

41. *Sasso v. Housing Authority of the City of Providence*, 111 A.2d 226, 230 (R.I. 1955).

42. *Uniform Appraisal Standards for Federal Land Acquisitions*, §A-11, p. 30.

highly unlikely that unity of use, or integrity of use, will exist between the two parcels in the after situation. Thus, it is unlikely they would be sold as a single parcel and, in all probability, they would be considered two separate larger parcels.

FIGURE 5.8 TWO LARGER PARCELS—AFTER SITUATION

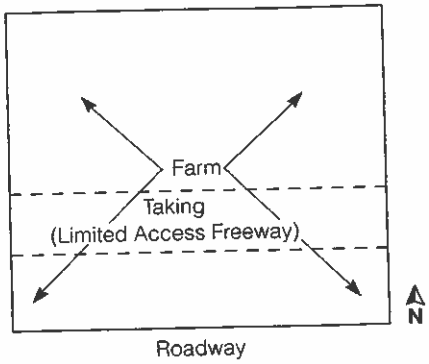
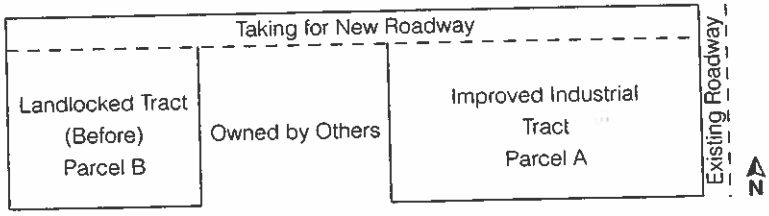


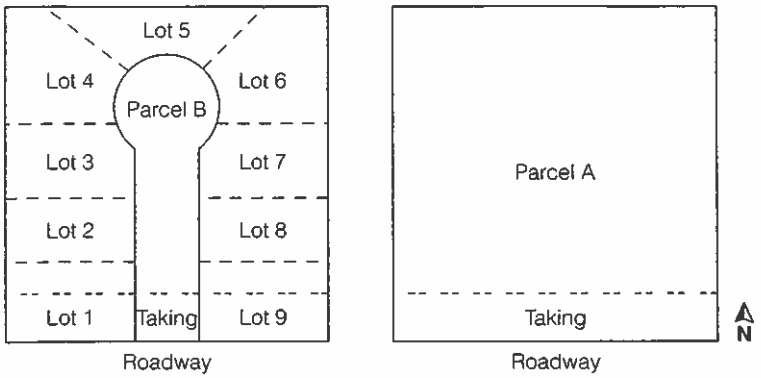
Figure 5.9 illustrates a very different situation in which two tracts that were separate in the before situation could become a single larger parcel in the after situation. If Parcel A could be developed to a greater density in the after situation by using Parcel B for required parking, special benefits could accrue; in those jurisdictions that allow the offsetting of special benefits against both damages and the value of the property taken, the property owner might not be entitled to any monetary compensation. (See Chapter 12 for information on the offsetting of special benefits.)

FIGURE 5.9 ONE LARGER PARCEL—AFTER SITUATION



Another problem which the courts have addressed upon occasion is illustrated in Figure 5.10. This could be described as the problem of the *paper plat*. The tract identified as Parcel A, the whole parcel, is, of course, considered the larger parcel and the entire remainder parcel is subject to potential compensable damages by reason of the taking. In regard to Parcel B, however, the determination of the larger parcel will often depend on the specific status of the paper plat.

FIGURE 5.10 PAPER PLATS



If the property owner has not dedicated the proposed street rights of way, or has only granted easements thereto while retaining the underlying fee, and no lots have been sold, the courts have generally ruled that all of Parcel B constitutes the larger parcel. The current status of the particular paper plat appears to be the key determinant. If the plat processing is beyond its initial stages, there could be two larger parcels (i.e., Lots 1 and 9), with Lots 2 through 8 falling outside the larger parcel and not subject to any compensable damages and/or special benefits.

An Ohio court expressed this situation well:

> As an allotment develops, as it progresses from open land to individual lots, there comes a point where the lots not only can be but must be considered as separate entities. When this point arrives and a part of the allotment only is taken, consisting of a number of lots, the question arises as to what is the remaining land to which damage may occur. Is it the whole remaining subdivision, or is it just the fragment of an individual lot not taken?
>
> Whether certain lots, taken by appropriation proceedings, constitute part of an entire tract so as to entitle the owner of the remaining continuous lots to damages within the rule is principally a question of unity of use and, as such, constitutes a factual matter to be determined by the jury under proper instructions.[45] [Citations omitted]

45. *In re Appropriation For Highway Purposes*, 239 N.E.2d 110, 115 (Ohio 1968).

