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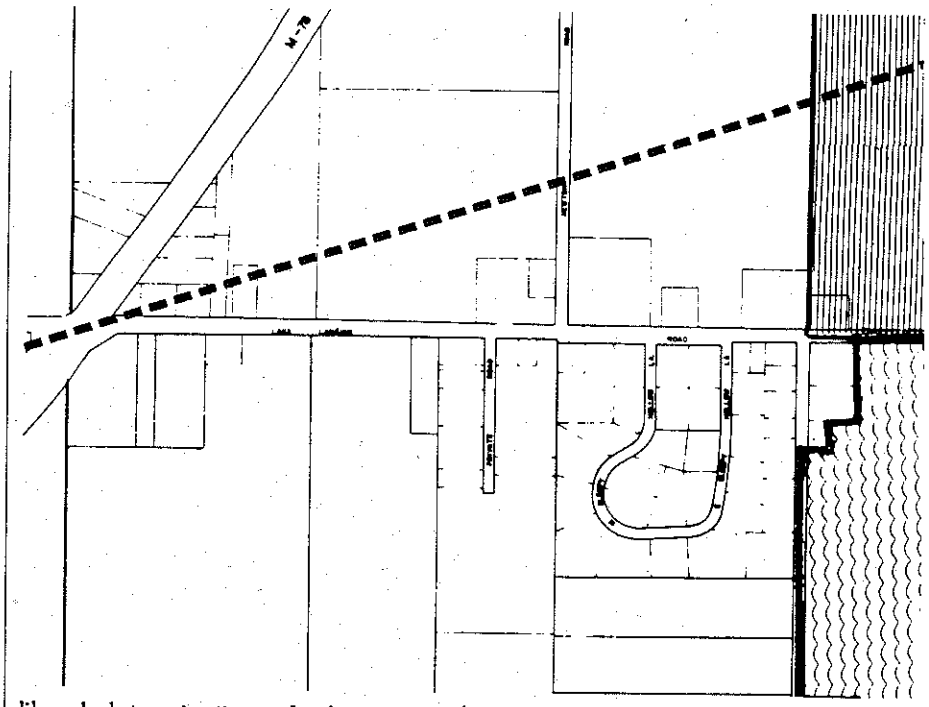

I. INTRODUCTION

Property owners who lose a portion of their land in condemnation proceedings no longer have to endure the paradox of finding themselves worse off than if the entire parcel had been taken. Thanks to a trend pioneered by the federal court system, determination of just compensation in partial taking cases has been liberalized.[1] This article examines this expansion of the allowance of remainder damages.

II. HISTORICAL PERSPECTIVES

Severance damages in partial taking cases have traditionally been premised upon three prerequisites:[2]

(1) Physical contiguity.
(2) Unity of title.
(3) Unity of use.

Precedent mandated that each of these factors be present before remainder damages would be allowed for the portion of the parcel not taken by the condemnor. A property owner would be entitled to recover damages to a portion of his/her land not taken only if the two tracts were physically connected, put to the same use, and the property interest in each was identical.

Thus, if an owner held two tracts of land separated by a street, or used one tract for farming and the other for a gas station, or maintained a tenancy on one while holding the other in fee, he/she would not be entitled to compensation for damages to the remaining parcel if only one section was taken.

Contiguity

Many jurisdictions, including the federal courts, have not placed heavy emphasis on the requirements of physical contiguity, and have therefore held that physically separate and distinct tracts of property may constitute one larger "parcel" for the purpose of determining remainder damages and ultimately, just compensation in condemnation actions.[3]

Baetjer v *U.S.* provides the foundation for the argument in support of a liberal determination of what constitutes a "parcel" in condemnation actions, for which a "before-taking" valuation might be established as part of the process of determining just compensation for the taking.[4] *Baetjer* stated:

> " . . . 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, *Powelson* v *United States*, 219 U.S. 266, 276, 63 S.Ct. 1047, 87 L.Ed. 1390; is reasonably sufficient to affect market value. *McCandless* v *U.S.*, 398 U.S. 342, 345, 56 S.Ct. 764, 765 80 L.Ed. 1205."[5]

Baetjer presaged the break, later followed by many state courts, from the three-part traditional standard for remainder damages. The *Baetjer* court recognized that distance between the tracts of land was relevant, but based its test as to whether noncontiguous parcels were a unit upon "integral use."[6]

Unity of Title

The second aspect of the traditional approach required the ownership interest to be the same on both parcels, in terms of both quality and quantity, before compensation would be allowed.[7]

In *Symms* v *Nelson Sand and Gravel*,[8] the Idaho Supreme Court held that a condemnee who had a fee interest in one property and a leasehold in another should not be barred from compensation.[9]

In *Toffolon* v *Avon*,[10] a sand and gravel company owned one property and had a lease on the second property. The owned property supported a processing plant while the leased property was being excavated for sand and gravel. The Connecticut Supreme Court held that there was a sufficient unity of ownership between the parcels to require payment of compensation.[11]

In *Guptill* v *New York*,[12] the court held that unity of title is not needed under all circumstances.

