

**Easements: Litigation Assumes All Rights Taken  
Will Be Used to Fullest Extent**

**Eminent Domain and Land Valuation Litigation  
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Assuming a condemnor has the legal authority to condemn private property and property rights, the primary question to be decided in a condemnation proceeding is the amount of just compensation that must be paid. Appraisal techniques have been developed, applied and critiqued in courts across the country for most if not all aspects of determining just compensation, including fair market value, easements, consequential damages, business damages, relocation benefits. While specific methods, rules and proceedings vary from state to state, fair market value is the standard for condemnation appraisals with few exceptions. Whether temporary or permanent, the taking of easement rights also requires payment of just compensation. Easements can be classified as surface, sub-surface and overhead, with typical uses for utilities, pipelines, slope, construction, drainage, and avigation. In theory, the nature of an easement in which only a portion of the total rights is conveyed assumes the owner retains some benefit, use or ownership of the underling fee, subject to the dominant easement. In reality, the limited taking of rights with an easement can lead to substantial often permanent damage to the remainder property. This paper explores

some of the common issues raised in appraisal of easements, including determining what rights and value is left with an owner when an easement is condemned.

## **I. Appraising Easement Rights and Damages**

In a partial taking, an appraisal must measure the difference in the value of the property before and after the taking with consideration of consequential benefits and consequential damages to the remainder. Elements such as highest and best use, the larger parcel, mitigation, project influence and the larger parcel may be incorporated into the appraisal. The principles and method for appraising partial acquisitions apply similarly to appraising easement rights. The proper measure of determining just compensation for an easement does not value directly the easement itself. Rather, the appraiser is and should be concerned with the loss of value for the owner caused by the easement, not the value of the easement to the condemnor.

### **A. Before and after vs. take plus damages methods**

Historically, appraising the taking of easements has employed two similar methods -- the "before and after" method, also known as the "federal rule", and the "take plus damages" method, or the "state rule".<sup>1</sup> Jurisdictions vary as to the specific method endorsed by courts with some variations.<sup>2</sup> Under the before and after or federal

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<sup>1</sup> Sherwood, Donnie, "The Valuation of Easements," Right of Way, November/December 2014, *IRWAOnline.org*; Lusvardi, Wayne C., "The Appraisal of Easements Under the State Rule," Right of Way, July/August 1996, *IRWAOnline.org*.

<sup>2</sup> For example, Arkansas adopts the "Whole Value Method" which pays for the value of the land as if in fee, but does not include consequential damages. See Arkansas Louisiana Gas Co. v. Cates, 664 S.W.2d 897, 898 (1984). Louisiana uses the "Percentage Method" which values the easement based on the percentage of value being taken from the fee holder. See Dixie Elec. Membership Corp. v. Watts, 268 So. 2d 128, 132 (1972).

rule, the value of the property in the before condition is compared to the value in the after with the easement in place with the difference in value resulting in compensation. If the after or remainder value is enhanced due to a benefit, it may result in zero compensation. The “take plus damages” or state rule separately measures the value of the taking as part of the entire property in the before, plus consideration of consequential benefits or damages to the remainder. It can lead to an artificial addition of damages to the remainder that are not supported by market data. The federal rule relies more on market data analysis whereas the state rule requires a more subjective determination of damage. As a result, the state rule has been criticized for assigning fictional values to the rights of property owners.<sup>3</sup>

### **B. Measuring the Amount of Interests Acquired**

Appraising permanent easements requires consideration of how much of the total property rights are being acquired with the taking of the easement. Legally, the underlying fee owner retains some level of interest and value in the property. This typically is measured as a percentage of the easement area’s use and utility in order to demonstrate the impact or loss caused by the easement. For example, water, sewer or pipeline utility easements may represent 50% to 75% of the underlying fee in the easement area due to the limits placed on the owner’s continued use of the easement area. Overhead power lines may be as high as 90% given the inability to build both permanent structures above ground and construct below ground in order to protect the integrity of the utility poles and towers. These measurements may be subject to further

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<sup>3</sup> Lusvardi, Wayne, “The Appraisal of Easements under the State Rule: Separating Fact from Fiction,” Right of Way, *IRWAOnline.org*, IRWA, 1996.

reduction due to existing rights and easements that burden the easement area in the before condition. In the excerpt below from an appraisal report of a 0.872 acre commercial parcel developed with a 9,625 square foot retail building, the appraiser determined that the 0.032 acre permanent construction easement represented a 50% taking of the total fee value:

It is the opinion of this appraiser that the probable value of the area of the easement is 50% of fee simple value. Therefore:		
	0.032 acre X \$263,761/acre @ 50% =	\$ 4,220
<b><u>Correlation of Value of the Part to be Acquired</u></b>		
Right of Way	0.262 acre X \$263,761 per acre =	\$69,105
Permanent Easement	0.032 acre X \$263,761/acre @ 50% =	<u>\$ 4,220</u>
	. Total	\$73,325

The permanent easement reduced the front buffer, reduced available parking spaces for retail tenants and impacted parking lot circulation.

