Division of Engineering Research on Call Agreement #39168

Task 6 – Legal Precedence Eminent Domain Compensability

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Prepared for:
The Ohio Department of Transportation
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Final Report

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16. Abstract

The Ohio Department of Transportation (ODOT) sought information regarding recent eminent domain court cases, within the past five years, to discern trends and requested that a legal analysis for items listed from ODOT's Guide to Compensability be updated if possible. Compensable items include but are not limited to: removal of driveway(s), limiting or access modifications, taking of access rights, internal circuity, alternative / green energy, lease implications & compensability, commercial signage and billboards, reduction of road frontage, severance issues, and grade changes. The COVID pandemic and a general dearth of eminent domain cases that go through a full jury trial made the sample of information limited and therefore during the research project, and with the permission of ODOT, the timeframe for case review was expanded to 8 years and the search encompassed the states in the Midwest. The research project is being broken down into three phases: white paper summary of the case law review; suggestions and edits to the ODOT Guide to Compensability; and a Synthesis Analysis Summary of the research project.

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1 Introduction

1.1 Scope of Work

The Ohio Department of Transportation (ODOT) sought information regarding recent eminent domain court cases, within the past five years, to discern trends and requested that a legal analysis for items listed from ODOT's Guide to Compensability be updated if possible. Compensable items include but are not limited to: removal of driveway(s), limiting or access modifications, taking of access rights, internal circuity, alternative / green energy, lease implications & compensability, commercial signage and billboards, reduction of road frontage, severance issues, and grade changes.

The COVID pandemic and a general dearth of eminent domain cases that go through a full jury trial made the sample of information limited; therefore, during the research project, with the permission of ODOT, the timeframe for case review was expanded to 8 years and the search encompassed the states in the Midwest. The research project is being broken down into three phases: white paper summary of the case law review; suggestions and edits to the ODOT Guide to Compensability; and a Synthesis Analysis Summary of the research project.

1.2 Outline of the Report

Chapter 2 explains the processes that were used for this research project.

Chapter 3 provides a summary of the White Paper found in Appendix A which analyzed the cases review in the research efforts which are each summarized in Appendix B.

Chapter 4 reviews ODOT's Guide to Compensability and recommended changes with an updated version of the Guide as Appendix C.

Chapter 5 summarizes the Synthesis Analysis found in Appendix D.

Chapter 6 presents the conclusions.

2 Processes and Data Used to Accomplish Research Project

The research team used online research systems, including Lexis, Westlaw, and Bloomberg Law, to find eminent domain decisions (mostly appeals from jury trials) of Ohio county courts of common pleas, courts of appeal, and the Ohio Supreme Court. The team also called the following 11 county clerks of court: Summit; Scioto; Lawrence; Gallia; Hamilton; Warren; Cuyahoga; Lucas; Franklin; Delaware; and Loraine to find the compensable items listed by courts and juries. Unfortunately, none of the clerks of court were able to assist in the research and rather than calling all of the other 77 counties, the team abandoned this direction.

The team delved into the cases and the on-line pleadings and forms to determine the progression of the case and other potentially valuable documents such as available jury verdict forms and recorded settlements that shed light onto the valuations proposed for compensable items. Finally, the team combed the websites of private legal counsel across the state to review their "wins" and determine compensability items and also glean their advocacy regarding national trends these eminent domain lawyers are discussing to confirm if any are manifesting in Ohio courts. To that end, the team further reviewed several editions of the IRWA publication "Summary of Major Eminent Domain Cases & Legislation." From those documents, it does appear that "inverse condemnations" are "hot" topics for law firms, but not with any significant frequency in Ohio as of yet.

3 Summary of the White Paper

The cases reviewed for this project are found in Appendix B, and they were distilled to produce the White Paper in Appendix A. The White paper is meant to provide a summary of the results of the caselaw review phase of the project and relay research performed to date, discuss any trends, flesh-out any updated relevant law, and highlight areas of potential concern for ODOT.

In summary, the White Paper provides information on more than two dozen cases were summarized and distilled and provided in the Case Summary. At least a dozen more cases were reviewed but not included in the summary due to age, inapplicability, or because they were settled. All cases reviewed, even the ones that were settled, provided insight into the direction of the industry and what can be expected from defendants, their experts, their attorneys, as well as judges and juries. The results of the caselaw review and analysis were that, in Ohio, the more things change the more they stay the same. The White Paper reflects that juries tend to find a "mean" rather than a middle, meaning they look to the best and most reasonable and representative numbers provided by the parties and generally split the difference. Additionally, the information reviewed indicated that settlement results trend like jury trial awards in that a general in-between number is gravitated to by the parties; not extremes. Finally, despite their best efforts and patients, neither judges nor juries respect or tolerate hyperbole and will "punish" a side that they determine is less than honest with a detrimental verdict or ruling.

4 Recommended Changes to ODOT's Guide to Compensability

ODOT's Guide to Compensability has 45 discrete sections. Each section was reviewed and compared with the cases that were analyzed as part of this project. From that review, the recommended changes to the Guide are reflected in Appendix C.

5 Synthesis Analysis Summary

A Synthesis Analysis, using formatting based on the caselaw analysis, White Paper, suggested edits to ODOT's Guide to Compensability is provide in Appendix D.

6 Conclusion

The concept of eminent domain has been around for a long time, with origins in 17th century English common law. The term "eminent domain" comes from the Latin phrase *dominium eminens*, which means "supreme lordship." Significant changes to this antique law come about rarely. Rather, changes are incremental and subtle. In Ohio, there were significant changes to the Ohio Revised Code Chapter 163 in 2007 based on the U.S. Supreme Court's *Kelo v. City of New London* decision from 2005. But since 2007, there have been no appreciable changes to the Ohio Revised Code and few shifts in Ohio Court precedence; consistent with the history of this legal theory, especially as applied to acquisition of property for roadway purposes.

What few changes there have been are explained under the Synthesis Analysis. Without under-emphasizing them, it is safe to say the changes have been minor, potentially anomalous, and not yet reflected by the Ohio Supreme Court. However, in 2025 there are several new justices and there are some intimations that a conservative Court may be willing to expand the rights of property owners in Ohio based on dicta from both *State ex rel. New Wen, Inc. v. Marchbanks*, 163 Ohio St.3d 14, 2020-Ohio-4865 and *Ohio Power Co. v. Burns*, 171 Ohio St.3d 84, 2022-Ohio-4713.

Thus, it was prudent and timely for ODOT to institute this Research Project, to not only understand what, if any, changes to Ohio eminent domain law and the results of eminent domain jury trials have happened in the last few years, but to get a good baseline in the event legal precedent in this area does evolve and to further anticipate where the change winds may be heading from the legal bar and industry surrounding right of way acquisition in this state.

References

OHIO

- *City of Dublin v. RiverPark Grp., LLC*, 2019-Ohio-1790 (10th Dist.)
- *Wray v. Sandusky 250-Perkins, LLC*, 2018-Ohio-3515 (6th Dist.)
- *Wray v. Gahm Props.*, 2018-Ohio-50, 103 N.E.3d 148 (4th Dist.)
- *Village of Silverton v. LLK Props*., 2019 Ohio App. LEXIS 3991 (1st Dist.)
- *City Of North Canton VS Julius Brown LLC et al*, Stark C.P. No. 2022-CV-01024 (Feb. 9, 2024)
- *Buckeye Valley Local School District v. Brent Stooksbury, Angie Stooksbury and Delaware County Treasurer*, Delaware C.P. No. 17-CV-H-01-0037 (Mar. 29, 2018)
- *Ohio Dept. of Transportation v. Baumhart Road Holdings, LLC*, Lorain C.P. No. 20-CV-20-2373 (Feb. 2, 2023)
- *City of Rossford v. Lawrence L. Wojnar, et al*., Wood C.P. No. 2018-CV-0088 (Oct. 31, 2019)
- *Ohio Power Company v. David Duff*, Madison C.P. No. CVH-2019-0161 (Sept. 28, 2020)
- *State, Dep't of Natural Res. v. Thomas,* 2016-Ohio-8406 (3rd Dist.)
- *State of Ohio Department of Natural Resources v. Wayne T. Doner, Janet K. Doner, et al.*, Mercer C.P. No. 12-CIV-150 (Jan. 11, 2013)
- *Butler County Trans. Improvement Dist. v. Omesh Prop*., 2017 WL 9808520 (Butler Ct. Comm. Plea)
- *Marchbanks, Dir. Ohio Dep't of Transp. v. Clark,* 2021 WL 9456185 (Lucas Ct. Comm. Plea.)
- *Marchbanks, Dir. Ohio Dep't. of Transp. v. Ernest J. Giles Revocable Trust,* 2022 WL 4289964 (Portage Ct. Comm. Plea.)
- *Algoma Group, A Gen. Partnership v. Marchbanks,* 2024-Ohio-2342 (10th. Dist.)

ILLINOIS

- *Dept. of Trans. for & on behalf of People v. Sanchez*, 2023 WL 8943251 (Ill. App. Ct. Dec. 27, 2023).
- *Dept. of Trans. for & on Behalf of People v. GreatBanc Tr. Co.*, 157 N.E.3d 953 (Ill. App. Ct. 2020)

INDIANA

- *Town of St. John v. Guzzo,* 2023 WL 6391114 (Ind.Super. May 18, 2023). *See Also Guzzo v. Town of St. John,* 203 N.E.3d 1055 (Ind. Ct. App. 2023)
- *City of Kokomo v. Estate of Newton,* 136 N.E.3d 1172 (Ind. Ct. App. 2019)
- *State V. Franciscan Alliance, Inc*., 232 N.E.3d 638 (N.D. Ind. 2024)

KENTUCKY

- *Baker v. Trans. Cabinet, Dept. of Highways,* 2023 WL 2052290 (Ky. Ct. App. Feb. 17, 2023).
- *Trans. Cabinet, Dept. of Highways v. Wilkerson,* 2023 WL 3397522 (Ky. Ct. App. May. 12, 2023)

MICHIGAN

- *Michigan Dep't of Transp. v. 260 S. Crawford,* 2018 WL 8058892 (Mich. Cir. Ct. Oct. 24, 2018).

PENNSYLVANIA

- *Dept. of Trans. of Right-of-Way for State Route 00700, Section 21H, in the Borough of Bentleyville v. Bentleyville Garden Inn, Inc.,* 264 A.3d 415, 434 (Pa. Commw. Ct. Aug. 21, 2021)
- *Niki D' Atri Enterprises, Inc. v. Dept. of Trans.,* 296 A.3d 661 (Pa. Commw. Ct. Mar. 17, 2023)
- *HPT TA Properties Tr. v. Twp. of W. Hanover,* 2020 WL 1987057 (Pa. Commw. Ct. Apr. 27, 2020)

Appendices

Appendix A
White Paper

WHITE PAPER REVIEW

Legal Precedence Eminent Domain Compensability

To: Kevin White, PhD, PE, E.L. Robinson Engineering
From: Tom Pannett, KBHR Access
Date: 9/30/2024
Re: Results of Research and Summarization of Relevant Case Law

SUMMARY OF TASKS:

Provide a summary of the results of the case law review phase of the project and relay research performed to date, discuss any trends, flesh-out any updated relevant law, and highlight areas of potential concern for ODOT.

SUMMARY OF ANALYSIS:

More than two dozen cases were summarized and distilled and provided in the Case Summary. At least a dozen more were reviewed but not included in the summary due to age, inapplicability, or because they were settled. All cases reviewed, even the ones that were settled, provide insight into the direction of the industry and what can be expected from defendants, their experts, their attorneys, as well as judges and juries. Simply put, in Ohio, the more things change the more they stay the same. Thus, consistent with the topics highlighted below, juries tend to find a "mean" rather than a middle, meaning they look to the best and most reasonable and representative numbers provided by the parties and generally split the difference. And, fair – to both sides -- settlements likely save the condemnor from both the expense of trial and risk of legal fees because essentially juries gravitate toward what the deem fair rather than picking one position over the other in these matters.

4 TOPICS

Topic 1: Trends from Recent Jury Trials

Jurys want information on which to base their determination of value. If a landowner can provide evidence of a high value for a parcel or high damage, the condemnor needs to put out their own numbers with some reasonable justification. If a condemnor does not put up a reasonable monetary counter-position, they risk the jury defaulting to the landowner's number and their position. That said, if a landowner introduced evidence of a facially extreme or unsupportable valuation, neither the court nor the jury will likely find in their favor.

For example, in 2022 the City of North Canton instituted a public works project that acquired property from Julius Brown, LLC. Mr. Brown testified that his abandoned and dilapidated car dealership building was severely damaged in value by the City's activities despite it not being

touched by the City's improvement. The City offered $216,000 and Mr. Brown testified to $1.6M; mostly in damages to the unimpacted structure. The jury awarded an additional $40,744 above the City's deposit, but most of that was an increase in rent value of the temporary taking. This case stands for the proposition that a jury is not likely to award excessive monetary demands from landowner; especially if the government's position is clear and reasonable. *City Of North Canton v. Julius Brown LLC, Et. Al*. (2022 CV01024)(Stark County Court of Common Pleas).

Another example of a landowner's extreme position was reflected in the jury verdict in the case of *Marchbanks, Dir. Ohio Dep't. of Transp. v. Ernest J. Giles Revocable Trust*, 2022 WL 4289964 (Portage Ct. Comm. Plea.) (Case No. 2020CV00358). Here, ODOT acquired a small portion of the property from a business and eliminated one access point. The deposit was small and contained little damages to the residue; deposit was $13,590. The landowner sought total compensation of $394,631.00 arguing 80% devaluation by internal circuity of travel and thus less marketability. The jury essentially fell on ODOT's number for the property taken but believed there was some damage and awarded $50,000.

Consistent with this line of inquiry, in the case of *Michigan Dep't of Transp. v. 260 S. Crawford*, 2018 WL 8058892 (Mich. Cir. Ct.), MDOT deposited $475,000 and the jury awarded their number. The landowner sought and additional $1,090,000 for essentially speculative damages which the jury did not accept.