MYTHS ABOUT THE LARGER PARCEL

As has been demonstrated, nearly all of the court decisions relating to the larger parcel involve either alleged damages or special benefits to the remainder. Two of the definitions of the larger parcel quoted previously specifically relate the term to damages to the remainder property. However, determination of the larger parcel is also important in cases in which damages and/or benefits are not claimed. In nearly all jurisdictions, the value of the land taken is measured as it contributes to the whole (larger parcel), rather than as a separate entity, regardless of whether the before and after or taking plus damages rule is applicable. Thus, appraisers must make a determination of the larger parcel in all cases.

Even when damages or benefits are not alleged, determination of the larger parcel can have a significant impact on the amount of compensation indicated. Two economic factors can come into play in larger parcel valuations: *plottage* (or assemblage) and *size regression*.

> *Plottage* is an increment of value that results when two or more sites are combined to produce greater utility. Sometimes highest and best use results from assembling two or more parcels of land under one ownership. If the combined parcels have a greater unit value than they did separately, plottage value is created.[44]

Size regression is the basic economic principle that as the number of units of a commodity increases, the price per unit paid for the commodity decreases. It is the concept of the bulk sales discount. As applied to land, as the number of units (*e.g.*, acres, square feet) in a tract of land increases, the price, or value, per unit tends to decrease. "Common sense tells us that a larger tract of land, holding other factors equal, would sell for less per unit."[45]

The courts seem to recognize plottage, but fail to acknowledge the effect of size regression. In fact, at least two courts have ruled, *as a matter of law*, that two assembled tracts of land always have a larger square foot value than they would if considered as two separate tracts.[46]

Appraisers are well aware of size regression. In fact, a favorite technique of the biased (and unethical) appraiser who is attempting to support a high value estimate is to compare the prices paid per acre for small tracts against the price of a substantially larger subject parcel, without making a size adjustment. Conversely, the biased appraiser attempting to support a low value will compare the prices paid per acre for large tracts against a small tract under appraisal without making a size adjustment.

The situation shown in Figure 5.11 illustrates the importance of the larger parcel determination even when damages and/or benefits are not at issue. Assume that the physical characteristics of all parts of the 100-acre farm are equal and that sales data show that farms of 75 to 125 acres sell for $2,000 per acre. If no damages or benefits are involved and the entire farm is considered a single larger

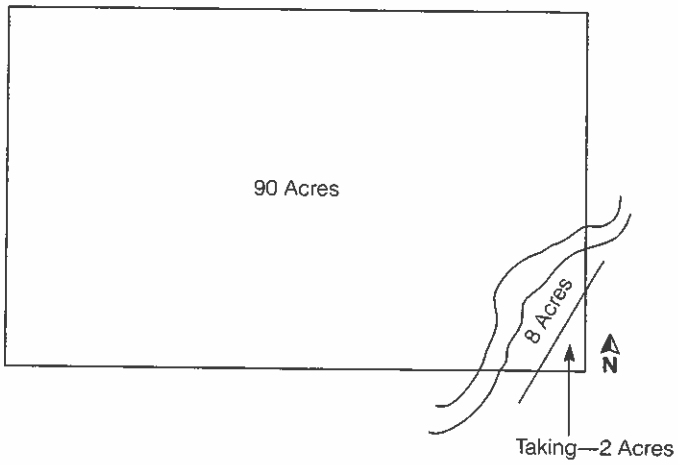
44. *The Appraisal of Real Estate*, 10th ed., 211–212.

45. Gene Dillmore, "Size Adjustment Tables," *The Real Estate Appraiser* (May–June 1976), 25.

46. *City of Buffalo v. Goldman*, 406 N.Y.S 2d 407 (N.Y. 1978); *In re Elgart's Appeal*, 149 A.2d 641 (Pa. 1959).

parcel, the indicated compensation for the two-acre taking would be $4,000, regardless of whether the before and after rule or the taking (as a part of the whole) plus damages rule is applied.

FIGURE 5.11 PARTIAL TAKING OF 100-ACRE FARM



However, the situation might be more complicated. Further assume that small acreage sales in the area, ranging from five to 15 acres, typically sell for $5,000 per acre for use as rural homesites. If the appraiser concluded that the 10-acre parcel separated from the balance of the ownership by the creek had an independent highest and best use as a homesite, and thus a value of $5,000 per acre, the indicated compensation would be $10,000.

Even if the 10-acre tract had the same highest and best use as the 90-acre tract (i.e., farming), the two parcels could constitute separate larger parcels. A conclusion that two larger parcels existed could probably be justified if there were no *actual* unity of use between the parcels and/or no bridge across the creek physically connecting the two parcels. In such a case, it would not be surprising to find that 10-acre tracts were selling for substantially more per acre than 100-acre tracts because of size regression, even though the tracts had the same highest and best use.

