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EMINENT DOMAIN: COMPENSATION FOR PARTIAL TAKING OF FARM LAND IN CONSTRUCTING LIMITED-ACCESS HIGHWAYS

INTRODUCTION

The concept of the limited-access highway has arisen as a partial answer to the needs of a modern "generation on wheels." This type of highway, sometimes called the "freeway" or "parkway," is designed especially for through traffic, with either limited or no access to abutting landowners, and few, if any, cross streets. Recognizing the need for highways of this type, the federal government has appropriated money to aid the states in the construction of limited-access highways. This proposed network of new highways has been officially christened the Interstate Highway System. As part of this system, Minnesota can build 937 miles of limited-access highways in the next thirteen years.

The nature and purpose of a limited-access highway require that it be constructed in rural areas and that towns and cities be by-passed. This construction plan can be of considerable import to the farmer. As an example, if twenty acres of a 200 acre farm are condemned for the highway, the farmer will not only lose the use of those twenty acres, but his farm may be completely severed, with ninety acres left on each side of the highway. If he has no direct access from one ninety acre tract to the other, he may not be able to use both tracts as one farm unit. In turn, his buildings may be too large and he may have too much machinery for the reduced size of his available farm acreage.

Though the situation may look dismal to the farmer, he will not be left without some compensation for his loss. However, determi-

3. Ibid.
4. Interview with Ward Gronfield, attorney, Minnesota Highway Department, Feb. 21, 1957.
5. Minnesota's Interstate Highway is proposed to by-pass all cities except Minneapolis, St. Paul, Duluth, and possibly Fargo-Moorhead. Interview with Ward Gronfield, attorney, Minnesota Highway Department, Feb. 21, 1957.
6. The highway department will condemn a right-of-way with an average width of approximately 300 feet. This means that approximately thirty-seven acres per mile of highway will be taken. Interview with Ward Gronfield, attorney, Minnesota Highway Department, Feb. 21, 1957.
7. The average acreage on Minnesota farms in 1954 was 195 acres, with 120,100 out of 165,200 farms in the 100 to 500-acre class. Engene, Minnesota Farms Are Getting Larger, Minnesota Farm Business Notes, Aug. 27, 1956, p. 3.
nation of the amount of his compensation raises many problems. Somewhat analogous problems have arisen in the past in determining compensation for the taking of land and legal rules have been developed in attempt to solve them. This Note will re-evaluate those rules to determine their applicability to the problems presented in compensating for the condemnation of farm land for limited-access highways.

**The Compensation Requirement**

Although almost every state constitution, as well as the Federal Constitution, requires that "just compensation" be given when land is condemned for public use, these provisions become meaningful only through judicial interpretation. As the condemnation situations become more complex, the judicial application of the just compensation provisions becomes more difficult. Before consideration of the problems presented in compensating for the taking of farm land for limited-access highways, a few general considerations are in order.

### A. Market Value

Two concepts of value have been rejected and one generally accepted as the measure of just compensation. First, "value of the land to the taker" has been rejected since it would depend on the need of the condemning authority. If value to the taker were used to determine the amount of compensation, the price of the land might be raised far beyond what the landowner could receive from any other purchaser on the open market. Secondly, "value of the land to the owner" has generally been rejected since it might mislead the jury into compensating for such intangibles as sentimental attachment, and could make the cost of new highways prohibitive.

"Market value" is the generally accepted measure of just compensation. Broadly defined, market value is that price which would be determined in negotiations between a seller who is willing but not obligated to sell and a buyer who is willing but not obligated to buy. The market value of the property would be determined under normal market conditions. The market value of the property is the highest price that a willing buyer would be willing to pay for the parcel of land in its present condition and the highest price that a willing seller would be willing to accept for the parcel of land in its present condition.

8. *E.g.*, Mich. Const. art. 13, § 1; Minn. Const. art. 1, § 13; N.Y. Const. art. 1, § 7; Ohio Const. art. 1, § 19.

9. U.S. Const. amend. V.

10. Jahr, Eminent Domain: Valuation and Procedure § 68 (1953) (hereinafter cited as Jahr); 4 Nichols, Eminent Domain § 12.21 (3d ed. 1951) (hereinafter cited as Nichols). However, the land's special adaptability for highway purposes may be taken into consideration. See In the Matter of Superintendent of Highways, 193 Misc. 617, 84 N.Y.S.2d 78 (County Ct. 1948).