Similarly, in *Buckeye Valley Local School District v. Brent Stooksbury, Angie Stooksbury and Delaware County Treasurer*; 2018 Jury Verdicts LEXIS 17846, the School district provided some acknowledgment at trial (as well as could be discerned from the case records) of the value of the home and business being taken which occupied a house. The jury split the valuation and recognized that the property use was unique. Regarding the numbers, the school's appraiser valued the taking at $100,000, the landowner sought $330,000.00, and the jury awarded $229,000.00.

The above cases show that when a landowner is extreme in its position, the jury will not likely follow along with a high award. But where the landowner is reasonable and the condemnor has some similarly reasonable position, the jury will award something, and it will likely split the difference with just a slight tilt toward one side or the other based on the facts of the case.

This played out against ODOT when it provided only a minimal valuation and no damages to the residual property which the landowner had planned to use for its active business purposes. In *Ohio DOT v. Baumhart Road Holdings, LLC*, Lorain Co., 2023, Case # 20CV202372, the Department only deposited $9,427 for land taken in front of a property for a roundabout that would eliminate access for a large portion of the undeveloped frontage. The jury verdict was $393,450.00 and attorney fees were $79,430.20.

Ohio eminent domain case law is shaped by utilities as well as actual government actors like ODOT, ODNR, and local governments. Juries are supposed to be neutral assessors regardless of the condemnor. Consistent with the aforementioned cases, if the condemnor provides no outlet

for a valuation position, the juries appear to default to the landowner's' position. This happened in *AEP v. Duff,* Madison County Case No. CVH 20190161. Here, AEP provided no real damage to the residue for the 50' wide easement they were acquiring. Their position appeared to be that the farmer could continue to farm under their easement so there was no appreciable damage. Well known appraiser Frank Hinkle testified for the property owner and found significant damages. After observing three days of evidence, testimony, and legal arguments, a unanimous panel of twelve Madison County jurors returned their verdict, awarding $374,000 more than AEP's suggested valuation of $88,857; total award of $462,000. And, since this was a farm, there was an additional amount for attorney and expert fees tacked on at $71,750.

Topic 2: Relevant Case Law from Recent Jury Trials

It seems like landowner appraisers and their aggressive legal counsel lead the way in expanding protections and ways to increase valuations in eminent domain cases. ODOT tends not to be pushing the opposite direction, but local governments and utilities do – if ever so slightly. An example of this is *City of Dublin v. RiverPark Grp., LLC*, 2019-Ohio-1790 (10th District Ohio Court of Appeals May 9, 2019). This case was tried to a jury and on July 11, 2018, the trial court issued a "judgment entry on verdict" whereby the court awarded Dublin a permanent shared-use path easement on the appropriated real property "to construct, operate, maintain, repair, and replace a shared-use path, and to perform such grading work as necessary" and for "ingress and egress over portions of Defendants' property reasonably necessary to facilitate [Dublin's] use of the easement area." There was a challenge to Dublin's quick take authority as they were constructing a shared use path adjacent to a roadway improvement. At least as far as this Franklin County case goes, acquisition via quick take for both a roadway improvement and "shared use path" was not a violation of Chapter 163.

Judges and trials are always in the news, but there seems to be more evidence and reporting of judges who appear to take a more active role in cases and make rulings that are not always consistent with *stare decisis*. That was determined to be a fatal flaw in *Wray v. Sandusky 250-Perkins, LLC* (6th District Ohio Court of Appeals August 31, 2018). Reversing a significant verdict for the landowner, the 6th District found that when a judge bolsters a witness's credibility and is and shows partiality toward a witness that can reasonably be inferred from the jury's verdict, such judicial activism taints the process and is plain error and will be reversed. However, this case and the *Village of Silverton v. LLK Properties* show courts' willingness to allow testimony of non-owners and non-appraisers if the testimony goes to the underlying determination of valuation. In *Wray v. Sandusky*, a local real estate agent was permitted to testify regarding rental valuations when those same valuation were used in the expert appraiser's report. In *Village of Silverton v. LLK Properties*, the landowner was permitted to testify to the successfulness and thus higher value of her business because of its current location which – also – was reflected in the appraisal.

The next cases deal with an affirmation regarding the date of take by court. *State, Dep't of Natural Res. v. Thomas* (3rd District Ohio Court of Appeals December 27, 2016) was one in a series of cases, settlements, trials and appeals that involved ODNR's work on Grand Lake St. Marys and

flooding of adjacent farms. The litigation spanned two decades. In the *Thomas* case, the jury returned a verdict indicating that the flowage easement was worth $515,970.00 and ODNR appealed. Part of the appeal involved determination of the date of take due to the re-occurring flooding over the years. To be consistent and clear (because the "encroachment" by the condemnor happened infrequently but at least annually) , the date of take was held to be the date of trial. Evidence and schemes evaluating property and damages was not admitted by the trial court as they occurred post date of trial and date of the good faith offer which the court found relevant. This court reinforced the Ohio Supreme Court precedent in *Director v. Olrich* (1966) and *Evans v. Hope* (1984) which held the date of take was the earlier of the date of trial, or the date of possession by the condemnor. Ultimately, the jury in this case leaned toward the condemnor with a verdict of $515,970.00. The ODNR's appraiser testified that the amount due was $363,100.00 and the landowner's appraiser testified to $1,218,285.00.

Despite the relatively small size of the acquisition by ODOT, the landowners in *Algoma Group, A Gen. Partnership v. Marchbanks*, 2024-Ohio-2342 (10th. Dist.) fought mightily for years in what appears to be an attempt to change the law in Ohio regarding necessity, proper before and after appraisals required by the government for any level of eminent domain, and what defines a roadway for quick take power. Losing at every level and on all fronts did not deter these landowners, but ultimately a reviewing court found that ODOT's determination of necessity and testimony regarding what constitutes a road for quick take power won the day. Furthermore, it was held that a petition to appropriate did not have to be based on a full-blown "before and after" appraisal. Finally, and particularly relevant to drafts of legislation pending before the Ohio General Assembly, the court determined that the policy provisions set out under R.C. 163.59 are explicitly NOT prerequisites for the filing of an appropriation action. Citing *Ohio History Connection v. Moundbuilders County Club Co*., 171 Ohio St.3rd 663 (2022). Also see R.C. 163.52(A).

Inapposite to precedent in Ohio, an Indiana jury awarded $1.5M for loss of direct access to State Route 37 via another public road since the new access was available through a one mile re-routing external to the property. Fortunately, the Indiana DOT successfully appealed this determination. In both states, a party may not obtain damages in an eminent domain action resulting from a claim that traffic is diverted from the premises or made to travel a more circuitous route because an abutting landowner has no cognizable property right in the free flow of traffic past their property. Thus, while it was good that traditional precedent was followed, it was disconcerting that a jury was allowed to come down with such a verdict and should be a cautionary warning that lawyers for landowner are always trying to gain new ground in these matters – even if their position is against a well-trodden path.

Topic 3: New or Nuanced Issues Exhumed from Recent Jury Trials

Courts in Ohio appear willing to award attorney's fees when there is any reasonable argument to be made that the appropriation takes land used for agricultural purposes. This was played out in the *Wray v. Gahm Properties* case where the jury returned a verdict awarding the defendant significant compensation for their land taken and, despite ODOT's expert testifying to the

property not being used for agricultural purposes, the Court nevertheless awarded costs and expenses under R.C. 163.21(C)(2) because evidence was adduced regarding agricultural use for timber harvesting. Thus, it should be recognized that even occasional and limited timber harvesting could be considered an agricultural use for which attorney's fees may be granted.

Future lost profits are typically not considered in condemnation proceedings, but creative landowners are still able to get that testimony in front of a jury. In *Village of Silverton v. LLK Properties*, the landowner's testimony involved future lost profits, but not for the purposes of proving or supplementing her appraiser's valuation testimony, but to demonstrate that the location was particularly lucrative and contributed to her success, thus the business should be valued on the higher side of an analysis. The Village offered $118,000, and the landowner's expert testified to $680,000. The jury ultimately awarded $661,000. The appeal of the Village also failed as they argued that the verdict was outside the testimony which it clearly was not.

Challenging necessity for roadway project is often a throw-away argument for property owners, as their burden to prove a project required right-of-way is NOT necessary is very high. However, occasionally some landowners put up a fight and that happened recently in the Delaware County case *Algoma Group, A Gen. Partnership v. Marchbanks.* These property owners argued very aggressively but the Court uniformly found that ODOT had the right to the property to perform the necessary work. The court found that the new necessity arguments affirmed by the Ohio Supreme Court in the *Ohio Power v. Burns* matter do not apply to roadway projects. Three other very good determinations came out of the Court of Appeals in the *Algoma* case. First, that a "before and after" appraisal is not required to file a taking. Second, ODOT's petition including findings, declarations, and resolutions which adequately explained the necessity of the taking and inability of the parties to agree and the public use the property being acquired is for were adequate to show necessity. Third, that the policy provisions set out under R.C. 163.59 are explicitly NOT prerequisites for the filing of an appropriation action. These are not necessarily new, but they are useful reinforcements of good precedent for roadway condemnors.

Courts have a great deal of patience with pro-se litigants, but in the case of the Illinois DOT under *Dept. of Trans. for & on behalf of People v. Sanchez*, 2024 WL 2807294 (4th. Dist. Ct. App.), after multiple opportunities to testify and even cross examine witnesses, the court ultimately stopped Mr. Sanchez narrative arguments and attempts and introducing irrelevant and prejudicial evidence and was able to keep the jury on track enough to award the defendant the condemnor's deposit. It would have been prudent for the condemnor here to confess judgment and thus have the costs of the trial assessed against the defendant.

It is certainly important for the trial court to keep control of witness testimony and proceedings. Courts of appeals may reverse if protocols regarding proper testimony are not followed and the condemnor properly objects throughout the trial and/or moves *in limine*. In an Indiana case, *City of Kokomo v. Estate of Newton*, the court allowed the person who was the estate trustee, the business owner, and the owner of the adjacent parcel to conflate damages to all these entities despite only the estate having title to the parcel being acquired. The condemnor moved *in limine*, objected multiple times and moved for a directed verdict. This preserved their rights on appeal

and persuaded the court to rule in their favor. A similar result happened in favor of the landowner in *Dept. of Trans. of Right-of-Way for State Route 00700, Section 21H, in the Borough of Bentleyville v. Bentleyville Garden Inn, Inc*. Despite the objections from the landowner's attorney, the court allowed the condemnor's appraiser to testify regarding baseless and incorrect assumption and incorrect applications of appraisal analyses. From this testimony (deemed inadmissible by the appeals court), the jury rendered a verdict of $355,000 which was substantially less than the Pennsylvania Board of Reviewers determination of $2,000,000. Since the jury relied on this incompetent testimony, the case was reversed and remanded for a new trial.

The opposite result for the condemnor happened in *Trans. Cabinet, Dept. of Highways v. Wilkerson* because the KyDOT attorney did not properly move *in limine* nor preserve objections throughout trial. Despite determining in deposition that the landowner's appraiser used improper appraisal methods, the landowner's attorney was able to effectively rehabilitate their witness at trial and the DOT attorney did not aggressively pursue its objections during trial testimony. Thus, the court indicated any error was not preserved and ruled in favor of the landowner.

Incompetent evidence resulted in reversible error in the *HPT TA Properties Tr. v. Twp. of W. Hanover* case. Here, for a road widening project that cut off an access road the condemnor offered $15,385.55 but the jury rendered a $1,750,000.00 verdict in favor of landowner solely because of a side road closure. The verdict was reduced to the condemnor's offer by the court via a JNOV – judgment notwithstanding the verdict – because the property owner had no interest in the area of the road closure. Courts are to be the gate keeper of the law in these proceedings and will overturn a verdict that is clearly outside the bounds of the legal precedent. This Pennsylvania case is parallel to Ohio's interpretation of the law which prohibits a taking for external circuity of access. While not stated in that way in the decisions, the court did hold that: 1) the condemnor could close the road at any time without paying compensation; 2) the property owners do not have any cognizable legal interested in preserving a particular traffic flow; and 3) external and minor changes to an intersection requiring motorist to travel an additional short distance is not compensable. A final statement made by the court is also worth keeping in mind: a landowner cannot assert the rights of a condemnee in the absence of a compensable interest as a property owner. Meaning, if no property or property right is taken, the landowner cannot assert that it is due any compensation for a taking.

The final case reviewed under this Topic was *Niki D' Atri Enterprises, Inc. v. Dept. of Trans*. There, the jury was permitted to hear the salvage/book value of each vehicle in a junk yard that was being acquired by the condemnor. Holding that such valuation was not lost profits, the court determined that the $3,000,000 verdict took into account "replacement costs" of the items to be acquired by the agency. Being personal property and inventory, the jury was entitled to hear of its value and their assessment was within the range of values provided in testimony between the owner and experts. It is important to note that the owner was not entitled to "retail sales" cost of inventory which would have included lost profits.

Topic 4: Final Thoughts on Settlement vs. Trials

As cases and court decisions, verdicts, and various rulings were reviewed, I came across many settlements that are public records that are worth a summary review for this white paper. Quite often, the settlements reviewed appeared consistent with jury verdicts in that – like a jury – if one side appears through the record to be wholly unreasonable, they are likely to have their position discounted. However, if both parties can present reasonable positions, a middle-ish level compromise appears to be reached via sentiment. This is relevant as it is essentially what juries in Ohio appear to do in these cases. If there are extremes, they discount that position, but if they believe they can understand both sides the jury will find what they determine to be a reasonable solution. A good example is the *City of Rossford v. Wojnar*. Here, when the condemnor offered $0 in damages and the owner sought $365,000, the jury gravitated toward the center with a tilt to the condemnor for an award of $152,700 for the damages to the residue. The condemnor would have been better served to anticipate some damages and offered the jury an alternative. Debbie Wilcox was appraiser for landowner here and she was obviously persuasive enough on the stand to convince the jury that damages should be awarded. The City of Rossford could have saved itself time and money and had a better chance at settlement if it offered some reasonable compromise on damages rather than $0. Ultimately, here the jury awarded the condemnor's value of taking and splitting in ½ (essentially) the owners demand for damages.

