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# FRONTLAND TAKING—BACKLAND VALUE

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For some peculiar reason the backland concept of valuation for the taking of frontland or frontage engenders both resistance and incomprehension when it is first presented to the uninitiated. The term uninitiated includes both judges and juries in the first instance and owners and their attorneys in the second. Yet all the rules of damages which have evolved throughout the centuries of litigation of eminent domain matters, no other rule is so soundly based in logic and marketplace experience and is so nearly susceptible of pythagorean proof.

In the analysis that follows, certain basic assumptions are made in the interests of simplicity. These assumptions are:

1. Access is unlimited in both the before and after situations as far as legal or police power restraints are concerned.
2. The physical construction of the highway does not adversely affect access.
3. There is no substantial difference between the topography and terrain of the part taken and any remainder.
4. No restrictive covenants are involved and zoning is not present or does not affect the problem.
5. The land is unimproved.

The invalidity of one or more of these assumptions does not require a total rejection of the frontland-backland concept but merely requires that the concept's application be tempered by the presence of that factor.

The backland concept, as I shall call it, arises most frequently in connection with the widening of an existing highway but might also arise in the widening of a railroad, canal or other similar right of way. The *sine qua non* is that the area sought to be acquired has a higher or different value than any of the remainder of the property because of its abutment on some particular feature—natural or artificial.

This increment of value is commonly inferred by the use of the term "frontage." Frontage is generally used to indicate that a piece of property abuts or fronts on a particular feature. A property may abut on a street, alley, boulevard, highway, stream, river, lake, ocean, railroad, national forest, park, or whatever. While the use

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of the term normally implies an added value or advantage under some few unique circumstances, a property fronting on certain features such as an open sewer, let us say, would suffer a depreciation rather than an appreciation in value. What is to be done in such circumstances presents an interesting question.

In the simplest terms the backland concept as applied in eminent domain practice simply means that although the land being taken comes off the front of the lot or tract its value or the amount of damages is predicated on the value of a theoretical taking of an identical strip off the back end of the lot.[1] The rule is founded on the realization that the taking of a strip off the front has in reality only reduced the over-all depth of the lot and all that has been lost is a certain amount of depth. Support for this premise can be found in the depth tables found in most appraisal texts.[2]

From the concentration of value toward the front end of the lot two further effects inescapably flow:

> 1. As the depth of a lot decreases from the typical, the frontage unit decreases but the square-foot or acreage unit increases.
> 2. As depth increases beyond the typical, the frontage unit increases but the square-foot or acreage unit decreases.[3]

Stated in perhaps more understandable terms, as the depth of the lot increases the frontage value influence is dissipated over a

1. Perhaps the clearest explanation was by Judge John S. Palmore, Ct. App. Ky., at the 1968 Institute on Eminent Domain, Southwestern Legal Foundation, Dallas, Texas. Southwestern Legal Foundation, Institute on Eminent Domain 61-62 (1968):

> With all deference to the courts that have decided otherwise, I submit that in a simple street or highway-widening case the condemnor does not acquire frontage and should not be made to pay for it. To the extent that *access* remains undiminished the frontage is undisturbed. It is not taken, but merely relocated. The remainder parcel is damaged, of course, to the extent that its depth is reduced or for some other reason it is less advantageously situated than was the portion taken, . . . .

2. Boeckh, Boeckh's Manual of Appraisals, 954-955 (6th ed. 1963):

> It is generally recognized that two increments of value affect the lot in relation to its depth. First, the more valuable the lot, the more concentration of value near the front end of the lot, and second, the ratio of depth and value vary with the utility of the lot.

American Institute of Real Estate Appraisers, The Appraisal of Real Estate 110 (5th ed. 1967):

> Depth tables are tables of percentage designed to provide a uniform system of measuring the additional value which accrues because of added depth. A standard depth is established for a lot of a stated type. This standard originally was fixed in most localities at 100 feet. The series of percentages in the depth table begins with a lot of 100 foot depth which is designated as 100%. It ranges downward for less depth and upward for more depth, usually in accordance with past experience of utility or through the use of a computed curve.

3. Boeckh, *supra* note 2.

greater and greater area thus causing the square-foot value to constantly decrease, somewhat as the waves caused by a pebble tossed into a pool ultimately die away to invisibility. Certainly other than the matter of access, land a mile from a highway is little influenced by highway frontage value.

An earlier and simpler, and from the eminent domain standpoint equally acceptable, rule is the 4-3-2-1 rule. This rule simply indicates that the first quarter of the lot holds 40% of the value; the second quarter 30% and so on down to the fourth quarter's 10%.[4] Use of this rule obviates the necessity for determination of a standard or optimum depth.

