ATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM
REPORT 88

RECOGNITION OF BENEFITS TO REMAINDER PROPERTY IN HIGHWAY VALUATION CASES

GHWAY RESEARCH BOARD
TIONAL RESEARCH COUNCIL
TIONAL ACADEMY OF SCIENCES—NATIONAL ACADEMY OF ENGINEERING

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RESEARCH SPONSORED BY THE AMERICAN ASSOCIATION
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NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM

Systematic, well-designed research provides the most effective approach to the solution of many problems facing highway administrators and engineers. Often, highway problems are of local interest and can best be studied by highway departments individually or in cooperation with their state universities and others. However, the accelerating growth of highway transportation develops increasingly complex problems of wide interest to highway authorities. These problems are best studied through a coordinated program of cooperative research.

In recognition of these needs, the highway administrators of the American Association of State Highway Officials initiated in 1962 an objective national highway research program employing modern scientific techniques. This program is supported on a continuing basis by funds from participating member states of the Association and it receives the full cooperation and support of the Bureau of Public Roads, United States Department of Transportation.

The Highway Research Board of the National Academy of Sciences-National Research Council was requested by the Association to administer the research program because of the Board's recognized objectivity and understanding of modern research practices. The Board is uniquely suited for this purpose as: it maintains an extensive committee structure from which authorities on any highway transportation subject may be drawn; it possesses avenues of communications and cooperation with federal, state, and local governmental agencies, universities, and industry; its relationship to its parent organization, the National Academy of Sciences, a private, nonprofit institution, is an insurance of objectivity; it maintains a full-time research correlation staff of specialists in highway transportation matters to bring the findings of research directly to those who are in a position to use them.

The program is developed on the basis of research needs identified by chief administrators of the highway departments and by committees of AASHO. Each year, specific areas of research needs to be included in the program are proposed to the Academy and the Board by the American Association of State Highway Officials. Research projects to fulfill these needs are defined by the Board, and qualified research agencies are selected from those that have submitted proposals. Administration and surveillance of research contracts are responsibilities of the Academy and its Highway Research Board.

The needs for highway research are many, and the National Cooperative Highway Research Program can make significant contributions to the solution of highway transportation problems of mutual concern to many responsible groups. The program, however, is intended to complement rather than to substitute for or duplicate other highway research programs.

This report is one of a series of reports issued from a continuing research program conducted under a three-way agreement entered into in June 1962 by and among the National Academy of Sciences-National Research Council, the American Association of State Highway Officials, and the U. S. Bureau of Public Roads. Individual fiscal agreements are executed annually by the Academy-Research Council, the Bureau of Public Roads, and participating state highway departments, members of the American Association of State Highway Officials.

This report was prepared by the contracting research agency. It has been reviewed by the appropriate Advisory Panel for clarity, documentation, and fulfillment of the contract. It has been accepted by the Highway Research Board and published in the interest of an effectual dissemination of findings and their application in the formulation of policies, procedures, and practices in the subject problem area.

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FOREWORD

By Staff
Highway Research Board

This report will be of primary interest to highway lawyers, right-of-way engineers, appraisers and other highway personnel engaged in the acquisition of property for highway purposes. The effect that the construction will have upon the value of the remaining property (i.e., when only a portion of an ownership is acquired) is one of the factors considered in determining the amount of compensation which the owner receives and which the public must pay. The value may be decreased and/or increased. It is the increase or enhancement in value (i.e., "benefit to the remainder") which this research discusses.

Where a portion of land is acquired for a highway right-of-way, various factors are considered to determine the amount of compensation to the owner. The subject of benefits is often discussed and casually considered, largely because it is a mandatory finding in many states. Because of the need for more equitable treatment, in the public interest the practitioner, both legal and appraisal, needs to be more fully informed of the many ramifications of this complex problem.

There is a rather large and surprisingly liberal body of case law allowing a variety of benefits to offset or mitigate the amount of compensation that must be paid.

The object or purpose of this research is to provide information about the trial aspects of benefits in highway right-of-way condemnation valuation trials. The objectives are threefold in nature. First, to give a short and concise, but comprehensive, statement of what appellate courts have said about the trial aspects of benefits; second, to provide an inventory of these appellate decisions and to list annotations, treatises, and legal periodicals as well; and, third, to give some suggestions and ideas about what should be done and how to prove that benefits have resulted by virtue of the construction of a public improvement.

It was not the intent of the researchers, Joseph M. Montano and Associates, to editorialize concerning constitutional or statutory provisions as they may affect benefits, nor was it their intent to discuss or present an extensive analysis of the legal discussion of the subject. Rather, it was recognized that different rules of law do, in fact, exist in different jurisdictions, and with this in mind, the information was compiled and summarized for the purpose of providing material which can assist in the actual trial itself.

The cases which were read and inventoried and which are listed are primarily those dealing with highway right-of-way acquisitions. Cases concerned with other types of acquisition are not listed except where it was deemed that they establish a principle that could assist in the trial of highway cases. Also, the cases are confined to those situations where the highway improvement is to be paid solely from public funds and not from special assessments or betterment taxes imposed upon the land benefited by the improvement.

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The research reported herein was performed under NCHRP Project 11-1(2) by Montano & Associates, with Joseph M. Montano, Attorney at Law, as Principal Investigator.

Completion of the study was the result of the combined efforts of a number of people. Richard W. Phillips, Leonard Ripps, and George D. Dikeou, attorneys at law, contributed substantially to the legal research and analysis of the subject matter. William T. VanCourt provided important information and advice and counsel concerning the appraisal process.

The chief highway attorney from practically every state highway department answered inquiries, and also commented on the legal aspects of benefits in his respective jurisdiction. This information was of great importance in analysis of the material used for this study.

RECOGNITION OF BENEFITS TO REMAINDER PROPERTY IN HIGHWAY VALUATION CASES

CHAPTER ONE

SPECIAL AND GENERAL BENEFITS

Benefits have been classified into two general categories—general and special. The distinction, if indeed one can truly be made, is necessary because in most states it is only special benefits that can be considered as a proper offset against the damages to the residue or value of the land taken, or both. Courts use different terminology to define and distinguish benefits, and for the most part become hopelessly embroiled in an academic discussion of the difference between the two. The Courts appear to have lost sight of the essential thing (i.e., whether the remainder has in fact been benefited) and rather become preoccupied with a futile attempt to use magic words to distinguish between the two categories.

In any event, the Courts generally say that benefits, whether general or special, arise from the public improvement constructed on the land which is taken for public use. General benefits are those which increase values of land in the general community.[1] This value is conferred on all properties within the range of the utility.[2] They arise from the fulfillment or purpose of the public improvement and are enjoyed by the general community and the general public.[3] The fulfillment of the purpose is to provide convenient travel upon the roadway—hence, any benefit arising from convenient travel once upon the highway is deemed to be a general benefit.[4] General benefits are greater or lesser in degree, but not different in kind (i.e., they accrue to all in the general area [5]), whether the properties touch or abut on the highway project.[6]

Special benefits, like general benefits, must result from the construction of the public improvement for which the land is taken.[7] But, unlike general benefits, special benefits arise or accrue from the property's position or its relationship to the highway improvement.[8] The key to special benefits is that the property generally, if not always, abuts or borders on the new highway.[9] Because of the property's relationship or position to the improvement, the benefit which accrues is unlike or is different in kind from those accruing to the properties in the area.[10] They do not accrue to or cannot be shared by those whose property is not taken.[11] They are, therefore, special [12] and peculiar [13] to the owner.

The benefit to be special or specific need not be shared by one property only. If other properties fronting on the

[1] California
Los Angeles County v. Marblehead Land Co., 273 Pac. 131 (Dist. Ct. App. 1928)
Podesta v. Linden Irrigation District, 296 P.2d 401 (Dist. Ct. App. 1956)
Montana
Gallatin Valley Electric Ry. v. Neible, 186 Pac. 689 (1919)

[2] Missouri
State v. Bank of Lewis County, 102 S.W.2d 774 (1937)

[3] Alabama
McRea v. Marion County, 133 So. 278 (1931)
Arizona
Phoenix Title and Trust Co. v. State, 425 P.2d 434 (1967)
Missouri
State v. Hartman, 44 S.W.2d 169 (1931)
New Mexico
Board of Commissioners of Dona Ana County v. Gardner, 260 P.2d 682 (1953)
North Carolina
Kirkman v. State Highway Commission, 126 S.E.2d 107 (1962)
Texas
City of Corsicana v. Marino, 282 S.W.2d 720 (1955)

[4] Indiana
Hootman v. Indiana, 143 N.E.2d 666 (1957)
Missouri
State Highway Commission v. McMurtrey, 300 S.W.2d 521 (1957)

[5] Arizona
Phoenix Title and Trust Co. v. State, 425 P.2d 434 (1967)
Missouri
State v. McCann, 248 S.W.2d 17 (1952)

[6] Alabama
McRea v. Marion County, 133 So. 278 (1931)

[7] North Carolina
Kirkman v State Highway Commission, 126 S.E.2d 107 (1962)
Tennessee
Faulkner v. City of Nashville, 285 S.W. 39 (1926)
Washington
Town of Sumner v. Fryar, 264 Pac. 411 (1928)

[8] Florida
Daniels v. State Rd. Dept. of Florida, 170 So.2d 846 (1964)
Montana
Gallatin Valley Electric Ry. v. Neible, 186 Pac. 689 (1919)
Nebraska
Crawford v. Central Nebraska Public Power and Irrigation District, 49 N.W.2d 682 (1951)
New Mexico
Board of Commissioners of Dona Ana County v. Gardner, 260 P.2d 682 (1953)
North Carolina
Kirkman v. State Highway Commission, 126 S.E.2d 107 (1962)

[9] Alabama
McRea v. Marion County, 133 So. 278 (1931)
Missouri
State v. Pope, 74 S.W.2d 265 (Ct. App. 1934)
State v. McCann, 248 S.W.2d 17 (1952)

[10] Missouri
State v. Jones, 15 S.W.2d 338 (1929)
State v. Pope, 74 S.W.2d 265 (Ct. App. 1934)
West Virginia
Jones v. City of Clarksburg, 99 S.E. 484 (1919)

[11] Missouri
State Highway Commission v. McMurtry, 292 S.W.2d 947 (1956)
Nebraska
Crawford v. Central Nebraska Public Power and Irrigation District, 49 N.W.2d 682 (1951)

highway, i.e., if their position on or relationship to the improvement is the same and if they, too, are benefited specially and peculiarly, then all such properties similarly situated are specifically benefited. Specific benefits can be offset in all of these instances.[14]

The benefits may be physical or non-physical or both. A physical benefit arises where the public improvement makes changes which physically improve or relieve the property of a burden. Non-physical benefits, on the other hand, arise from the fact that the adaptability of the land has been changed to a higher and better use.[15]

Before a special benefit can be offset, it must not only benefit the land in some way or another, but also it must enhance or increase the market value of the residue.[16] The increase has to be measured in dollars and cents.[17] The benefit must be real, proximate, and substantial [18] (i.e., it must be reasonably certain to result [19]), and it must be permanent and not temporary.[20] Thus, it cannot be conjectural, remote, speculative, chimerical, uncertain and contingent.[21] Nor can an item of construction to mitigate damages be used to establish a benefit.[22]

The fact that at some future time the road might be altered,[23] terminated or abandoned [24] does not affect the status of the special benefit; i.e., it is still special.

The language used by the Courts to distinguish the two categories of benefits does not lend itself to a simple and concise statement capable of complete understanding and uniform application. The Courts have found it difficult to distinguish between the two categories of benefits. As one Court put it:

> Whether or not a given benefit is general or special must be largely determined by the facts and circumstances in each case. Difficulties are apt to result from an attempt to lay down definite, general rules.[25]

Because it is not the purpose of this report to editorialize or philosophize on the Rules of Law as they pertain to the differences between the two categories, no analysis is made concerning the language used and the difficulties with which the Courts are confronted in this regard. The distinction has been treated extensively in a number of Law Review articles and in two comprehensive A.L.R. Annotations.[26]

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[13] Arkansas
Ross v. Clark County, 45 S.W.2d 31 (1932)
California
People v. Loop, 274 P.2d 885 (Dist. Ct. App. 1954)
Georgia
Smith v. State Highway Department, 124 S.E.2d 305 (Ct. App. 1962)
Missouri
State v. Haid, 59 S.W.2d 1057 (1933)
Oregon
Stanley v. City of Salem, 427 P.2d 406 (1967)

[14] Arkansas
Bridgman v. Baxter County, 148 S.W.2d 673 (1941)
Herndon v. Pulaski County, 117 S.W.2d 1051 (1938)
Ball v. Independence County, 217 S.W.2d 913 (1949)
Koelsch v. Arkansas State Highway Commission, 267 S.W.2d 4 (1954)
Colorado
San Luis Valley Irrigation Dist. v. Noffsinger, 274 Pac. 827 (1929)
Illinois
Forest Preserve Dist. of Cook County v. Chicago Title & Trust Co., 183 N.E. 819 (1932)
Indiana
Hootman v. Indiana, 143 N.E.2d 666 (1957)
Louisiana
Louisiana Highway Comm. v. Grey, 2 So.2d 654 (1941)
State Department of Highways v. Miller, 182 So.2d 155 (Ct. App. 1966)
Missouri
State v. Jones, 15 S.W.2d 338 (1929)
State v. Duncan, 19 S.W.2d 465 (1929)
State v. Hartman, 44 S.W.2d 169 (1931)
State v. Pope, 74 S.W.2d 265 (Ct. App. 1934)
State v. McCann, 248 S.W.2d 17 (Ct. App. 1952)
State Highway Commission v. McMurtry, 292 S.W.2d 947 (1956)

[15] Indiana
Hootman v. Indiana, 143 N.E.2d 666 (1957)
Nebraska
Crawford v. Central Nebraska Public Power and Irrigation District, 49 N.W.2d 682 (1951)

[16] Indiana
Hootman v. Indiana, 143 N.E.2d 666 (1957)
Louisiana
State v. Hayes, 150 So.2d 667 (Ct. App. 1963)
Missouri
State v. McCann, 248 S.W.2d 17 (Ct. App. 1952)
State Highway Commission v. McMurtry, 292 S.W.2d 947 (1956)
Oregon
Selbee v. Multnomah County, 430 P.2d 561 (1967)
Pennsylvania
In Re Appointment of Viewers, 23 A 2d 880 (1942)
Texas
Hall v. Wilbarger County, 37 S.W.2d 1041 (Civ. App. 1931)
Virginia
Shirley v. Russell, 140 S.E. 816 (1927)

[17] Michigan
In Re Rogers, 220 N.W. 808 (1928)
Nebraska
Phillips v. State, 93 N.W.2d 635 (1958)
Richardson v. Big Indian Watershed Conservancy Dist., 151 N.W.2d 283 (1967)
North Dakota
Boylan v. Board of County Commissioners, 105 N.W.2d 329 (1960)

[18] Illinois
Department of Public Works and Buildings v. Divit, 182 N.E.2d 749 (1962)
Missouri
State v. Pope, 74 S.W.2d 265 (Ct. App. 1934)

[19] California
Los Angeles County v. Marblehead Land Co., 273 Pac. 131 (Dist. Ct. App. 1928)
Connecticut
Schwartz v. City of New London, 120 A.2d 84 (1955)

[20] Pennsylvania
Reading R. Co. v. Balthaser, 13 A. 294 (1888)

[21] Illinois
Department of Public Works and Buildings v. Divit, 182 N.E.2d 729 (1962)
North Carolina
Kirkman v. State Highway Commission, 126 S.E.2d 107 (1962)
North Carolina State Highway Comm. v. Thomas, et al., 163 S.E.2d 649 (1968)

[22] California
People v. Anderson, 46 Cal. Rptr. 377 (Dist. Ct. App. 1965)

[23] California
People v. Bond, 41 Cal. Rptr. 900 (Dist. Ct. App. 1964)

[24] California
People v. Thomas, 239 P.2d 914 (Dist. Ct. App. 1952)
U.S. v. River Rouge Imp. Co., 269 U.S. 411, 46 S.Ct. 144, 70 L.Ed. 339 (1926)
Reichelderfer v. Quinn, 287 U.S. 315, 53 S.Ct. 177, 77 L.Ed. 331 (1932)

[25] Colorado
Denver Joint Stock Land Bank v. Board of Commissioners, 98 P.2d 283 (1940)

The matter is also discussed in Volume 18, *American Jurisprudence 2d, Eminent Domain,* Sections 357-374, and in *Nichols on Eminent Domain,* 3d Edition, Volume 3, commencing at Section 8.62.