**C. Temporary Easements**

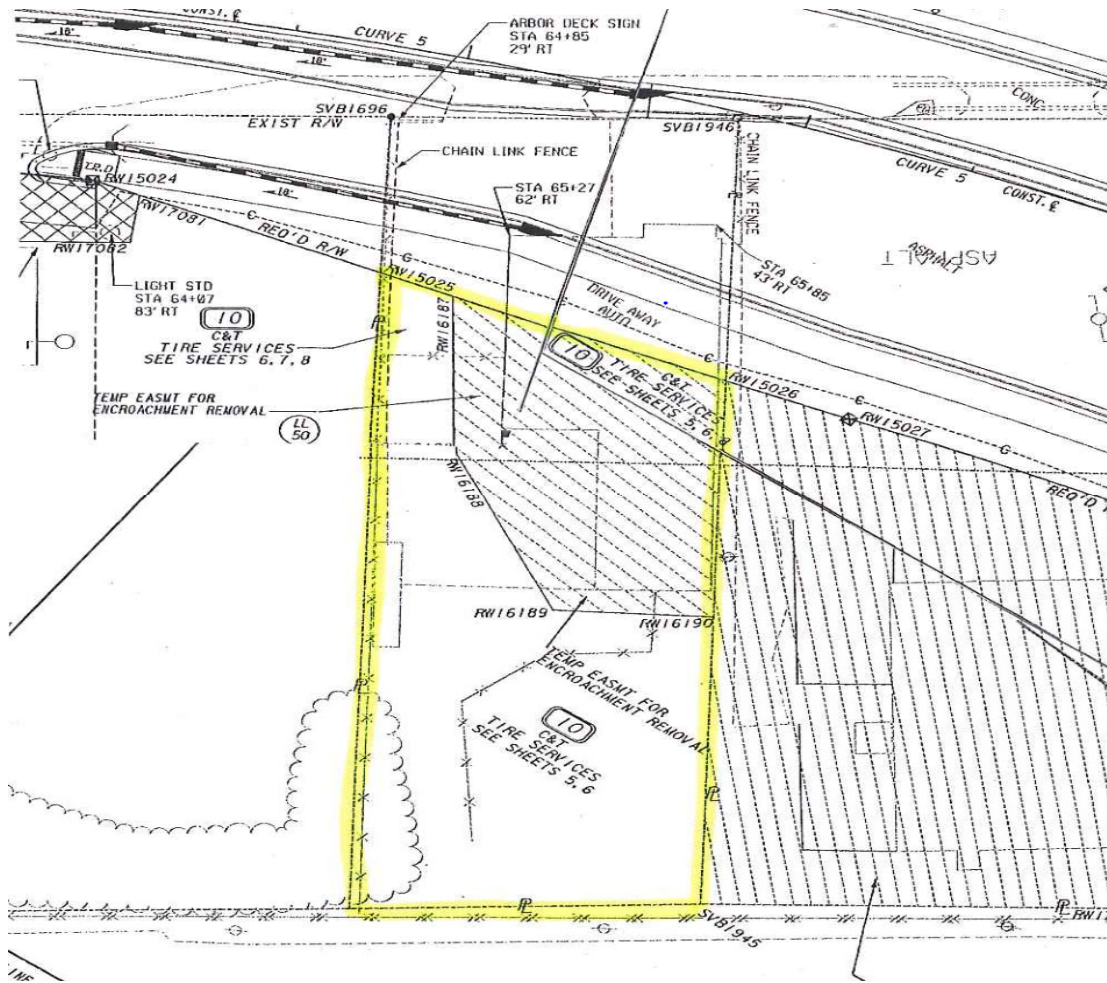
When a taking is temporary, the measure of compensation is the value of the property for the period that it is to be held by the condemnor or the diminution in the value of the property by reason of the owner’s loss of its use and occupancy during the possession by the condemnor. Similar to permanent easements, temporary easements are compensated not based on their value to the condemnor, but on their value to the condemnee. The most common measure of damages is the rental value of the easement area for the period of occupancy by the condemnor. Because temporary easements often include unusual shapes and sizes and areas of limited utility, such as

slopes, earthen berms, and demolition, they are measured as a percentage of the entire property's rental value. Driveway easements are a common type of temporary easement takings for construction purposes to tie in existing pavement and/or grade to the new roadway. In the note below, the appraisal report identified above also considered a rental calculation for a large driveway easement on the retail parcel:

**Note:** If the driveway easement is considered as a compensable item, the award would be increased by \$4,431 (0.028 acre @ \$263,761/acre @ 10% per year for 6 years) to \$1,719,500 (\$1,719,431 rounded)

Rental value may not equal just compensation if the "temporary" easement leads to a loss of access to the property and a corresponding inability to develop the property during the easement period. In such cases, the appropriate compensation is a rate of return on the land (rental value) plus damages.