Appraisers, whether they are retained by the condemnor or the condemnee, have a tendency to estimate the value of the parcel shown on the condemnor's right-of-way map, often without adequately analyzing the larger parcel. If an appraiser receives an assignment from a condemnor to appraise the property shown in Figure 5.11, and is provided with a right-of-way map depicting the entire 100-acre ownership as the parcel to be appraised, it is the appraiser's obligation to determine whether the larger parcel is, in fact, the 100-acre parcel or the

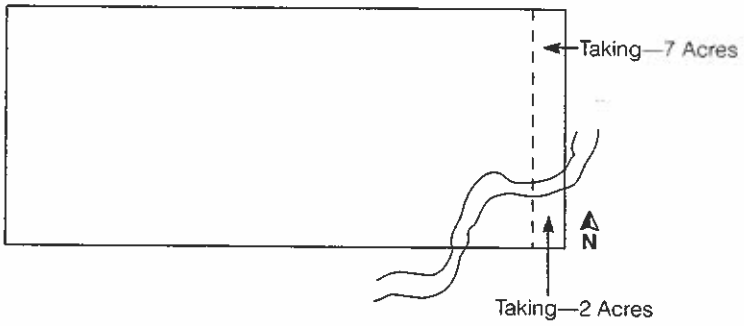
10-acre parcel. If the appraiser reasonably concludes that the 10-acre parcel is the larger parcel and thus the value of the taking, as a part of the whole, is $10,000, it is possible that he will receive resistance and/or criticism from the client. Nevertheless, the larger parcel determination, as a part of highest and best use analysis, is the appraiser's decision, and it must be made objectively regardless of the desires, or opinions, of the client.

The condemnor may disagree with the appraiser's conclusion as to the larger parcel and reject the appraiser's value conclusion; that is the condemnor's prerogative. However, a distinction must be made between rejection of the appraiser's conclusion and rejection of the appraiser's report. Appraisal reports are rejected for technical deficiencies; conclusions are rejected because of a difference of opinion. If an appraisal report is technically sufficient but the conclusion is rejected, the appraiser has fulfilled his or her obligation under the terms of the appraisal assignment and the appraisal contract. The appraiser has been retained to furnish the client with an adequately supported opinion of value. There is no guarantee that the client is going to like the opinion. As a matter of fact, it is considered a compliment by some appraisers to have their reports approved, but their opinions rejected because appraisal reviewers tend to look harder for technical deficiencies in appraisal reports when they disagree with the appraiser's conclusion. A report must be well supported to pass such scrutiny.

The property owner's appraiser also has an obligation to make a proper analysis of the larger parcel, rather than merely to appraise an entire ownership or the parcel shown on the condemnor's map. Returning to the situation depicted in Figure 5.11, improper analysis of the larger parcel in this case could result in the appraiser's client receiving only 40% of the compensation due.

Figure 5.12 shows the same property shown in Figure 5.11, but in this instance it is assumed that the taking is of the entire frontage of the property. Condemnors would invariably treat this situation as one taking from one parcel, even those condemnors who would be astute enough to recognize that the 10 acres shown in Figure 5.11 might constitute a separate parcel. Nevertheless, the

FIGURE 5.12 TAKING OF FARM FRONTAGE



extent or location of the taking should not alter the analysis of the larger parcel in the before situation. The larger parcel determination made under the circumstances shown in Figure 5.11 would be the same under the circumstances shown in Figure 5.12, or under the circumstances of any other taking configuration, including the taking of the entire ownership.

The *Uniform Appraisal Standards for Federal Land Acquisitions* states:

> It should be noted, however, that since unity of use is one of the elements for an integrated unit, it would not necessarily follow that a contiguous body of land in the same ownership constitutes a unit for valuation if the highest and best use for various parts are different. Failure to value the property as an integrated unit should, however, always be explained and supported [in much the same way that highest and best use is supported].[47]

If the appraiser concludes that the 10-acre tract south of the stream is a separate larger parcel, in the situation depicted in Figure 5.12 the appraiser would estimate the values of the 10-acre parcel and the 90-acre parcel as two separate, independent tracts. If the client has requested a single appraisal report, the appraiser can simply include two separate valuations within a single report. In such a report, many of the report sections (e.g., regional data, neighborhood data, assumptions and limiting conditions) will be applicable to both parcels, while other sections (e.g., highest and best use, sales comparison approach to value) will have to be developed separately for each parcel.