In the widening of the commonplace land service road, access being unchanged, what specific elements of damage can be reasonably anticipated as affecting or not affecting the property?

Air, light, and view, the siamese triumvirate, would ordinarily not be impaired but rather would be improved because of the wider right of way.

Access might or might not be impaired depending largely on the physical configuration of the abutting land. Unless the strip sought for widening was an overly wide swath under most circumstances the change would be nearly immeasurable

The linear footage of frontage could either increase or decrease, depending on the tract's exterior shape and its relationship to the highway right of way line. A tract with parallel or nearly parallel side lines would neither measurably increase nor decrease in linear frontage. Triangular shaped tracts, depending on the relationship of the triangle to the highway, might increase or decrease in linear frontage in measurable amounts that would require consideration. Odd shaped tracts present so many possible variants that they can only be considered on an individual basis.

Noise, dust, fumes, and loss of privacy would appear to be noncompensable due to the prior existence of the highway. Likewise, diversion of traffic, circuity of travel, and loss of business, whose presence is highly questionable, would also in most jurisdictions be considered noncompensable. The so-called proximity damage, assuming an improved property, might have to be considered as having a damaging effect. Severance damage in terms of reduction in the total tract size would also merit consideration; but only in instances where the reduction in size reduced the tract to less than an acceptable or standard size would it have to be given weight.

Assuming then that our damage problem is limited to determin-

4. American Institute of Real Estate Appraisers, Appraisal Terminology and Handbook 52-53 (4th ed. 1962).

ing the loss to the property owner caused by the taking of a strip of his "frontage," how is the amount of his damage accurately determined?

It should first be noted that in using comparable sales to establish the quantum of damage due to a *front strip taking* care must be exercised or a false element is injected into the valuation process, for there is no loss of frontage or access.[5] Thus, even should it be assumed that there are two larger tracts, of say ten acres, with a private sale of the two frontage acres off one and a highway taking off the other of an identical two frontage acres, the private sale price would be utterly misleading if this was the amount of claimed damages. The private sale price would include the loss of access to the remainder eight acres while in the highway acquisition no access was lost. Supposing a sale of the remainder eight acres after the private sale, this price would more nearly reflect the damages caused by the highway acquisition than the two acre sale, for it obviously would not include any frontage value since the frontage had already been sold off.

But, if in a highway widening the strip taken comprised the entire ownership, then comparable private sales of highway frontage where access is in effect sold would furnish the best evidence of market value and the earlier comments would be inapplicable.

A simple but illustrative situation of this sort frequently arises in cases of large tracts abutting a highway where there have been a limited number of small frontage sales for highway oriented businesses. The landowner seeks to secure the same price per acre for a strip taking without any loss of access as for the small tracts sold which included access.

A near perfect example of exactly such an attempt is provided by a recent Arizona case.[6] Two strips comprising 11.7 acres were

5. This is rather ably pointed out by Judge John S. Palmore, *supra* note 1, at 60:

> Bearing in mind that market value is the price a willing buyer would give and a willing seller would take, neither being under any compulsion, obviously the price paid for street or highway frontage in a *private sale* will include whatever diminution in value results (or has resulted at some time in the past) to the remainder by reason of its loss of direct access to the public thoroughfare. *Comparable sales introduced by the landowner in a condemnation proceeding almost always will reflect that factor.* But in a street or highway condemnation case, unless the plans contemplate limited access or nonaccess, that factor usually will not or should not be present. Hence the prices paid in private sales for comparable property constitute highly deceptive evidence in favor of the landowner. . . . *See also* Frenel v. Commonwealth, 361 S.W. 2d 280 (Ky. 1962); City of Grand Rapids v. Barth, 248 Mich. 13, 226 N.W. 690, 64 A.L.R. 1507 annotated case (1929).

6. Deer Valley Indus. Park Dev. and Lease Co. v. State, 5 Ariz. App. 150, 424 P.2d 192 (1967).

taken from the property (a quarter section) lying athwart the already existing highway to permit the construction of a divided highway. No access controls were imposed and the linear frontage remained substantially the same. In affirming the award of $11,700 based on the state's testimony of $1,000 per acre as opposed to the owner's testimony of $8,500 per acre, the Arizona court neatly exposed the falsity of the owner's position. It said:

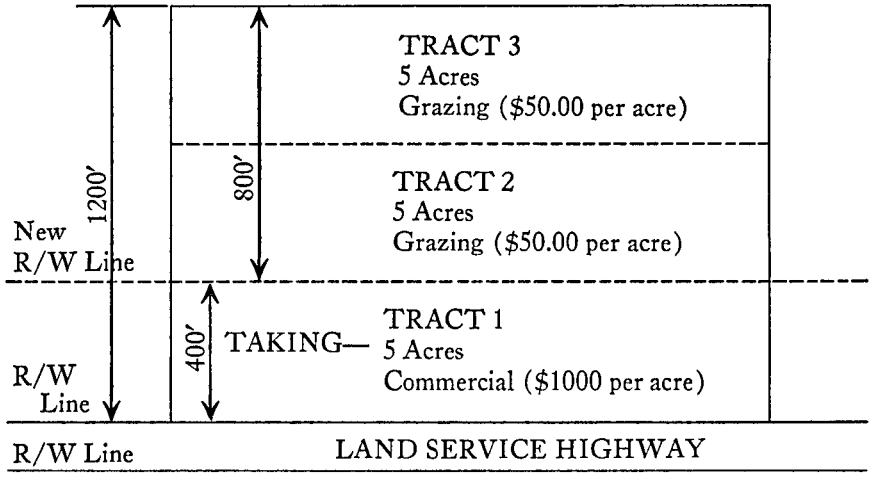
> However, it is our view there is a second and more fundamental reason why the approach of the property owners' appraisers in this action was not a proper one. It is abundantly clear in cases such as this that a substantial portion of the value of the property in question arises by reason of its right of access to the public road upon which it fronts. In insisting that the two parcels of land taken here should be compared to parcels of land of similar size sold in this area, it is significant that the property owners' appraisers have selected sales of smaller parcel [sic] of land which in each case included the frontage rights, which frontage rights pertained to property of substantially less depth than that of the 160 acres involved here. These smaller parcels of land presumably have been separated out of larger parcels of land and sold for their frontage value. When this is done, rights of access attaching to the rear portions of the larger parcels have been separated from their access rights to the highway, in a quid pro quo exchange, so that in effect the buyers have paid additional value for the totality of the access rights of the larger parcels of land. To compare the sale of these smaller parcels to the taking here seems to this court to be completely unrealistic and not within the contemplation of either our constitution or our statutory provisions pertaining to eminent domain.[7]

The fallacy of claiming damages on a frontage basis in highway widenings is subject to mathematical disproof. Figure 1 shows a larger tract of 15 acres divided into three numbered five acre tracts with the strip taking being all of tract 1. The frontage (tract 1) has been given an assumed $1,000 per acre value and the backland (tracts 2 and 3) a $50 per acre value, both figures being based on comparable sales. The dollar values can be varied in any way without affecting the outcome. Should the backland for some reason have a greater value than the frontage, then resort must be had to the value of the interior land—presumably of lower value.

If the back end of the tract is lower in value than the front end but higher in value than the interior portion, it does no violence to

7. *Id.* at 196; *cf.* Simmons v. State Highway Commission, 178 Kan. 26, 283 P.2d 392 (1955) (court held that where frontage land was condemned without restoring access measure of damages was worth of frontage land).

FIGURE 1




the backland concept to assume a taking from the interior portion of the tract—the area of lowest value. After all, the theory behind just compensation is to make good the owner's loss and it should be obvious that frontage at neither end has been lost but, as in the single frontage situation, only the depth has been reduced.

The value of the land in question based on Figure 1 is:

| | | |
|---|---|---|
| tract 3—5 acres of backland @ $50 | = | $ 250.00 |
| tract 2—5 acres of backland @ $50 | = | 250.00 |
| tract 1—5 acres of frontage land @ $1,000 | = | 5,000.00 |
| TOTAL | = | $5,500.00 |

Applying these values on a strict before and after basis, the result would be this:

| | *Before* | *After* |
|---|---|---|
| tract 3 | $ 250 | $ 250 |
| tract 2 | 250 | 250 |
| tract 1 | 5,000 | —0— |
| TOTAL | $5,500 | $ 500 |

| | |
|---|---|
| Before | $5,500 |
| After | 500 |
| Damages | $5,000 |

The zero figure in the after value for tract 1 is, of course, the result of this tract being totally taken.

This is the simplest application of the principle that the difference between the before and after values of a piece of property—assuming a partial taking—gives the resulting damages. Quite clearly the result here is based on the assumption that there has been a taking of frontage having a value of $1,000 per acre.