Certainly, condemnors should not be expected to throw money at cases just to make them settle, but the data indicates that – all things (evidence/experts) being equal – the jury will just as likely split the difference. So condemnors may as well embrace that mindset and save themselves costs and aggravation when presented with an opportunity for a not-unreasonable compromise

RECOMMENDATION:

Juries continue to trend toward a "reasonable" position based upon all the evidence they are exposed to during a trial. Juries need something to anchor their valuations, so the condemnor is well served with a rational argument for some damage if the landowner is indicating that their property suffered a devaluation because of the project. That devaluation, however, cannot be extreme or irrational on either side of the ledger. Juries don't appear to reward landowners for untenably high valuations, but they also appear willing to "punish" a condemnor if they are dismissive of a landowner's damage position. The value in recognizing this trend can be to: 1) take a step back and re-assess valuation and damages if a government appraiser's report shows no damages on a property but the landowner's appraiser reports some and reasonable damages; and 2) consider in settlement negotiations that juries are less likely to reward extreme positions, but they will find some way to award a value that is split if they can tether their valuation to something rational.

It is further important to keep on top of the pulse of certain relevant nuanced valuations such as: 1) land taken that arguably could be considered agricultural; 2) land that has chattels on it and

how those are values; 3) loss of access for future use; and 4) landowner testimony that is remotely relevant to valuation. When approached with unusual valuations or credible landowner testimony, condemnors should take a step back and look at the case with fresh eyes.

It is further important to remember that at trial, attorneys must be aggressive in objecting and preserving their clients positions before, during and after proceedings, and that landowner attorneys are always willing to push the envelope and even re-tread old ground if they have a client they think will fund their litigation in the off-chance they can get a change in the law or a change in interpretations to their client's benefits. It would bode well for attorneys representing condemnors to continually seek training on best practices in litigation and to make sure they have opportunities for robust mentorship.

DISCLAIMER:

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Appendix B
Case Law Review

OHIO
Case: *City of Dublin v. RiverPark Grp., LLC*, 2019-Ohio-1790 (10th Dist.)
Owner Valuation: $35,930.00 (appraised value of the property which both parties agreed to via joint stipulation).
Condemnor Valuation: $35,930.00 (see above).
Award: $35,930.00
Fees: Not awarded.
Facts: The case was tried to a jury and, on July 11, 2018, the trial court issued a "judgment entry on verdict" whereby the court awarded Dublin a permanent shared-use path easement on the appropriated real property "to construct, operate, maintain, repair, and replace a shared-use path, and to perform such grading work as necessary" and for "ingress and egress over portions of Defendants' property reasonably necessary to facilitate [Dublin's] use of the easement area." The trial court also awarded Dublin a "temporary easement for construction and grading" on the appropriated real property. In accordance with the jury verdict, the trial court ordered the sums Dublin previously deposited with the court, $35,930, paid as compensation to "any individual or entity having interest in the easements taken pursuant to the notice and opportunity to be heard."
Issue(s): Challenging quick take, intervenors, post-award actions by land-owners.
Holding: Citing the *Friedman* and *Carskadon* cases, the court held that: 1) once an agency completes the project and acquires the interest, those issues are moot; 2) when a petition to appropriate is filed under R.C. 163.02 and 163.08 for roadways the owner is denied the ability to challenge necessity; and 3) once the proceedings are finished and the landowner receives an award, a reviewing court cannot entertain a challenge to the right to appropriate, even if the taking was “unconstitutional.”
Analysis: Acquistion via quick take for both a roadway improvement and “shared use path”. Third party intervenor and counter claimant sought admission to the proceedings based on their interest in an access point. They further sought to challenge necessity. All motions were denied however the trial court allowed the access interest holder to be added as a party-in-interest under R.C. 163.12.
Case: *Wray v. Sandusky 250-Perkins, LLC*, 2018-Ohio-3515 (6th Dist.)
Owner Valuation: $926,490.00
Condemnor Valuation: $71,402.00
Award: $461,486.00 (reversed and remanded for new trial).
Fees: Not awarded.
Facts: In this eminent domain action, appellant ODOT appeals the judgment of the Erie County Court of Common Pleas, following a jury trial, which awarded appellee, Sandusky 250-Perkins, LLC,1 $461,486.00 in compensation for the property taken and damages. Reversed.
Issue(s): Was it reversable error for a judge to bolster a witness’s credibility and is market value rent admissible to as a factor when determining fair market value of a property
Holding: Yes, and yes
Analysis: A trial court can in no way show partiality toward a witness. It taints the process and is plain error and will be reversed. Further, despite ODOT’s objections, information regarding the market value rent can be presented to a jury when it is used as a factor for overall fair market value. Finally, despite the case being reversed, it is useful to note that the landowner’s expert witness testified to $926,490.00 as the total amount owed, and ODOT’s witness testified to $71,402.00 as the total value with the Jury awarding $461,486.00. The jury favored the landowner’s testimony, and it was bolstered by the testimony of the ancillary witness real estate

broker. Take away could be that "piling on" witnesses – at least as long as they are testifying to valuation or a portion of a valuation calculations – helps that side in swaying the jury.
Case: *Wray v. Gahm Props.*, 2018-Ohio-50, 103 N.E.3d 148 (4th Dist.)
Owner Valuation: N/A, Unable to access docket.
Condemnor Valuation: N/A, Unable to access docket.
Award: $330,419.00 as compensation for ODOT's taking (affirmed on appeal).
Fees: $32,224.00 for Costs and Expenses.
Facts: Jury returned a verdict awarding Gahm Properties $330,419 as compensation for ODOT's taking. Gahm Properties filed a motion for an award of costs and expenses under R.C. 163.21(C)(2) because evidence was adduced regarding agricultural use for timber harvesting.
Issue(s): Can occasional and limited timber harvesting be considered an agricultural use for which attorney's fees may be granted by a trial court in an eminent domain proceeding?
Holding: Yes.
Analysis: Case stands for the proposition that even limited evidence of qualified agricultural use would be enough to quality the case for attorney fees should the verdict exceed 150% of the ODOT valuation.
Case: *Village of Silverton v. LLK Props*., 2019 Ohio App. LEXIS 3991 (1st Dist.)
Owner Valuation: Multiple evaluations ranging from $595,000.00 - $680,000.00
Condemnor Valuation: $111,800.00
Award: $661,000.00 (affirmed on appeal).
Fees: Not awarded.
Facts: Village of Silverton ("Silverton") appeals from the judgment entry on a jury verdict awarding LLK Properties, Inc., ("LLK") $661,000 for the city's appropriation of its property. LLK appeals from the judgment of the trial court concluding that Silverton's appropriation was for the purpose of a road improvement project. Affirmed.
Issue(s): Can a landowner testify regarding the success of her business as part of its valuation given her position that the location contributed to the business success?
Holding: Yes, as long as the owner is not seeking future lost profits, and that the testimony is constrained to the value of the property based on the location and its success.
Analysis: This case is relevant as it not only establishes a way for owners to get in front of a jury their values based on how successful they claim to be. It is also important to show that here, it was apparent that the Jury was much more favorable to the business owner. The appraisal testimony was that the business valuation was relevant. The condemnor appraiser provided a total amount due was $118,000.00 and the owner's appraisal testified that the amount due was $680,000.00. The jury verdict was $661,000.00. The condemnor's appeal suggesting that the award was outside the testimony failed.
Case: *City Of North Canton VS Julius Brown LLC et al*, Stark C.P. No. 2022-CV-01024 (Feb. 9, 2024).
Owner Valuation: $1,600,000.00
Condemnor Valuation: $216,000.00
Award: $256,744.00
Fees: Not awarded.

Facts: Jury trial over the value of the former Spitzer dealership property. The unanimous verdict by the jury of eight came at the end of a four-day trial and less than two hours of deliberations Thursday afternoon. North Canton had already agreed to pay about $216,000. Julius Brown LLC was seeking $1.6 million. City to pay an additional $40,744.
Issue(s): Will the speculative value of the owner and complaints of poor treatment by the condemnor sway the jury.
Holding: No, the jury awarded $256,734.96.
Analysis: Excessive demand from landowner and clarity of the government's taking kept the verdict reasonable.
Case: *Buckeye Valley Local School District v. Brent Stooksbury, Angie Stooksbury and Delaware County Treasurer*, Delaware C.P. No. 17-CV-H-01-0037 (Mar. 29, 2018).
Owner Valuation: $330,000.00
Condemnor Valuation: $100,000.00
Award: $229,000.00
Fees: Not awarded.
Facts: School district used ED to take an adjacent house. The jury determined the fair market value for the taking at $229,00p0, which was very close to the middle of the two opposing views held by the parties as to the fair market value.
Issue(s): Can the "special use" of a property be used to enhance valuation?
Holding: Yes
Analysis: Landowner alleged to have made significant upgrades to unit for special use. School appraiser valued the taking at $100,000. Landowner sought $330,000.00. Jury awarded $229,000.00 which was close to the middle. Furthermore attorney's fees were awarded because the award was in excess of 125% of the last offer.
Case: *Ohio Dept. of Transportation v. Baumhart Road Holdings, LLC*, Lorain C.P. No. 20-CV-20-2373 (Feb. 2, 2023).
Owner Valuation: $199,200.00
Condemnor Valuation: $9,000.00
Award: $393,450.00
Fees: $66,394.50 for Attorneys Fees.
Facts: A Lorain County Common Pleas Court jury concluded a Henrietta Township couple is owed $393,450 for land they lost to a roundabout constructed by the Ohio Department of Transportation.
Issue(s): Business lost frontage and access points. Presume that the larger parcel of 44+ acres was somehow determined to be agricultural given attorney's fees were awarded although it appears to be zoned commercial. Co-defendant was "Ortner Farms, Ltd."
Holding: According to the trial docket, Defendants sought fees post-trial and ODOT objected but the court rules in the Defendants' favor.
Analysis: The docket did not provide any documentation; only summaries so it was not possible to see the details of the case. Debbie Wilcox was the appraiser.
Case: *City of Rossford v. Lawrence L. Wojnar, et al*., Wood C.P. No. 2018-CV-0088 (Oct. 31, 2019).
Owner Valuation: $365,000.00
Condemnor Valuation: $22,300.00

Award: $175,000.00
Fees: Not awarded.
Facts: Following a jury trial, the City of Rossford paid $175,000 for acquisition of property needed for the roundabout project at the intersection of Lime City and Buck roads.
Issue(s): Original offer was $22,300.00, which included no damages. However, the Jury awarded all valuation of the permanent and temporary take and $152,700.00 in damages to the residue.
Holding: Condemnor's value of taking and splitting in ½ (essentially) the owners demand for damages.
Analysis: When the condemnor offers 0 in damages and the owner seeks $365,000.00, the Jury will want to offer something and probably believed it was being reasonable splitting the difference. The condemnor would have been better served to anticipate some damages and offer the jury an alternative. Debbie Wilcox was appraiser for land owner.
Case: *Ohio Power Company v. David Duff*, Madison C.P. No. CVH-2019-0161 (Sept. 28, 2020).
Owner Valuation: $1,740,900.00
Condemnor Valuation: $88,857.00
Award: $462,000.00
Fees: $71,750.00 in Attorney and Court fees.
Facts: After observing three days of evidence, testimony, and legal arguments, a unanimous panel of twelve Madison County jurors returned their verdict, awarding $374,000 more than AEP's suggested valuation of $88,857; total award of $462,000.00.
Issue(s): AEP's low valuation of damages and their 50' wide swath of easement.
Holding: Jury awarded substantial damages.
Analysis: In this case, Frank Hinkle testified for the property owner. This was an acquisition from a farm and thus an additional set of attorney fees were assessed at $71,750.00.
Case: *State, Dep't of Natural Res. v. Thomas,* 2016-Ohio-8406 (3rd Dist.)
Owner Valuation: $1,218,285.00
Condemnor Valuation: $363,100.00
Award: $515,970.00
Fees: $38,217.50 for Attorney and Court fees.
Facts: Another trial involving ODNR's work on Grand Lake St. Marys and flooding of adjacent farms. The jury returned a verdict indicating that the flowage easement was worth $515,970.00 and ODNR appealed. Part of the appeal involved determination of the date of take due to the re-occurring flooding over the years.
Issue(s): Should the date of take be the date flooding started or the date of trial?
Holding: To be consistent and clear, the date of take was held to be the date of trial. Further, ODNR's attempt to introduce updated analyses and evidence was deemed improper. Finally, evidence regarding information that could be used in an appraisal but wasn't because a different appraisal method was used by an expert was not relevant and would be denied by the court.
Analysis: Moving the date of take and having it sooner or later caused the valuation methods to fluxuate and be uncertain and potentially not comparable, thus the court settled on a date that was clear. Further, for this farm that was damaged by reoccurring flooding, the sales comparison valuation method was also deemed proper and not the income approach. The income approach was sought to be used by ODNR when they tried to obtain crop yield information, but the court

denied that discovery. The Court reinforced the Ohio Supreme Court precedent in *Director v. Olrich* (1966) and *Evans v. Hope* (1984) which held the date of take was the earlier of the date of trial, or the date of possession by the condemnor. The jury award here leaned toward the condemnor with a verdict of $515,970.00. The ODNR's appraiser testified that the amount due was $363,100.00 and the landowner's appraiser testified to $1,218,285.00.
Case: *State of Ohio Department of Natural Resources v. Wayne T. Doner, Janet K. Doner, et al.*, Mercer C.P. No. 12-CIV-150 (Jan. 11, 2013).
Owner Valuation: $ 2,400,000.00
Condemnor Valuation: $1,360,000.00
Award: $1,950,000.00
Fees: $250,000.00 for Attorney's fees.
Facts: One of a series of cases surround farmland flooding of Grand Lake St. Marys in the 2000–2017-time frame.
Issue(s): Valuation of farmland due to continued flooding and damages and the inverse condemnation required to be filed by the Ohio Supreme Court.
Holding: Jury split verdict and provided landowner $1.9M. They also received $250k in attorney fees.
Analysis: These cases are relevant to show the jury verdict trends in very similar cases and how the jury will take both expert opinions, and likely split the difference with a lean one way or the other depending upon the unknown factors such as sympathy of landowner or credibility of expert. They also stand for the proposition that these cases have a good chance of being tried as the attorney fees are paid for given the land is agricultural.
Case: *Butler County Trans. Improvement Dist. v. Omesh Prop.*, 2017 WL 9808520 (Butler Ct. Comm. Plea.)
Owner Valuation: $1,150,000.00
Condemnor Valuation: $333,000.00
Award: $600,000.00
Fees: Not awarded.
Facts: The Butler County Transportation Improvement District sought to appropriate property that included a 2,020 square foot convenience store for the purpose of public roadway improvements. The panel returned a verdict awarding the defendants $600,000.
Issue(s): Owner and his appraiser testified to the uniqueness of this property and sought $1,150,000.00.
Holding: Jury heard all relevant testimony and weighed the evidence more in favor of the condemnor, but the landowner still received almost 2X the condemnor's deposit.
Analysis: Deposit was $333,000.00. Debbie Wilcox appraisal at $1,150,00.00 and she used questionable comparable sales and double counted values of inventory and valuation. Jury awarded less than the ½-way amount.
Case: *Marchbanks, Dir. Ohio Dep't of Transp. v. Clark,* 2021 WL 9456185 (Lucas Ct. Comm. Plea)
Owner Valuation: $37,500.00
Condemnor Valuation: $3,225.00
Award: $10,000.00