Suffice it to say that there are three types of benefits that fall into the two general categories [27]:

1. Those which affect the entire community.
2. Those which accrue to a definite neighborhood by reason of its nearness to the public improvement.
3. Those which affect peculiarly a tract of land, part of which is taken for construction of the public improvement.

RULES FOR MEASURING COMPENSATION

Not all jurisdictions have adopted the same rules for setoff of benefits. Obviously, the rule for measuring compensation in any particular jurisdiction will affect the manner in which benefits can be offset. Five rules appear to have been considered and adopted by various states. These rules are: [28]

1. Benefits, whether special or general, cannot be considered.
2. Special benefits only can be offset against damages to the residue, but not against the value of the land taken.
3. Special benefits and general benefits can be offset against damages to the residue, but not against the value of the land taken.
4. Special benefits can be offset against both the damages to the residue and the value of the land taken.
5. Special and general benefits can be offset against both damages to the residue and value of the land taken.

Of the five rules, two have been adopted by the majority of states. One group of states has adopted Rule 2 and the other group Rule 4. A small minority of the states has adopted either one of the other three rules. It is important, however, to point out that where one rule has been adopted or where one rule applies, others do not.

It is not the purpose of this report to set forth the specific rule applicable in each state. The highway lawyer in his respective state knows or should know the rule which his state follows. Furthermore, the breakdown on a state-by-state basis is covered extensively in an annotation in 145 A.L.R. 1 and in a legal periodical entitled, "Enhancement in Condemnation Cases," 13 Ala. Law Review 123. But, it is the purpose herein to deal with ways and means which can assist highway lawyers to implement the rules which have been adopted by the Courts.

Obviously, it is only where special benefits can be offset that most problems will arise. Distinctions must be made between general and special benefits, and this is the problem to which most appellate decisions have directed themselves. The distinguishing elements have been noted heretofore. Practically all cases cited herein in some form or another define special benefits and attempt to distinguish them from general benefits.

The burden of proof to prove benefits and obviously to distinguish general from special benefits is on the condemnor.[29] It is up to the condemnor to carry this burden if he wishes the jury to find and to offset benefits.

Oftentimes, the condemnor is faced with the problem concerning which matters he must ask the Court to determine and which he must leave for the jury's consideration. The cases for the most part do not indicate clear-cut distinctions of whether it is for the jury to determine if a specific item or element is a specific or general benefit. Few cases specifically hold that it is a question of law; accordingly, it is for the Court to determine.[30] Where the testimony is admitted and later the Court rules that the item is not specific, the evidence should be stricken.[31] Most cases merely say that whether a property is specially benefited is a factual question for the jury.[32] A very recent Nevada case [33] held that the trier of facts determines first if the residue has been increased in value. The Court then determines whether the item responsible for the increase is one of special benefits. It is clear, however, that the jury determines the extent and amount of the benefit.[34]

ITEMS OF SPECIAL BENEFITS

In his effort to sustain the burden of proof, the highway lawyer will be called upon to argue a position that a certain feature resulting from the construction of the public improvement is a special benefit. If cases have been decided dealing with the same or similar feature, his task will be easier.

Certain items have been deemed to be special benefits and proper for the jury to consider. Other items can be

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[26] 145 A.L.R. 1, Deduction of Benefits in Determining Compensation; 13 A.L.R.3d 1149, Eminent Domain Deduction of Benefits in Determining Compensation or Damages in Proceedings Involving Opening, Widening, or Otherwise Altering Highway; 13 Ala. Law Review 123, Enhancement in Condemnation Cases; 51 Calif. L. Rev. 833, Determination of Benefits in Land Acquisition; Calif. SB J 40:245, Special Benefits in Eminent Domain. Phantom of the Opera; 43 Ia. L. Rev. 303, Set-Off of Benefits Against Damages to Remaining Land Denied; 10 Ohio S.L.J. 74-8, Benefits Conferred Upon Property by Public Use

[27] Missouri
State v. Pope, 74 S.W.2d 265 (Ct. App. 1934)
Nebraska
Phillips v. State, 93 N.W.2d 635 (1958)

[28] New Mexico
Board of Commissioners of Dona Ana County v. Gardner, 260 P.2d 682 (1953)

[29] Arkansas
McMahan v. Carroll County, 384 S.W.2d 488 (1964)
Kansas
Collins v. State Highway Commission of Kansas, 66 P.2d 409 (1937)
Louisiana
City of New Orleans v. Giraud, 115 So.2d 349 (1959)
Missouri
Thomson v. Kansas City, 379 S.W.2d 194 (1964)
Nebraska
Richardson v. Big Indian Creek Watershed Conservancy Dist., 151 N.W.2d 283 (1967)
Nevada
State v. Pinson, 207 P.2d 1105 (1949)
North Carolina
Kirkman v. State Highway Commission, 126 S.E.2d 107 (1962)
North Carolina State Highway Comm. v. Thomas, et al., 163 S.E.2d 649 (1968)
Virginia
Long v. Shirley, 14 S.E.2d 375 (1941)

[30] Hawaii
Territory of Hawaii v. Mendonca, 375 P.2d 6 (1962)
Indiana
Hootman v. Indiana, 143 N.E.2d 666 (1957)
Nebraska
Backer v. City of Sidney, 87 N.W.2d 610 (1958)
Missouri
State v. Ellis, 382 S.W.2d 225 (1964)

[31] California
People v. Lipari, 28 Cal. Rptr. 808 (1963)

argued to have been deemed to be special in nature, also. Not all of the cases use language specifically saying that the item was one of special benefit. But, in most instances, the evidence was before the jury, and it can thus be argued that the items dealt with special benefits, otherwise it would have been kept from the fact-finding body. In some of the cases, there may not have been a finding of special benefits or the Court may have refused to give an instruction on benefits; but this may have been for reasons other than the fact that the item was not one of special benefits. In some cases, there may not have been any testimony that the item enhanced the market value of the residue or perhaps the amount of benefits (i.e., in dollars and cents) was not given. Further, realization of the benefit may have been remote or speculative. Any attorney who uses this work is cautioned that he must read and analyze any case herein mentioned before he cites it to the Court in support of his position. The reason for this is that many of the cases, by way of dictum, state and intimate that a particular element or item is special in nature; and the highway lawyer must be accurate and correct in his explanation of the case to the Court.

The following have been considered to be special in nature:

Advertising: [35]

Access:
- Improved: [36]
- Leading to major highway: [37]
- Private road—opened to: [38]

Barber Shop: [39]

Beauty Shop: [40]

Bridge:
- Construction of by public authority: [41]
- Maintenance of by public authority: [42]

Burden:
- Relieved of—general: [43]
- Relieved of building road for development of subdivision: [44]

Cattle Pass: [45]

Corner Site:
- Creating: [46]

Curb: [47]

Drainage:
- Improved: [48]

Drive-In: [49]

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[32] Arkansas
City of Paragould v. Milner, 170 S W. 78 (1914)
Bridgman v. Baxter County, 148 S.W.2d 673 (1941)
Herndon v. Pulaski County, 117 S.W.2d 1051 (1938)
Ball v. Independence County, 217 S.W.2d 913 (1949)
Martin v Newton County, 394 S.W.2d 133 (1965)
Colorado
Wiley Drainage Dist. v. Semmens, 250 Pac. 527 (1926)
Georgia
Muecke v. City of Macon, 131 S.E. 124 (Ct. App. 1925)
Illinois
Forest Preserve Dist. of Cook County v. Chicago Title and Trust Co., 183 N.E. 819 (1932)
Kansas
Thomson v. Kansas City, 379 S.W.2d 194 (1964)
Maryland
Big Pool Holstein Farms, Inc., v. State Roads Comm., 225 A.2d 283 (Ct. App. 1967)
Missouri
State v. Young, 235 S.W.2d 130 (1929)
State v. Day, 47 S.W.2d 147 (1932)
State v. Bailey, 115 S.W.2d 17 (Ct. App. 1938)
Nebraska
Backer v. City of Sidney, 89 N.W.2d 592 (1958)
New York
Pauly v State, 179 N Y.S.2d 88 (1958)
Foster v. State, 227 N.Y.S.2d 220 (1961)
North Carolina
Elks v. Board of Commissioners of Pitt County, 102 S.E. 414 (1920)
Oregon
Selbee v. Multnomah County, 430 P.2d 561 (1967)
Texas
Stappers v. State, 410 S.W.2d 470 (1966)
Vermont
Howe v. State Highway Board, 187 A.2d 342 (1963)

[33] Nevada
State Ex Rel Dept. of Highways v. Haapanen, 448 P.2d 703 (1968)

[34] See cases listed in Footnote 32 and:
California
People v. Loop, 274 P.2d 885 (Ct. App. 1954)
Hawaii
Territory of Hawaii v. Mendonca, 375 P.2d 6 (1962)
Missouri
State v. Vorhof-Duenke Co., 366 S.W.2d 329 (1963)
Nevada
State Ex Rel Dept. of Highways v. Haapanen, 448 P.2d 703 (1968)
Texas
Dickens County v. Dobbins, 95 S.W.2d 153 (Ct. App. 1936)

[35] Illinois
Cuneo v. City of Chicago, 81 N.E.2d 451 (1948)

[36] Hawaii
Territory of Hawaii v. Mendonca, 375 P.2d 6 (1962)
Illinois
Cuneo v. City of Chicago, 81 N.E.2d 451 (1948)
Indiana
Hootman v. Indiana, 143 N.E.2d 666 (1957)
Louisiana
Louisiana Highway Commission v. Grey, 2 So. 2d 654 (1941)
Missouri
State v. Duncan, 19 S.W.2d 465 (1929)
State v. Southern Securities Co., 60 S.W.2d 632 (1933)
State v. Bailey, 115 S.W.2d 17 (Ct. App. 1938)
State Highway Commission v. McMurtrey, 300 S.W.2d 521 (1957)
New York
Mitchell v. State, 195 N.Y.S.2d 376 (1960)
North Carolina
Phifer v. Commissioners of Cabarrus County, 72 S.E. 852 (1911)
Tennessee
Newberry v. Hamblen County, 9 S.W.2d 700 (1928)
Brookside Mills, Inc., v. Moulton, 404 S.W.2d 258 (1965)

[37] Colorado
Mack v. Board of County Commissioners of County of Adams, 381 P.2d 987 (1963)
Missouri
State of Missouri v. Parker, 387 S.W.2d 505 (1965)

[38] Kansas
Trosper v. Commissioners of Saline Co., 27 Kan. 391 (1882)

[39] Louisiana
State v. Hayes, 150 So.2d 667 (Ct. App. 1963)

[40] Louisiana
State v. Hayes, 150 So.2d 667 (Ct. App. 1963)

[41] Illinois
Dept. of Public Works and Buildings v. Keck, 161 N.E. 55 (1928)

[42] Illinois
Dept. of Public Works and Buildings v. Keck, 161 N.E. 55 (1928)

[43] Indiana
Hootman v. Indiana, 143 N.E.2d 666 (1957)

[44] Hawaii
Territory of Hawaii v. Mendonca, 375 P.2d 6 (1962)

[45] Kansas
Zook v. State Highway Commission, 131 P.2d 652 (1942)
Missouri
State v. Lindley, 113 S.W.2d 132 (Ct. App. 1938)

[46] Louisiana
State Dept. of Highways v. Mouledous, 200 So.2d 384 (1967)
New York
Hartman v. State, 161 N.Y.S.2d 748 (1957)

[47] Missouri
State v. Bailey, 115 S.W.2d 17 (Ct. App. 1938)
State v. Lindley, 113 S.W.2d 132 (Ct. App. 1938)

[48] Missouri
Ketchum v. City of Monett, 192 S.W. 470 (1917)
State v. Cady, 400 S.W.2d 481 (1965)
Tennessee
Newberry v. Hamblen County, 9 S.W.2d 700 (1928)
Texas
Stappers v. State, 410 S.W.2d 470 (1966)

[49] Louisiana
State v. Hayes, 150 So.2d 667 (Ct. App. 1963)

Expressway:
Proximity to: [50]
Fence: [51]
Frontage on Highway:
Added or New: [52]
New Road: [53]
Frontage Road:
Access to—leading to Interstate Highway: [54]
In general: [55]
Gutter: [56]
Hard Surface Road: [57]
Highest and Best Use of Remainder—Changed to:
Commercial: [58]
Advertising purposes: [59]
Barber Shop: [60]
Beauty Parlor: [61]
Drive-In: [62]
Office Building: [63]
Petroleum Products: [64]
Service Station: [65]
Residential:
Country Homes: [66]
Subdivision Potential: [67]
Improved Road: [68]

Interchange:
Remainder located near: [69]
Livestock Pass: [70]
New Road: [71]
Office Building: [72]
Overlook:
Made more attractive: [73]
Private Road:
Access opened to: [74]
Shorten: [75]

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[50] Georgia
Andruss v. State Highway Dept., 93 S.E.2d 174 (Ct. App. 1956)
Missouri
State of Missouri v. Parker, 387 S.W.2d 505 (1965)

[51] California
People v. Thomas, 239 P.2d 914 (Dist. Ct. App. 1952)
Texas
Isenberg v. Gulf T & W Ry. Co., 152 S.W. 233 (1912)

[52] Arkansas
Washa v. Prairie County, 54 S.W.2d 686 (1932)
California
Los Angeles County v. Marblehead Land Co., 273 Pac. 131 (Dist. Ct. App. 1928)
Indiana
Hootman v. Indiana, 143 N.E.2d 666 (1957)
Louisiana
Louisiana Highway Commission v. Grey, 2 So.2d 654 (1941)
Missouri
City of Springfield v. Ellis, 97 S.W 2d 154 (Ct. App. 1936)
Texas
Tuttle v. State, 381 S.W.2d 330 (1964)
Hughes v. State, 302 S.W.2d 747 (1957)
Washington
Town of Sumner v. Fryar, 264 Pac. 411 (1928)