Admittedly, the property which has been taken is being taken off the front portion of the lot—that portion which most directly abuts on the highway—but has frontage in actuality been taken? Restating the question in different terms, has the front taking in any way impaired those particular and peculiar attributes of value of the property encompassed within the term "frontage"? The answer is clearly in the negative, for tract 2 now has all the peculiar value attributes formerly associated with tract 1. Is it not reasonable to suggest that whatever special value tract 1 had as frontage—$1,000 per acre—in the after situation now adheres to tract 2? If tract 1 had a before market value of $1,000 per acre, does not tract 2 now have the same $1,000 per acre market value plus perhaps a small added increment due to the improved highway?

Proceeding on this assumption, let us re-evaluate on a before and after basis:

| | *Before* | *After* |
|---|---|---|
| tract 3 | $ 250 | $ 250 |
| tract 2 | 250 | 5,000 |
| tract 1 | 5,000 | —0— |
| TOTAL | $5,500 | $5,250 |

| | |
|---|---|
| Before | $5,500 |
| After | 5,250 |
| Damage | $ 250 |

Basing our next step on the previous assumption that the special value to tract 1 adhered to tract 2 when tract 1 was taken, an examination of the owner's financial standing (net worth) in the after situation is enlightening.

| | *Frontage Value* | *Backland Value* |
|---|---|---|
| tract 3 | $ 250 | $ 250 |
| tract 2 | 5,000 | 5,000 |
| tract 1 | (cash) 5,000* | (cash) 250* |
| TOTAL | $10,250 | $5,500 |

* Indicates the amount of damages actually paid by condemnor.

It could hardly appear more plainly that if the condemnor while taking frontland pays for it as frontage the owner, rather than

receiving just compensation, receives a windfall of $4,750, for his net worth has now jumped to $10,250. An owner whose net worth has jumped from $5,500 to $10,250 would appear to have received something more than just compensation.

A technique which falls between that of valuing the take as frontland or backland is that exemplified by the California case of *City of Los Angeles v. Allen*.[8] The facts giving rise to the litigation are so similar to those used in connection with Figure 1 that it is unnecessary to repeat them. The witnesses placed a $1.64 per square foot value on the frontland and a $0.25 for the backland. Then the total values were added together and the average value ($0.32) per square foot was determined and multiplied by the square foot area being taken to ascertain the amount of damages.

A computation much like the one used here in connection with Figure 1 was used to expose the fallacy of paying for the strip on a front value basis.

If the Allen premise that all the backland is of one value is accepted, the averaging process can easily be demonstrated as unsound. Suppose we take two tracts, one exactly as laid out in Figure 1 but the other having the same frontage but a much greater depth, thus making the second tract have an area of fifty acres, but using the same per acre values, and assuming a five acre taking we find as indicated below:

| | *15 acres* | *50 acres* | |
|---|---|---|---|
| Frontland (5 acres) | $5,000 | $5,000 | (5 acres) |
| Backland (10 acres) | 500 | 2,250 | (45 acres) |
| Total | $5,500 | $7,250 | |

By computation we now find the average per acre value of the 15 acre tract to be $367 and of the 50 acre tract to be $145. Thus, the owner of the 15 acre tract receives $1,835 and the owner of the 50 acre tract receives $725. Since both the frontland and backland of each tract had the same $50 per acre value, one or the other, or both, received too much or too little.

If we compare the two averaged figures with a five acre backland value of $250, it seems unchallengeable that both are receiving too much in proportion to their loss.

If three sets of values are used—frontland, midland, and backland—but the averaging method is retained, the variance between the averaged value and the backland value will be reduced but it

8. 1 Cal. App. 2d 572, 36 P.2d 611 (Calif. 1934).

still will exceed the backland value. Equally, the spread between the value of the two takings will remain but in reduced amount.

In some states—altogether too many—where benefits, either general or special, can only be set off against severance damages and not against the value of the part taken, such a result has received approval by the highest courts.[9]

These courts insist on treating the front taking as a taking of frontage and the new frontage as a benefit whereas, Judge Palmore so clearly pointed out, the frontage effect is merely relocated—neither taken nor returned by way of a benefit.

Benefits have been defined as that which adds "anything to the convenience, accessibility and use of the property. . . ."[10] It is difficult to grasp how acquiring an additional strip of right of way to widen a highway which, in effect, merely relocates the right of way further back on the abutting property can be construed overall as adding anything to the convenience, accessibility, and use of the property. There might be a minor increase in one or all of these items, but to go beyond this when the same elements were present both before and after the taking is to disregard the factual verities.

The use of the before and after rule for measuring damages does not automatically make the backland doctrine operative. An appraiser can, and quite easily, knowingly or not, frame his appraisal on the before and after rule yet come up with damages predicated on a frontage value of the taking. The only possible counter is by way of a careful cross examination to expose the falsity of the appraisal premise. If such an appraiser can be made to admit a substantial difference in front and back square foot values, the game is won.