Unity of Use

The Uniform Eminent Domain Code provides one of the most liberal of all statutory constructions in determining what constitutes a "single parcel" in condemnation actions, distilling the traditional three-part approach to ▶

basically a consideration of unity of use.

Eliminating contiguity and title considerations, the United Code examines, (1) reasonable suitability and availability for use in the reasonably foreseeable future and (2) highest and best use as an integrated economic unit. [13]

In *U.S. v 3276.21 Acres of Land,* [14] the United States District Court for the Southern District of California held that the possibility of intended future joint use of properties under different ownership at the date of taking may be enough to affect market and allow for payment of just compensation for damage to the remainder. The decision seems to extend the possibility of just compensation much futher than that contemplated even under the Uniform Eminent Domain Code. [15]

III. THE APPROACH IN MICHIGAN

In *State Highway Commissioner v Snell,* the Michigan Court of Appeals followed the more liberal approach to just compensation in approving the logic of 27 Am Jur 2d Eminent Domain §315, which provides in part:

> **"It is a fundamental principle that where a portion of a parcel of land is taken for the public use, the owner is entitled to recover for the injury to the remainder of that parcel only, and cannot recover for injury to separate and independent parcels of land which he may happen to own in the same neighborhood. According to the prevailing view, in determining what constitutes a separate and independent parcel of land, when the property is actually used and occupied, unity of use is the principal test, and if a tract of land, no part of which is taken, is used in connection with the same farm, or the same manufacturing establishment, or the same enterprise of any other character as the tract, part of which was taken, it is not considered a separate and independent parcel merely because it was bought at a different time, and separated by an imaginary line, or even if the two tracts are separated by a highway, street, alley, railroad, or canal or other body of water." [16]**

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Although the *Snell* reference to Am Jur supports the premise that unity of use will be considered the most relevant of factors, the decision itself leaves open the relevancy of contiguity.

However, the contiguity requirement has been eliminated legislatively in Michigan by the Uniform Condemnation Procedures Act, Public Act 87 of 1980 (MCLA 213.51 *et seq,* MSA 265 *et seq.*) Analysis of the Act reveals that:

> **" 'Parcel' means an identifiable unit of land, *whether physically contiguous or not,* having substantially common beneficial ownership, all or part of which is being acquired, and treated as separate for valuation purposes." (emphasis supplied) [17]**

Similarly, "owner" is broadly defined to include anyone with any "estate, title, or interest, including beneficial, possessory and security interest" in the property being taken. [18] Further, "property" encompasses everything from land and structures to hereditaments to intangible items, whether real, personal or mixed. [19]

Thus physical contiguity and variations in title are legislatively precluded from ever entering into the determination of whether to allow remainder damages in partial takes. This statutory development echoes the judicial concept of "indemnification" in condemnation cases: Property owners are to be left in as good a position after the taking as they would have been had the taking not occurred. [20]

Coupled with the "indemnification" principle, the test for remainder damages has become basically one of "common beneficial ownership," and requires presentation of the issue to the trier of fact after even the most minimal showing of unity of use between the property taken and the severed remainder. [21]

The majority rule on remainder damages treats the issue as one of fact, to be presented to the trier of fact once nonspeculative evidence is properly entered. [22] This contrasts with the rule in some jurisdictions, such as California, where the judiciary has maintained that the state's statutory framework makes these damages a legal issue, not a factual issue. [23]

With respect to the level of evidence needed to persuade the trier of the issue, in jurisdictions which have a burden of proof in condemnation actions, [24] the burden has generally fallen on the condemnee to show that the property taken and the remainder constitute a single unit. Requiring the condemnee to carry the burden with respect to unity is consistent with some jurisdictions' corresponding burden to prove damages to the remainder.