[53] Arkansas
Weidemeyer v. City of Little Rock, 247 S.W. 62 (1923)
McMahan v. Carroll County, 384 S.W.2d 488 (1964)
Illinois
Forest Preserve Dist. of Cook County v. Chicago Title & Trust Co , 183 N.E. 819 (1932)
Louisiana
Louisiana Highway Commission v. Grey, 2 So.2d 654 (1941)
State v. Hayes, 150 So.2d 667 (1963)
Missouri
State v. Day, 47 S.W.2d 147 (1932)
State v. Riggs, 47 S.W.2d 178 (1932)
State Highway Commission v. Clevenger, 291 S.W.2d 57 (1956)
Thomson v. Kansas City, 379 S.W.2d 194 (1964)
Texas
Maddox v. State, 373 S.W.2d 322 (1963)

[54] Colorado
Mack v. Board of County Commissioners of County of Adams, 381 P.2d 987 (1963)

[55] Alabama
State of Alabama v. Huggins, 196 So.2d 387 (1967)
Louisiana
State of Louisiana Dept. of Highways v. Circle Center Corp., 148 So.2d 411 (1962)
State v. Waterbury, 171 So.2d 790 (Ct. App. 1965)
Minnesota
State v. Hayden Miller Co., 116 N.W.2d 535 (1962)

[56] Missouri
State v. Bailey, 115 S.W.2d 17 (Ct. App. 1938)
State v. Lindley, 113 S.W.2d 132 (Ct. App. 1938)

[57] Arkansas
Bridgman v. Baxter County, 148 S.W.2d 673 (1941)
Herndon v. Pulaski County, 117 S.W.2d 1051 (1938)
Ball v. Independence County, 217 S.W.2d 913 (1949)
Georgia
Stansell & Rape Bros. v. City of McDonough, 177 S.E. 749 (Ct. App. 1934)
Muecke v. City of Macon, 131 S.E. 124 (Ct. App. 1925)
Illinois
Dept. of Public Works and Buildings v. Keck, 161 N.E. 55 (1928)
Louisiana
Parish of East Baton Rouge v. Edwards, 119 So.2d 175 (1960)
Missouri
State v. Craighead, 65 S.W.2d 145 (1933)
State v. Lindley, 113 S.W.2d 132 (Ct. App. 1938)

[58] Illinois
Capitol Bldg. Co. v. City of Chicago, 77 N.E.2d 28 (1948)

[59] Illinois
Cuneo v. City of Chicago, 81 N E.2d 451 (1948)

[60] Louisiana
State v. Hayes, 150 So.2d 667 (Ct. App. 1963)

[61] Louisiana
State v. Hayes, 150 So.2d 667 (Ct. App. 1963)

[62] Louisiana
State v. Hayes, 150 So.2d 667 (Ct. App. 1963)

[63] Louisiana
State v. Hayes, 150 So.2d 667 (Ct. App. 1963)

[64] Illinois
Dept. of Public Works and Buildings v. Keck, 161 N.E. 55 (1928)

[65] Louisiana
State v. Hayes, 150 So.2d 667 (Ct. App. 1963)

[66] Illinois
Dept. of Public Works and Buildings v. Keck, 161 N.E. 55 (1928)

[67] Hawaii
Territory of Hawaii v. Mendonca, 375 P 2d 6 (1962)
Texas
Stappers v. State, 410 S.W.2d 470 (1966)

[68] Arkansas
Peterson v. Garland County, 65 S.W.2d 18 (1933)
Missouri
State v. Craighead, 65 S.W.2d 145 (1933)
State v. Scheer, 84 S.W.2d 641 (Ct. App. 1935)
State v. Bailey, 115 S.W.2d 17 (Ct. App. 1938)
State v. Powell, 226 S.W.2d 106 (Ct. App. 1950)
Nebraska
Barr v. Omaha, 60 N.W. 591 (1894)
Aaronson v. U.S., 79 F.2d 139 (1935)

[69] Alabama
State of Alabama v. Huggins, 196 So.2d 387 (1967)
North Dakota
Boylan v. Board of County Commissioners, 105 N.W.2d 329 (1960)
Tennessee
Brookside Mills, Inc., v. Moulton, 404 S.W.2d 258 (1965)

[70] Kansas
Zook v. State Highway Commission, 131 P.2d 652 (1942)
Missouri
State v. Lindley, 113 S.W.2d 132 (Ct. App. 1938)

[71] Arkansas
Weidemeyer v. City of Little Rock, 247 S.W. 62 (1923)
McMahan v. Carroll County, 384 S.W.2d 488 (1964)
Illinois
Forest Preserve Dist. of Cook County v. Chicago Title & Trust Co., 183 N.E. 819 (1932)
Louisiana
Louisiana Highway Commission v. Grey, 2 So.2d 654 (1941)
State v. Hayes, 150 So.2d 667 (Ct. App. 1963)
Missouri
State v. Day, 47 S.W.2d 147 (1932)
State v. Riggs, 47 S.W.2d 178 (1932)
State Highway Commission v. Clevenger, 291 S.W.2d 57 (1956)
Thomson v. Kansas City, 379 S.W.2d 194 (1964)
Texas
Maddox v. State, 373 S.W.2d 322 (Ct. App. 1963)

[73] Louisiana
State v. Hayes, 150 So.2d 667 (Ct. App. 1963)

Proximity to Major Road or Expressway: [76]
Residential Potential: [77]
Route:
Shorten—Farm-to-Market: [78]
Farm-to-Town: [79]
Service Road: [80]
Service Station: [81]
Sewer Lines—Placed in Road: [82]
Shorten Route:
Farm-to-Market: [83]
Farm-to-Town: [84]
Sidewalk: [85]
Stock Pass: [86]
Subdivision Potential: [87]
Surfacing of Road:
Hard Surface (Change Ground to Hard Surface): [88]
Traffic:
Channeled by Front Door: [89]
Increased:
Pedestrian: [90]
Vehicular: [91]
Water Line—Placed in Road: [92]
Widening Road: [93]

ITEMS OF GENERAL BENEFITS

Knowledge of what is considered to be a special benefit is important. But, equally important is knowing what is not a special benefit and what is a general benefit. The importance is in determining what type of evidence to introduce and what type to exclude. Not only is it necessary to get before the jury evidence of special benefits, but it is also imperative to keep from it evidence of general benefits. Otherwise, error will be interjected and a victory in the trial court may be lost on appeal.

The following have been deemed to be items of general benefits. It is to be observed that in some instances the Courts are not in agreement. Items which some Courts have deemed to be specific benefits and previously listed as such are deemed by other Courts to be general and are so listed:

Abandonment
Reversion of Road [94]
Access
Improved Driveway [95]
Bigger Loads [96]
Cattle Pass [97]
Convenient Travel on Road [98]

[73] Tennessee
Newberry v. Hamblen County, 9 S.W.2d 700 (1928)
Aaronson v. U.S., 79 F.2d 139 (1935)
[74] Kansas
Trosper v. Commissioners of Saline Co., 27 Kan. 391 (1882)
[75] Illinois
Dept of Public Works and Buildings v. Keck, 161 N.E. 55 (1928)
[76] Georgia
Anduss v. State Highway Dept., 93 S.E.2d 174 (1956)
Missouri
State of Missouri v. Parker, 387 S.W.2d 505 (1965)
[77] Illinois
Dept. of Public Works and Buildings v. Keck, 161 N.E. 55 (1928)
Indiana
Hootman v. Indiana, 143 N.E.2d 666 (1957)
Louisiana
State v. Cooper, 36 So.2d 22 (1948)
[78] Wisconsin
Nowaczyk v. Marathon County, 238 N.W. 383 (1931)
[79] Arkansas
Cate v. Crawford County, 4 S.W.2d 517 (1928)
[80] Alabama
State of Alabama v. Huggins, 196 So.2d 387 (1967)
Colorado
Mack v. Board of County Commissioners of County of Adams, 381 P.2d 987 (1963)
Louisiana
State of Louisiana Dept. of Highways v. Circle Center Corp., 148 So.2d 411 (1962)
State through Dept. of Highways v. Waterbury, 171 So.2d 790 (Ct. App. 1965)
Minnesota
State v. Hayden Miller Co., 116 N.W.2d 535 (1962)
Missouri
State v. Vorhof-Duenke Co., 366 S.W.2d 329 (1963)
[81] Illinois
Dept. of Public Works and Buildings v. Keck, 161 N.E. 55 (1928)
Louisiana
State v. Hayes, 150 So.2d 667 (Ct. App. 1963)
[82] North Carolina
City of Randleman v. Hinshaw, 147 S.E.2d 902 (1966)
Pennsylvania
Simon v. City of Philadelphia, 177 A.2d 621 (1962)
[83] Wisconsin
Nowaczyk v. Marathon County, 238 N.W. 383 (1931)
[84] Arkansas
Cate v. Crawford County, 4 S.W.2d 516 (1928)
[85] Georgia
Muecke v. City of Macon, 131 S.E. 124 (Ct. App. 1925)
[86] Kansas
Zook v. State Highway Commission, 131 P.2d 652 (1943)
Missouri
State v. Lindley, 113 S.W.2d 132 (Ct. App. 1938)
[87] Hawaii
Territory of Hawaii v. Mendonca, 375 P.2d 6 (1962)
Texas
Stappers v. State, 410 S.W.2d 470 (1967)

[88] Arkansas
Bridgman v. Baxter County, 148 S.W.2d 673 (1941)
Herndon v. Pulaski County, 117 S.W.2d 1051 (1938)
Ball v. Independence County, 217 S.W.2d 913 (1949)
Georgia
Stansell & Rape Bros v. City of McDonough, 177 S.E. 749 (Ct. App. 1934)
Muecke v. City of Macon, 131 S.E. 124 (Ct. App. 1925)
Illinois
Dept. of Public Works and Buildings v. Keck, 161 N.E. 55 (1928)
Louisiana
Parish of East Baton Rouge v. Edwards, 119 So.2d 175 (Ct. App. 1960)
Missouri
State v. Craighead, 65 S.W.2d 145 (1933)
State v. Lindley, 113 S.W.2d 132 (Ct. App. 1938)
[89] Illinois
Gravander v. Chicago, 71 N.E.2d 371 (1947)
Capitol Bldg Co. v. Chicago, 77 N.E.2d 28 (1948)
Tennessee
Brookside Mills, Inc., v. Moulton, 404 S.W.2d 258 (1965)
[90] Illinois
Capitol Bldg. Co. v. City of Chicago, 77 N.E.2d 28 (1948)
[91] Georgia
Stansell & Rape Bros. v. City of McDonough, 177 S.E. 749 (Ct. App. 1938)
Illinois
Cuneo v. City of Chicago, 81 N.E.2d 451 (1948)
New York
Vanech v. State, 270 N.Y.S.2d 357 (1966)
[92] North Carolina
City of Randleman v. Hinshaw, 147 S.E.2d 902 (1966)
[93] Arkansas
Peterson v. Garland County, 65 S.W.2d 18 (1933)
Missouri
State v. Craighead, 65 S.W.2d 145 (1933)
State v. Scheer, 84 S.W.2d 641 (Ct. App. 1935)
State v. Bailey, 115 S.W.2d 17 (Ct. App. 1938)
State v. Powell, 226 S.W.2d 106 (Ct. App. 1950)
[94] Georgia
St. Clair v. State Highway Board, 165 S.E. 297 (Ct. App. 1932)
[95] Nebraska
Phillips v. State, 93 N.W.2d 635 (1958)
[96] Missouri
Mississippi County v. Byrd, 4 S.W.2d 810 (1928)
[97] Montana
State Highway Commission v. Wheeler, 419 P.2d 492 (1966)

Drainage:
  Improved [99]
Driveway
  Improved [100]
Frontage—New
  For residential potential—where speculative: [101]
  On new street [102]
Hard Surface
  Convert Gravel to Hard Surface [103]
Improved Road [104]
Livestock Pass [105]
Maintenance of Road
  Improved [106]
  New Road [107]
Proximity to Highway
  Interchange [108]
Site Prominence [109]
Stock Pass [110]
Traffic
  Increase [111]
  Non-stopping [112]
  Speed—increase [113]
Transportation
  Improved [114]
    To market [115]
    To town [116]
    For school bus [117]
    Heavier loads [118]
    Travel on road convenient [119]
Surfacing
  Convert Gravel to Hard Surface [120]
Use of Residue
  Change of [121]
    To commercial near interchange [122]
    Better adaptability—proximity to highway [123]
View
  But unable to reach property [124]
Zoning
  Change in—if speculative [125]

[98] Indiana
Hootman v. Indiana, 143 N.E.2d 666 (1957)
Missouri
State Highway Commission v. McMurtrey, 300 S.W.2d 521 (1957)
[99] Oregon
Portland, Oregon City Ry. Co. v. Penny, 158 Pac. 404 (1916)
[100] Nebraska
Phillips v State, 93 N.W.2d 635 (1958)
[101] Missouri
State v. McCann, 248 S.W.2d 17 (Ct. App. 1952)
[102] Texas
Hill v. Melton, 311 S.W.2d 496 (1958)
[103] Illinois
Dept. of Public Works and Buildings v. Keck, 161 N.E. 55 (1928)
Iowa
Trachta v. Iowa State Highway Commission, 86 N.W.2d 849 (1957)
New York
Hawley v. Village of Elmira Heights, 297 N.Y.S. 732 (1937)
Texas
Cook v. Eastland County, 260 S.W. 881 (1924)
Hall v. Wilbarger County, 37 S.W.2d 1041 (Civ. App. 1931)
Virginia
Shirley v. Russell, 140 S.E. 816 (1927)
[104] Missouri
State v. Pope, 74 S.W.2d 265 (Ct. App. 1934)
Rhode Island
D'Angelo v. Director of Public Works, 152 A.2d 211 (1959)
[105] Montana
State Highway Commission v. Wheeler, 419 P.2d 492 (1966)
[106] Alabama
Pryor v. Limestone County, 134 So. 17 (1931)
[107] Missouri
State v. Boone, 52 S.W.2d 186 (1932)
[108] Arizona
Phoenix Title and Trust Co. v. State, 425 P.2d 434 (1967)
Vermont
Farrell v. State Highway Board, 194 A.2d 410 (1963)
Wisconsin
Hietpas v. State, 130 N.W.2d 248 (1964)
[109] California
People v. Loop, 274 P.2d 885 (Dist. Ct. App. 1954)
[110] Montana
State Highway Commission v. Wheeler, 419 P.2d 492 (1966)
[111] Arizona
Phoenix Title and Trust Co. v. State, 425 P.2d 434 (1967)
Colorado
Boxberger v. State Highway Commission, 251 P.2d 920 (1952)
Missouri
State v. Pope, 74 S.W.2d 265 (Ct. App. 1934)
State of Missouri v. Parker, 387 S.W.2d 505 (1965)
Vermont
Demers v. City of Montpelier, 141 A.2d 676 (1958)
Howe v. State Highway Board, 187 A.2d 342 (1963)
[112] Ohio
State of Ohio v. Linder, 165 N.E.2d 460 (1959)
[113] Ohio
State of Ohio v. Linder, 165 N.E.2d 460 (1959)

[114] Minnesota
State v. Anderson, 223 N.W. 923 (1929)
Missouri
State v. Vorhof-Duenke Co., 366 S.W.2d 329 (1963)
[115] Missouri
State v. Pope, 74 S.W.2d 265 (Ct. App. 1934)
Oregon
Portland-Oregon City Ry. Co. v. Penny, 158 Pac. 404 (1916)
[116] Hawaii
Territory of Hawaii v. Mendonca, 375 P.2d 6 (1962)
Missouri
Mississippi County v. Byrd, 4 S.W.2d 810 (1928)
State Highway Commission v. McMurtry, 292 S.W.2d 947 (1956)
[117] Colorado
Denver Joint Stock Land Bank v. Board of Commissioners, 98 P.2d 283 (1940)
[118] Missouri
Mississippi County v. Byrd, 4 S.W.2d 810 (1928)
[119] Indiana
Hootman v. Indiana, 143 N.E.2d 666 (1957)
Missouri
State Highway Commission v. McMurtrey 300 S.W.2d 521 (1957)
[120] Illinois
Dept. of Public Works and Buildings v. Keck, 161 N.E. 55 (1928)
Iowa
Trachta v. Iowa State Highway Commission, 86 N.W.2d 849 (1957)
New York
Hawley v. Village of Elmira Heights, 297 N.Y.S. 732 (1937)
Texas
Cook v. Eastland County, 260 S.W. 881 (Civ. App. 1924)
Hall v. Wilbarger County, 37 S.W.2d 1041 (Civ. App. 1931)
Virginia
Shirley v. Russell, 140 S.E. 816 (1927)
[121] Indiana
Hootman v. Indiana, 143 N.E.2d 666 (1957)
[122] Arizona
Phoenix Title and Trust Co. v. State, 425 P.2d 434 (1967)
Wisconsin
Hietpas v. State, 130 N.W.2d 248 (1964)
[123] Wisconsin
Hietpas v. State, 130 N.W.2d 248 (1964)
[124] California
People v. Lipari, 28 Cal. Rptr. 808 (1963)
[125] Wisconsin
Hietpas v. State, 130 N.W.2d 248 (1964)

PROOF OF BENEFITS AND EVIDENTIARY MATTERS

Armed with the knowledge of what is or might be and what is not a special benefit, the next thing is to prove that the benefit exists and then to convince the jury that it has enhanced the market value of the residue by a specific amount.