12. Jahr § 70; 4 Nichols § 12.2; 1 Orgel, Valuation Under Eminent Domain § 17 (2d ed. 1953) (hereinafter cited as Orgel).
Though the market value test may be harsh as applied in some situations, if it is applied liberally, rather than strictly, it will be in most cases an adequate and workable measure of just compensation.

B. Noncompensable Injuries

Adherence to the concept of market value of the property taken as the measure of compensation would seemingly exclude from the determination of market value those losses of the landowner which do not affect market value. But this is not the distinction that has been used to draw the line between compensable and noncompensable losses. Instead, the courts will hold that a particular loss is not to be considered in determining market value on the grounds that the injuries are either: too speculative; a personal loss as distinguished from a property loss; not different from the loss suffered by the public in general; or not resulting from the use of property taken from the complaining landowner, but from the use of property taken from others.

On the facts of some of the cases involving non-compensable injuries, the court could have arrived at the same result by reasoning that the particular loss did not affect market value of the property taken. Thus, where a farmer claims a loss because of his sentiment,13 though the market value test may be harsh as applied in some situations, if it is applied liberally, rather than strictly, it will be in most cases an adequate and workable measure of just compensation.14


14. For example, in the midwest dairy area there is little demand for small farms because economic developments are pressing for large farms. Interview with Dr. Philip Raup, professor, Department of Agricultural Economics, University of Minnesota Institute of Agriculture, March 9, 1957. In this situation, when the farm is condemned and compensation is based on market value, the award may be much less than the actual capital investment of the farmer.

15. For an exhaustive discussion and citation of cases on the admissibility of evidence to determine market value, see 5 Nichols §§ 18.4 (opinion evidence); 19.1, 19.3 (income); 19.2 (rent); 20.1, 20.2 (costs); 21.2 (sales of the property itself); 21.3 (sales of similar property); 21.4 (offers). See also Jahr §§ 132-58.

16. E.g., Miller v. United States, 137 F.2d 592 (3d Cir. 1943) (mental hazard); Housing Authority v. Green, 200 La. 463, 8 So.2d 295 (1942) (loss of music pupils, inconvenience); Texas Pipe Line Co. v. Hildreth, 225 S.W. 583 (Tex. Civ. App. 1920) (possibility of contamination of water by oil, and frightening of cattle because of inspection crews).


19. E.g., City of Crookston v. Erickson, 244 Minn. 321, 69 N.W.2d 909 (1955); Lewisburg & N.R.R. v. Dudley, 161 Tenn. 545, 30 S.W.2d 278 (1930) (damages resulting from use of a train on property taken from others held not a part of compensation for property taken from condemning party).
mental attachment for a farm which has been in the family for generations, a court will say that this is too speculative a loss to be considered in the determination of market value. The court could have said that sentimental attachment is not a factor which affects the price which purchasers on the open market would pay for the land.\textsuperscript{20}

In other cases, the loss appears to be one which affects market value; however, the courts do not consider it in determining market value. For example, most courts do not consider loss of goodwill on the ground that this is a personal rather than a property loss.\textsuperscript{21} Yet, in private negotiations, goodwill is often a factor in determining the selling price of the property.

In searching for a justification for this seemingly arbitrary labeling, which constitutes a departure from market value as a test, one comes across the oft-quoted statement in the cases that “the award must be fair to the condemnor as well as to the condemnee.”\textsuperscript{22} In effect, the court is saying that “if we compensate for this type of injury, the cost of public improvements would come too high.” With thousands of acres of land to be condemned for the Interstate Highway System, it may be well for the courts to re-examine their reasons for not compensating for an injury suffered by the landowner, in order to avoid the possibility of a rather arbitrary disallowance of compensation merely to save the public a few dollars.\textsuperscript{23}

\section*{Partial Taking}

When only part of a landowner’s property is condemned, the courts have universally held that the constitutional requirement of just compensation means that compensation must be given for

\textsuperscript{20} As was mentioned previously, after the farm is severed by the limited-access highway, the farmer’s machinery may have too large a capacity for the now available farm acreage. This may be an example of a loss which would be considered a personal loss and therefore noncompensable. However, the real reason it may be noncompensable is that this loss would have no effect on market value. On the other hand, if the machinery is of the type which is ordinarily sold with the land, the loss may decrease the market value of the land, and the landowner should be compensated. This is similar to the distinction made, in considering removal costs, between fixtures and personal property. See, \textit{e.g.}, United States v. 40.558 Acres of Land, 62 F. Supp. 98 (D.Del. 1945); Kansas City So. Ry. v. Anderson, 88 Ark. 129, 113 S.W. 1030 (1908).