How is the valuation of a partial taking handled in a highway widening where the backland also fronts on a highway and therefore presumably has a frontage value? If the backland concept is mechanically applied, a frontage take in widening one highway would be paid for at the value of the frontage where the property abutted on the other highway.

Let us postulate one highway as an important traffic artery with high frontage values and the other as a minor highway with comparatively low frontage values. To substantiate this it can be suggested that one frontage has a highest and best use of commercial, while the other is residential. If the taking is from the end of the

9. State v. Meyer, 403 S.W. 2d 366 (Tex. 1966); People v. Silveira, 236 Cal. App. 2d 604, 46 Cal. Rptr. 260 (1965); Territory v. Adelmeyer, 45 Hawaii 144, 363 P.2d 979 (1961).

10. Hempstead v. Salt Lake City, 32 Utah 261, 90 P. 397, 401 (1907).

tract abutting the minor highway, then compensation on a mechanistic approach would have to be paid on the basis of the high frontage value of the opposite end—an obviously unsound approach. Conversely, if the taking was from the high value frontage compensation based on the low value frontage would be less excessive but still unsound.

Since frontage is not being taken from either end of the tract, for both ends retain their frontage, assuming that the depth is more than sufficient to allow full commercial development at both ends with some interior land remaining, we then have what might be characterized as a midland or interior taking. The midland being beyond both frontage influences would naturally be the least valuable land.

The soundness of such an approach can be easily demonstrated in a similar fashion to that used earlier in demonstrating the soundness of the backland concept in strictly backland situations.

Of course, should the tract have insufficient depth to allow use of the midland concept, then the backland concept must, necessarily, be used, but regardless of the end from which the taking occurs, compensation can only be fairly awarded on the assumption that the taking was from the low value portion of the tract, for to do otherwise would present the owner with a windfall.

Such a procedure is as obvious and sound as the choice that would be made by a captain who is forced to jettison one of two pieces of cargo of equal weight but unequal value in order to save his ship from sinking. Can anyone doubt that it would be the less valuable cargo that would be given the deep six.

A New York case in which a twenty foot strip was being taken from a vacant city block points in this direction.[11] The "square" block was 425′ x 197.5′, lying between East 32nd and 33rd Streets, Lexington, and Fourth Avenues. While not stated in the opinion, the Avenue frontages were the shorter dimension and the street frontages were the longer dimension. The taking was from the Fourth Avenue side—the most valuable frontage—which is the southward extension of famed Park Avenue.

The owner used a damage theory based on lots of one hundred foot depth fronting on Fourth Avenue with a consequent 20% loss in depth. Damages were set at 25% of the lot values.

In reversing, the Appellate Division pointed out that there were no short lots remaining, and the taking only "set claimant's front-

11. *In re* Fourth Avenue, 221 App. Div. 458, 223 N.Y.S. 525, aff'd 247 N.Y. 569, 161 N.E. 186 (1928).

age on Fourth Avenue back 20 feet, but [left] it remaining on Fourth Avenue."[12]

If it can be assumed that the depth of the lots on Lexington Avenue was also 100 feet, then by subtracting the total of the two depths—200 feet—from the over-all block length—425 feet—a midland area of 225 feet remained. This midland area, while having frontage on two streets (New York's Manhattan Island streets are in general far narrower than avenues), was the least valuable portion of the block.

Would the owner here, any more than our hypothetical ship captain, in effect jettison the most valuable frontage depth or would he, having collected from the city, realign his lots to his best financial advantage?

An allied theory was attempted in an earlier New York case[13] where there was unplatted land lying behind a line of lots abutting Westchester Avenue. The decision in rejecting the awards granted by the lower court points out that the effect of the taking was simply "to set the lots so much further back" and "the assessment of damages should have been on an acreage valuation, instead of a city lot valuation."[14]

## CONCLUSION

In partial takings to widen an existing highway damages should be predicated not on a frontage value, regardless of whether the frontage is assumed to be re-located or treated as a benefit, but on the taking of the least valuable backland. In partial takings, where the backland in turn abuts on another highway, giving the backland added value, damages should be predicated on the lower value midland.

To award damages based on an assumed taking of anything other than the least valuable portion of a tract of land is to award the owner more than he lost, for simple common sense dictates that the owner will so handle matters as to accomplish this result.

12 *Id.* at 527.
13. *In re* Westchester Ave., 126 App. Div. 839, 111 N.Y.S. 351 (1908).
14. *Id.* at 353.