Unfortunately, few of the appellate decisions deal with specific and detailed factual items of proof. There are, therefore, few guidelines concerning evidentiary matters relating to proof of benefits. Where the matter was discussed to any degree, it was generally with reference to

lack of proof. But, certain requirements have been deemed essential to prove benefits. These are discussed in this section.

To avoid objections and rulings that the special benefits are remote, uncertain, contingent, speculative, etc., or that the benefit is general, not special, certain steps must be taken.

Every element in the definition of special benefits should be covered in the testimony.

Obviously, benefits must be proved;[126] and it is elementary that it must be done with evidence.[127] Because benefits must result from the public improvement, evidence of the physical improvement and its purpose must be introduced. It is essential that the situation before the condemnation be clearly shown then evidence of the improvement or proposed improvement should be given.[128] If, at the time of the trial, the construction of the improvement has not begun or the improvement is not completed, evidence of the proposal is proper. The jury must assume that the improvement will be or has been constructed as proposed and an instruction on this point is proper to be given.[129] Care, however, must be taken not to introduce evidence of benefits arising from a previous improvement, as this has been deemed to be improper.[130]

Although it is essential that the benefits must improve the land,[131] the key testimony must be that the improvement has advanced the market value of the residue beyond the mere general appreciation in value of properties in the neighborhood.[132] Evidence of the improvement without testimony of an increase in market value is not enough and a failure to produce testimony of an increase in specific dollars and cents will defeat the condemnor's case of benefits.[133]

The witness on benefits must be shown to be familiar with values in the area; otherwise his testimony may be deemed to be speculative.[134] He must also specify the item or element of benefit [135] and must show how this item or element improves the land [136] and affects the market value of the residue.[137] If the witness does not give facts to support his opinion, his testimony may be deemed to be speculative and thus ignored.[138]

The appraisal criteria used and applied to a before basis can also be used and applied to an after situation (*Nichols, Eminent Domain,* 3d Edition, Volume 3, Sec. 8.6201). It is no more speculative to estimate what the property would sell for without the improvement than what it will sell for with the improvement.[139] The same standard which is used to estimate a reduction in value is proper to determine an increase in value.[140]

The witness must be able to distinguish between general benefits and special benefits and must exclude from his consideration any increase attributed to general benefits. What is special and what is general will obviously depend largely on the fact circumstances of the case.[141] If he is unable to make the distinction, whether on direct or cross examination, the testimony is improper.[142] He must also be able to distinguish what other factors apart from the improvement enhance the market value of the residue and he must not consider these to arrive at his opinion of benefits.[143]

Because the law of benefits has been confused by a

[126] Arkansas
Martin v. Newton County, 394 S.W.2d 133 (1965)
Louisiana
City of New Orleans v. Giraud, 115 So 2d 349 (1959)

[127] Alabama
State of Alabama v. Jacks 128 So.2d 734 (1961)

[128] California
People v. Schultz Co., 268 P.2d 117 (Dist. Ct. App. 1954)

[129] California
People v. Schultz Co., 268 P.2d 117 (Dist. Ct. App. 1954)
Georgia
Muecke v. City of Macon, 131 S.E. 124 (Ct. App. 1925)
Virginia
Long v. Shirley, 14 S.E.2d 375 (1941)

[130] Kentucky
East Kentucky Rural Electrical Coop v. Smith, 310 S.W.2d 535 (1958)
Missouri
State v. Bailey, 115 S.W.2d 17 (Ct. App. 1938)
145 A.L.R. 110

[131] Rhode Island
D'Angelo v. Director of Public Works, 152 A.2d 211 (1959)
Texas
Hall v. Wilbarger County, 37 S.W.2d 1041 (Civ. App. 1931)

[132] Florida
Daniels v. State Rd. Dept. of Florida, 170 So.2d 846 (1964)

[133] Alabama
State of Alabama v. Huggins, 196 So.2d 387 (1967)
Florida
Daniels v. State Rd. Dept. of Florida, 170 So.2d 846 (1964)
Georgia
Anduss v. State Highway Department, 93 S.E.2d 174 (Ct. App. 1956)
Smith v. State Highway Department, 124 S.E.2d 305 (Ct. App. 1962)
Illinois
Forest Preserve Dist. of Cook County v. Chicago Title and Trust Co., 183 N.E. 819 (1932)
Indiana
State v. Stabb, 79 N.E.2d 392 (1948)
Missouri
State v. Cady, 400 S.W.2d 481 (1965)
Nebraska
Phillips v. State, 93 N.W.2d 635 (1958)
Richardson v. Big Indian Creek Watershed Conservancy Dist., 151 N.W.2d 283 (1967)
New York
Brand v. State, 260 N.Y.S.2d 239 (1965)
North Carolina
Kirkman v. State Highway Commission, 126 S.E.2d 107 (1962)
North Dakota
Boylan v. Board of County Commissioners, 105 N.W.2d 329 (1960)
Oregon
Selbee v. Multnomah County, 430 P.2d 561 (1967)
Pennsylvania
In Re Appointment of Viewers, 23 A.2d 880 (1942)

[134] Kansas
Collins v. State Highway Commission of Kansas, 66 P.2d 409 (1937)

[135] Arkansas
Koelsch v. Arkansas State Highway Comm., 267 S.W.2d 4 (1954)

[136] Rhode Island
D'Angelo v. Director of Public Works, 152 A.2d 211 (1959)
Texas
Hall v. Wilbarger County, 37 S.W.2d 1041 (Civ. App. 1931)

[137] Missouri
State v. Vesper, 419 S.W.2d 469 (1967)

[138] Kentucky
Commonwealth v. Combs, 50 S.W.2d 497 (1932)
Missouri
State v. Ellis, 382 S.W.2d 225 (1964)

[139] Kentucky
Commonwealth Dept. of Highways v. Sherrod, 367 S.W.2d 844 (1963)

[140] Missouri
State v. Vesper, 419 S.W.2d 469 (1967)

[141] Colorado
Denver Joint Stock Land Bank v. Board of Commissioners, 98 P.2d 283 (1940)

[142] Louisiana
State Department of Highways v. Miller, 182 So.2d 155 (1966)
Missouri
State v. McCann, 248 S.W.2d 17 (Ct. App. 1952)

[143] Missouri
North Nishnabotna Drainage Dist. v. Morgan, 18 S.W.2d 438 (1929)

number of Courts, the appraisal witness should be instructed as to what the law is in his particular jurisdiction. Only then will the appraiser know whether specific items, which affect the values of the residue, are general or special benefits.

A mere statement that the property has been increased in value or that it has been benefited is not sufficient.[144] Specific evidence showing monetary values before and after is required. The evidence must be given in specific dollars and cents and not by mere comments that the property has been increased in value.[145] However, an award of benefits which does not conform to the specific figures of witnesses is not improper, if there are sufficient facts for the jury to reach its conclusion.[146]

The witness must be able to testify that the benefits or increase in value are capable of financial realization within a reasonable period of time [147] and must give the time or date as of which his opinion was formulated, and this time must conform to the date of valuation. Where he relies on a change in use as a basis for increase in value, he must establish the reasonableness of this probable use [148] and that there is a demand for this use.[149] Proof must be shown of the reasonable probability as to the time, nature and extent of the special benefits.[150]

Examples of Situations Where There Was Lack of Proof

Filling Stations

Evidence by itself that special benefits accrue because the property could be used for a filling station is not sufficient. This evidence alone is not proper. The witness did not testify to the market value on an after basis. He was not asked the question.[151] (It appears that if the question had been asked as to the fair market value on an after basis, the evidence with reference to the filling station might have been proper.)

Interchange Properties

1. Evidence of benefits has been deemed to be conjectural and speculative where the witness did not present facts from which benefits could be computed. Specifically, the witness did not know when the improvement (a freeway) would be completed. Nor was he able to give volumes of traffic. Although it appeared his testimony was based on proximity to an interchange, he was unable to show the frequency of other interchanges along the freeway. Nor did he give any estimates of the amount of traffic that would leave the freeway via the interchange near the property. Neither were any factors given from which it could be concluded that travelers would be encouraged to leave the freeway at this interchange.[152]

2. After studies which show that interchange properties are enhanced in value are not, of and by themselves, sufficient. They must be related to the particular interchange in question. For example, a mere showing of traffic counts is not enough because traffic might well damage as well as benefit a property. At a specific interchange the type, direction, reasons for flow of traffic, and the effect of traffic on property values must be shown. Where the interchange merely makes the flow of traffic easier, it is not such an element which may be considered in estimating special benefits.[153]

3. Evidence that remainders of farm land on interchanges are increased in value for industrial uses, motels, filling stations, restaurants and so forth, based upon mere statements that at other interchanges the properties sold for phenomenal prices was not considered proper where the witness did not give any evidence of the sales at the other interchanges.[154] (Apparently, if the sales data had been given and related to the interchange in question, the evidence would have been proper.)

Livestock Passes

An instruction on benefits was refused because the evidence did not show that the Highway Commission was bound to build a stock pass nor did the evidence show that the stock pass would benefit the property. The ranch was severed by the improvement and the stock pass was for the purpose of allowing the livestock to go from one side of the severed farm to the other.[155]

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[144] Missouri
State v. Cady, 400 S.W.2d 481 (1965)
North Dakota
City of Bismarck v. Casey, 43 N.W.2d 372 (1950)

[145] Alabama
State of Alabama v. Huggins, 196 So.2d 387 (1967)
Florida
Daniels v. State Rd. Dept. of Florida, 170 So.2d 846 (1964)
Georgia
Andruss v. State Highway Dept., 93 S.E.2d 174 (Ct. App. 1956)
Smith v. State Highway Department, 124 S.E.2d 305 (Ct. App. 1962)
Illinois
Forest Preserve Dist. of Cook County v. Chicago Title & Trust Co., 183 N.E. 819 (1932)
Indiana
State v. Stabb, 79 N.E.2d 392 (1948)
Missouri
State v. Cady, 400 S.W.2d 481 (1965)
Nebraska
Phillips v. State, 93 N.W.2d 635 (1958)
Richardson v. Big Indian Creek Watershed Conservancy Dist., 151 N.W.2d 283 (1967)
New York
Brand v. State, 260 N.Y.S.2d 239 (1965)
North Carolina
Kirkman v. State Highway Commission, 126 S.E.2d 107 (1962)
North Dakota
Boyland v. Board of County Commissioners, 105 N.W.2d 329 (1960)
Oregon
Selbee v. Multnomah County, 430 P.2d 561 (1967)
Pennsylvania
In Re Appointment of Viewers, 23 A.2d 880 (1942)

[146] Georgia
Swiney v. State Highway Department, 158 S.E.2d 321 (Ct. App. 1967)

[147] Michigan
In Re Rogers, 220 N.W. 808 (1928)

[148] Missouri
State Highway Commission v. Clevenger, 291 S.W.2d 57 (1956)

[149] Colorado
Denver Joint Stock Land Bank v. Board of Commissioners, 98 P.2d 283 (1940)

[150] Wisconsin
Petkus v. State Highway Commission, 130 N.W.2d 253 (1964)

[151] Texas
State v. Davis, 140 S.W.2d 861 (Ct. App. 1940)

[152] Illinois
Department of Public Works and Buildings v. Divit, 182 N.E.2d 749 (1962)

[153] New York
Brand v. State, 260 N.Y.S.2d 239 (1965)

[154] North Carolina
Robinson v. State Highway Commission, 105 S.E.2d 287 (1958)

[155] Kansas
Zook v. State Highway Commission, 131 P.2d 652 (1943)

Residential Sites

A mere statement that farm land was now valuable for residential sites was speculative where there was no evidence to show that the property had been increased or enhanced for this purpose.[156]

These situations should serve to apprise the lawyer of what he must do and how he must present his evidence and to what extent.

The application of the foregoing rules may differ depending upon the rule for measuring compensation in a particular jurisdiction.

In those states where benefits can be offset only against damages (i.e., not against the value of the land taken), if the landowner waives damages the condemnor cannot introduce any evidence of benefits.[157] This is generally done where the damages are minimal and the benefits extensive. Landowners are fearful that the jury may subconsciously or perhaps even actually offset the benefits against the land taken and, therefore, in order to preclude this possibility, waive damages in order to keep the jury from hearing any evidence of benefits.

In those states where benefits can be offset against damages only, three findings are usually required. These are: (1) the value of the land taken, (2) the damages to the residue, and (3) the benefits to the residue. If the statute requires separate findings, this requirement is mandatory.[158] The jury in this instance will not generally make the offset. Instead, it is done by the Court after the verdict is in. In this type of jurisdiction, the witness generally cannot offset the benefits against damages. He must give two separate figures.[159] Nor can he offset benefits in excess over damages against the land taken.[160] Where, however, a straight before-and-after rule is in effect, only one finding is necessary and that is the difference in value of the property before and the value of the property afterwards.[161] In this situation, the witness does in fact make the offset and, of course, the offset is not only against the damages but against the value of the land taken as well.

CHAPTER TWO

EVIDENCE OF VALUE

If one thing is evident from a reading of cases and articles on benefits, it is that the Courts, the treatise writers, and even the attorneys, are so preoccupied with determining what is and what is not a benefit and whether the benefit is general or special that the importance of actually determining the value of the remainder is generally ignored. And yet, for the trier of fact, the issue of controlling significance is whether the remainder would sell for more or less as a result of the construction or proposed construction of the improvement.

Although the Courts have had their problems establishing a comprehensible body of benefits law, rules for the introduction of evidence to prove value—generally in relation to valuing the whole property unaffected by the improvement—have been formulated. Cases are few which say that in valuing the remainder the testimony should be based on different approaches to value than are accepted in valuing the whole property. The three approaches to value most commonly utilized and accepted are the market data (comparable sales) approach and the cost and income approaches. The rules governing the use of these approaches may vary from one jurisdiction to another, but whatever the rules, proper use of one or more of these approaches is the key to proving benefits or disproving damages.