If the appraiser is following the before and after rule, the value conclusions might be reported as follows:

Homesite parcel:

Before value (10 acres @ $5,000)	$ 50,000
After value (8 acres @ $5,000)	- 40,000
Difference (just compensation)	$ 10,000

Farm parcel:

Before value (90 acres @ $2,000)	$180,000
After value (83 acres @ $2,000)	- 166,000
Difference (just compensation)	$ 14,000

Note that the before value of the homesite parcel and the before value of the farm parcel are *not* added together and reported as a single figure. Together the value of the farm parcel and the value of the homesite parcel do not equal the value of the two parcels as a single entity. The above value estimates are separate appraisals and should be reported as such. If the client insists that a single figure be reported before and after the takings, this can be done, but it must be shown as the *sum* of the two independent value estimates. Moreover, it must be explained, every time the sum is reported, that the total is the *mathematical sum* of two independent value estimates and does not (or at least may not) represent the value of the properties if sold as a single entity.

47. *Uniform Appraisal Standards for Federal Land Acquisitions*, §A-13, p. 42.

Although the courts seldom address the issue, larger parcel determination can be important in cases that do not involve alleged damages and/or benefits. Because most legal treatises on eminent domain do not recognize this fact, they usually state that property owners often advocate the expanded parcel (so as to claim damages to the remainder), while condemnors advocate the limited larger parcel (to limit the property subject to compensable damage).[48] As the preceding discussion demonstrates, however, reducing the larger parcel can, in some circumstances, substantially increase an owner's claim of compensation.

The myth that the larger parcel determination is only important in damage and/or benefit cases can only be broken if appraisers carefully analyze properties subject to eminent domain action, properly support larger parcel determinations, and properly explain the valuation principles involved.

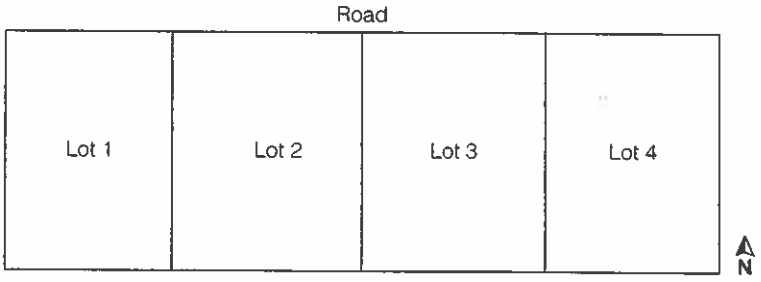
ADVANCED PROBLEMS

There are a number of larger parcel questions that have not been adequately addressed by the courts and by condemnors and thus no definitive guidance on these matters can be provided to the appraiser. This is not because these problems are rarely encountered; rather, it is because they are frequently unrecognized or ignored. Some of these issues are not really valuation problems, but inequalities in the treatment of property owners.

The best advice for the appraiser in these situations is to remember two things. First, the appraiser is estimating market value, so any approach to value should mirror market realities. Second, the goal is to place the owner in the same position, monetarily, after the taking that he or she was in before the taking.

To demonstrate the potential inequality in the treatment of property owners, assume that all of the property depicted in Figure 5.13 is under the same ownership and that the condemnor is acquiring all of Lot 1. Under these circumstances, the condemnor would undoubtedly treat Lot 1 as a separate parcel, claiming that

FIGURE 5.13 TREATMENT OF PROPERTY OWNERS



48. *Nichols'*, vol. 4A, §14B.05[2] (1992).

the balance of the property is not part of the larger parcel because it consists of legally platted lots that have separate highest and best uses. Such treatment would deny the owner the right to any damages to the remainder lots. However, if all of the lots were being taken, many condemnors would take the position that all of the lots should be valued as if they were sold as a single parcel because all of the lots are being acquired by the government as a single parcel. Valuing the land as if it would be sold as a single parcel would typically lead to a value estimate lower than the sum of the values of the lots valued individually.

This variation in treatment suggests that many condemnors attempt to apply different standards in larger parcel determination, depending on the extent of the taking. This different treatment appears to have no basis in either the law or market realities. The extent of the taking does not alter the larger parcel in the before situation. If the four lots are considered independent parcels when only Lot 1 is being taken, they should remain independent parcels when all four are taken, and they should be valued as such.

The argument advanced by condemnors that they are acquiring the entire property in one transaction, and therefore the property should be valued on the basis of a single sale, is without merit. The fact that the government is condemning the entire ownership should not preclude the property owner from receiving compensation equal to the market value of the property as if voluntarily marketed in the most advantageous way. The owner should not be forced to take a bulk sales discount when a bulk sale of the property does not produce its highest value, and is therefore not the highest and best use of the property.

Another potential inequity can be demonstrated by referring to Parcel B in Figure 5.10. If Parcel B were fully developed, the courts and condemnors would undoubtedly recognize Lots 1 and 9 as independent parcels. However, they often fail to recognize that the larger parcel in the after situation can include lands that were not part of the larger parcel in the before situation, as was demonstrated in Figure 5.9. This failure can result in overcompensation in some instances. For example, assume that Lots 1, 2, 8, and 9 each contain 12,000 square feet of area in the before situation and that comparable sales indicate that residential lots are selling for $3.00 per square foot. Further assume that the taking from Lots 1 and 9 removes 9,000 square feet of area from each lot and that, in the after situation, the two remainders would be *uneconomic remnants* as independent parcels with only a nominal value of $0.60 per square foot.