Fees: Not awarded.
Facts: For the taking of property for a highway improvement project in Lucas County. The trial court ruled that just compensation was $10,000.
Issue(s): What is the fair amount to compensate the defendant for the taking?
Holding: Jury Trial Awarded $10,000.00.
Analysis: None, save the observation that a Jury will try to find a compromise and avoid extremes.
Case: *Marchbanks, Dir. Ohio Dep't. of Transp. v. Ernest J. Giles Revocable Trust,* 2022 WL 4289964 (Portage Ct. Comm. Plea.)
Owner Valuation: $394,632.00
Condemnor Valuation: $10,830.00
Award: $63,230.00
Facts: For the taking of property for a highway improvement project in Portage County, the trial court ruled that just compensation was $63,230. (Deposit was $13,590)
Issue(s): Jury trial before a magistrate. Very little acreage acquired thus damages to the residue with the main issue.
Holding: Jury awarded $50,000 as damages.
Analysis: Landowner's appraiser damaged the property 80% due to the elimination of one access. Thus, total compensation sought was $394,631.00. Attempted to argue internal circuity of travel land less marketability with only one access point. The jury did not agree but gave the landowner much more than the ODOT deposit and their appraisal. Reviewing a series of cases in this county between 2020 and 2023 for what is assumed to be the same project, the settlements recorded on the Clerks' website seem to be congruous with this jury verdict. In other words, they are not extreme but at least 2X ODOT's deposit.
Facts: For the taking of property for a highway improvement project in Portage County, the trial court ruled that just compensation was $63,230. (Deposit was $13,590)
Case: *Algoma Group, A Gen. Partnership v. Marchbanks,* 2024-Ohio-2342 (10th. Dist.)
Owner Valuation: $9,186.00
Condemnor Valuation: (Did not provide an evaluation, as they stated ODOT was not able to appropriate the land for a variety of reasons)
Award: $9,186.00
Fee's: Not awarded.
Facts: For takings of land for improvements to State Route 315 in Franklin County, the trial court awarded $9,168 for two parcels of land.
Issue(s): Landowners challenged necessity, proper before and after appraisals, and other matters and received a stay in Delaware County and complaints in Franklin County under R.C. 5501.22 and 42 U.S.C. 1983.
Holding: A "before and after" appraisal is not required to file a taking. ODOT's petition including findings, declarations, and resolutions which adequately explained the necessity of the taking and inability of the parties to agree and the public use the property being acquired is for.
Analysis: ODOT's appropriation was for the purpose of maintaining roads that will be free and open to the public. They are presumed, therefore, to be exercising a public use function and the burden is high to prove otherwise. The requirement for specific statements of necessity found by the Ohio Supreme Court in *Ohio Power Co. v. Burns*, 171 Ohio St.3d 84 (2022) do not apply to

acquisition for roadways under R.C. 163.09(B)(1)(b). Further, the court determined that the policy provisions set out under R.C. 163.59 are explicitly NOT prerequisites for the filing of an appropriation action. Citing *Ohio History Connection v. Moundbuilders County Club Co.,* 171 Ohio St.3rd 663 (2022). Also see R.C. 163.52(A).
ILLINOIS
Case: *Dept. of Trans. for & on behalf of People v. Sanchez*, 2023 WL 8943251 (Ill. App. Ct. Dec. 27, 2023).
Owner Valuation: $20,000.00 (testified individually at trial, no third-party appraisal sought**)**
Condemnor Valuation: $7,000.00
Award: $7,000.00
Fees: Not awarded.
Facts: For construction of a state highway, the court conducted a jury trial to determine the fair market value of the property. The jury returned a verdict finding just compensation for the taking of the property was $7,000.00 which was the amount of the deposit.
Issue(s): This court of appeals decision turned on the lack of the ability of a pro se property owner to follow any rules of court or appellate practice.
Holding: Appeal Dismissed
Analysis: This case shows the lengths courts will go to in an attempt to give property owners every opportunity to present their case. The trial court was exhaustively patient with this owner and allowed him leeway to present some evidence and testimony to the jury. However, the jury was able to see through the irrelevant and distracting antics of the pro se owner, stuck to the facts, law and expert testimony, and rendered a verdict for the condemnor.
Case: *Dept. of Trans. for & on Behalf of People v. GreatBanc Tr. Co.*, 157 N.E.3d 953 (Ill. App. Ct. 2020)
Owner Valuation: $3,377,902.00.
Condemnor Valuation: $1,520,000.00.
Award: $1,500,000.00.
Fee's: Not awarded.
Facts: To expand the intersection of US Route 6 and US Route 45, the Illinois Department of Transportation had to take real property with an extreme number of named defendants and heirs. Heirs and others withdrew funds that they were not otherwise entitled to and had to return same. The trial court awarded $3,202,000 for the parcel of land, and properly distributed funds.
Issue(s): Who is responsible for the return of excess funds.
Holding: The trial court was required to seek the return of funds via a pro-rata share determined after a hearing and presentation of evidence, including funds provided to legal counsel.
Analysis: In this case, IDOT deposited over $3M for a quick take but was later determined to only owe $1.5M. The parties appealed for several years seeking clarification of who was responsible for what amount in the pro-rata return of funds because the trial court initially granted them all full access to the total deposit. Take away is that the condemnor should require orders from the court regarding each condemned entity's share should there be multiple parties in distribution.
INDIANA
Case: *Town of St. John v. Guzzo,* 2023 WL 6391114 (Ind.Super. May 18, 2023). *See Also Guzzo v. Town of St. John,* 203 N.E.3d 1055 (Ind. Ct. App. 2023)

Owner Valuation: $1,850,000.00
Condemnor Valuation: $607,000.00
Award: $1,945,979.00 ($1,280,000.00 + $664,337.53 of preliminary interest). This number was increased to $3,004,416.00 by the Supreme Court of Indiana due to additional interest.
Fees: Not awarded.
Facts: In an eminent domain action where the City of St. John took land to improve U.S. 41, it was ruled that the owner of the property (the "Guzzos") was entitled to $3,004,416.00.
Issue(s): Property owners of a home in Indiana are able to receive 150% of the home's value for a total taking, but only received 100% at the trial.
Holding: Owners were entitled to receive 150% of value as well as interest on the 50% not paid during the pendency of the appeals.
Analysis: While not in lock step with Ohio law, the courts in Ohio may find similarly should less than full value (if as directed by statute) is not awarded at the trial court level. In this case, the statutory interest (post and prejudgment when combined) was approaching $1,000,000. Thus, may be further emblematic of a legislature that is anti-eminent domain.
Case: *City of Kokomo v. Estate of Newton,* 136 N.E.3d 1172 (Ind. Ct. App. 2019)
Owner Valuation: $305,600.00
Condemnor Valuation: $143,000.00
Award: $305,600.00
Fees: $25,000.00 for Attorneys fees.
Facts: In an action in which the City of Kokomo took land for a highway improvement project, the court reduced jury award from $305,600.00 plus fees to an award of $118,916.96 because Jury improperly assessed damages to adjacent parcel and for a non-owner tenant.
Issue(s): Who can present evidence at trial regarding a taking and damages between a closely held corporation, an estate, and an individual owner who are practically the same but legally different.
Holding: Jury verdict reversed, and a directed verdict instituted by the Court of Appeals.
Analysis: The same person was the estate trustee, the business owner, and the owner of the adjacent parcel. However, only the estate had title to the parcel being acquired. During trial, the court permitted testimony that conflated the ownership and damages. The condemnor moved in limine, objected multiple times and moved for a directed verdict. This preserved their rights on appeal and persuaded the court to rule in their favor.
Case: *State V. Franciscan Alliance, Inc*., 232 N.E.3d 638 (N.D. Ind. 2024)
Owner Valuation: $2,180,000.00
Condemnor Valuation: $1,986,000.00
State Jury Trial Awarded: $2,180,000.00 + $397,179.62 in interest. (Case is currently before the northern district of Indiana.
Fees: $50,000.00 for Attorneys fees.
Facts: A case is currently before the Northern District of Indiana regarding the taking of land for a 1-69 project. Jury awarded $1.5M for loss of direct access to State Route 37 via another public road. New access is one mile re-routing external to the property.
Issue(s): Was it appropriate for a jury (in Indiana) to award damages for loss of indirect access via one public road to a state route and causing a one-mile detour?
Holding: No, it was error for the jury to award for these damages.

Analysis: A party may not obtain damages in an eminent domain action resulting from a claim that traffic is diverted from [the] premises or made to travel a more circuitous route because an abutting landowner has no cognizable property right in the free flow of traffic past his property.
KENTUCKY
Case: *Baker v. Trans. Cabinet, Dept. of Highways,* 2023 WL 2052290 (Ky. Ct. App. Feb. 17, 2023).
Owner Valuation: $15,000.00
Condemnor Valuation: $10,000.00
Award: $10,000.00
Fees: Not awarded.
Facts: Landowners appealed the decision of court to essentially direct a verdict for valuation and dismiss the case which they protracted for 7 years.
Issue(s): Was it an abuse of discretion for the trial court to adopt the value determination of the commissioners when the landowners could not allegedly find an expert due to the DOT's monopoly on experts?
Holding: No, the landowners had seven years to find an expert and they exhausted their opportunities to delay.
Analysis: At some point the trial court will make determinations resolving cases even if there are some rational reasons for delay when the delay becomes egregious.
Case: *Trans. Cabinet, Dept. of Highways v. Wilkerson,* 2023 WL 3397522 (Ky. Ct. App. May. 12, 2023).
Owner Valuation: $ 583,096.00
Condemnor Valuation: originally paid the Wilkerson's $161,000.00, later expert reported it was worth $229,500.00
Award: $ 583,096.00
Fees: Not awarded.
Facts: KyDOT appealed jury verdict when, for the taking of land to expand a highway, the jury ruled in favor of the property owner for $583,096.00. DOT acquired 18 acres of 125-acre farm.
Issue(s): Can an expert provide testimony at trial when their deposition testimony indicated they used improper valuation calculations?
Holding: Yes, an expert can testify at trial even thought their depositions testimony indicated they used improper valuation calculations when the Court: 1) instructs the expert to NOT use the improper methods and the expert follows the Court's direction; and 2) when the opposing party does not property object to the testimony thus potentially preserving an appeal.
Analysis: The court found that evidence in these cases should be liberally admitted. The court further permitted errors in depositions or in reports to be corrected at trial. The jury was the trier of fact and the court determined that there was no reasonable basis on which the expert's evidence could be held so devoid of probative value as to rend the jury's verdict unsupportable.
MICHIGAN
Case: *Michigan Dep't of Transp. v. 260 S. Crawford,* 2018 WL 8058892 (Mich. Cir. Ct. Oct. 24, 2018).
Owner Valuation: $1,090,000.00
Condemnor Valuation: initially $400,000.00 but added $75,000.00 later.
Award: $475,000.00