In Michigan, there is *no* general burden of proof in condemnation cases. [25] However, with respect to partial takings, condemnors have the only statutorily explicit burden of proof, when they claim enhancement to the remainder. [26] In the past, condemnees may have had a requirement of persuasion when asserting unity and remainder damages. [27]

The clear implication from the silence of Act 87 is that the condemnee has no such burden and is entitled to take his/her claim for damages to the trier of fact.

IV. CONCLUSION

Courts across the country have generally modified the traditional tripartite test for determining whether to allow remainder damages, and increasingly rely on the concept of unity of use. This liberal trend is especially exemplified in Michigan, where the test has been streamlined to one of "common beneficial ownership." This may represent the most liberal rule in the entire United States. ■

Footnotes

1. In Michigan these developments are noted (in part) in Standard Jury Instruction 90.12:

   "This case involves what is known as a

'partial taking;' that is to say, the property being acquired by the City of Detroit is part of a larger parcel under the control of the owner.

"When only part of the larger parcel is taken, as is the case here, the owner is entitled to recover not only for the property taken, but also for any loss in the value of his or her remaining property.

"The measure of compensation is the difference between (1) the market value of the entire parcel before the taking and (2) the market value of what is left of the parcel after the taking."

2. *People ex rel. Department of Public Works v Fair*, 43 Cal Reporter, 644, 229 Cal App 2d 801 (1964). See also *County of Cook v LaSalle National Bank*, 274 NE2d 919, 1 Ill App 3d 579 (1971) (must be common ownership and contiguous to be considered a parcel for valuation purposes); *Verzani v State*, 195 NW2d 762, 188 Neb 162 (1972) ("owned by same proprietor, contiguous to the land taken, and devoted to the same use"); *Smith v State of Tenn*, 526 SW2d 104 (1974).

3. *Baetjer v U.S.*, 143 F2d 391; (1944);

Essex Storage v Victory Lumber, 108A 426 (1919); *City of Los Angeles v Wolfe*, 491 P2d 813, 99 Cal Rptr. 21 (1971).

4. Per the instruction set forth in Footnote 1, supra, compensation is assessed at the difference between the value of the entire "combined parcel" (as enhanced by the "combination") and the value of the remainder (as diminished by severance from the whole).

5. 143 F2d 391, 295.

6. "Integrated use, not physical contiguity, therefore is the test. Physical contiguity is important, however, in that it frequently has great bearing on the question of unity of use. Tracts physically separated from one another frequently, but we cannot say always, are not and cannot be operated as a unit, and the greater the distance between them, the less is the possibility of unitary operation, but separation still remains an evidentiary, not an operative fact, that is, a subsidiary fact bearing upon but not necessarily determinative of the ultimate fact upon the answer to which the question at issue hinges," 143 F2d at 395.

7. *U.S. v Honolulu Plantation*, 182 F2d 172 (9th Cir. 1950). "Before-after" rule, supra, applies only to fee simple ownership of tracts involved. The fear discussed in *Honolulu Plantation* (" . . . if compensation were not limited to owners of interests in property condemned, the sovereign, in taking property for public use, would be subjected to limitless claims of inconveniences, business loss and damage to prospects yet unborn," 182 P2d at 175) is diametrically opposed to the basic constitutional requirement of just compensation for damages created by condemnation.

8. 468 P2d 306, 93 Ida 558.

9. " . . . as long as the same person has an ownership interest in each of two tracts, he need not have the same quantity or quality of estate in each tract to claim severance damages. *Chicago and Evanston Railroad v Dresel*, 110 Ill. 89 (1884); *People v Hemmerling*, 58 Cal Rptr. 203 (1967); *State v Carrow*, 14 P2d 891 (1941)." *Symms*, 468 P2d at 312.

10. 378 A2d 580, 173 Conn 525 (1977).

11. "This court has recognized that an individual is entitled to compensation for 'every kind of right or interest in property which has a market value,' *Canterbury Realty v Ives*, 216 A2d 426, 430, including a lease, *Siavitt v Ives*, 303 A2d 13. Though some courts have indicated that a person seeking severance damages must have the same quantity or quality of interest or estate in both tracts, *U.S. v Honolulu Plantation*, 182 F2d 172, the more reasonable view seems to be that as long as the same person has some compensable ownership interest in two tracts, he need not have the identical quantity or quality of interest in each. *Symms. v Nelson Sand and Gravel*, 468 P2d 306." *Toffolon*, 378 A2d at 587.