If Lots 1 and 9 are treated as two separate larger parcels in both the before and after situations, total compensation might be computed using the before and after rule:

Before value:

Lot 1, as separate parcel (12,000 sq. ft. @ $3.00)	$36,000	
Lot 9, as separate parcel (12,000 sq. ft. @ $3.00)	36,000	
Sum of before values		$ 72,000*

After value:

Lot 1, as separate parcel (3,000 sq. ft. @ $0.60)	$ 1,800	
Lot 9, as separate parcel (3,000 sq. ft. @ $0.60)	1,800	
Sum of after values		3,600*
Difference (indicated compensation)		$ 68,400

* Not indicative of the value of both lots if sold as a single entity.

However, the reality of the situation is that the owner of Lots 1 and 9 also owns Lots 2 and 8. Recognizing this market reality, and the fact that the remnants of Lots 1 and 9 could be merged with Lots 2 and 8 after the taking, compensation could be computed as follows:

Before value:

Lot 1, as separate parcel (12,000 sq. ft. @ $3.00)	$36,000	
Lot 2, as separate parcel (12,000 sq. ft. @ $3.00)	36,000	
Lot 8, as separate parcel (12,000 sq. ft. @ $3.00)	36,000	
Lot 9, as separate parcel (12,000 sq. ft. @ $3.00)	36,000	
Sum of before values		$144,000*

After value:

Lots 1 & 2 merged, as separate parcel (15,000 sq. ft. @ $3.00)	$45,000	
Lots 8 & 9 merged, as separate parcel (15,000 sq. ft. @ $3.00)	45,000	
Sum of after values		90,000*
Difference (indicated compensation)		$ 54,000

* Not indicative of the value of the lots if sold as a single entity.

This second method of analysis produces an indicated compensation amount that is 21% lower than the compensation calculated by the first method. Moreover, this second method mirrors the realities of the marketplace and puts the owner in exactly the same position, pecuniarily, in the after situation as he would have been in had the taking never occurred.

Another inconsistency in the treatment of property owners can be demonstrated by considering Parcel B in Figure 5.10. Assume that all lots in the subdivision are fully developed and all are to be taken. Under Premise 1, each lot is owned by a different party and each, as a independent entity, has a market value of $36,000. The typical condemnor would have each lot valued independently and pay each lot owner $36,000 in compensation; thus the condemnor would pay total compensation of $324,000 (9 lots @ $36,000) for all of the lots.

Now consider the same property under another premise. Under Premise 2, the fully developed lots have not yet been sold and ownership of the lots remains with the developer. In this situation the typical condemnor would attempt to apply a modified development approach to value. (See Chapter 12 for a detailed description of the development approach.) Compensation, under Premise 2, might be computed as follows:

Retail value of lots (9 lots @ $36,000)	$324,000
Less costs:	
Sales costs (10%)	- 32,400
Developer's (entrepreneur's) profit (20%)*	- 64,800
Net sale proceeds	$226,800
Market absorption:	
Absorption rate - 3 lots per year	
Absorption time (9 lots ÷ 3 lots per year)	3 years
Annual net sales income ($226,800 ÷ 3 years)	$ 75,600
Factor to convert 3-year income stream into present value discounted @ 10%†	x 2.486852
Value of property (compensation)	$188,006

* Supported by market data.

† Present worth of $1 per period for 3 years discounted at 10%. (See *The Appraisal of Real Estate*, 10th ed., 710.) Rate supported by market data.

In comparing the results of these two approaches, a number of interesting and perplexing questions arise. First, how can the market value of a property change by more than 40% due to its ownership, particularly when an eminent domain action is *in rem* and not *in personam*. The answer is, of course, it cannot. Therefore, it is necessary to look at the elements, or assumptions, that are built into these two different value indications.

Under Premise 2, sales costs are deducted from the retail value of the lots, but no such deduction is made under Premise 1. Realistically, sales costs would be incurred in both situations. However, it is a long-standing policy in eminent domain valuation, and in estimating market value for other purposes, that sales costs are not deducted from the price at which a property could be sold. No definition of market value in use today suggests that market value is the price that could be received for a property less the costs of sale. Thus, it must be concluded that to penalize a property owner by deducting sales costs from the market value of his lots merely because he owns more than one lot is inappropriate.