\textsuperscript{22} \textit{E.g.}, Wilmington Housing Authority v. Harris, 47 Del. (8 Terry) 469, 93 A.2d 518 (Super. Ct. 1952).

\textsuperscript{23} For an extensive treatment of the points raised in this section, see Orgel §§ 66-80.
damages to the remainder as well as for the part taken. These damages are measured by the reduction in market value of the remainder and are therefore distinguishable from those noncompensable injuries considered in the preceding section which have no affect on market value either of the part taken or of the remainder.

A. Severance Damages

The taking of a strip of land through the middle of a farm may leave the condemnee with two tracts partially or completely severed. This loss of access from one tract to the other is termed "severance damage" and is measured by the reduction in market value of the two tracts as a unit. Three requisites to recovery of severance damages have been developed by the courts: 1) unity of ownership; 2) contiguity of the severed parcels; and 3) unity of use.

Unity of ownership

The most apparent reason for the unity of ownership requirement is that contiguous tracts of land, used as a unit, but owned by different persons, will probably not be sold as a unit, even though the market value of the two tracts sold as a unit would be higher than that of the tracts sold separately. Therefore, the severance of the two tracts does not constitute a loss to the landowners. They can still sell their tracts individually as they would have done before the severance.

The courts have been strict in applying the unity of ownership requirement. For example, where a man and his wife owned one tract of land as tenants by the entirety and the wife owned another tract in fee, both contiguous and used as one farm, it was held that severance damages could only be awarded for injury to the remainder of the tract from which a strip was taken. In this case the two


26. See the discussion on injury to "use value" of the land, pp. 119-20 infra.


tracts had been used as one farm unit and would undoubtedly have been sold as a unit by the husband and wife, if and when they did decide to sell. The now severed parcels would bring a lower price on the market than the two tracts sold as a unit before condemnation; yet, no compensation was given for this reduction in market value of the farm unit.

A "dead hand" application of the unity of ownership requirement can produce results such as that illustrated by the case above. This result seems inconsistent with the reason for the requirement. Perhaps the requirement should be rephrased to take into account those situations where two or more tracts of land, owned by more than one person, would almost certainly have been sold as one contiguous unit. One court has made an exception to the unity of ownership requirement and allowed severance damages when several contiguous tracts of property were owned by different people but governed by a contract for joint use.31 Another exception should be made where two tracts, contiguous and used as one unit, are owned by closely related persons, such as husband and wife.

Contiguity of severed parcels

Some courts have recognized the possible inequity which could result if the requirement that the severed parcels must have been contiguous to one another is applied too strictly. Those courts have said that when two parcels of property are so inseparably connected in use that the injury or destruction of one must necessarily injure the other, a physical connection is not necessary and severance damages will be given if the condemnation now prevents use of the severed parcels as one unit.32 Thus tempered, the contiguity requirement seems to be a reasonable means of rejecting spurious claims.

Unity of use

The unity of use requirement should also be applied with one eye on the result. For example, a tract of land may be owned by one person but rented as two separate farms. Although the tract is not used as a single unit, it could be sold as a unit. When part of the property is taken for a limited-access highway, the landowner suffers a loss since the severed parcels may not now be sold as a unit. The fact that the landowner is not using his land as a unit should

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make little difference if the land could be sold as a unit for a higher price than as severed parcels.  

B. The Problem of Access

When a limited-access highway is constructed through a farm, the farmer may lose access not only to other parts of his land but also to the highway.  This loss, like severance damage, is measured by the reduction in market value of the remainder.

**Historical background**

Since the Interstate Highway System is to be of the limited-access type, with the states doing most of the actual condemning of land, state provisions for acquisition of easements of access become increasingly important. In understanding and evaluating these state provisions some historical background of access rights is helpful.

Before the development of the automobile, most roads were built mainly to give abutting landowners access from their property to neighboring farms, markets, and churches. The roads were financed solely by the abutting landowners. In a very real sense these landowners owned the road, though the public was allowed to use it. As owners, they had a right of access to the road from any part of their property.