If the attorney preparing for trial could think in terms of how he is going to prove the value of the remainder as affected by the improvement using judicially accepted approaches to value rather than concentrating on the preparation of testimony laden with reference to the terms "special or general benefits," he will be far better off.

It is not unreasonable to assume that much of the incomprehensible benefits law that has been formulated has been the result of a failure to concentrate on the essential issue—the value of the remainder. The attorney for the condemnor would be well advised to spend more time preparing his case to conform to existing law on the use of the valuation methods rather than relying strictly on bene-

[156] Louisiana
State through Department of Highways v. Miller, 182 So.2d 155 (1966)

[157] Hawaii
State v. Heirs of Kapahi, 395 P.2d 932 (1964)
Texas
Steele v City of Anson, 229 S.W.2d 948 (1950)
State v. Meyer, 403 S.W.2d 366 (1966)
Bel-Aire Housing Corp. v. State of Texas, 405 S.W.2d 225 (Civ. App. 1966)
Hughes v. State, 302 S.W.2d 747 (1957)

[158] California
Sonoma County v. DeWinton, 287 Pac. 121 (Dist. Ct. App. 1930)
People v. Schultz Co., 268 P.2d 117 (Dist. Ct. App. 1954)

[159] Georgia
State Highway Dept. v. Grant, 127 S.E.2d 920 (Ct. App. 1962)

[160] Georgia
Fulton County v. Bailey, 130 S.E.2d 800 (Ct. App. 1963)

[161] Missouri
State v. Powell, 226 S.W.2d 106 (Ct. App. 1950)

fits cases to advise him of what he can and cannot do to prove benefits. Proving the value of the remainder is the attorney's real task and this can only be done if there is a thorough understanding of the whole valuation process.

The following discussion of the generally accepted approaches to value as used in valuing remainders is meant to serve only as a guide to the preparation and presentation of valuation evidence. An analysis of existing law and its application to the facts of a particular case will be up to the attorney. Hopefully, however, the following remarks will indicate how existing law on the valuation process can be used to prove benefits.

COMPARABLE SALES APPROACH

The almost complete lack of any guidelines in the cases for valuing the remainder other than the standard comment that damages and benefits are to be based on the difference between the before and after value must be at least partially attributable to the failure of attorneys for condemnors to present the Courts with market data to support their opinions of benefits. As the Court in *Brand v. State,* 46 Misc. 2d 645, 260 N.Y.S. 2d 239 (1965) admonishes, it is not enough for the condemnor's witness to assert that the improvement will bring increased traffic and, therefore, the remainder will be worth more money. The Court wanted to be apprised of "the effect of traffic on property values in the area," and the type, direction, and reason for the traffic flow. Documentation of the type which the Courts wish to have presented can be done by way of foundation for the introduction of comparable sales. Increased traffic by itself has no logical correlation with increased value. But, sales of other property which will be or are subject to the same or similar traffic conditions as the subject remainder is or will be, may provide the necessary support for the appraiser's conclusion that the value of the remainder will increase as a result of the improvement.

The use of comparable sales need not be confined to a determination of what the property was worth without the influence of the improvement. This is, of course, one function of comparable sales used in determining the value of the whole property, but the trier of fact is also charged with the duty of determining the market value of the remainder as of the valuation date as such value is affected by the improvement.

Just as Courts have indicated that the market data (comparable sales) approach is the most satisfactory method of determining the value of the property before the improvement, sales of similar properties can be equally valuable in determining the value of the remainder.

Assuming that comparable sales were used to establish the value of the whole, which includes the remainder, there is generally no better way to determine whether the remainder value will change from what it was before than by the use of comparable sales.

If, for instance, an appraiser testifies that after examining various sales it is his opinion that the value of the whole before is worth $50,000, of which $40,000 is attributable to the remainder and $10,000 to the land taken, he must then determine whether the $40,000 value has changed as a result of the improvement. He should then be allowed to give evidence of sales which would tend to indicate what the $40,000 property would be worth considering the influence of the improvement. Whether the sales reflect more value or less value should have no bearing on the admissibility of the sale. Evidence of a sale purportedly comparable to the remainder should be admissible if under the law of the particular jurisdiction it meets the criteria of comparability set up for sales used to value the whole property before the taking.

Characteristics of the sale property such as size, shape, terrain, distance from the subject remainder, and time of the sale must be examined to determine comparability. In any particular jurisdiction, it may be largely discretionary with the Court whether a sale has the necessary elements of comparability, and the attorney can examine the cases to determine generally where the Courts in his jurisdiction have drawn the line.

Sales reflecting enhanced values resulting from the improvement can be used to rebut contentions of damages, as well as to show possible benefits. While opposing counsel may argue that the sales do not show benefits to the subject property, he will not be able to argue convincingly that they are not an indication of a lack of damages unless he has sales which show that the improvement will have a detrimental effect on the remainder.

In essence, the argument is that evidence of comparable sales is a preferable means of estimating the value of the remainder than to exclude such evidence and rely totally on some less reliable approach to value. The unsupported opinion of the appraiser that the remainder will sell for more or less as a result of the construction or proposed construction of the improvement carries far less weight if unsupported by market data.

The cases which will be most helpful in arguing the admissibility of sales to prove benefits are those which allow the landowner to testify to sales that require considerable adjustments to make them comparable. Taking highway cases as an example, if the landowner is permitted to testify to the value of his property for commercial use before the taking, relying on sales of debatable comparability, the condemnor should have the same privilege.

In *San Bernardino County Flood Control District v. Sweet,* 63 Cal. Rptr. 640 (Cal. C.A. 4th Dist. 1967), the landowner's witnesses contended that the highest and best use of the property was for a filling station, but after the acquisition the property would be reduced in size below the standard 150 x 150 square feet. The acquisition was not for highway purposes, but for the purpose of installing a storm drain that would make the interchange site less valuable. The property was already located on a freeway off-ramp and, thus, the landowner's position was that he was entitled to the enhanced value. The appraisal witness for the landowner proceeded to introduce sales of other property on an interchange some three to five miles from the subject property. The Court found that the admissibility of evidence of sales is largely discretionary and that the trial court properly required the witness to adjust the sales prices to the date of valuation of the subject property. Therefore, it was held that the trial court had not abused its discretion in admitting the sales.

Obviously, if the landowner is entitled to use distant sales to value his property to establish his damages created by the loss of the enhanced value of a pre-existing highway improvement, the condemnor should be allowed to use sales on other interchanges to show the values that the proposed highway improvement will create.

In *State v. Williams*, 65 N.J. Super. 518, 168 A.2d 233 (N.J. 1961), an existing filling station on a secondary road was partially condemned, taking the outlying pump islands, making the remainder unusable for filling station purposes. The property was located on a secondary road, yet the landowner was allowed to use sales in another municipality two and one-half miles away on a main road. The Court held the sales admissible and pointed out that the trial court had given the proper cautionary instructions and that the condemnor was given extensive opportunity to cross examine.

These sales, while used to determine the value of the whole property, certainly must have had great influence on the computation of the value of the remainder after the take since it was no longer suitable for filling station purposes. If sales in an admittedly more desirable location can be used to value a site for filling station purposes, there should be no objection to the condemnor using similar sales to show the value of a remainder which will become valuable for commercial purposes as a result of the improvement.

Cases such as *Hays v. State*, 342 S.W. 2d 167 (Cr. Civ. Ap. Tex., 1960), are also valuable in pointing out that the distance of the sale from the subject is not controlling. The Court therein pointed out that sales similar to the property being appraised may be used if located within the metropolitan trade area where city property is involved or within the same type of marketable land area where rural property is involved.

Of like import is the case of *Knollman v. U.S.*, 214 F. 2d 106 (C. A. 6) (1954), in which condemnee was prevented by the trial court from introducing sales in another township which took place after the valuation date. The sales were offered to show what good industrial land was selling for. It was contended that the landowner's property was suited for the same purpose and that such land was scarce and in demand in the vicinity of the subject property. The Court ruled that it was an abuse of discretion and reversible error to exclude such sales, stating that whether sales were within 2,000 ft of the subject or eight miles away was a question of weight, since land situated several miles away may be more comparable. Sales evidence indicating the lack of land available for a certain use was held to be directly relevant to the question of the demand for the subject land in the reasonably near future.

If, as this case indicates, the distance is not determinative and if sales can be used to indicate demand, the condemnor should be able to introduce sales which show that the proximity of the remainder to the subject improvement and the relatively few parcels which have this advantage will increase, or certainly will not lessen, its value as demonstrated by sales which have taken place in other areas where like influences are present.

At the very least, the cases which can be found in almost all jurisdictions allowing considerable latitude in the use of comparable sales can be cited to the trial courts if opposing counsel objects to evidence of particular sales. And it can be pointed out to the Court that in those cases where the trier of fact was faced with valuing a piece of property having rather unique characteristics, such as a particular propensity for a certain type of use or proximity to a unique improvement, the Courts have recognized the necessity of permitting the appraiser a wider area of discovery than might be permissible if there were sufficient sales of the same type in the immediate vicinity of the subject. Where the witness is charged with determining the effect of a particular improvement on the market value of a particular piece of property, he has no choice but to gather his market data where it exists even if that happens to be some distance from the subject.

In some instances, it will not be necessary or possible to go out of the area to show the influences of the improvement on the value of the remainder. There may be sales which took place in the area after the announcement of the location of the improvement which will show increased value. In those cases where after sales have been excluded, the reason is generally that the sales price was or could have been enhanced by the improvement and, thus, is not a fair indication of the value of the property uninfluenced by the improvement.

If the after sale is as close to the valuation date, even though subsequent to it, as those used to show the before value which occurred prior to the valuation date, they are equally as reliable to indicate the value of the remainder.

In *U. S. v. 63.04 Acres of Land*, 245 F.2d 140 (1957) (C.A. 2d Cir.), the trial court excluded after sales offered by the condemnee to prove that rezoning on the south side of the street had increased values on the north side of the street. In reversing, the Appellate Court noted that the most important issue was whether rezoning on the south had affected property values on the north which outweighed any danger of artificial inflation created by the improvement and, therefore, it was an abuse of discretion not to allow the after sales in evidence.

The Court held that not only were the sales admissible on direct examination of the witnesses to show value, but were admissible on cross examination in rebuttal to the condemnor's assertion of a lesser value. Where the condemnee has stated an opinion of the value of the remainder before and after, the use of sales after the valuation date should be admissible to rebut his opinion of value just as he can use sales to rebut the condemnor's opinion of value.

If sales are offered to show that the value of the remainder after is not as low as that contended by the condemnee, they should not be vulnerable to an objection that the sales do not indicate whether their value is attributable to the improvement. The values indicated by the sales should be admissible if for no other purpose than to show the price for which land is selling in the area after the announcement of the improvement and to determine whether there has been any general diminution in value as a result thereof. If the sales prices indicate that the other properties do not seem to be adversely affected by the improvement, it should be the burden of the landowner to show why the value of

his specific remainder has been diminished while the surrounding property has not been so affected.

Although sales can be used to establish benefits, it is likely that options to purchase cannot. Options, if proper, can only be used as a declaration against interest. *Arkansas S H C v. Hambuchen,* 422 S.W. 2d 688 (Ark. 1968).

COST APPROACH

As a supplement to the comparable sales or market data approach, the cost approach may prove useful in determining the values of the remainder.

The cost to build a road that would otherwise have had to be provided to develop the property were it not for the new road might be said to give an indication of the increased market value of the remainder. As with the market data approach, one does not find a comprehensive body of law defining how costs can be used to prove benefits. Rather, the attorney should explore the case law in his jurisdiction concerning when the cost approach can be used to prove value. In those jurisdictions where the cost approach can be used when it serves to indicate the market value of the whole property, it may be equally relevant in indicating how the improvement will affect the market value of the remainder. And, if the particular jurisdiction allows use of the cost approach in proving damages, its use should be allowed in attempting to prove benefits.

But, as with comparable sales, the better approach is to introduce cost testimony as an indication of the market value of the remainder rather than to set forth its purpose as being "benefits" testimony.

In fact, evidence of the cost to build the hypothetical road previously referred to might first be introduced to show its effect on the value of the whole property before the construction of the improvement as an indication of how the property would have to be developed to its highest and best use. Evidence of the before value of the property may be at least partly based on the fact that to develop the property, certain roads would have to be constructed and that since these facilities had not been available prior to the highway improvement, the property would only be worth $1,000 per acre. After the roads were constructed, however, the property would be worth $3,000 per acre. If the highway improvement provides access to areas of the property where none existed before, the appraiser may well find a considerable increase in the value of the remainder. The testimony, having been originally admitted to show highest and best use of the whole property, should not be subject to exclusion because it also indirectly shows a benefit to the remainder.

In those jurisdictions where the appraiser would not be allowed to compute the cost of constructing roads to improve access to the property as being too speculative, the witness would still be entitled to his opinion that improved access would make the property more valuable. In fact, on cross examination the condemnee's expert witnesses may be forced to admit that if the property were more accessible or had more and better roads surrounding and running through the property before the acquisition, it would be more valuable. Without realizing it, the witness may have made a case for benefits if in fact the highway improvement will provide this desirable access to the remainder. At the very least, the condemnee should find it difficult to make a case for damages to the remainder without appearing to be inconsistent.

INCOME APPROACH

The income approach converts net income, attributable to the real estate, into an indication of value by the use of a capitalization rate. After establishing economic rent, the appraiser makes deductions for vacancy allowance and all operating expenses. The remaining net income is then capitalized with a rate which provides for interest on the investment and recapture of the investment in the wasting asset (improvements). It is possible to measure increased value due to the improvement by the application of the income approach if an increase in both gross and net income to the real estate can be clearly shown. For example, a service station property which has experienced an increase in the volume of gasoline sales because of increased trade resulting from a highway improvement would in all likelihood experience a corresponding increase in land value. However, it should be emphasized that the income approach is very sensitive and seemingly minor adjustments of income and expenses result in major changes in indications of value. If this method of measuring benefits is applied, great care should be taken to separate the income influences stemming from the improvement project from other economic influences.

The income approach will have limited application if the improvement has not been constructed at the time of the trial. In those jurisdictions where the income approach can be used to value the whole property, it should be equally permissible in valuing the remainder where it can be established that the income was so much before the improvement and it is so much after. The testimony may be especially relevant in those cases where damages are alleged. If the property is deriving more income than it did before the improvement, damages will be difficult to prove.

When, at the time of trial, the improvement has not been completed or the remainder property has not as yet been developed with an income-generating business, the income approach may still serve a useful function for the appraiser. Other properties located near other similar improvements should be examined, if for no other reason than to attempt to determine whether such improvements have a detrimental effect on surrounding business properties. While the appraiser may not be able to make direct comparisons with other properties, if the study reveals that improvements of the kind contemplated have not diminished the income of surrounding properties but that in fact income generally increases after the construction of the improvement, it may well form the foundation for a determination by the appraiser that the remainder will not be diminished in value and should increase in value. But, it will still be up to the appraiser to discover the specific reasons why such improvements create increased income and increased property value. The income approach may prove a useful supplement in determining the value of the remainder, but it should not be relied upon as the primary vehicle through which to prove benefits.