The other amount deducted from the retail value of the lots using the modified development method of valuation was identified as developer's, or entrepreneur's, profit. Developer's profit is obviously an appropriate part of any real estate development proposal, be it the subdivision of land or improvement of the land with a building. However, a distinction must be drawn between a proposed development and an existing development. In this instance all of the lots are *fully developed*, not proposed. Therefore, the developer has already de-

signed the development, obtained all necessary permits, procured financing (if necessary), and made all improvements to the land necessary for the sale of the individual lots. This is an existing subdivision, not a proposed subdivision.

Developer's, or entrepreneur's, profit compensates the developer for the time and risks assumed in undertaking the development. In this case the developer has already expended the time and money to develop the land and already assumed the risks associated with the land's development. In other words, the developer has already earned his profit associated with the development. (The risks inherent in the actual sale of the lots is reflected in the discount rate applied to the projected annual net sales income.) This position was supported in a Louisiana case. In fact, the court went beyond allowing developer's profit for fully developed lots, saying:

> Thus, where an owner-developer owns land forming part of a subdivision actually developed and in the process of being sold as individual lots, and where a portion of the tract destined for that use but not actually yet developed is taken, the owner-developer is entitled to receive just and adequate compensation for the tract taken on the basis of the retail value of the lots to individual purchasers (assuming that the evidence shows such sales to be reasonably prospective), rather than artificially limited to a value based upon a hypothetical sale as a single-tract unit to another developer. The owner-developer should not be excluded from the land-profit the evidence shows he was reasonably certain to receive, except that the taking took place.
>
> The owner-developer is entitled to receive as just and adequate compensation the actual pecuniary loss caused by the taking which the evidence shows to be attributable to the loss of the value of the land itself. He should not be deprived of the profit attributable to the retail (as compared with the wholesale) value of the land simply because of some arbitrary formula that bases the market value of the tract, not upon its actually prospective retail sales to lot-purchasers, but instead upon a fictitious, unintended, and unlikely sale of it as a single tract to a nonexisting third person who would himself develop and retail the land (and keep the land-profit), just as the owner-developer was in the process of doing.[49]

However, because this Louisiana case dealt with land that was not fully developed, as is the land in our example, the court added:

> Nevertheless, as the Department correctly contends, an owner of land is not entitled to recover on the basis of its retail value if sold as lots, simply because the land's highest and best use is for subdivision purposes. The evidence must additionally show that it was reasonably certain that the owner could and would have sold them on such basis, had it not been for the intervening expropriation.[50]

The issue of absorption, or marketing time, is more difficult to relate to the factual situation and market realities. First, there must be a clear understanding of the definition of market value. Implicit in all definitions of market value is the presumption that "a reasonable time is allowed for exposure in the open mar-

49. *State, Dept. of Highways v. Terrace Land Co. Inc.*, 298 So.2d 859, 863 (La. 1974).

50. Ibid.

ket."[51] *Exposure time*, as used in the definition, is retrospective, not prospective. It has already occurred on the date of value. If a reasonable exposure time for the property under appraisal is 90 days, the question to be answered by the estimate of market value is "What would the property have sold for today (the date of value) had it been placed on the open market 90 days ago?", not "What would the property sell for within the next 90 days if it were placed on the market today?"

When this definition is applied to an individual lot valued under Premise 1 (with each lot owned by a different party), it is assumed that the exposure time has already occurred. There is no presumption that the other eight, individually owned lots being acquired by the condemnor were placed on the market at the same time, thereby skewing the supply and demand for such lots and resulting in abnormally excessive competition for the lot under appraisal. Yet that is precisely the presumption made under Premise 2.

Under Premise 2 it is assumed that all nine lots will be placed on the market at same time, outstripping the demand for such lots so that they must compete for a limited number of buyers. This is obviously treating, and valuing, the lots differently because of the nature of their ownership, which would appear to violate the *in rem* nature of the condemnation action. It would also appear to violate the definition of market value applied under Premise 1, inasmuch as prospective, rather than retrospective, market exposure time is being assumed.

However, treating the nine lots owned by the developer in exactly the same manner as the lots owned by nine individuals is to ignore the realities of the situation and the market. The nine lots are, in fact, owned by the developer and if he were to sell them individually, it would take him three years to do so.

The source of this apparent conflict is found in the various definitions of *just compensation* handed down by the courts. *Black's Law Dictionary* states that "'just compensation' means the full monetary equivalent of the property taken," but goes on to say that "[i]t means a settlement which leaves one no poorer or richer than he was before the property was taken. It requires that the owner be put in as good position pecuniarily as he would otherwise have been if the property had not been taken."[52]

Applying the first part of this definition to the example would indicate just compensation of $324,000 because the market value of the lots is not altered by the form, or nature, of their ownership. However, applying the second part of the definition (i.e., putting the owner in the same position pecuniarily that he would have been without the take) leads to a different conclusion. Recognizing that sales costs are never deducted from the estimate of market value and that the developer has already earned his profit from developing the land, and further recognizing the market realities of the situation, the developer's "pecuniary position" before the taking is essentially:

51. The Appraisal Foundation, *Uniform Standards of Professional Appraisal Practice*, 1994 ed., p. 8.

52. *Black's*, s.v. "just compensation."