Today, our highways are financed by the taxpayers generally or by motor-vehicle-users; yet, the law of access rights has not undergone any significant changes. The abutting landowner still has a right of access to the ordinary highway and this right is still recognized as a property right, rather than as a revocable license.

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33. For further treatment of the point, see the discussion on injury to "use value" of the land, pp. 119-20 infra.

34. For a discussion of the problems presented in this section, see Cunyngham, The Limited-Access Highway from a Lawyer's Viewpoint, 13 Mo. L. Rev. 19, 37 (1948).


36. The Federal-Aid Highway Act of 1956, 70 Stat. 381, 23 U.S.C.A. § 159 (Supp. 1956), provides for federal condemnation and reconveyance to the states of rights of way if the Secretary of Commerce decides that the state is unable to acquire the necessary "lands or interests in lands (including within the term 'interests in lands' the control of access thereto from adjoining lands')" required for the Interstate Highway System, or cannot acquire these rights of way promptly.

37. See Cunyngham, supra note 34, at 31-32.

from the state. Even though the landowner, as an abutter, has contributed nothing to the construction and maintenance of the highway, he is given a right of access to the highway for which he must be compensated when that right of access is condemned. Whether or not there is a present day justification for this result will be discussed later in this section.

**New location or old**

A limited-access highway may be established in one of two ways. It may be constructed in a new location where no highway previously existed, or it may be created out of an existing highway.

The prevailing view is that when a limited-access highway is constructed where no highway existed, the abutting landowners should not be compensated for loss of access since they previously had no access. On the other hand, it could be argued that an abutting landowner has a right of access to a limited-access highway in a new location just as he would have had a right of access had this been an ordinary highway. An abutting landowner, therefore, should be compensated for the loss of that right. For those who prefer form to substance, this argument may be appealing. Legalistic reasoning aside, it is difficult to escape the conclusion that an award of damages in this situation would be a pure windfall to the abutter, since loss of access would not reduce the present market value of his abutting property. Rights of access were never considered in the market value of the property before construction of the

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39. A right of access may be restricted or destroyed completely without compensation through the exercise of the state's police power. See, e.g., Carazalla v. Wisconsin, 269 Wis. 593, 71 N.W.2d 276 (1955). The limitations on the use of this power, however, make it of little value to the state in a large scale highway construction program. For discussion of the police power, see Clarke, *The Limited-Access Highway*, 27 Wash. L. Rev. 111, 119-22 (1952).

40. See p. 114 infra.


The Minnesota Supreme Court has not as yet ruled on the question. A legislative determination of the question was offered by the proposed Minnesota Limited-access Statute, H.F. No. 57, § 3, Intro. Jan. 16, 1957, which provided that "no right of access shall vest in any property abutting upon any portion of any trunk highway established . . . after July 1, 1957 . . ." unless the commissioner of highways permitted a right of access. However, this section was excluded from the final version of the statute. See Minn. Stat. Ann. §§ 161.415-.416 (Supp. 1957).

42. The court in Burnquist v. Cook, 220 Minn. 48, 19 N.W.2d 294 (1945), in speaking of an ordinary highway, said that, "the creation of a public highway at the same time subordinates the land on which it is established to the easement of access insofar as abutting landowners are concerned. . . ." Id. at 54, 19 N.W.2d at 397.
new highway, so the abutter has suffered no loss. It may be ventured that few, if any, courts will adopt the formalistic argument which would be so costly to the state.

A different problem arises when an existing highway is converted into a limited-access highway. Here, the abutting landowner clearly has a right of access (whether or not he has made use of that right) which is taken from him. The courts have unanimously held that in this situation the abutting landowner must be compensated. The opposing argument, referring back to the historical introduction to this section, is that an abutting property owner has no "constitution-given right" to demand compensation for loss of access. When the highway was built the abutting landowner was given the right of access without paying for it. The state, which gave him the right of access, should not now be required to compensate him for taking it away. However, this argument ignores rather important factors. Most landowners whose lands abut the highway have expended money in reliance on the existence of access rights when they purchased their property or when they subsequently made improvements. In essence, the abutter has an executed license. If, as one noted authority in the field of property has argued, an executed license is really an easement, the courts may not be too far off base in calling a right of access a property right. As a property right, the right of access should be compensated for when taken.