EXAMPLES OF INCREASED PROPERTY VALUE RESULTING FROM THE IMPROVEMENT

The following examples of particular instances in which increases in property values may result from the construction or proposed construction of an improvement are offered only to suggest possible benefit situations and elementary considerations for the appraiser. As so often happens, an appraisal will be turned in giving little if any thought to increased value. It may be that the only comment in the report will be to the effect that while benefits may exist, they are "general" in nature and, therefore, were not considered. Since the appraisers are usually not attorneys, their qualifications to offer an opinion as to whether a benefit is general or special are questionable. Rather, their concern should be with whether the remainder increased or decreased in value as a result of the improvement.

The appraiser should be instructed to investigate and document possibilities of increased value. As is often the case, the appraiser may be generally competent, but not have a very good conception of what to look for in valuing the remainder.

Only a minimal number of factual situations which might give rise to increased value are included in the following listing, and they are presented only to give the attorney and appraiser some conception of how to formulate a preliminary analysis of a potential benefit situation.

Benefits can be separated into two general categories. The first of these are physical and relate to the visible and tangible aspects of property. The second category is economic and includes those benefits which relate to the use of property. Examples and illustrations of the two types are discussed as follows:

Physical

1. *Improved Access.*—The construction of frontage roads along existing highways will often result in increasing the values of abutting properties. Experience has shown that optimum use of properties adjoining highways is often not possible because of both excessively heavy flow and speed of vehicular traffic. The development of service roads will afford potential highway customers the opportunity to slow down and purchase goods and services. Also, where access is controlled on a major highway, the service road will permit commercial utilization where it might otherwise have been impossible.

Improved ingress and egress may also result from the construction of deceleration lanes. In fact, any highway project which results in a better flow of vehicle traffic may result in increased values of adjoining properties because of reduction in traffic congestion.

EXAMPLE.—A main arterial street in an urban community has become overloaded with vehicular traffic during most daylight hours because of community growth. A road project is undertaken to provide additional lanes to handle the increased traffic. Right-of-way is acquired from property owners on both sides of the existing street for street widening.

In this case, the most effective means of measuring increased value would be through the use of comparable sales. Before and after sales in the project area would be most effective. Useful documentation in the presentation of evidence would include traffic and destination studies and ample enlarged before and after photographs.

2. *Creation of a Corner.*—It is conceivable that a new road project through a developed area could create corner locations. That is to say, tracts of land which were originally situated in the center of a block could be situated on corners after the new road is built. It is a generally accepted valuation principle that corner sites will command a premium in the market because of the probability of higher and more profitable uses.

EXAMPLE.—An existing arterial street is extended through a platted or subdivided area. Streets within the subdivision are not aligned with the arterial street, so that the road improvement severs some of the platted blocks. Former interior lots are then situated on corners, after the project is completed.

The best means of demonstrating increased values in this case would be by comparison of interior lot sales vs corner lot sales. In most instances, corner lots zoned for commercial use will command a premium over commercial interior lots.

3. *Improved Drainage.*—In modern highway construction, considerable attention is given to problems of surface drainage. This is not done to accommodate adjoining property owners, but to protect the investment in the roadway. However, in many instances, the adjoining owners will benefit from the improved drainage.

EXAMPLE.—An existing highway is being improved by widening, resurfacing and construction of curbs and gutters. The original roadway followed the surface of the land. Little attention had been given to drainage when the road was built, resulting in occasional flooding. The improved road had been properly engineered to carry off surface drainage by the use of curbs, gutters, and culverts.

The most effective means of measurement in this case would be before and after sales either in the subject area or similar neighborhoods where drainage problems had been prevalent.

4. *Fencing.*—Some modern highway construction requires fencing along the right-of-way line. This might obviously result in increased values in a rural area where no fences existed before or where a new fence replaces an old, obsolete one.

EXAMPLE.—An existing highway is widened to accommodate increased vehicular traffic. The old right-of-way line has been fenced by the property owner to protect his livestock. The fencing is an old, three-strand barb-wire-type with wood posts. The new highway right-of-way line is fenced by the State Highway Department with a modern mesh-type fencing with steel posts.

In this case, it would probably be difficult, if not impossible, to find before and after sales to show this increased value. The best measurement might be to show that a prudent purchaser of the subject property would be willing to pay an additional purchase price at least in the amount of the cost of the fencing.

5. *New Curb, Gutters or Hard Surfacing.*—The installation of new curbs, gutters and hard surfacing of gravel roads

is another type of improvement that will directly benefit adjoining properties. Modern, high-density commercial and industrial uses virtually demand highly improved access roadways.

EXAMPLE.—A secondary road in a growing suburban community has been utilized primarily by suburban homeowners. However, the growth of the community has resulted in a number of new subdivisions which, in turn, has resulted in drastically increased road use. The gravel-surfaced road creates clouds of dust in summer months and mud in inclement weather.

Here again, the most effective method of measurement would be by the use of before and after sales. If these cannot be found, another possibility is to measure the increased value by a proportionate share of the cost of the road improvement. This is on the premise that the market value of adjacent properties will increase by at least the proportionate cost of the road improvements.

6. *Appearance.*—Physical appearance, as noted under special benefits, may be improved through an entire neighborhood. Physical appearance may also increase the value of one or more individual properties. While highway projects are usually not intended to upgrade unsightly neighborhoods or remove dilapidated buildings, the effect may be just that.

EXAMPLE.—A small cluster of "shack-type" houses is situated on both sides of a two-lane suburban roadway. Community growth requires improvement and widening of the road to serve developing new subdivision. As a part of the road project, the dilapidated houses are removed.

One method of measurement of the increased values in this instance would be to analyze and tabulate the amount and type of sale activity before and after the highway improvement. In all probability, the neighborhood was dormant or static in the before situation because of the depressed housing. After construction is completed, there will most likely be an increase in sale activity and a corresponding increase in property values.

7. *Installation of Utility Lines.*—Some road projects will provide not only for highway improvement, but also for the installation of sewer or water main in the new or improved road. This is usually the result of timing, in that the cost of sewer and waterline construction will be less if undertaken before the highway improvement. In any event, if utility service is made available where it was previously not available, increased value may result.

EXAMPLE.—A suburban community is planning to extend utility service to an unserviced area. At the same time, it is proposed that the principal arterial street into the area will be improved. Utility service is made available not only to the unserviced subdivision, but also to abutting property owners along the existing arterial street.

Measurement of increased value in this instance could be made either with the use of sales with vs without utility service or by proportionate cost of the improvement. The latter is again on the premise that a prudent purchaser would pay at least that much more for the property for the convenience of having utility service.

8. *Creating or Increasing Frontage.*—The value of commercial properties is very often in direct ratio to the number of front feet on a major arterial. Value is often expressed on a "front foot" basis with commercial properties. New roadways or widening of existing roadways may result in increasing or creating frontage of adjoining commercial tracts. If the measure of land value is "frontage" and the lineal feet of frontage is increased, an increased value may result.

EXAMPLE.—A pie-shaped tract of commercially zoned land is somewhat restricted in use because of relatively narrow access to the adjoining arterial street. The State Highway Department has undertaken a major widening project which actually increases the number of front feet of the subject tract.

In this instance, it would be most effective to express land value in terms of front feet. From the standpoint of valuation theory, the increase in frontage would have to be directly related to an increase in utility of the land.

Economic

1. *Higher and More Profitable Land Use.*—The most common economic gain in value is in changes of highest and best uses of land. Suburban or rural tracts which had been utilized for agricultural purposes may be better suited for residential, commercial. or industrial uses after construction.

EXAMPLE.—A new connecter road is constructed between the existing main street of a suburban community and a new Interstate highway. The new connecter road passes through a neighborhood which had been primarily improved with small farms and suburban residences. After completion of the project, the land abutting the new road is better suited for commercial and high-density residential uses.

The most effective measurement of increased value here is by the use of comparable sales of both the former and later use types. Careful analysis of land sales in the area before thc highway project, as related to commercial or residential high-density sales after, will almost always clearly show a gain in value.

2. *Location Near an Interchange.*—A commercial tract which is situated near an interchange of a new Interstate highway will obviously benefit in a specific way. This is because access to the new road is controlled and permitted only at interchange points. The result is that vehicular traffic is funneled or channeled past relatively few properties.

EXAMPLE.—A 10-acre suburban residential tract is situated on a secondary farm-to-market road. A new Interstate highway is constructed near the east property line, with 1½ acres of the subject property acquired for an interchange. In the before situation, the subject property was one of many fronting on a secondary road. In the after situation, it is in a prime commercial location, because of the Interstate highway interchange.

Measurement in this case would be best presented by the history of other tracts of land that have experienced the same interchange situation. It is most desirable to cite these sales at other interchanges which have experienced the full economic cycle. In all probability, the full cycle has not occurred with the subject property at the time of right-of-way acquisition.

3. *Changes in Vehicular Traffic.*—A new or improved road may result in an increase of both vehicle and pedestrian traffic past a particular property. The greater number of passing people and cars may result in a greater volume of retail sales which would, in turn, result in higher land value for the subject property.

EXAMPLE.—An improved road in an urban area has been used primarily for local traffic. Adjoining properties are presently zoned and utilized for commercial purposes. Because of the direction of growth of the community, the existing road is improved to accommodate a substantial increase in vehicular traffic. What had originally been a local service road becomes a main arterial road. Adjoining commercial property owners experience a gain in value because of the increased traffic. This gain in value is related directly to the decision to improve this particular road and not another one.

Here again, the use of before and after sales would be most convincing to a jury. Traffic counts and destination studies would also support the conclusion of increased value stemming from increased traffic.

4. *Advertising Value.*—The suitability of a particular tract of land for billboard-type advertising may increase directly as a result of a highway project. A sign location that has value because it is in a prominent place for public viewing will obviously have greater value if it has greater exposure to more people.

EXAMPLE.—The improvement of an existing roadway results in the lowering of the street surface so that an adjoining sign site is in a more prominent position. The sign company that leases the site is able to charge increased fees to advertisers as a result of the improved location feature.

The measurement of increased value in this case would be by analyzing before and after rentals paid the lessor. If he is able to obtain a higher rent from the sign company as a result of the highway improvement, it is reasonable to expect that there has been a corresponding increase in land value.

CONCLUSION

The attorney for the condemnor need not give up if upon cursory analysis of the benefits law in his jurisdiction he determines that the courts have placed a number of road blocks in his path. The possibility of alternative routes to the desired destination should be explored. Directions in plotting the correct course can often be found in the decisions which seem to present the greatest obstacles.

A case in point is *Farrell v. State Highway Board,* 123 Vt. 453, 194 A.2d 410 (Vt. 1963), in which the Vermont Supreme Court ordered the trial court to strike the $35,000 in benefits because they were considered "general" and award the landowner $45,000 in damages without offset. The rationale of the Court was to the effect that a landowner whose portion of land was being taken should not be penalized when the property owners across the street whose land was not being taken would reap the full harvest of benefits. Since Vermont is a state in which benefits may only be set off against damages, this logic makes absolutely no sense. In offering testimony that the remaining land would increase rather than decrease in value as a result of the location of a freeway off-ramp adjacent to the subject property, the condemnor is attempting to deprive the landowner of nothing but damages which do not exist. If the remainder would be worth more after the take, presumably the remainder would sell on the open market for a price reflecting this increased value. For the trier of fact to award damages when the remainder will increase in value defies comprehension.

In the *Farrell* case the evidence offered to prove the increased value was not found to be inadmissible. The Supreme Court confined its holding to striking the benefits which were considered "general" in nature. The Court did not say that testimony tending to show increased value was inadmissible *per se.*

An obvious alternative to striking the benefits and letting the damages stand would have been to order a new trial. In altering the award itself, the Supreme Court is presuming that the trier of fact would find that the value of the remainder had decreased in value by $45,000 if they had been advised that the benefits were general. And, yet, the deliberations of the trier of fact produced a net damage of $10,000 at the first trial, which means that it was estimated that the remainder would be worth $10,000 less than it was before the improvement. Just because the benefits were determined to be "general" and could not be offset against damages does not mean that the trier of fact would have to find that the remainder would sell for $45,000 less than it would have before the improvement.

The only way a trier of fact can arrive at an award of both damages and benefits on the same remainder is to consider how much the remainder would be decreased in value if the damaging effects of the improvement were all that were considered and then to estimate benefits considering only the beneficial effects. While this method is admittedly contrived, it must have been what the trier of fact did in *Farrell.*

Just because the testimony concerning increased value was not competent for the purpose of assisting the trier of fact in arriving at a benefits figure does not mean that it could not be considered in determining whether the remainder had actually decreased in value. If the evidence tended to show that the property in the area of the subject would not decrease as a result of the improvement, the trier of fact should consider this information in estimating damages.

In those states where only specific benefits may be offset against damages, it should not mean that those factors which keep the remainder from diminishing in value cannot be considered in estimating damages, but only that they may not be added in with specific benefits for a direct and automatic offset against damages. For instance, if the trier of fact determined that because of specific and general benefits the remainder would rise in value $50,000, of which $30,000 was a direct result of the improvement and $20,000 an indirect result, they would only show $30,000 in the benefits slot of the award. If the remainder also showed some damage items such as the severance of one part of the remainder from another, the trier of fact would consider how much the remainder would be decreased in value as a result of the severance and at the same time

consider all the characteristics of the remainder and its location, except specific benefits, which would tend to keep the remainder from decreasing in value.

In the *Farrell* case, all the Court has done is to conclude that the trier of fact erroneously stuck general benefits in the slot reserved for specific benefits. But the trier of fact, in assuming the items to be special benefits, was not given an opportunity to consider whether these items labeled general benefits were not also an indication that the value of the remainder would not be reduced to the extent contended by the landowner. A case would be considered absurd which held that the trier of fact was to award damages on the basis of how much the remainder would be decreased in value by the improvement, disregarding all relevant evidence of other factors which would diminish or negate the harmful effects of the improvement.

The *Farrell* case is over and the specific result cannot be undone. But, practical lessons can be learned in jurisdictions where like results have or could occur. As noted, the Court in Vermont did not hold that the evidence of increased value had no relevancy to the issue of the amount of damages actually sustained. Yet, perhaps because of the way the issue was presented and argued, the Court failed to appreciate why a new trial should be granted if the benefits were found to be general.

If the evidence is admissible, to rebut damages if nothing else, the attorney and his witnesses should consider the possibility of offering all testimony concerning the increased value of the remainder as foundation evidence for the witnesses' conclusion of no or limited damages and phrasing the testimony in such terms.

If the appraiser uses the standard approach of "I think the remainder is specifically benefited because . . .", a red flag is immediately waved and objections will likely be forthcoming. Once introduced, whether the evidence of increased value is determined to constitute a special benefit or merely something to be considered in estimating damages is less important than the fact that the trier of fact has been presented with the necessary data on which to base an informed estimate.

It may still be critical in states in which the value of the property before and after the take is the measure of compensation to attempt to have the evidence labeled "benefits" testimony, but even in before and after states, evidence of increased value of the remainder should be admissible to rebut the landowner's claim that just compensation should exceed the value of the part taken.

The importance for the attorney and the witness thinking and testifying in terms of increased or decreased value rather than stating that the remainder is damaged or benefitted cannot be overestimated. Both Courts and triers of fact can forget what these terms mean, if they were ever properly informed. In fact, inconceivable as it seems, the attorneys and their witnesses often get caught up in semantics and fail to convey any concept of decreasing or increasing market value.