Retail value of lots (9 lots @ $36,000)	$324,000
Absorption rate (9 lots ÷ 3 lots per year)	3 years
Annual income stream ($324,000 ÷ 3)	$108,000
Factor to convert 3-year income stream into present value discounted @ 10%*	x 2.486852
Pecuniary position of owner before taking	$268,580

* Present worth of $1 per period for 3 years discounted at 10%. (See *The Appraisal of Real Estate*, 10th ed., 710.) Rate supported by market data.

Resolving this conflict is ultimately the obligation of the courts, not appraisers. Nevertheless, the appraiser must understand the conflict and why it exists and should make the client aware of the conflict when it is encountered. Until this conflict is settled by the courts, if it ever is, the best policy for appraisers is to estimate the market value of the real estate unaffected by its ownership. While the courts have deviated from the market value standard of measuring just compensation in some instances, for every such instance there are literally hundreds of instances in which the courts have adhered to the market value standard. Thousands of the public acquisitions that occur each year are based on the market value standard. To encourage appraisers to use a different standard of measurement and then proclaim, as some lawyers do, that "[a]n appraiser's mission in a condemnation case is to estimate 'just compensation'"[53] is misleading. Accepting such advice places a burden on appraisers that even the U.S. Supreme Court has found difficult to shoulder. The appraiser should never deviate from estimating market value without clearly written legal instructions that are reasonable and adequately supported.

If the appraiser's condemnor client wants to argue to the court that the Premise 2 method of valuation results in just compensation, rather than the Premise 1 valuation, the appraiser can, upon receipt of proper legal instructions, prepare a double-premise appraisal and report both value estimates. It will then be up to the court, or trier of fact, to determine whether just compensation requires payment of the market value of the individual lots (Premise 1) or whether the owner should merely be put back in the same pecuniary position enjoyed before the taking (Premise 2).

Although one of the rules of the larger parcel specifies that for two or more parcels to be considered part of a single larger parcel, there must be unity of ownership, there is no inverse rule. There is no rule that prescribes that two or more tracts under the same ownership must be treated as a single larger parcel. With regard to subdivided lots, or legally separate parcels, case law supports the conclusion that they are separate larger parcels and should be treated as such:

> In the case now before the court there is no evidence whatsoever as to the adaptability of the plaintiff's land for any purpose other than building lots, and therefore each lot, *prima facie*, is a separate and distinct entity. . . . Where the entire tract has no adaptability peculiar to itself as an entity, and can be subdivided without

53. Jay Dushoff and Denise Henslee, "When Eminent Domain 'Working Rules' Don't Work," *The Appraisal Journal* (July 1991), 429.

> injury to its adaptability for use as an entire tract, and the value of a particular subdivision thereof is not dependent upon being incorporated in the tract as a part of the entity, as where the entire tract has been subdivided and plotted into building lots, and the value of no individual lot is dependent upon its relationship to the entire tract, each lot, for the purpose of assessment of damages... may be regarded as a separate distinct tract.[54]

It is clear that the nine lots used in our example are separate and distinct parcels, each with their own highest and best use, and therefore should be valued independent of one another.

The example above referred to nine subdivided lots, but lands under the same ownership do not necessarily have to be subdivided for the appraiser to conclude that they constitute two or more separate and distinct larger parcels. If there are two or more distinct highest and best uses in geographically different portions of the property, the ownership may consist of two or more larger parcels, and each larger parcel should be treated and valued as a separate and distinct entity. In fact, it has been ruled that they *must* be valued as separate parcels.[55]

If a client requests that the value of an entire ownership be reported as a single figure, the appraiser can comply with such request, but only if the single figure is identified as the mathematical sum of the two or more estimates of market value, which is not or may not be indicative of the market value of the entire ownership as a single entity.

SUMMARY

The larger parcel is a premise unique to eminent domain valuation. The premise asserts that it is the larger parcel which is considered in condemnation valuation, and that the larger parcel must generally possess unity of title, unity of use, and contiguity. Court rulings clearly indicate that all three of these elements need not be present in every case. The courts have been most lax in requiring physical contiguity, but unity of use and unity of title have been almost universally held to be prerequisites of the larger parcel.

The courts in the various jurisdictions disagree as to whether unity of use must be an existing unity, or a highest and best unity, of use. The latter view appears to be prevalent in the majority of jurisdictions. In many of the cases in which the courts have ruled that unity of use must be existing, it appears that the alleged highest and best use would have been ruled so remote and speculative as to merit no consideration, even if the larger parcel were not in question.