Arguing from the concept of market value, these rights of access were considered in the market value of the property before condemnation. The loss of these rights will decrease the market value of the property and therefore compensation should be awarded.

43. Prior to a taking it must be established that the state has the power to acquire rights of access by condemnation. Many states have adopted statutes expressly authorizing condemnation for limited-access highways, including acquisition of access rights. E.g., Ky. Rev. Stat. Ann. §§ 177.230-270 (Baldwin 1955); Mich. Comp. Laws §§ 252.51-55 (1948).

In the absence of a statute, it has been held that the general power of condemnation does not include the power to condemn rights of access possessed by the abutting owner on an existing highway. State v. Superior Court, 33 Wash.2d 638, 206 P.2d 1028 (1949). Contra, Burnquist v. Cook, 230 Minn. 48, 19 N.W.2d 394 (1945).

44. E.g., Bacich v. Board of Control, 23 Cal.2d 343, 144 P.2d 818 (1943); Standiford Civic Club v. Commonwealth, 289 S.W.2d 498 (Ky. 1954); Burnquist v. Cook, 220 Minn. 48, 19 N.W.2d 394 (1945); Neuwiler v. Kauer, 62 Ohio L. Abs. 536, 107 N.E.2d 779 (Ct. C.P. 1951).

45. See Cunyngham, supra note 34, at 32-33.

46. See Clarke, Covenants and Interests Running with Land 46-51 (1929).

47. Id. at 47.

48. See note 38 supra.

49. All state constitutions require compensation for property taken for public use. E.g., Minn. Const. art. 1, § 13.
Service roads

Whether the limited-access highway is established in a new or old location, the state may build service roads to give the abutting landowners an indirect access to the main thoroughfare. If the limited-access highway is built in a new location, the state’s construction of service roads is a gift to the abutting landowners. Before the establishment of the highway they did not have rights of access and now they have at least an indirect access.

Once again, a wholly different problem arises where an ordinary highway is converted into a limited-access highway. In this case, even though the state builds a service road, the abutting landowner will lose his former direct access to the highway. This loss may be substantial. The problem becomes one of formulating a rule of compensation which recognizes the damage which may be caused by loss of direct access and also recognizes that the construction of a service road may mitigate and sometimes eliminate those damages.

A verbal formula adopted by some courts is that “compensation is not to be given for mere circuity of travel.” However, the application of this test may misguide the jury into totally disallowing compensation merely because a service road has been constructed. The test is objectionable because of its “black or white” approach to the problem: has a service road been constructed? If so, no compensation is awarded since the only damage to the abutter is that now he must travel further to reach the main thoroughfare. Thus, under this test, if a small one-lane gravel road is constructed as a service road, the abutter may receive no compensation even though he formerly had direct access to a paved highway, and even though his loss of direct access substantially affects the market value of the property. In short, the test fails to emphasize the adequacy of the substituted means of access.

A better rule was announced by the California court in People v. Ricciardi. The court in that case held that access damages would be allowed, even though the state had built a service road, if the abutter’s access rights were substantially impaired. The

50. One whose land did not abut the highway before it was converted to a limited-access highway is not entitled to compensation even though he now must travel further to reach the highway. E.g., Schneider v. State, 38 Cal. 2d 439, 241 P.2d 1 (1952). The announced reason for this result is that such a landowner never had direct access to the highway. But this simply restates the rule. It would appear that the real reason for not compensating the injured landowner in this situation is that to do so would make the cost of new highways prohibitive.


52. 23 Cal.2d 390, 144 P.2d 799 (1943).
phasis in this case was on the adequacy of the service road. This rule recognized both aspects of the problem: 1) that it is necessary to mitigate damages when a service road is constructed so that the building of such roads by the state will not be discouraged; and 2) that to totally disallow compensation if any kind of service road is constructed may be a "taking of property without compensation."

C. Measure of Damages

All courts attempt to give an award which will include compensation both for that part of the property actually taken and for injuries to the remainder. In order to arrive at that result, the courts have developed two verbal formulas: 1) value of the part taken plus damages to the remainder; and 2) market value of the whole property before and after the taking. The first formula considers damages to the remainder separately, whereas the second formula lumps together both value of the property taken and damages to the remainder.