12. 261 NYS2d 435 (1965). ". . . [T]he paramount constitutional requirement of just compensation must be allowed to prevail over the niceties of legal title advanced by the State." *Guptill*, supra, at 437. See also *Arizona State Land Dept. v State*, 547 P2d 479 (1976), citing *State v Carrow*, supra. "Severance damages may be awarded while title to the property varies both in quality and quantity, provided the property is held and used by one party for a common purpose." 547 P2d at 482. This rule has been extended even farther in New York, where consequential damages were allowed to tenants based upon the taking of a separate tract of the fee-holder, which had a use integrated with the tenants.' *DiBacco v New York*, 363 NYS 2d 121, 123 (1975).

13. Entire Property:
"For the purpose of determining compensation under this Article, all parcels of real property, whether contiguous or noncontiguous, that are in substantially identical ownership and are being used, or are reasonably suitable and available for use in the reasonably foreseeable future, for their highest and best use as an integrated economic unit, shall be treated as if the entire property constitutes a single parcel. Any issue arising under this section shall be decided by the court [trier of fact]." Uniform Em. Dow. Code # 1007.

14. " . . . where parcels are held in different ownership at the date of taking, the proof of the use of such lands in combination or with other lands is not excluded, 'if the possibility of such combination is reasonably sufficient to affect market value,' " *McCandless v United States*, 1934, 298 US 342, 56 S.Ct. 764, 80 L.Ed. 1205; citing *Olson v United States*, 1934, 292 US 246, 54 S.Ct. 704, 78 L.Ed. 1236; and *United States ex rel. Tennessee Valley Authority v Powelson*, 1942, 319 US 266, 63 S.Ct. 1047, 87 L.Ed. 1390, the court determined that the 'reasonable probability' of unitization or use of parcels in combination is a question of fact to be presented to the jury or the trier of fact. 194 F. Supp at 298. In *U.S. v 429.59 Acres of Land (1980)*, 612 P2d 459, the court stated:

As the Supreme Court stated in *United States v Miller, supra*, 376 U.S. at 376, 63 S Ct at 281:

"[A] parcel of land which has been used and treated as an entity shall be so considered in assessing compensation for the taking of part or all of it. The fact that land thus treated is owned by different entities does not destroy the unity concept. *(Olson v United States*, 292 U.S. 246, 256, 54 S.Ct. 704, 709, 78 L.Ed. 1236 (1934) ("The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value.")." 612 F2d at 464.

15. See Footnote 13 supra.

16. 8 Mich App 299, 308, 154 NW2d 631 (1967).

17. MCLA 213.51(f), MSA 8.265(1)(f).

18. MCLA 213.51(e), MSA 8.265(1)(e).

19. MCLA 213.51(h), MSA 8.265(1)(h).

20. *In re Grand Haven Hwy.*, 357 Mich 20, 97 NW2d 748 (1959); See also SJI 2d 90.05, "Just Compensation — Definition."

21. Once there is a genuine issue of material fact upon which reasonable minds might differ, the issue should be presented to the finder of fact and a determination be made thereon. GCR 1963, 117. Note also approach of *Arkansas Highway Commission v Schanbeck*, 240 Ark 277, 97 SW2d 897 (1966) which approved the use of a special jury interrogatory asking it to find whether the owner has proven by a preponderance of the evidence the unity issue.

22. *Symms v Nelson Sand Gravel*, supra; *U.S. v 658.59 Acres*, 224 F. Supp. 645 (1963); *Arkansas State Highway Commission v Vaught*, 401 SW2d 553 (1966); *Ives v Kansas Turnpike*, footnote 24 below; *Hawaii v Adelmeyer*, 45 Haw. 144, 363 P2d 979 (1961); *McCandless v U.S.*, supra (evidence for consideration of trier of fact, exclusion prejudicial); *U.S. v Honolulu Plantation*, supra. Note that per FRCivP 71A (h), the trier of fact may nearly always be the judge, who would instruct the jury as to the effect of his decision upon its determination of just compensation.

23. *People v Fair*, supra, at 804; *Oakland v Pacific Coast Lumber Mill Co.*, 171 Cal 392, 153 P 705 (1916).

24. In *Housing Authority v Norfolk Realty*, 364 A2d 1052, 71 NJ 314 (1976), the New Jersey Supreme Court noted that the burden of showing the severed part of a parcel as part of a single economic unit is on the owner. In *Ives v Kansas Turnpike Authority*, 334 P2d 399, 407, 184 Kan 134 (1959), the Kansas Supreme Court stated:

"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."

25. SJI 90.03, Comment.

26. MCLA 213.73(4), MSA 8.265(23)(4).

27. SJI 90.03, Comment.