In essence, overused terms of art lose more cases than they win, and the attorney and appraiser wishing to sell benefits would do well to prepare their case thinking in terms of increasing and decreasing market value, which conveys more meaning to the trier of fact and is a more precise description than the catch-all legalisms "damages" and "benefits."

CHAPTER THREE

PROBABILITY OF REZONING

After a valuation witness has stated his opinion of the particular highest and best use of a piece of property, but it is not zoned to permit that use, testimony is required concerning the probability of rezoning.

If the property is zoned for residential purposes but has commercial potential, it is not enough to find sales of property with commercial zoning and ascribe that value to the residential property. Property already zoned commercial will generally command a higher price than property which just possesses the probability of rezoning.

Nevertheless, the Courts have allowed witnesses to establish the probability and then state how much more the property would be worth even though zoned residential, as such price would be influenced by the possibility of rezoning. It might strike the inquisitive attorney that if the trier of fact is allowed to speculate on an increased sales price as a result of the probability of rezoning, there is no justification for not allowing consideration of the less speculative effect of the improvement on the value of the remainder. The improvement, though it may not be constructed at the time of trial, is a foregone conclusion, whereas no one can say for certain that the zoning change will ever be proposed or granted.

Furthermore, the effect which the improvement will have on the value of a piece of property is no more speculative than the effect that a contemplated zoning change would have on the sales price.

Cases can be found in most all jurisdictions allowing some latitude in the introduction of evidence tending to show that the property has a higher and better use than that

for which it is zoned. While some courts may be more strict than others as to the type of testimony necessary to establish the probability of rezoning, the requirements are generally not insurmountable.

For instance, if a qualified zoning expert is needed to support the opinion of the appraiser that rezoning is probable, they are available. In a typical case, such an expert would testify something to the effect that where particular conditions have been found to exist in the community, rezoning has been granted and that those conditions exist in the area where the subject property is located which would create a probability of rezoning.

If such testimony is sufficient to get the question of the probability of rezoning to the trier of fact, similar testimony should suffice on the question of the effect of the improvement on the remainder. Any number of qualified development experts, which may even include the condemnor's appraiser, can be secured to testify that when similar improvements have been introduced into other areas, a certain type of development takes place, such as zoning changes, particular uses for property in close proximity to the improvement, etc. The expert should then be able to testify that those same or similar conditions exist in the area where the remainder is located.

The old bromide objection may be offered by opposing counsel that just because such development took place down the road does not mean it will happen here. The response is to point out the probability of rezoning cases and by indicating that your witness is merely testifying on the issue of highest and best use and he is entitled to his opinion and can document this opinion by basing it on experience in other areas. This is exactly the type of testimony that is required to establish the highest and best use of property which may be unfavorably zoned and it is certainly no more speculative when applied to the probable effect of the improvement which is a stipulated fact than when applied to the probable effect of an uncertain change in zoning.

Unless opposing counsel can distinguish the zoning cases, he will in effect be asking the Court to overrule or at least disregard all the cases which have allowed experts to call on past experience in the community to formulate an opinion of present worth.

In the zoning cases, the issue of highest and best use is recognized as a matter of opinion to be substantiated by whatever knowledge or experience the expert has. The issue of highest and best use and the effect of the improvement on the remainder is so essential that if the trier of fact is not presented with evidence of what has happened, total reliance must be placed in the undocumented opinion of the expert. If the opposing counsel has evidence which suggests a different effect, he will be entitled to present it. But it is not for counsel or the Courts, but for the trier of fact, to determine which opinion is supported by the best facts. Just as the trier of fact is entitled to hear the reasons why there may be a probability of rezoning, so should the same type of evidence be admissible to document the opinion of the expert that the improvement will have a particular effect on the improvement.

Whether the attorney for the condemnor prevails in such arguments may depend on his approach. If he is led by opposing counsel into a debate on whether such testimony is admissible to prove benefits, he has probably been sidetracked from the real issue. The preliminary testimony on the effect of the improvement is presented for the purpose of showing the potential uses of the property or how existing uses will be affected by the improvement. It is essentially a discussion of highest and best use. If the reasons for his opinion are no more speculative than those used to support an opinion that there is a reasonable probability of rezoning, both the opinion and the documentation should be allowed to be presented to the trier of fact.

As the Court held in *People v. Hurd*, 23 Cal. Rptr. 67, (Cal. C.A.2d Dist. 1962), since the reasonable probability of rezoning may be taken into consideration in fixing present market value of the property to be taken, it may also be considered "in determining the matter of special benefits." In the *Hurd* case, the remainder would front on a new road and would also be adjacent to an off-ramp of a new freeway. A witness for the State was allowed to testify that a change in zoning as a result of the freeway was reasonably probable, having checked with the zoning authorities. He testified that after the rezoning took place, the land would be worth more than twice what it was worth on the date of valuation, but limited his estimate of benefits to present value as influenced by the probability of rezoning.

The Court does not indicate whether the appraiser used any sales to show that properties which were zoned as he anticipated the subject remainder would be zoned command a higher price. As far as the Court in *Hurd* indicates, it was sufficient that the witness made an investigation and determined that it was reasonably probable that the property would be rezoned as a result of the construction of the improvement and that this probability would increase the present market value.

The Court did not elaborate on whether the condemnee objected to the testimony because of an insufficient showing of reasonable probability or whether the condemnee argued that the probability of rezoning was a general rather than a special benefit.

The latter objection would make no sense because evidence of the probability would have been competent to refute damages, which the condemnee claimed would accrue to the remainder. If there was a probability of rezoning which would raise property values, damages could not be awarded since damages will only result if the market value of the remainder is lowered as a result of the improvement.

Suffice it to say that the liberal principles espoused in the probability of rezoning cases are particularly applicable when arguing for the introduction of evidence to prove the value of the remainder.

CHAPTER FOUR

INSTRUCTIONS

Instructions are one of the most important facets of any successful condemnation trial. This is particularly true when the issue of benefits is involved. The type of instructions required will depend on the evidence presented and the rule for measuring just compensation in the particular jurisdiction involved.

Regardless of the rule applicable, it is elementary that instructions cannot be given to a jury unless they are based on evidence produced during the course of the trial. For this reason, the evidence of benefit should be closely tied to and directed toward the ultimate statement of the law which is intended to be included in the instructions. This not only gives great cumulative weight to the benefits evidence, but often makes the finding of benefits inescapable.

The major problem in preparing instructions is that of clarity. It is essential to set forth the controlling rules of law in clear and concise language, which can be understood by a lay jury. If an instruction cannot be easily understood, the Court will be more inclined to reject it; and even if accepted, it will be valueless in achieving the desired result; i.e., that of convincing a jury that benefits have accrued to the residue of the landowner's property. Therefore, clear, precise, simple language should be used.

The most important instructions are those which set forth the general rule of law for measuring compensation and contain a definition of special and/or general benefits. These instructions will tell the jury exactly what a benefit is, and how to apply its finding of benefits to the ultimate conclusion of just compensation.

Before specific examples of instructions are discussed, it is well to point out some of the rules of law which should be used and followed when preparing benefit instructions:

1. In special benefit states, the instructions should define special benefits and should distinguish them from general benefits.[162] Otherwise, the instruction is objectionable.[163] Guidelines must be given to the jury or commission in the instructions so that they can readily distinguish between special and general benefits.[164] It must be made clear to the jury that special benefits are the only ones that can be considered by them. An instruction which uses the word "benefit" without distinguishing between a general and specific benefit is erroneous.[165] Obviously, an instruction which permits the consideration of general benefits in a special benefit only state is also erroneous.[166]

2. In special benefit states, where the Court has excluded certain items as constituting general benefits, it is improper for the jury to be instructed on the matter of general benefits.[167]

3. Generally, it is improper to instruct the jury on either special or general benefits when there is no evidence of benefits.[168]

4. Care should be taken in a special benefit jurisdiction to make sure that an instruction is tendered in such a way that the jury is advised that a benefit is not rendered "general" merely because other lands in the neighborhood similarly situated receive the same benefit.[169] Therefore, an instruction which defines a special benefit as one which "no other" than the landowner can receive is erroneous.[170] Such an instruction would make it impossible for a jury to find special benefits when the special benefit is shared by others in the neighborhood.

5. When an instruction is framed in such a way that it assumes the existence of damage, it is erroneous.[171] Likewise, it is erroneous if the instruction assumes that the jury must find damages.[172] Such instructions take away from the jury the question of whether the property has, in fact, been damaged. Conversely, it should follow that an instruction which takes away from the jury any questions as to the presence of a benefit is similarly erroneous.

6. Where the "Before and After Rule" is in effect (i.e., where the benefits can be offset against damages and the land taken), instructions should clearly tell the jury that benefits can be offset against the land taken, as well as damages.[173] However, it is erroneous to require the jury to find a separate figure for the land taken.[174] The reason is obvious, because only one figure is required and that is the difference in value of the property before and the value of the property remaining afterwards.

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[162] Missouri
State v. Haid, 59 S.W.2d 1057 (1933)

[163] Missouri
State v. Bank of Lewis County, 102 S.W.2d 774 (Ct. App. 1937)
State v. McCann, 248 S.W.2d 17 (Ct. App. 1952)
Vermont
Howe v. State Highway Board, 187 A.2d 342 (1963)

[164] Vermont
Howe v. State Highway Board, 187 A.2d 342 (1963)

[165] Missouri
State v. McCann, 248 S.W.2d 17 (Ct. App. 1952)

[166] Missouri
State v. Manzer, 77 S.W.2d 123 (Ct. App. 1934)

[167] Vermont
Howe v. State Highway Board, 187 A.2d 342 (1963)

[168] Alabama
State of Alabama v. Huggins, 196 So.2d 387 (1967)
Indiana
State v. Stabb, 79 N.E.2d 392 (1948)
Nebraska
Phillips v. State, 93 N.W.2d 635 (1958)
North Carolina
Kirkman v. State Highway Commission, 126 S.E.2d 107 (1962)

[169] Illinois
Forest Preserve Dist. of Cook County v. Chicago Title and Trust Co., 183 N.E. 819 (1932)
Missouri
City of Springfield v. Ellis, 97 S W.2d 154 (Ct. App. 1936)

[170] Missouri
State v. Day, 47 S.W.2d 147 (1932)
State v. Riggs, 47 S.W.2d 178 (1932)
State v. Caruthers, 51 S.W.2d 126 (1932)

[171] Missouri
State v. Riggs, 47 S.W.2d 178 (1932)
State v. Powell, 226 S.W.2d 106 (Ct. App. 1950)

[172] Missouri
State v. Williams, 69 S.W.2d 970 (Ct. App. 1934)

[173] Missouri
State v. Powell, 226 S.W.2d 106 (Ct. App. 1950)

[174] Missouri
State v. Scheer, 84 S.W.2d 641 (Ct. App. 1935)

With a view to helping the highway lawyer in the preparation of instructions, several suggested forms are included herein. The reader is *cautioned* that these instructions will not have application in every state nor in every factual situation. They are presented as a guideline to instructions which have, as a general proposition, been viewed with favor by Courts throughout the country. It may be necessary to modify these instructions to fit a particular rule of law or factual situation.

It is assumed that each attorney has previously prepared, as a part of his personal trial manual, certain stock or form instructions which relate to the proper measure of just compensation in his state. This instruction would conform to one of the four rules of law as follows:

INSTRUCTION NO. ——

You are instructed that, if you find special benefits to exist, these special benefits may be set off against damages to the residue of the landowner's property, but may not be set off against the value of the land being acquired.

INSTRUCTION NO. ——

You are instructed that, if you find both special and general benefits to exist, these benefits may be set off against the amount of damages to the residue of the landowner's property, but such general and special benefits may not be set off against the value of the land being acquired.

INSTRUCTION NO. ——

You are instructed that, if you find special benefits to exist, such benefits may be set off against both the value of the land to be acquired and the damages to the residue, if any.

INSTRUCTION NO. ——

You are instructed that, if you find special and general benefits to exist, both such benefits may be set off against the value of the land to be acquired and damages to the residue, if any.

Obviously, the foregoing instructions are based on the assumption that the jury will make all necessary calculations and setoffs and return a gross verdict of just compensation; i.e., return a finding of one figure only. However, it is the rule in many of the states that the Court will do all setting off and the jury need only fill in an appropriate space in a form verdict. Thus, for such a state, the following instruction would be of value:

INSTRUCTION NO. ——

You are instructed that, in completing the form of verdict which has been provided for your use, a blank space has been provided for the amount of special (and/or general) benefits, if any, which you may find to accrue to the residue of the landowner's property. If you find that special (and/or general) benefits have accrued to the residue, the amount of such special (and/or general) benefits must be inserted in the proper space in the verdict. If you find no such special (and/or general) benefits to exist, the word "none" must be inserted in the proper space in the verdict.

Obviously, if state law requires a form verdict, an instruction relating to the just compensation rule of law and its application to a finding of benefits is not essential.

In addition to the foregoing instructions, it is essential that the attorney have stock or form instructions which define market value, residue, and damages to the residue. It is assumed that each attorney has such instructions and that such instructions perform a vital role in each highway attorney's case.

Perhaps the most difficult task facing the highway attorney is that of defining special and/or general benefits. The following instructions, each of which defines a special benefit, or a general benefit, have gained acceptance in various jurisdictions throughout the United States. These instructions are set forth for consideration and use, on the assumption that they can be modified or changed, perhaps even combined, to fit a particular situation.

INSTRUCTION NO. ——

You are instructed that special benefits are benefits which accrue directly and proximately to the residue of the landowner's property by reason of the construction of the public work. Such benefits are to be measured by an increase in the market value of the residue of the landowner's property.[175]

INSTRUCTION NO. ——

A special benefit is any benefit which causes an increase in the market value of the residue of landowner's property by reason of the residue's position directly on the highway, which benefit is not enjoyed generally by other tracts of land in the neighborhood, no portion of which lands were acquired for the construction of said highway. Such benefits are special, although conferred upon other tracts of land similarly situated.[176]

INSTRUCTION NO. ——

A special benefit is one which accrued as a result of the construction of the public work on the land acquired, and which benefit increases the market value of the residue of landowner's property by improving the residue's physical condition and/or its adaptability for use.[177]

INSTRUCTION NO. ——

Special benefits are those benefits which result from the public work in question, which benefits enhance the market value of the residue of landowner's property because of the residue's peculiar relationship to the improvement in question.[178]

INSTRUCTION NO. ——

You are instructed that special benefits are those affecting a particular estate by reason of its direct relationship to the improvement.[179]

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[175] Missouri
State Highway Commission v. Clevenger, 291 S.W.2d 57 (1956)
State Highway Commission v. Ballwin Plaza Corp., 382 S.W.2d 633 (1964)

[176] Missouri
State v. Bailey, 115 S.W.2d 17 (Ct. App. 1938)
State v. Lindley, 113 S.W.2d 132 (1938)
State Highway Commission v. Clevenger, 291 S.W.2d 57 (1956)
State Highway Commission v. Ballwin Plaza Corp., 382 S.W.2d 633 (1964)

[177] Wisconsin
Petkus v. State Highway Commission, 130 N.W.2d 253 (1964)

[178] North Carolina
Kirkman v. State Highway Commission, 126 S.E.2d 107 (1962)

[179] Missouri
State v. Pope, 74 S.W.2d 265 (Ct. App. 1934)

INSTRUCTION NO. ____

You are instructed that special benefits are those which result directly and peculiarly to the particular tract of which a part is taken.[180]

INSTRUCTION NO. ____

You are instructed that special benefits are those which arise from the peculiar relationship of the land in question to the public improvement.[181]

INSTRUCTION NO. ____

You are instructed that special benefits are benefits which accrue directly and proximately to the residue of the landowner's property by reason of the construction of the public work. Such benefits are different in kind, not in degree, from those accruing to the community as a whole and the general public. They result from the residue's position on or relationship to the public improvement and are measured by an increase in the market value of the residue. Such benefits are special even though they are shared by other properties similarly situated.