Fees: Not awarded.
Facts: The Michigan Department of Transportation took a parcel of property to building a bridge for an interstate. The jury returned a verdict ruling that the department owed the landowner $475,000.00.
Issue(s): Difference between the owner and condemnor's valuation.
Holding: Condemnor's valuation was persuasive to the jury.
Analysis: It appears the owner sought damages that were not available to it in this circumstance. They demanded $1,090,000.00 but were only awarded the condemnor's valuation which it testified to at trial.
PENNSYLVANIA
Case: *Dept. of Trans. of Right-of-Way for State Route 00700, Section 21H, in the Borough of Bentleyville v. Bentleyville Garden Inn, Inc.,* 264 A.3d 415, 434 (Pa. Commw. Ct. Aug. 21, 2021)
Owner Valuation: $2,908,000.00
Condemnor Valuation: $286,915.00
Award: $355,000.00
Fees: Not awarded.
Facts: For the taking of a parcel of land for a highway project, the jury awarded $355,000 in damages. However, previously the Penn. "Board of Reviewers" had awarded in excess of $2,000,000, from which PennDOT appeal to the court of common pleas for a jury trial.
Issue(s): Can an expert's opinion be so incorrect and baseless as to significantly sway a jury and create an unfair verdict?
Holding: The erroneous assumptions of an expert which were testified to a trial and appeared to impact the jury – proven post-trial but objected to at trial – are enough to overturn a jury verdict.
Analysis: Court determined that incorrect legal assumptions, incorrect factual assumptions, and ignoring of certain appraisal practices rendered the condemnor's expert incompetent. Jury relied on this incompetent testimony and case was reversed and remanded for a new trial.
Case: *Niki D' Atri Enterprises, Inc. v. Dept. of Trans.,* 296 A.3d 661 (Pa. Commw. Ct. Mar. 17, 2023)
Owner Valuation: 10,374,874.61
Condemnor Valuation: 215,875.00
Award: 3,189,677.00
Fees: Not awarded.
Facts: For an upgraded road project. The jury awarded the tenant of a salvage yard $3,189,677 in damages which was significantly more than the board of assessors which recommended $600k. DOT appealed.
Issue(s): How much to value the "in place" salvage yard inventory.
Holding: Inventory can be valued on a per item basis cost with depreciation. Such a valuation is not an assessment of "lost profits."
Analysis: The DOT argued that the assessments were lost profits, but the court determined that they were replacement costs of the items to be acquired by the agency. Being personal property and inventory, the jury was entitled to hear of its value and their assessment was within the range of values provided in testimony between the owner and experts. Owner was not entitled to "retail sales" cost of inventory which would have included lost profits. Given that the trial court allowed

testimony that includes lost profits, it was error to not instruct the jury to ignore same, but not reversible error.
Case: *HPT TA Properties Tr. v. Twp. of W. Hanover,* 2020 WL 1987057 (Pa. Commw. Ct. Apr. 27, 2020)
Owner Valuation: $1,750,000.00
Condemnor Valuation: $15,385.55
Award: $1,750,000.00
Fees: Not awarded.
Facts: Property taken for road widening project. Condemnor offered $15,385.55. Jury rendered a $1,750,000.00 verdict in favor of landowner because of a side road closure. Verdict was reduced to condemnor's offer by the court via a JNOV – judgment notwithstanding the verdict – because the property owner had no interest in the area of the road closure.
Issue(s): Is there a compensable taking where a side road – owned by the government – is closed and access is reverted to one point off another road which was widened and thus including some taking of the property during the same project that closed the side road? Can a trial court grant a JNOV that completely eliminates a jury verdict?
Holding: A JNOV based on the jury's incorrect application of the law will be upheld. A property owner has no interest in a closing of a public road when they have full access from an adjacent public road.
Analysis: The JNOV is interesting in that the difference was so extreme: over $1.7M reduction. But taken in context is it is understandable that a court – which is the gate keeper of the law in these proceedings – would overturn a verdict that is clearly outside the bounds of the legal precedent. This Pennsylvania case is parallel to Ohio's interpretation of the law which prohibits a taking for external circuity of access. While not stated in that way in the decisions, the court did hold that: 1) the condemnor could close the road at any time without paying compensation; 2) the property owners do not have any cognizable legal interested in preserving a particular traffic flow; and 3) external and minor changes to an intersection requiring motorist to travel an additional short distance is not compensable. A final statement made by the court is also worth keeping in mind: a landowner cannot assert the rights of a condemnee in the absence of a compensable interest as a property owner. Meaning, if no property or property right is taken, the landowner cannot assert that it is due any compensation for a taking.

Appendix C
ODOT Guide to Compensability Updated

OHIO DEPARTMENT OF TRANSPORTATION
OFFICE OF REAL ESTATE

DATE: January __, 2025

TO: Users of the Real Estate Manual

FROM: Manager Appraisal Unit

RE: Changes and Updates to the Real Estate Manual

The only current and accurate source of ODOT's Real Estate Manual is on the Office of Real Estate's website. Click here to access the site. Desired information can be accessed by scrolling down the left column and selecting "Manuals and Booklets." Specific information can be selected by clicking on the desired section.

The Real Estate Manual is a "living document" as procedures will evolve and change. Individuals or firms providing various services to the Office of Real Estate (e.g. negotiations, titles, appraisal, appraisal review, relocation, relocation review, closing, property management, railroad coordination and utility relocation) must perform these services in compliance with current published policies and procedures. Individuals utilizing a hard copy version of the manual, without accessing the website for updates, risk providing non-compliant services to the Office of Real Estate. Therefore, all users must be aware of the changes as various sections of the manual are updated.

ODOT will provide notice of manual changes on the Publications gateway web page. Click here to access the site. Scroll down to "Real Estate Manuals" and select the desired section for updates. The Publications gateway web page is updated two times a year.

The Office of Real Estate may also provide additional guidance to its procedures by Inter-Office Communications (IOC's). These communications will be made a part of the Real Estate Manual. If individuals have questions pertaining specifically to this Section, contact the Manager Appraisal Unit at (614) 446-5054.

This Guide is required to be used on Ohio Department of Transportation Projects and Federally Funded Highway Projects in Ohio. It is not a mandate for local governments or other state agencies but can be used as guidance. This Guide further does not create any legal duty on behalf of ODOT, its consultants toward landowners whose property is being acquired by ODOT or impacted by an ODOT project. It does not create any independent cause of action under Ohio law and cannot be used in a Court of Law for any purpose other than as general guidance.

GUIDE TO COMPENSABILITY

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4400 GUIDE TO COMPENSABILITY

4400.01 General

A. This Section is not intended as a legal memorandum or a legal opinion. Rather, it is intended as a guide for appraisers to assist in estimating fair market value. As appraisers well know, each parcel of land is different and unique from every other parcel of land. The same can be said for each situation that comes to the attention of an Assistant Attorney General. There is no substitute for legal advice directed toward the specific problem. The following general guide may be useful in determining what is compensable and what is not compensable. This guide is by no means exhaustive.

B. In instances where legal advice is required on a specific appraisal problem, the appraiser should submit questions to the District Real Estate Administrator (DREA). The DREA will determine if guidance is needed from the Central Office Appraisal Unit and/or from the Transportation Section of the Ohio Attorney General's Office.

4400.02 Definition of Fair Market Value is Compensation

A. The purpose of estimating compensation for property taken (acquired) through ODOT's power of eminent domain is based upon the limitation of the power requiring the owner be paid just compensation. Just compensation is the fair market value of the property acquired at the time it is acquired or the date the property is appropriated unless otherwise advised by the Attorney General or a judicially declared date of valuation. See R.C. 163.59 (D). If part of the owner's property is taken, just compensation is the fair market value of the part taken plus damages, if any, to the residue. See R.C. 163.14. Also see *Columbia Gas Transm. Corp. v. An Exclusive Natural Gas Storage Easement* (1993), 67 Ohio St.3d 463, 464, 620 N.E.2d 48, 49,

Market value is not value to the acquiring agency, nor is it value to the owner. It is based upon an external standard. The definition of fair market value utilized by the Ohio Department of Transportation is based on the Ohio Jury Instruction and is as follows:

> *You will award to the property owner(s) the amount of money you determine to be the fair market value of the property taken. Fair market value is the amount of money which could be obtained on the market at a voluntary sale of the property. It is the amount a purchaser who is willing, but not required to buy, would pay and that a seller who is willing, but not required to sell, would accept, when both are fully aware and informed of all the circumstances involving the value and use of the property. You should consider every element that a buyer would consider before making a purchase. You should take into consideration the location, surrounding area, quality and general conditions of the premises, the improvements thereon and everything that adds or detracts from the value of the property.*

See, generally, *Wray v. Wessell*, 2016-Ohio-8584 (Ct. App. 4th Dist.), citing *Sowers v. Schaeffer*, 155 Ohio St. 454 , 459 , 99 N.E.2d 313.

The estimate of fair market value is influenced by regulation in the Ohio Administrative Code, 5501:2-5-06 (C)(2), that requires the appraiser to ignore project influence in the compensation estimate. The regulation is:

Influence of the project on just compensation: The appraiser shall disregard any decrease or increase in market value of the real property caused by the project for which the property is to be acquired, or by the likelihood that the property would be acquired for the project, other than that due to physical deterioration within reasonable control of the owner.

See Section 4400.06 of this Guide for more information about project influence.

4400.03 Highest and Best Use

A. The rule of valuation employed in an appropriation proceeding is the owner is entitled to the worth of his property for its highest and best use. Ohio's Jury Instructions are:

The property must be valued at its worth for the most valuable use for which it may, reasonably lawfully, and practically can be used.

See *City of Columbus v. Triplett*, 632 N.E.2d 550, 553 (Ohio Ct. App. 10th Dist. 1993), citing *Masheter v. Ohio Holding Co.* (1973), 38 Ohio App.2d 49, 53.

4400.04 Date of Value

A. When an appraisal is required for the acquisition of property, the date of the value estimate is the date the appraiser inspected the property unless otherwise instructed by ODOT.

B. When an appraisal is needed in the appropriation of a property, the date of value may be different from the date of inspection. It may be months or years before the appraiser is called upon to testify to an opinion of market value. Depending upon the facts of the case, the appraiser may be testifying to the original market value estimate or may be called upon to estimate market value as of a later date, such as the date of actual possession by ODOT or the date of trial. As these circumstances dictate, the appraiser may justifiably alter previous conclusions because of changed conditions. (See Section 4400.05 of this Manual for additional information regarding date of take.) The general rule concerning the date of valuation in appropriation cases is:

> *Property taken for public use shall be valued as of the date of trial; that being the date of take, unless the acquiring agency has taken possession prior thereto, in which event compensation is determined as of the time of the taking.*

See *Richley v. Van Horneff*, 38 Ohio App. 2d 22, 311 N.E.2d 37 (App. 1st Dist. 1973)

C. It is important that the appraiser accurately reflect the time of evaluation or the "as of" date of appraisal when completing the RE 25-6 (Certificate of Appraiser). The "as of" date at the bottom of the RE 25-6 is the date of value. In an appropriation, the appraiser will be told the date of value by the Attorney General's Office. In an acquisition, the date of value is typically the last date of inspection by the appraiser, unless otherwise instructed.

4400.05 Date of Take

A. "Date of Take" is the transfer of physical possession to the acquiring agency. This transfer may be voluntary or involuntary. The value ODOT pays for appropriated property is the value of the property on that date when ODOT first entered upon the land or the date of trial, whichever occurs first in time. See *Bd. of Cty. Comm'rs of Putnam Cty. v. Weis*, 2019-Ohio-3720 (Ct. App. 3d Dist. 2019), citing *Director of Highways v. Olrich*, 5 Ohio St.2d 70 , 72 , 213 N.E.2d 823 , (1966).Factors influencing date of take may include the date the utility contractor entered on to the land; date an occupant was provided notice to move; date of the first inspection by the appraiser; date the construction contractor entered onto the land; or, date of trial. The issues influencing a date of take are unique to the circumstances influencing a particular property. The Attorney General's Office informs the appraiser of the date of take.

4400.06 Project Influence on Value

A. The owner is only entitled to be compensated for the value of land of which the owner has been deprived. The property owner is not entitled to receive any enhanced value which accrues to the property by reason of the proposed project. Similarly, the owner is not made to suffer any decreases in value which result from the presence of the project.

B. This principle is based on 49 CFR 24.103(b) and Ohio Administrative Code, Section 5501:2-5-06(C)(2). It is also based in part on Article I, Section 19 of the Ohio Constitution which states that "compensation shall be assessed *** without deduction for benefits to any property owner." See *Richley v. Bowling*, 34 Ohio App. 2d 200, 299 N.E.2d 288 (App. 3d Dist. 1972) for a discussion of benefits both general and special.

C. To permit compensation to be either reduced or increased because of an alteration in market value attributable to the project itself would not lead to just compensation. The increase or decrease in the fair market value caused by the public improvement for which the property is required, or by the likelihood the property would be acquired for such improvement, other than that due to physical deterioration within reasonable control of the owner, will be disregarded in determining the compensation for the property. To be subject to this rule, it must be determined if the lands were within the scope of the project from the time the government was committed to it.

D. To ignore the influence of the project on compensation, the appraiser disregards the project in the before value of the property.

4400.07 Diversity of Interests in Land

A. The proper method to determine the value of real property when there exists more than one interest in the property is to value the property as a whole. It would be improper to take each interest or estate as a unit and establish a value to each separately. Hence, the valuation of the real property should be accomplished with no reference to whether there may be more than one interest in the property. See *Sowers v. Schaeffer* (1951), 155 Ohio St. 454.

B. Ohio Administrative Code, 5501:2-5-06(E) does require an allocation of value when all parties agree (fee owner and tenant owner) that an improvement taken by the acquisition is classified as real property, is owned by the tenant and, the tenant is to be paid compensation for his improvement. In this situation, the appraiser values the property ignoring the tenant's interest and concludes a contributory value to the improvement that is tenant-owned. The acquiring agency is then required to estimate salvage value of this improvement. The tenant will be made an offer for the improvement that is the greater of salvage value or contributory value. The fee owner will be made an offer that is the fair market value less the contributory value of the tenant-owned improvement. See Section 5302 of the Real Estate Manual for more information about the acquisition of tenant-owned improvements. The review appraiser allocates compensation between the fee owner and the tenant-owner on form RE 22-1.

4400.08 Apartments vs. Condominiums

A. When a parcel of land is occupied by an apartment complex, there is most often unity of use and unity of title of the land being acquired. In other words, the owner of the apartment complex would be the only entity engaged in the eminent domain proceedings. However, if the building's valuation is impacted by the taking, then the owner could be entitled to the diminution in the loss of rent if the income approach is considered the proper valuation method.

B. Conversely, when acquiring property that is occupied by a condominium complex or a home owner's association, typically, the units are all individually owned and individually titled, thus they do not have unity of ownership. Moreover, if only frontage is taken (and no units are otherwise impacted), then it is likely that only the common area will suffer any devaluation. Common areas are usually owned and controlled by the Condominium Association or Home Owner's Association for the benefit of the individual homes or unit owners It will therefore be important for the appraiser to have a complete understanding of the terms of the Condominium Association Bylaws, and how they structure compensation for eminent domain proceedings. It may be that only the Association receives any compensation from the appropriation of part of a common area if the Bylaws are so structured. *Murphy v. State,* 14 A.D.3d 127 (App. Div. 2d Dep't 2004).