Unity of title is generally a legal question. The quality of title to the various tracts making up the larger parcel need not be identical; as a general rule, if the same individual or group of individuals control the title and future use of all of the tracts, unity of title is considered to be present. Physical contiguity, which is generally an engineering matter, is not always necessary, nor does it follow that a whole parcel constitutes the larger parcel just because it possesses contiguity and

54. *Gains v. City of Calhoun*, 42 Ga.App. 89 (Ga. 1951).

55. *Foster v. Sanders*, 557 S.W.2d 205 (Ky. 1977).

unity of ownership. Right-of-way maps do not control the determination of the larger parcel and, in fact, may have no bearing on the question. The same is true of appraisal contracts or assignments.

Unity of use is an appraisal question, and the ultimate determination of the larger parcel is typically in the strict purview of the appraiser. This is strongly supported by two court rulings. First:

> The method of valuation of the parcels taken, whether as a separate entity or in a relationship to the whole tract, then becomes a matter of opinion of appraisers to be weighed by the jury.... We conclude that in this case the use of either method of valuation by the expert witnesses was proper and their testimony admissible, subject only to the inherent risk of nonpersuasion.[56]

And second:

> Where the property taken is less than the entire tract, other considerations arise. The highest and best use of the part taken may be as a separate and distinct piece of property unrelated to the entire property endowing such part with a fair cash market value. On the other hand the highest and best use of the part taken may be so related to the entire property that the value of the part taken for its highest and best use is dependent upon the value of the entire tract. Such a relation or dependence may present an issue of fact and either party is entitled to present his theory of independent or dependent valuation.[57]

It is commonly believed that determination of the larger parcel is only important in cases in which damages and/or special benefits are alleged. This belief is false. Due to the effects of size regression and plottage, determination of the larger parcel can have a significant effect on the indicated compensation in cases in which neither damages nor benefits are claimed.

Because of the importance of the appraiser's determination of the larger parcel and its potential effect on value, the appraiser should exercise the same care in developing the larger parcel determination as is exercised in developing highest and best use conclusions and value estimates. A complete description of the analysis of the larger parcel and the reasoning on which the appraiser's conclusion is based should be included in the appraisal report.

The extent of a condemnor's taking does not alter the standards under which the larger parcel is determined. A larger parcel determination made prior to the government's taking should be made without any reference whatsoever to the taking. The appraiser should only be concerned with contiguity, or proximity, as it relates to highest and best use, unity of ownership, and unity of highest and best use.

"It should be noted...that since unity of use is one of the elements for an integrated unit, it would not necessarily follow that a contiguous body of land in the same ownership constitutes a unit for valuation if the highest and best use for various parts are different."[58] Thus, parcels that are contiguous and under the same ownership may have independent highest and best uses. Those highest and

56. *Territory of Hawaii v. Adelmeyer*, 363 P.2d 979, 986 (Haw. 1961).

57. *Department of Public Works & Buildings v. Oberlaender*, 235 N.E.2d 5, 9 (Ill. 1968), Aff'd 247 N.E.2d 888 (1969).

58. *Uniform Appraisal Standards for Federal Land Acquisitions*, §A-13, p. 42.

best uses may be identical (e.g., single-family homesite), but if the highest and best uses of the tracts do not require a common, or integrated use, they are separate larger parcels and should be valued as such.

Proper application of the larger parcel premise can reduce the scope and complexity of the appraisal assignment. Moreover, it will often prevent misapplication of the backland theory.

Court applications of the larger parcel premise can be quite contradictory. Therefore, it is important that the appraiser fully understand the court's application of this premise in the jurisdiction where the property being appraised is located. If, after proper analysis, the appraiser concludes that the larger parcel is unquestionably that tract or tracts that are physically contiguous, are under the same ownership, and have the same existing, and highest and best, use, it is usually safe to complete the appraisal assignment without legal guidance. Under any other circumstance, however, the legal permissibility of the appraiser's larger parcel determination should be reviewed by legal counsel.

If there is a question as to the legal acceptability of the appraiser's determination of the larger parcel, the appraiser must obtain legal instructions from the appropriate attorney, with supporting citations as to the legal acceptability of such a determination. If these instructions are contrary to the appraiser's determination of the larger parcel, and the legal instructions are reasonable and supported by applicable citations, the appraiser must alter his or her determination to conform with jurisdictional law. This is the only way appraisers can fully comply with their professional obligations. The inclusion of such legal instructions in the appraiser's report is a prudent appraisal practice and is required by professional and technical appraisal standards.[39]

39. USPAP, 1994 ed., Ethics Provision (Conduct), p. 2 and *Uniform Appraisal Standards for Federal Land Acquisitions*, §C-9, pp. 95-97.