Although theoretically there should be no difference in the award using either formula, practically, different results may be reached since one formula may be less confusing than the other for the jury to apply. In the following two sections a few of the improper applications of the formulas will be discussed.

Value plus damages

In some jurisdictions the jury will be instructed that they are to find: first, the value of the property actually taken; and second, the amount of damages to the remaining property. The jury is further instructed that damages to the remainder are to be determined by the difference between the market value of the remainder before and after the part is taken.

However, since the narrow strip taken for a limited-access highway may have little value in itself but great value as part of the

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53. The construction of a service road is not mandatory. Neuweiler v. Kauer, 62 Ohio L. Abs. 536, 107 N.E.2d 779 (Ct. C.P. 1951). As a practical matter, however, service roads will be constructed if they substantially mitigate damages. Interview with Ward Gronfield, attorney, Minnesota Highway Department, Feb. 21, 1957.

54. For a comparative analysis of the two formulas see, United States v. Indian Creek Marble Co., 40 F. Supp. 811 (E.D. Tenn. 1941); People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943).


property to which it is attached, many courts also instruct a jury that they are not to consider the part taken separately but rather in its relationship to the rest of the tract. Such instructions may be confusing to the jury. In determining the value of the part taken, they may use depreciation in market value of the whole property due to the taking. Then in determining damages to the remainder, they may include the same elements as were included in deciding the value of the part taken, in effect awarding double damages.

For example, the jury may determine the value of 10 acres taken from a 100-acre $50,000 farm to be $7,500, basing their decision on the decrease in value of the farm to $42,500 after the severance of the 10 acres. In determining severance damages, the jury could then decide the value of the remainder before the severance was $45,000, basing this decision on an average of $500 an acre, and award remainder damages of $2,500 ($45,000 value of remainder before, less $42,500 value of remainder after). This would make the final award $10,000, while the farmer would only have suffered a $7,500 injury as a result of the condemnation.

The jury could have arrived at the correct figure by valuing the part taken at $5,000 (average of $500 per acre for 10 acres), then deduct that figure from the value of the property before ($50,000) to get a remainder-before value of $45,000. The severance damages could then be determined by deducting the market value of the remainder after severance ($42,500) from the market value of the remainder before severance ($45,000), making the ultimate award $7,500 ($5,000 value of part taken, plus $2,500 severance damages).

In the example given above, the jury was confused by instructions designed to correct the seemingly unrealistic idea of valuing the part taken separately from the rest of the tract. The danger that such confusion will occur is real enough to demand a more simplified formula with less need for elaborating instructions.

**Market before and after**

Some courts will instruct a jury that in determining the amount of compensation they should take the difference between the market

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58. See, *e.g.*, Department of Pub. Works and Bldgs. v. Griffin, 305 Ill. 585, 137 N.E. 523 (1922) (where it appears that double damages were awarded). See also, *e.g.*, State v. Carpenter, 126 Tex. 604, 89 S.W.2d 194 (1936) (where the award was invalidated because double damages had been given).

59. For further discussion of the problem of confusing instructions in the value plus damages formula, see 1 Orgel § 52.
value of the whole property before and after the taking. With this instruction, the jury need not bother with the problem of valuing the part taken separately from damages to the remainder. In the illustration given in the preceding section, the jury would merely deduct $42,500 (value of the land after condemnation) from $50,000 (value of the land before condemnation). It is obvious that this formula is easier to apply and is not as confusing as the value plus damages formula, and perhaps for this reason many courts have adopted it.

This formula, however, may allow a set-off for special benefits in states which do not normally allow such a set-off, or may result in a double set-off in states which do allow a set-off for special benefits. In all states, general benefits may be considered under this formula. As an example of a double set-off of special benefits, when a limited-access highway is constructed, it may provide a condemnee with better drainage facilities. This is a special benefit which in some states may be set off from the award. Better drainage facilities would necessarily increase the market value of the property thus decreasing the difference between market value of the property before and after condemnation. The condemnee's award would therefore be lessened. If the value of the special benefit is then set-off from the already reduced award, the condemnee is twice cursed. This defect should be remedied with proper instructions.