4400.09 The Use of Comparable Sales in Determining Market Value

A. It is well accepted that comparable sales are the best method to show market value. See *Bd. of Trustees of Sinclair Community College Dist. v. Farra*, 2010-Ohio-568 (Ct. App. 2d Dist.) citing *Wray v. Hart* (Aug. 13, 1992), Lawrence App. No. 91CA20, 1992 WL 208900, * 7, citing Knepper and Frye, Ohio Eminent Domain Practice (1977) 231-232, Section 8.08.

Sales that are not representative of market value may be excluded at trial if the sales are remote in time, or if they are not similar in character, location or circumstances relating to market value, or if they are not voluntary or bona fide, that is, made in a fair and open market.

B. The question of remoteness in time rests within the discretion of the trial court. Therefore, decisions allowing and excluding evidence of prior sales cannot be categorized based solely on their proximity or remoteness. See *Director of Highways v. Bennett*, 118 Ohio App. 207, 208 (App. 6th Dist. 1962). However, sound reasoning should be utilized. For example, a sale nine years before the appropriation action was excluded within the sound discretion of the trial court; in another case, sales of comparable land which took place about a year after the date of valuation was admitted as evidence by some courts.

4400.10 Listings (Offers for Sale)

A. A listing or an offer to sell real property at a certain price does not properly reflect the market value of such real property. Besides being speculative, the use of listings or "offers to sell" to show fair market value can pose additional problems. Offers to sell property are often fishing expeditions where the sky is the limit and the seller is merely testing the market. Listings may support a value conclusion, but the value conclusion may not be based on a listing. See generally *Proctor v. Wolber*, 2002-Ohio-2593 (Ct. App. 3d Dist.), citing *Gupta v. Cuyahoga Cty. Bd. of Revision* (1997), 79 Ohio St. 3d 397, 683 N.E.2d 1076*;* and see *Proctor v. Jamieson* (April 6, 2001), [2001-OHIO-2187], 2001 Ohio App. LEXIS 1627, Shelby App. No. 17-2000-19.

4400.11 County Auditor Tax Valuation

A. The value placed on property by the county auditor for taxation purposes is not admissible to prove the fair market value of the property being acquired in an eminent domain proceeding. However, such evidence can be used to determine ownership, outstanding tax owed, and information regarding foreclosure. See *Toledo Edison Co. v. Roller*, 46 Ohio App.2d 61 (App. 6th Dist. 1974), citing *Ohio Power Co. v. Diller* , 18 Ohio App. 2d 167 ; *In re Appropriation by Ohio Turnpike Comm.* , 164 Ohio St. 377 ; *Masheter v. Yake* , 9 Ohio App. 2d 327; *Naftzger v. State*, 24 Ohio App. 183 , and 29A Corpus Juris Secundum 1210, Eminent Domain, Section 273, Note 67.1

4400.12 Contracts for Sale and Purchase (Not executed)

A. Contracts where both parties have not signed:

Fair market value cannot be based on contracts for sale and purchase that are unexecuted (unsigned by all parties). See, generally, *Proctor v. Wolber*, 2002-Ohio-2593 (App. 3d Eist. 2002). This procedure is based on the "2000" Edition of the "Uniform Standards for Federal Land Acquisitions":

> *It is well settled that a mere offer, unaccepted, to buy or sell real estate is inadmissible to establish market value in eminent domain valuation proceedings. The U.S. Supreme Court has stated the reasons as follows:*

It is frequently very difficult to show precisely the situation under which these offers were made. In our judgment they do not tend to show value, and they are unsatisfactory, easy of fabrication and even dangerous in their character as evidence upon this subject. An option to purchase is a form of an offer; it is an offer that is irrevocable for the period stipulated. Even though consideration has been paid for it, an unexercised option is inadmissible.

B. Contracts where both parties have signed, but not yet closed:

If the contract can be verified with parties to the sale as arms length and indicative of fair market value and that it is binding and unconditional, it may be used by the appraiser in the estimation of fair market value assuming no unusual conditions or circumstances with the contract. Value cannot be based solely on a contract(s). Contracts may supplement other comparable sales. This procedure is based on the "2000" Edition of the "Uniform Standards for Federal Land Acquisitions":

A binding and unconditional contract of sale, even where title has yet to be conveyed, is generally competent admissible evidence of value and may be utilized by the appraiser as a comparable sale. However, it is essential that the contract be binding and unconditional.

It is the appraiser's responsibility to investigate the sale and determine whether the contract is binding and unconditional. Investigation will likely include personal discussions with the parties to the transaction. If such determination cannot be made by the appraiser, then the contract cannot be used as a sale.

4400.13 Forced Transactions – [i.e. Sheriff Sales, foreclosures, short sales]

A. Sales not in a fair and open market are forced transactions and are not proper to show market value. See *City of Toledo v. Kim's Auto & Truck Serv., Inc*., 2003-Ohio-5604 (Ct. App. 6th Dist.), citing 5 Nichols, Eminent Domain (Rev. 3 Ed.1997) 21-62 - 21-82, Section 21.05, 21.06. This procedure is based on the 2000 Edition of the Uniform Standards for Federal Land Acquisitions:

Forced sales, i.e., sales made under some form of legal (as distinguished from economic) compulsion, are generally not admissible in a condemnation trial. A forced sale is one which has no probative value whatever and therefore must be excluded from evidence. The phrase 'forced sale' is used in the law of condemnation to describe a sale of property which is inadmissible as evidence of value because elements of compulsion so affected the seller that the sale could not be said to be fairly representative of market value at the time made. This conception of a forced or compulsive sale includes force or compulsion as a result of some kind of legal process.

From Valuation in Litigation, 2nd edition, page 223, "Forced Sales and sales to purchasers with the power of eminent domain generally do not meet the criteria of an arm's-length transaction and will often not be admitted as comparable sales."

The Dictionary of Real Estate Appraisal, 4th Edition list a forced sale as "A sale at a Public Auction made under a court order".

A sale must be in the usual manner when offered for sale by one who desires, but is not obliged to sell, and purchased by one who is under no necessity of having it. Sales by sheriffs and sales that are in the nature of a compromise such as foreclosures and short sales do not meet this criterion and are considered forced sales. Likewise, the price paid by a condemning agency to other landowners does not properly reflect market value because there is always a threat of a legal proceeding regardless of the practices of the acquiring agency.

4400.14 Effect of Deed Restrictions

A. When ODOT takes a property, it is not an open market sale but a forced sale by the state which is not bound by any restrictions in the deed. Thus, the property is to be appraised for its highest and best use for which it is suited without regard to the deed restriction. The agency seeks to determine the fee simple value of the property. As a result, private deed restrictions are to be identified in the appraisal report but ignored in the compensation estimate. See R.C. 5501.31. Also see *Wray v. Wymer*, 77 Ohio App.3d 122, 130 (4th Dist. 1991) citing *Masheter v. Diver*, 20 Ohio St. 74, 81 (1969); and see *Ohio Jury Instructions*, CV § 609.05[2] (Rev. Aug. 2024)

4400.15 Effect of Zoning Restrictions

A. An appraiser should consider those factors which indicate a likelihood of a change in zoning that affects the fair market value under present zoning conditions. That is, the appraiser should determine what a willing buyer would pay to a willing seller in anticipation of a future rezoning, under the present zoning conditions. But the appraiser cannot speculate that a rezoning is imminent and base the valuation on a higher use than that permitted by present law. See, generally, *Masheter v. Mariemont, Inc*., 36 Ohio App. 2d 78, 302 N.E.2d 583 (App. 10th Dist. 1971).

If the appraiser determines the highest and best use of the property is to hold in anticipation of a future rezoning, the appraiser may consider those facts which would induce a willing buyer to pay a willing seller more than the market value that is justified under the present zoning classification. The appraiser must support any such opinion providing evidence that rezoning is feasible and that purchasers in the market recognize the probability of rezoning in their purchases.

4400.16 Easements and PRO

A. When an easement interest rather than the fee simple interest is being appropriated, the landowner is entitled to be compensated for only the rights of which the property owner has been deprived. Further, if the acquiring agency has purchased an easement and at a later date seeks to obtain the underlying fee interest, the owner is entitled to compensation based upon additional rights taken. *State ex rel. Lindemann v. Preston*, 171 Ohio St. 303, 306 (1960); *Norwood v. Forest Converting Co*., 16 Ohio App. 3d 411, 413 (1st Dist. 1984).

B. The term PRO means Present Road Occupied, and it is property encumbered by a highway easement. The underlying fee owner still retains an interest in the property. A common acquisition occurrence in a project has the District Office purchasing the underlying fee rights retained by the fee owner. This is commonly known as a PRO conversion. Under Ohio Law, if PRO is taken in fee, then only nominal compensation ($10.00 or less) may be awarded O*hio Jury Instructions*, CV § 609.05[4] (Rev. Aug. 2024).

C. The procedure followed by ODOT is to pay $1.00 when the District decides to purchase the property rights remaining in an area encumbered by a highway easement (PRO).

4400.17 County and Township Roads Under State Statute

A. County and Township roadway right of way in Ohio enjoys a statutorily presumed width of 30 feet. See R.C. 5553.03 and 1964 Op. Atty Gen. No. 1198, p. 2-253. Therefore, as PRO is calculated, should there not be any clear dedication or demarcation of PRO in the title work for these roadways, it is reasonable to assume that the right of way is 15 feet of center. Local governments, by actions of their Commissioners or Trustees and in coordination with the County Engineer, can establish or acquire wider right of way than the statutory minimum. See, e.g., *Dickess v. Stephens*, 2006-Ohio-4972 (Ct. App. 4th Dist.). Thus, it is prudent and appropriate to coordinate with them and access their historical knowledge. Historic roadway information and early establishment of public road locations is also available in the Library of the State of Ohio.

4400.18 Temporary Taking

A. When real property is acquired by the District for a temporary period, the owner is to be compensated for such a temporary taking of the property. Whether an injury constitutes a taking of property depends upon its effect on the owner's proprietary rights.

B. Compensation is based upon the effect of the temporary taking on the residue property and not the property before the taking. Generally, the compensation estimate is the value of the property for the period during which it is held by the District, or more specifically, the rental value of the property held for the period of occupation. See *Proctor v. Costal Bros*., 2006-Ohio-6343 (App. 11th Dist. 2006).

In estimating compensation for the temporary taking, consideration should be given to the manner in which the District is occupying the property. Just compensation for the temporary use and occupancy of a portion of a tract of land may include damages resulting from the temporary occupancy to the part not taken.

C. An accurate forecasting of the duration of a temporary taking should be provided to the appraiser as they perform their valuation analysis. It could be that the inability of the landowner to use their property – although temporary – may have a greater impact depending on the duration of a temporary take; especially if it exceeds a year or two.

D. Property taken temporarily, but permanently altered, may require a valuation analysis if the alteration is such that a physical characteristic of the property is permanently changed. For example, if property adjacent to the roadway improvement is sloped during construction such that maintenance is more difficult after the property is returned to the owner, consideration may be given as to costs of future maintenance or decrease in value or usage of the newly graded part of the property.

E. Courts have held in the instances of a temporary taking, it may be appropriate to consider the diminution in the rental value of the temporary taking due to factors such as construction noise, dust and vibration. See *Wray v. Deters*, 111 Ohio App. 3d 107, 675 N.E.2d 881 (App. 1st Dist. 1996), citing *Wray v. Parsson* (1995), 101 Ohio App.3d 514, 655 N.E.2d 1365. Such damages are typically not considered in the circumstances of a permanent taking. See Section 4400.28.

4400.19 Fixtures

A. A fixture is an article that was originally a chattel (personal property) and which by being physically annexed or affixed to the realty, became accessory to it, and part and parcel to it. In an eminent domain setting, the necessity of determining fixture status is based on the theory that the condemner has no duty to make compensation for personal property taken with the appropriated realty. The determination of whether personal property has attained fixture status is based on three (3) general criteria:

1. Mode and sufficiency of attachment

The degree of attachment of an item is indicative of its classification as a fixture or personal property. The consideration of attachment is to include: (a) manner in which it is attached to the realty; (b) degrees of difficulty and extent of any loss involved in removing the attachment from the realty; (c) damage to the severed property which such removal would cause.

2. Purpose or use of the fixture to the realty

The primary distinction between personal property and fixtures is whether the chattel is maintained primarily for business conducted on the premises or for the use of the land on which the business is conducted. Chattels maintained for business are personal in its nature and, articles that are merely accessory to the business and have been put on the premises for this purpose and, not as accessions to the real estate, retain the personal character of the principal to which they belong are subservient.

Articles which have been annexed to the premises as accessory to it, whatever business is carried on upon it, are not for the benefit of a present business which may be of a temporary duration, become subservient to the realty and acquire and retain its legal character. Articles attached to the premises so as to become a part of it, even though of benefit to any and all businesses which might be carried on there, take on the legal characteristics of real property.

3. Intention of the party attaching the chattel

Determining the intention of a party is inferred from: a) the nature of the article affixed; b) the relation and situation of the party making the attachment; c) the structure and method of the attachment; and, d) the purpose or use for which the attachment has been made. The determination of intention must take into consideration whether it was made with a view of permanence or with a view of serving a special purpose or business.

See *Master v. Boehm*, 37 Ohio St. 2d 68, 72 (1974) quoting *Teaff v. Hewitt*, 167 Ohio St. 511, 530 (1853) for the 3 criteria referenced above. Also see *Ohio Jury Instructions*, CV § 609.15[1] (Rev. Aug. 2024) - for the general definition of fixture.