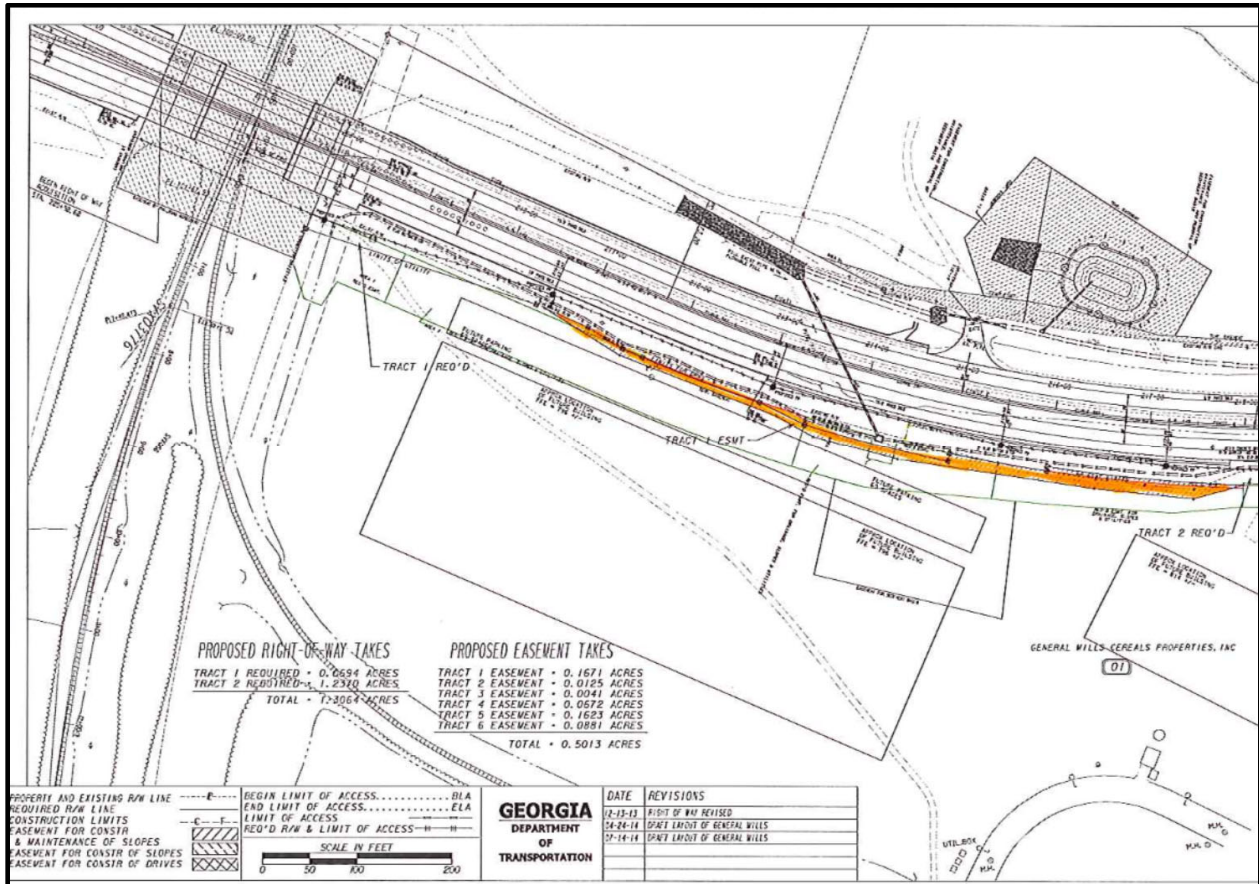
In theory, any impacts caused by a temporary easement are removed by termination of the easement and uses. In practice, however, the property can incur permanent losses or impacts. For example, a "temporary" construction easement may result in a permanent grade change to a driveway, permanent damaging access and potentially entitling the owner to damage. Demolition easements are "temporary" but result in the removal of buildings and improvements. In the example below, a DOT road widening project required the tear down of a retail commercial building, leaving the owner with an uneconomic remnant:



**D. Highest and Best Use and Easements**

The specific nature of an easement may result in a change to the highest and best use of the remainder without completely removing all utility of the easement area. For example, with vacant land for high density mixed use development, a high power transmission line easement prohibits the building of permanent structures in the easement area. This in turn can impact the highest and best of the remainder for development, or at least reduce potential density of the entire remainder. The same easement area, however, may serve a secondary use, such as parking, roads and greenspace for the development. In the example below, a permanent construction and

slope easement was proposed along the frontage of a large manufacturing plant:  
 permanent easement alters development capability of vacant land, it



The easement area was undeveloped at the time, but was slated for a long-term expansion of the plant facility. Without this expansion capability, the highest and best use of the entire property would have changed, ensuring substantial damage to the remainder property.