Since a landowner whose property is condemned is not in the position of an ordinary seller and cannot take precautions with respect to the use to which the buyer intends to put the land, it is important that the use the condemnor intends to make of the condemned property be considered in awarding compensation for injuries to the remainder. Recognizing this, courts hold that the use for which the parcel is taken must be considered in the award. However, some courts state merely that the measure of compensation is the market value of the whole property before and after the

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60. E.g., In re Improvement of Third St., 177 Minn. 159, 225 N.W. 92 (1929); Kamo Elec. Cooperative v. Baker, 287 S.W.2d 858 (Mo. 1956).
61. See, e.g., People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943).
62. See, e.g., State v. Reid, 204 Ind. 631, 185 N.E. 449 (1933) (good discussion on treatment of benefits in the various states).
63. For discussion on rules as to set-off of special benefits in each jurisdiction, see 3 Nichols § 8.6211.
64. General benefits are not allowed to be set off or considered. See, e.g., In re Improvement of Third St., 177 Minn. 159, 225 N.W. 92 (1929). General benefits are distinguished from special benefits in that the former benefit the public in general, whereas special benefits are peculiar to the condemnee's land.
With this instruction a jury may fail to consider the prospective public improvement to be placed on the condemned property. Properly, some courts state that the measure of compensation is the difference between the market value of the whole tract before the property is taken and the improvement is made, and the market value of the remainder after the property is taken and the improvement is constructed.

### D. Use Value

As has been seen, damages are determined by the use of verbal formulas based on market value. In turn, determination of market value involves another concept termed “use value,” which encompasses the predominant and all subordinate uses to which the land may be put. For example, farmland may also be suitable for subdivision into a residential area. Although the best, or predominant, use of the land is for farming, it has a second best, or subordinate, use value for subdivision. The predominant use value will primarily determine the market value of the property, however, the subordinate available uses will also be a factor in the determination. In condemnation for a limited-access highway, the concept of use value may be of particular significance.

When part of a condemnee's farmland is condemned for an ordinary highway or railroad, the use value of the land as a farm may be depreciated because of the cost of putting up fences, and the inconvenience in getting from one tract to another. Although the land will still be purchased for farming purposes as the best or predominant of all available uses, the owner may receive less for the land as farmland because of the highway.

However, when a limited-access highway is constructed through the farm, leaving two parcels of land relatively inaccessible to each other, the land may be worthless if valued as a single farming unit after condemnation. Other available uses of the now severed parcels must be taken into consideration in determining market value of the property after severance. Inadequate or unclear instruc-

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68. Most states adopt the "value in view of all available uses" rule. E.g., Los Angeles v. Hughes, 202 Cal. 731, 262 Pac. 737 (1928); Gilmore v. Central Maine Power Co., 127 Me. 522, 145 Atl. 137 (1929).

tions to the jury on this point may result in the condemnee being grossly overcompensated.

As examples of the application of use value in condemnation for a limited-access highway, consider the following situations: 1) land currently being used as a farm is better suited for other uses such as for subdivision and development; and 2) land currently being used as a farm is best suited for that purpose, but there is a possibility that the land may be subdivided some time in the near future.

In the first situation, the fact that a limited-access highway has severed the property completely does not destroy its predominant use for subdivision. However, the property may be depreciated in value insofar as its subordinate use for farming has been destroyed. To the extent that this injury to the subordinate use is reflected on the market value of the property, compensation must be awarded.

In the second situation, the predominant use is for farming. After the limited-access highway is built, the predominant use is no longer for farming but for subdivision, although the availability of the land for subdivision may be as remote after condemnation as before. The loss of the prior predominant use value will have a substantial affect on market value of the property, and insofar as market value is affected, compensation must be awarded. However, the land will not be valueless because it has lost its availability as a single farm unit. It still has some value for purposes of subdivision.

**SUMMARY AND CONCLUSION**

Limited-access highways, recently brought into prominence by the Federal Interstate Highway System, open up a new era in faster and safer travel. In this new era, condemnation presents special problems. Solutions to some of these problems have been suggested in this Note: more attention should be given to the adequacy of substituted means of access when direct means of access are taken; the jury should be given a more simplified formula for determining damages to the remainder when only part of a condemnee's property is taken; the judge should carefully explain the "use value" concept in his instructions.

Many more special problems may arise once condemnation is underway. With an awareness of the possible inapplicability of old rules of law to this relatively modern condemnation situation, the courts will be more likely to strike a proper balance between the interests of individual condemnees and the public at large.