B. Courts have admitted evidence as to the valuation of the chattel or cost to replace. For example, in the taking of a junk yard, the value of each vehicle acquired was admitted into evidence. However, landowners are not permitted to include lost profits in a valuation calculation. Thus, a court should not permit testimony or other evidence regarding the "retail" valuation of the chattel, just the actual cost of replacement as is if it is determined that the chattel is a true fixture for which just compensation is due. See *Niki D' Atri Enterprises, Inc. v. Dept. of Trans.*, 296 A.3d 661 (Pa. Commw. Ct. Mar. 17, 2023).

4400.20 Mineral Deposits

A. Compensation for minerals and mineral rights in an appropriated land proceeding should be considered, so far as they affect the market value of the appropriated land, in determining the fair market value of the land being taken. Accordingly, it is proper to consider that the land contains valuable mineral deposits, but the fair market value of the land taken cannot be reached by combining the separately evaluated land and deposits. See *Dorsey v. Donohoo*, 615 N.E.2d 239, 243 (Ohio Ct. App. 12th Dist. 1992), citing *Bd. of Park Commrs. v. DeBolt* (1984), 15 Ohio St.3d 376, 378, 15 OBR 494, 495, 474 N.E.2d 317, 319.

B. In order to determine the fair market value, the land must first be examined to determine the quantity and quality of minerals contained. It is proper to consider the presence and thickness of mineral deposits on lands in the vicinity of the land being appropriated.

C. Once the existence and extent of mineral deposits are shown, the mine-ability and marketability of those minerals determine the fair market value for the mineral deposits. In determining fair market value, the general rule is that the value of the property is not what the property is worth for any particular use, but what it is worth generally, for any and all uses for which it might be suitable, including the most valuable uses to which it reasonably and practically can be adopted.

D. Sale of lands which contain mineral deposits are proper for consideration where the:

1. Sale must be bonafide;
2. Sale must be voluntary, not forced;

3. Sale must have occurred relevantly in point of time; and

4. The sale must cover substantially the same type property which is the subject of the appropriation proceeding.

The proper method of appraisal of mineral lands, in addition to the above, is by the determination of the value of the minerals while in the land and not value thereof if the minerals could be sold on the open market already extracted from the land.

4400.21 Goodwill

A. Goodwill is defined in Ohio Revised Code, section 163.01(K), as "the calculable benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances that result in probable retention of old, or acquisition of new, patronage." The loss of goodwill is compensable, Ohio Revised Code 163.14(C), when the owner proves: 1) the loss is caused by the taking of the property and, 2) the loss cannot be reasonably prevented by relocation of the business or by taking steps and adopting procedures that a reasonable prudent person would take and adopt in preserving goodwill. Loss of goodwill cannot exceed $10,000 and shall not be awarded unless the entirety of the business property is taken.

B. The issue of goodwill is not dealt with in the appraisal or acquisition process but is considered in ODOT's relocation process. See Section 6500 of the Real Estate Manual for more information about goodwill.

C. At least one court has held that property value can be analyzed using the amount of profits a business makes – based on location – when compared with the profits of similar businesses at less desirable locations. *Village of Silverton v. LLK Props*., 2019 Ohio App. LEXIS 3991 (1st Dist.)

4400.22 Economic Loss to a Business

A. Businesses required to relocate may recover damages for the owner's actual economic loss. The owner must prove the loss. Section 163.15(B)(3)(a) of the Ohio Revised Code details the limits of economic loss to the business.

B. The issue of economic loss of a business is not dealt with in the appraisal or acquisition process but is considered in ODOT's relocation process. See Section 6500 of the Real Estate Manual for more information about economic loss.

4400.23 Temporary Inconvenience

A. Damages are not available for inconvenience in the transaction of business, or for the interruption, total suspension, or loss of trade, custom, or profits, caused by the work of making a public improvement; that this temporary inconvenience and all losses therefrom, must be suffered. Damages are proper for the permanent depreciation in value of property taken or injured, such depreciation to be judged by the effect of the improvement when completed.

B. The mere fact that an improvement renders the use of property more inconvenient for a time is not a taking where that inconvenience is suffered by the public in like manner, but in differing degree, there being no invasion of property rights of the private owner.

C. According to the Ohio Supreme Court, when there is no taking, either actual or *pro tanto,* of an individual's property, then such individual generally cannot recover for damages consequential to the taking of other property in the area. These losses are considered *damnum absque injuria*, or a damage without an injury. *State ex rel. Ohio Turnpike Com. v. Allen*, 158 Ohio St. 168, 175 (1952) citing *Smith v. Erie R. Co.*, 134 Ohio St. 135, 144-45 (1938); *State ex rel. Fejes v. Akron*, 5 Ohio St.2d 47, 49 (1966).

Furthermore, Article I, § 19 of the Ohio Constitution only provides compensation for that is taken, not damaged. Ohio Const., art. I, § 19. The Ohio Supreme Court consistently points to § 19 and comments that if the legislature wanted to allow compensation for "damage" to property [only] then the legislature would amend the Constitution to make that clear.

4400.24 Obstruction of Light, Air, and View

A. When no land is taken and a structure is erected (such as a bridge) in such a way that access to and from the property is maintained, the interference with light, air, and view alone, generally is not sufficient to justify the granting of compensation. The leading case in this area deals with the raising of the grade of a street in front of the complainant's property which interferes with the view, light, and air of the abutting property owner. The Ohio Supreme Court held:

> *Streets are established to afford light and air, as well as access, to the property through which they pass, and the right to access, light, and air is appurtenant to the property adjacent to the street, and is a part and parcel of it. ***But the right of the abutting property owner is subject to the rights of the public to use the street for highway purposes. Inasmuch as the rights of the abutter are subordinate to the rights of the public, there is no taking of private property where streets are used and improved for the purposes of a highway.*
>
> *There is no taking of property merely because the raising of the grade of a part of a street in front of land on that street or highway purposes only, substantially interferes with the view that the owner of that land had over that street and with the relative harmony of the street with his land.*

See State ex rel. Schiederer v. Preston, 170 Ohio St. 542, 166 N.E.2d 748 (1960).

4400.25 Right of Access and Change of Grade

A. An abutter to a street has the right to reasonable access to his or her property, but not specific access and in most cases, there is no compensable interest. See, generally *Babin v. City of Ashland*, 116 N.E.2d 580, 587 (Ohio 1953), citing *New York, Chicago & St. Louis Rd. Co. v. Bucsi*, 128 Ohio St., 134, 190 N. E., 562, 93 A. L. R., 632.

B. Where an owner of land abutting on a highway has made improvements with reference to an established grade for that highway, a substantial interference with his right of access to those improvements from that highway by a subsequent change of grade of the highway is a taking of property for which compensation must be provided.

4400.26 Access Interference

A. A parcel abutting a public roadway, other than a limited access highway, enjoys a right of access that is the reasonable opportunity to move from the property to a connecting roadway subject to regulation and public safety and welfare by the exercise of the police power. The right of reasonable ingress and egress to and from one's property may not be substantially or unreasonably destroyed or impaired or interfered with without compensation. See *OTR v. Columbus* (1996), 76 Ohio St.3d 203, 211-216, 667 N.E.2d 8.

4400.27 Traffic Dividers

A. A landowner abutting a public roadway has a property right to enter or leave the parcel by means of the public roadway. This right only extends to the traffic lane immediately along the property owner's frontage. Thus, no compensable injury arises from the placement of concrete lane dividers, median strips, etc., in the roadway, or from controls such as prohibitions against left-hand turns. Although the economic value of a parcel may be decreased when such devices are employed, such decreases in value are a non-compensable injury. See *Richley v. Jones*, 38 Ohio St. 2d 64, 310 N.E.2d 236 (1974).

4400.28 Noise, Smoke, Dirt, Vibrations

A. In general, damages due to noise, smoke, dirt, vibrations, shared in common are not compensable. Damages, if any, must be unique and special to this one particular property, and not be in the nature of annoyance or inconvenience to other owners or occupiers as well. If this is an issue on a particular property, the appraiser should have the agency seek legal guidance for fact specific interpretations. See *Wray v. Frank*, 2015-Ohio-4248, 44 N.E.3d 998 (App. 4th Dist. 2015).

B. Damages which occur during construction are not compensable in an appropriation action.

4400.29 Utility Facilities in the Right of Way

A. If, in the opinion of the Director, an individual, firm or corporation, not having a franchise or permit, uses or occupies a part of an existing road or highway on the state highway system, or the bridges or culverts thereon, with utility (i.e., telephone, sewer, electrical, oil, gas, steam, water, etc.) pipes, lines, poles, wires, tracks, switches or spurs, etc., as to obstruct or interfere with the highway right of way, such individual, firm, or corporation can be ordered to remove and relocate such equipment at its own expense. See R.C. 5515.02. Also, see *Weir v. Consol. Rail Corp*., 12 Ohio App. 3d 63, 465 N.E.2d 1341 (App. 8th Dist. 1983),

B. If the utilities exist under or by virtue of a franchise, or permit granted and in force, they may be relocated within the bounds of such road, highway, bridge, or culvert, if space exists. They

too must be removed or relocated at the owner's expense. If a local agency has control of an existing right of way, all arrangements are to be made through such agency. See the Utilities Section of the Real Estate Manual for more information. The cost of removing and relocating utility facilities within the existing right of way should not be included in appraisals, as these items are not compensable. *Id*.

C. These instructions are not meant to include utilities that are in a compensable position as defined in Section 8200 of the Utilities Manual and should be included in the appraisal.

4400.30 Trees in the Right of Way

A. Compensation must be made for the taking or injuring of trees under the power of eminent domain, but only as a contributing value to the land taken. Thus, trees located within a proposed right of way may be considered in the appraisal as part of the land taken at the time of the taking. See *City of Solon v. Smiley*, 229 N.E.2d 131, 136 (Ohio Prob. Ct. 1967).

B. Compensation is not paid for trees and shrubs that may exist in the current right of way. Section 5501.42 of the Ohio Revised Code makes a distinction between new right of way and existing right of way by stating:

> *The Director of Transportation shall have supervision control of all trees and shrubs within the limits of a state highway...the director may cut, trim, or remove any grass, shrubs, trees or weeds growing or being within the limits of a state highway. The powers conferred upon the director shall be exercised only when made necessary by the construction or maintenance of the highway or for the safety of the traveling public.*

4400.31 Advertising Device Bases

A. Advertising device bases may generally be classified as fixtures, and therefore included in the FMVE for the parcel. A sign base which is sunk into the ground or excavations which are filled with "poured" concrete to support an advertising device, generally meet all the criteria to be classified as fixtures.

B. When a party having less than a fee title in the property affixes the chattel, the determination of intent is more difficult to ascertain. It must comply with the test, especially with the intent to make a permanent fixture to the freehold. Caution must always be used in classifying a sign base as a fixture. Although a concrete base is affixed in a manner which appears permanent, it may be suited specifically for use in that particular business, and not the general use to which the property may be devoted, thus it remains personal property.

Other determining factors which must be considered are lease agreements, and the economic results of classifying chattels as fixtures. There should be a degree of flexibility and accommodation to circumstances necessary to ensure that both the director and the landowners will be dealt with fairly, with neither enjoying a windfall gain nor suffering unfair deprivation.

4400.32 Underground Storage Tanks

A. Underground storage tanks such as those used in service stations which are owned by the fee simple landowner are industrial fixtures and should be treated as part of the complete unit (realty) if the traditional fixture test is met. Underground storage tanks are generally regulated by BUSTR (Bureau of Underground Storage Tank Regulation). The appraiser does need to adequately consider the condition of such tanks. The telephone number of BUSTR is 614-752-7938 (this number may be subject to change).

4400.33 Property Abutting on Limited Access Highway

A. Limited access (LA) highways are established to accommodate travel to specific exit points. They are not established to afford accessibility to realty generally, as are normal roadways. Thus landowners abutting on a limited access highway have no property right of access along the LA frontage with the highway. When the limited access highway is established by upgrading a normal roadway to a limited access highway, the abutter's property right of access to that roadway is extinguished and compensation is due.

B. However, in instances when a limited access highway is newly established at a location which was not formerly subjected to a road, the abutting landowner may not have lost the advantage of access. See *Beasley v. Watkins-Alum Creek Co*., 2011-Ohio-6792 (App. 12th Dist. 2011).

4400.34 Riparian Rights and Littoral Rights

A. Riparian rights are rights pertaining to a body of water (stream, river, pond, etc.). These rights include the following:

1. The flow of the stream in its natural course and condition in respect to both volume and purity, except as affected by the reasonable use of other proprietors.

2. Access to and use of the stream and water.

3. Accretions.

B. A riparian owner may protect their soil against the inroads of the water and make improvements necessary to promote commerce and other uses in relation to navigation.

C. Riparian rights are property rights. These rights constitute a part of the owner's estate in the land and materially enter into its actual value. Any injurious invasion or impairment of these rights amounts to a taking of the property. See *Bay Point Props., LLC v. Northlake Estates Condo. Assn*., 183 Ohio App. 3d 311, 2009-Ohio-3671, 916 N.E.2d 1119 (3d Dist.). However, riparian rights like other property, are subject to the police power and the state, and a reasonable regulation enacted on behalf of the public health or safety, which in some degree interferes with the free exercise of such rights, is not a taking for which compensation must be made.

D. A littoral owner (owner of land abutting lakes and seas) also possesses certain property rights which are protected under Article 1, Section 19 of the Ohio Constitution. Such an owner is

entitled to compensation unless these rights are interfered with by an improvement made for navigation. However, it has been held that an owner of the land abutting upon a canal has no property interest in the canal and cannot claim compensation because of the abandonment of the canal. See *Vought v. Columbus, Hocking Valley & Athens R. R. Co.*, 58 Ohio St. 123, 50 N.E. 442 (1898).

E. Groundwater Rights: Article I, Section 19b(C) of the Ohio Constitution states:

> *A property owner has a property interest in the reasonable use of the ground water underlying the property owner's land.*

Therefore, should groundwater be impacted by a highway improvement, it may be considered as an item of compensation.