INSTRUCTION NO. ____

You are instructed that a general benefit is an advantage not peculiar to the remainder of a tract of land, part of which has been taken, but is a benefit which is conferred by the public work upon all property within the range of the utility of the public improvement being constructed. General benefits arise from the fulfillment or purpose of the public improvement and are enjoyed by the general community and the general public. They are greater or lesser in degree but not different in kind from those shared by the public in general. They accrue to all in the same area whether the properties touch or abut on the highway improvement.[182]

[180] Nebraska
Richardson v. Big Indian Creek Watershed Conservancy Dist., 151 N.W.2d 283 (1967)

[181] Nebraska
Phillips v. State, 93 N.W.2d 635 (1958)
New Mexico
Board of Commissioners of Dona Ana County v. Gardner, 260 P.2d 682 (1953)
City of Albuquerque v. Chapman, 413 P.2d 204 (1966)
North Carolina
Kirkman v. State Highway Commission, 126 S.E.2d 107 (1962)

[182] Missouri
State v. Bailey, 115 S.W.2d 17 (Ct. App. 1938)
State Highway Commission v. Clevenger, 291 S.W.2d 57 (1956)
State Highway Commission v. Ballwin Plaza Corp., 382 S.W.2d 633 (1964)

INSTRUCTION NO. ____

You are instructed that general benefits are those arising from causes which affect the whole community and perhaps raise the value of the entire town or neighborhood therein.[183]

INSTRUCTION NO. ____

You are instructed that general benefits are those which are bestowed upon other lands of similar character in the same vicinity.[184]

INSTRUCTION NO. ____

You are instructed that general benefits are those which arise from the fulfillment of the public objective which justifies the taking.[185]

INSTRUCTION NO. ____

You are instructed that general benefits are those which are shared in common with the general public.[186]

A few cases have dealt extensively with the question of instructions. Those which cover the subject comprehensively and which might be of interest to the highway lawyer are:

State v. Lindley, 113 S.W. 2d 132 (Mo. 1938)
State v. Bailey, 115 S.W. 2d 17 (Mo. 1938)
State v. Volz Concrete Materials Company, 330 S.W. 2d 870 (Mo. 1960)
State v. Ballwin Plaza Corporation, 382 S.W. 2d 633 (Mo. 1964)
State v. Carpenter, 89 S.W. 2d 194 (Tex. 1936)

[183] Missouri
State v. Pope, 74 S.W.2d 265 (Ct. App. 1934)

[184] California
Podesta v. Linden Irrigation District, 296 P.2d 401 (1956)

[185] Louisiana
Parish of East Baton Rouge v. Edwards, 119 So.2d 175 (1960)

[186] Alabama
McRea v. Marion County, 133 So. 278 (1931)
Indiana
Hootman v. Indiana, 143 N.E.2d 666 (1957)
Louisiana
State through Department of Highways of Louisiana v. Matice, 170 So.2d 709 (Ct. App. 1964)

CHAPTER FIVE

OTHER APPLICATIONS OF BENEFITS FINDINGS

LOSS OF ACCESS AS RELATED TO ISSUE OF BENEFITS

In states where benefits can only be offset against damages and not against the value of the land taken, a question often arises concerning whether the loss of access is a property right taken or one that is damaged.

The question then presented is can benefits be offset against reduction in value by loss of access? In those states where the benefits can be offset against the value of the land taken, and damages as well, there is no question that such offset can be made. But, where the offset is against the damages only, it may be argued that loss of access is a property right taken and, therefore, the benefits cannot be offset because they can only be offset against damages.

Landowners will obviously take the position that the loss is a taking of and not a damage of property in order to preclude a setoff of benefits. A few cases have dealt with this problem. These cases have specifically, or by way of dictum, held that the loss of access is a damage and, therefore, special benefits can be offset against this loss.[187]

COST OF CONSTRUCTION OF PORTION OF PUBLIC IMPROVEMENT AS EVIDENCE OF BENEFITS

Before benefits can be offset, it must be shown that the market value of the remainder has been increased. The actual cost to the condemnor of a specific item deemed to be a benefit cannot be used as the measure of the amount of the benefit.

The actual cost of an overpass,[188] a sanitary sewer line [189] and a drainage ditch [190] was deemed to be improper evidence because the cost is not the proper test; rather, it is the effect that the item has on the market value of the residue. It would seem that actual costs are not proper because, as in other areas of the law in condemnation, cost is not synonymous with the market value. Although the actual costs cannot be used to directly establish the amount of the benefit, it would appear that these costs can be used if related to an increase in market value.

JOINT VENTURE BETWEEN TWO GOVERNMENTAL AGENCIES

Oftentimes, two governmental agencies will undertake to construct a highway. One will buy the right-of-way and the other will construct the improvement. The fact that a different agency is building the highway does not preclude the one acquiring the right-of-way from considering the benefits which arise from the improvement. Evidence of benefits then is proper in a condemnation case to acquire the right-of-way.[191]

In some instances, the benefit may not result from the construction of the improvement, but, rather, will result from the operation thereof. The fact that the condemnor does not operate the facility does not preclude consideration of benefits.[192]

BENEFITS TO OTHER TRACTS OR PARCELS—MULTIPLE PARCELS AS SEPARATE OR ENTIRE

Land or property which can be charged with benefits must be a part of a tract or parcel which is taken or damaged. Therefore, it may become necessary to determine what constitutes the remainder or residue.

Because there are so few multiple-tract cases dealing with benefits, the decisions and annotations dealing with the damage situation may, for the most part, be applicable to benefits. These decisions are extensively covered in a number of A.L.R. annotations. These annotations are: 6 A.L.R. 2d 1197, *Unity or Contiguity of Properties Essential to Allowance of Damages in Eminent Domain Proceedings on Account of Remaining Property;* 95 A.L.R. 2d 887, *Unity of Ownership Necessary to Allowance of Severance Damages in Eminent Domain;* and 170 A.L.R. 721, *Compensation for Diminution in Value of the Remainder of Property Resulting from Taking or Use of Adjoining Land of Others for the Same Undertaking.*

Two or more parcels are held to be one when there is unity of title, unity of use, and contiguity. The Courts have treated these requirements in various ways. A few cases will be discussed and a number of annotations and treatises will be cited in order to give some insight to the problem.

Unity of Title

Tracts Owned by Relatives

1. Where husband and wife own separate tracts independently of each other, but farm them as a single unit, the one owned by the wife was not deemed to be a part of the residue of the one owned by the husband. Recovery for damages was precluded.[193]

2. Where a contract exists between different owners concerning the use of the land, the results may be different.

[187] Tennessee
Brookside Mills, Inc. v. Moulton, 404 S.W.2d 258 (1965)
Texas
State v. Meyer, 403 S.W.2d 366 (1966)
Washington
State v. Ward, 252 P.2d 279 (1953)

[188] Hawaii
State v. Heirs of Kapahi, 395 P.2d 932 (1964)

[189] Missouri
State v. Vesper, 419 S.W.2d 469 (1967)

[190] Missouri
State v. Vorhof Duenke Co., 366 S.W.2d 329

[191] Washington
Town of Summer v. Fryer, 264 Pac. 411

[192] Illinois
Capitol Building Co. v. City of Chicago, 77 N.E.2d 28 (1948)

[193] Kansas
McIntyre v. Board of County Commissioners, 211 P.2d 59 (1949)

Thus, where a father and his two sons each in his own name owned a quarter-section of land lying together in one body, the Court ruled that there was unity. Each was entitled to damages for the loss in value of his land. The reason was that a partnership agreement existed between them, calling for joint use of the land to raise cattle owned by them in common.[194]

3. Where a wife owned a parcel individually and another with her husband, as tenants by the entirety, she could not recover damages to the property she and her husband owned though the tracts were used together.[195] The same results were reached where the tract through which the improvement was made was owned by a brother and sister jointly and another tract owned by the sister alone. The damages could not be assessed against the tract owned by the sister.[196]

4. In a situation involving two brothers, one tract was owned by one brother individually and the other by the two jointly. The Court ruled that benefits to the remaining portion of one of the tracts could not be offset against the consequential damages resulting to the other tract.[197] The Court there stated that under these circumstances, the consequential damages resulting to the separate parcels should be assessed separately and the consequential benefits should also be assessed separately.

5. In one other case, a husband and wife owned one parcel as tenants by the entirety and the husband owned another parcel individually. For the purpose of determining the benefits or damages sustained by one proprietor, the Court held that all land belonging to him lying in a contiguous body and used together for a common purpose will be considered as one tract or farm. But the principle, the Court said, cannot be extended to cover land owned by different proprietors, although contiguous and used under one management and for one common purpose. The Court reasoned that claims for damages and proceedings of this character are personal, and must be asserted in the name of the actual owner or owners of the land affected. One person may not recover damages sustained by another, and manifestly special damages suffered by one proprietor could not be compensated by benefits accruing to another.[198]

Tracts Owned by Non-Relatives

1. Unity of title was deemed to be lacking where one parcel was owned separately and another jointly with a second person. The rule is actually the same as where parcels are owned separately by relatives. The Courts make no distinction between the relationship of the parties unless there is a contractual relationship relating to the use of the property.

[194] Kansas
Commissioners of Smith County v. Labore, 15 Pac. 577 (1887)
[195] Kansas
Leavenworth N. & S. Ry. Co. v. Wilkens, 26 Pac. 16 (1891)
Tennessee
Tillman v. Lewisburg & N. R. Co., 182 S.W. 597 (1916)
[196] Iowa
Duggan v. State, 242 N.W. 98 (1932)
[197] Georgia
Kennedy v. State Highway Department, 132 S.E.2d 135 (1963)
[198] Indiana
Glendenning v. Stahley, 91 N.E. 234 (1910)

Tracts Owned by Corporations and Stockholders

1. Where a corporation owned one parcel and the stockholders owned another parcel, although the two were used together, the Court found that the parcels were separate. The Court held that a corporation is treated as an entity, separate from its stockholders under all ordinary circumstances. Hence, each parcel was owned separately, and the parcels could not be valued as a single unit.[199]

Unity—Contiguity

What is and what is not a contiguous tract has been the subject of extensive treatment. An annotation in 6 A.L.R. 2d, commencing at page 1197, entitled "Eminent Domain—Damages—Severance," covers this subject extensively. At page 1203 of that annotation, the author states as follows:

> 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 one from another may constitute a single tract, but 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.

Thus, it would appear that contiguity is not as important as it would otherwise seem. Instead, it is the unity of title and the unity of use which are the important elements in determining whether one tract is a part of another one to determine damages or benefits.

Thus, it has been held that tracts separated by highways and streets or easements, whether private or public, are still contiguous if, in fact, they are devoted to the same use.[200]

In one of the leading cases, a landowner owned 30,000 acres of land on which were located four sugar mills and extensive railway systems, docks, warehouses and other facilities, all devoted to the raising of sugar cane. Two parcels of land, on separate islands, being five and six miles apart, were condemned. The landowner contended that the property taken was a part of a single, integrated property. The Court ruled that the properties were, in fact, a single tract. Specifically, the Court said:

> While physical contiguity is an important evidentiary fact in deciding what is a distinct and independent tract, integrated use, not physical contiguity, is the test.[201]

Unity of Use

Unity of use is the third requirement needed to enable the Courts to treat multiple parcels as a single unit. In connection with this requirement that the property must be a part

[199] Wisconsin
Jonas v. State, 121 N.W.2d 235 (1963)
[200] Florida
DiVirgilio v. State Road Department, 205 S.2d 317 (1967)
[201] Puerto Rico
U. S. v. 7,936.6 Acres of Land, 69 F.Supp. 328 (1947)

of the unit operation, the two tracts must be inseparably connected in use so that the injury or destruction of one must necessarily and permanently injure the other. In support of this statement, attention is directed to Volume 4, *Nichols on Eminent Domain,* 3d Edition, Sec. 14.31, pages 715-735; 27 A.J. 2d, *Eminent Domain,* Sec. 315, page 134; 6 A.L.R 2d 1179; *Sharp v. United States,* 191 U.S. 341, 24 Sup. Ct. 114; *Louisville & N.R. Co. v. Chenault,* 284 S.W. 397; *Baetjer v. United States,* 143 Fed. 2d 391. The latter case states, succinctly, the general rule of law, as follows:

> The basic question in condemnation cases involving severance damages is what constitutes a single tract as distinguished from separate ones, and the answer does not depend on artificial things like boundaries, or upon whether the owner acquired his land in one transaction or even at one time. Whether land condemned is a part of a single tract authorizing allowance of severance damages, does not wholly depend upon whether holdings are physically contiguous, since contiguous tracts may be separate ones if used separately, and tracts physically separated may constitute a single tract if put to integrated unitary use, or even if possibility of their being combined in the reasonably near future is reasonably sufficient to affect market value. Integrated use, not physical contiguity, is the test whether land condemned is part of a single tract warranting award of severance damage, but physical contiguity is important as bearing on unity of use, and separation remains an evidentiary, not an operative, fact.

Unities—Question of Fact or Question of Law

Where the facts are not in issue, the question of whether one parcel is or is not a part of another tract for the purposes of damage and benefits is usually a question of law for the Courts. However, if there is some issue of fact in dispute, that fact would generally be determined by a jury. Illustrative of this situation is a case where land which was subject to condemnation proceedings and was operated by father and son as a single ranch unit but consisted of parcels separately owned by either the father or the son, damages could not be awarded on the basis that the land constituted one parcel. The Court, in essence, stated that where facts are undisputed, the question of whether physically separate parcels of land constitute one parcel for condemnation purposes because of a common use is a question of law for the Courts. Further, attorneys could not stipulate that damages were to be awarded on the basis that the land constituted but one parcel since the stipulation amounted to a stipulation as to the legal effects of the facts and law of the case. The Court is not bound by a stipulation of attorneys as to the law.[202]

However, some cases have indicated that whether multiple tracts should be treated as a single parcel may become a question of fact ordinarily, to be submitted to a jury under proper instructions.[203]

BENEFITS DERIVED FROM PREVIOUS OR SUBSEQUENT IMPROVEMENTS

Before benefits can be set off against either land, damages, or both, they must arise as a result of the construction of the improvement for which the land is taken or damaged. They cannot be derived from previous or subsequent improvements constructed by the condemnor, nor from improvements constructed by third parties. However, the benefits derived from an entire improvement can be considered and need not be limited to those arising only from the construction on the land acquired. 27 Am. Jur., *Eminent Domain,* Sec. 364; 145 A.L.R. 110.

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[202] South Dakota
State Highway Commission v. Fortune, 91 N.W.2d 675 (1958)

[203] Pennsylvania
Kossler v. Pittsburgh C. C. & St. L. Ry. Co., 57 Atl. 66 (1904)
Washington
In re Queen Ann Boulevard, 137 Pac. 435 (1913)
West Virginia
Charleston & South Side Bridge Co. v. Comstock, 15 S.E. 69 (1892)

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