4400.35 Driveways and Approaches

A. Driveways are an exception where owner-installed facilities in the present right of way are moved at state expense. When an improvement of a road is undertaken by the Department of Transportation which will render the approaches or driveways of owners of abutting real estate unsuitable, provision for such approaches may be made in plans for the road improvement. If this provision is not made, the District must either compensate the abutting property owner or cause the approach or driveway to be reconstructed at public expense.

4400.36 Circuity of Travel

A. In Ohio, increased external circuity of travel is not compensable. The ability to travel on public ways from the part of the roadway adjoining the abutting parcel to a general system of roads is the right of access. If this tie-in to the general road system is provided, even though a circuitous route of travel, the property right of access is not invaded. Thus, a parcel enjoying the commercial advantage of easy accessibility to an area or road system frequented by many travelers may suffer great loss in value because of a change from easy accessibility to difficult and circuitous accessibility, without suffering any compensable invasion of the property rights of access. The mere fact that the tie-in is indirect where formerly it was direct does not create compensable injury. This rule holds true whether or not there is a taking of land or rights involved.

B. While external circuity of travel is not compensable, internal circuity of travel may be compensable. Circuity of travel within one's own property occurs when one entrance/exit way is removed, and another is not created. When circuity of travel is created within one's own property, the burden is placed solely on that property and not on the general public. A property that loses an existing point of access may or may not suffer damages to the residue by virtue of a change in internal circuity. Loss of access to a loading dock, reorientation of a drive thru window, or removal of an access point may demonstrate compensable losses, while loss of access to a property with multiple many access points (e.g., corner gas stations) may not suffer marketability Limiting access by the taking of frontage from a large parcel that may have some development potential is a further example that requires an analysis as the parcel may or may not decrease in value due to

this limitation. See, e.g. *Ohio DOT v. Baumhart Road Holdings, LLC*, Lorain Co., 2023, Case # 20CV202372.

4400.37 Growing Crops

A. If the landowner retains the right to harvest and remove growing crops, no evidence as to their value at trial is proper, and the District would not be justified in considering them in negotiating a settlement.

B. Growing crops may be considered only in fixing the fair market value of the land appropriated in highly unusual circumstances, but they are not separately valued or considered in eminent domain proceedings. The value to be arrived at is the fair market value of the land taken, and only evidence relevant to that value is admissible. However, in determining the fair market value of the land taken, the appraiser may utilize other comparable properties which have similar crops growing thereon. Crops that can be harvested are considered personalty. Crops that cannot be harvested during the time of acquisition are considered as part of the realty and are appraised (as is the case with trees, etc.) based on their contributory value to the whole property.

C. Under Ohio Law, harvesting timber for even a limited duration can qualify as an agricultural use. *Wray v. Gahm Props.*, 2018-Ohio-50, 103 N.E.3d 148 (4th Dist.) This and designation of property with a Current Agricultural Use Valuation (CAUV) should be analyzed by appraisers for not only the proper valuation of the property, but for fully informing the Department so they can be prepared for negotiations with a landowner that has enhanced rights to attorney and other fees under R. C. 163.21(C)(2).The Ohio Administrative Code definition under O.A.C. 5501:2-5-01 for "Farm operation: is:

> *"*** any activity conducted solely or primarily for the production of one or more agricultural products or commodities, including timber, for sale or home use, and customarily producing such products or commodities in sufficient quantity to be capable of contributing materially to the operator's support."*

4400.38 Diversion of Traffic

A. Frequently an abutter on a public roadway will employ the advantage of abutment by operating on his parcel an enterprise which caters to roadway travelers. Obviously in such a context, the greater the volume of traffic passing the parcel, the greater the pool of individuals comprising potential customers. Modification of some aspects of the road system may make a route which doesn't include passage by the parcel more attractive to travelers, thus "diverting" traffic from that parcel. Ohio law clearly maintains that an abutter has no property right in the volume of traffic passing his/her parcel, and any decreases in land value attributable to changes in traffic volume are a non-compensable injury. See *State ex rel. Merritt v. Linzell*, 163 Ohio St. 97, 126 N.E.2d 53 (1955).

4400.39 Dead Ending of Road

A. Changing a through road into a cul-de-sac (dead end road) can diminish the value of property abutting the road. The reasons for such diminution in value are generally the new burdens for additional external circuity of travel and diversion of traffic. As is the case in other circumstances where these injuries arise, they are non-compensable. See Section 4400.36 of this Guide for more information about circuity of travel. See *State ex rel. Merritt v. Linzell*, 163 Ohio St. 97, 126 N.E.2d 53 (1955).

B. The situation is different where the only roadway abutting a parcel is vacated. In such cases, the roadway is eliminated as a device serving the abutting parcel with public access of any sort. This destruction of access, as opposed to the making less convenient of access occurring when an abutting road is merely dead ended, is a compensable injury. This is not considered a property acquisition issue but is a property disposal issue. See the Property Management Section of the Real Estate Manual for more information about vacation of rights of way.

4400.40 Benefits to Property

A. Benefits are classified into general benefits and special benefits. Because the discussion of benefits can include project enhancement, anytime an appraiser suspects benefits may accrue to a property, they should seek guidance from the District before proceeding.

1. General benefits accrue to the community, or the vicinity at large, such as increased facilities for transportation and travel, and the building up of towns, and consequent enhancement of the value of lands and town lots.

2. Special benefits accrue directly and solely to the owner of the lands, from which the right of way is taken; as when the excavation of the railroad track has the effect to drain a morass and thus to transform what was a worthless swamp into valuable arable land, or to open up and improve a watercourse. An alternative example may be a property that was physically landlocked (by a creek or ravine) and where the project may provide direct at grade access to that property in the after situation in effect curing the detrimental condition that existed in the before situation. The property in this example received a benefit that other properties on the project did not receive making this benefit unique and therefore "special".

B. General benefits may not be deducted from or set off against damages to the remaining land (Ohio Constitution, Article 1 Section 19). Special benefits can be deductible from damage to the residue.

C. At least one court has held testimony of profits may be admissible if it is in conjunction with the value of the property and not as an item of compensation. *Village of Silverton v. LLK Props*., 2019 Ohio App. LEXIS 3991 (1st Dist.)

4400.41 First Off the Ramp

A. The benefit which accrues to property by reason of its being first off the ramp of an exit on a limited access highway is a benefit resulting not directly from the existence of such improvement, but indirectly as an economic consequence of an increased use of the highway by the traveling public, and accrues to all other owners of properties abutting on the exit or access in varying degrees, hence it is a general benefit. General benefits may not be used to offset damages. See Section 4400.40 of this Guide for more information about general benefits.

4400.42 Buildings that are Partially Taken

A. Eminent domain law (ORC 163.06(B) and 163.14) requires the District office to take the entire structure if a partial taking of the structure causes a manifest injury to the remaining structure.

4400.43 Residential Garages that are Taken

A. Eminent domain law in Ohio (ORC 163.05(G)) requires the District office to take the whole property and all structures on the property if the taking of less than the whole of any property containing a residence structure removes a garage and sufficient land that a replacement garage could not be lawfully or practically attached. See *Masheter v. Boehm*, 37 Ohio St. 2d 68, 307 N.E.2d 533 (1974).

The owner of the property does have discretion and may waive the requirement of the agency to acquire the whole of the property and in this instance, the District shall only acquire the portion of the property needed for the project.

B. See Section 5321 of the Real Estate Manual for more information about acquisitions subject to this garage law.

4400.44 Outdoor Advertising Devices

A. The removal of an advertising device is a compensable taking – see ORC 163.32.

4400.45 Fencing the Residue

A. Compensation to fence the residue property may be considered as a cost-to-cure to allow the residue to have its highest and best use. This includes fencing necessary to keep livestock on the residue property. The cost of fencing may be considered even though the land was not formerly fenced. See 4400.45 of these procedures for more detail about costs to cure.

4400.46 Greenhouses and Nurseries

A. There is a distinction between greenhouses and nurseries. Nurseries usually involve items growing in and attached to the soil which are later severed and sold. Items associated with greenhouses are often potted (and thus not annexed to the soil) or are implanted in long trenches or beds which are not part of the actual soil, but which are immovable because of their weight. This physical distinction between greenhouses and nurseries necessitates a difference in the

appraisal procedure to be followed. Both nurseries and greenhouses may have the same item which may be classified as realty or personalty.

B. Generally speaking, crops growing in a greenhouse should be treated as personalty and should not be included in the value of the property being appraised.

C. A nursery is an area of land devoted to the production and/or sale of trees, shrubs, evergreens, etc. For appraisal purposes, such plants are attached to the land and should be appraised as they contribute to the value of the land. However, trees and shrubs removed from the land, balled and ready for sale are considered as personalty.

4400.47 Damages

When ODOT requires real property for the purpose of making or repairing roads its director may appropriate the property pursuant to sections 163.01 to 163.22 of the Ohio Revised Code (ORC) – see sections 163.02(B) and 163 .06(B) of the ORC. When appropriating property or acquiring property under the threat of appropriation, ODOT must pay just compensation to the owner. Just Compensation is (1) the value of the property taken, together with (2) damages, if any, to the residue. See *Wray v. Wessell*, 2016-Ohio-8584 (App. 4th Dist. 2016).

Damages are the diminution in value to the residue property as a result of a taking (also known as severance damages). The taking can be physical (land) or legal (property rights). The residue property is also known as the remainder property or that property

that is "left over" after a project is completed. Damages can only result from a partial taking. Damages must never be assumed because there has been a partial taking but must be supported by the facts of each situation.

Damages are not estimated directly but are the result of a developed and supported estimate of value of the property before the taking, ignoring any influence of the project, and subtracting the value of what is left of the property after the taking and assuming the project has been completed and is open to the public. Ohio courts have explained the proper way to estimate Damages are as follows:

> Value of the Property Before the Taking (Ignoring project influence)
> (-) Value of the Residue (Assuming the taking has occurred and the project is completed) Difference
> (-) Value of the Part Taken (Based on values estimated before the taking) Damages

Not all damages are compensable. The determination of what is and is not compensable is governed by Ohio Revised Code, Ohio Supreme Court decisions and Ohio case law.

For example; ODOT has the right to install a concrete median in its right of way. If the median is established in front of a commercial property's driveway, ingress and egress to the property is restricted to a right-in and right-out. The loss in value (diminution) may be measurable in the market, however, it is well established that the loss in value is not compensable. The District and

its consultants must be aware of issues affecting compensability. When guidance is required, the District may contact the ODOT Office of Real Estate or the Attorney General's Office.

Damages can be divided into damages that are curable and damages that are incurable. It is possible for a property to suffer both categories of damages. Before considering curable damages, the District is required to always state the total amount of all damages as uncured. Uncured damages are determined by estimating the value of the residue property as if no cure has occurred to the property.

Only after estimating the value of the residue property as uncured, may the District now consider the feasibility of any cost to cure. The District may not establish FMVE based on cures that are not feasible. See Section 4400.48 of this Guide for more information regarding cost to cure measure of damage.

For ODOT, the proper method of deriving and supporting estimates of damage is outlined in the template for the RE 25-17 Summary R/W Appraisal Report which can be downloaded from the Office of Real Estate website.

4400.48 Costs-to-Cure

A. Ohio case law allows the District to consider damage to the residue that can be physically or economically corrected by remedial action taken by the owner known as a cost to cure. See *Wray v. Stvartak,* 700 N.E.2d 347, 357 (Ohio Ct. App. 6th Dist. 1997), citing *Columbus v. Farm Bur. Co-op. Assoc., Inc.* (1971), 27 Ohio App.2d 197, 203, 56 O.O.2d 382, 385, 273 N.E.2d 888, 892.

Under no circumstance can the cost to cure measure of damage be applied if the cost to cure exceeds the diminution in value that would result if such a cure were not taken. However, if the cost to cure is less than the diminution in value of the residue, the cost to cure measure of damage must be used. To implement these requirements of law, the appraiser must do the following when considering a cost to cure:

1. The appraiser is required to value the larger parcel before the taking.

2. The appraiser is required to value the residue property as if no cure has been considered. This is known as the residue uncured.

3. The appraiser is to estimate damages based on the residue being uncured. This damage estimate is known as "the diminution in value to the uncured residue", or, "total damages, if uncured".

Value of the Property Before the Taking
(-) Value of the Residue Uncured
Difference
(-) The Part Taken

Total Damages, If Uncured

4. The appraiser is to document the cost of the cure and determine if the cure is feasible. A cost to cure is feasible when it is less than the total damages, if uncured. If the cost to cure is feasible, the appraiser moves on to No. 5 below.

Cost to Cure ≤ The Total Damages, If Uncured

If the cost to cure is not feasible, the analysis stops at this point and compensation is estimated based on No. 3 above.

Cost to Cure ≥ The Total Damages, If Uncured

5. The appraiser then values the residue property as if cured.

6. The appraiser then determines if any uncured damages remain after the residue is cured. To determine if uncured damages remain, the appraiser does the following analysis:

Value of the Residue Cured
(-)Value of the Residue Uncured
Value of the Cure

Total Damages, If Uncured
(-) Value of the Cure
Remaining Damages Not Cured

7. The appraiser then determines if any items cured have already been paid for in the part taken to avoid compensation. This analysis is done as follows:

The Cost to Cure
(-) Items Cured, but Paid for in the Part Taken
Net Cost to Cure

8. The appraiser then estimates compensation by considering the following:

The Part Taken
+ The Cost to Cure, or, Net Cost to Cure
+ Uncured Damages
+ Temporary Easements
Total Compensation Estimate

4400.49 Larger Parcel

A. "Larger parcel" is a term defined by the Appraisal Institute in its *Dictionary of Real Estate Appraisal, 7th Edition*. Larger parcel is defined therein as follows:

> *In governmental land acquisitions and in valuation of charitable donations of partial interests in property such as easements, the tract or tracts of land that are under the beneficial control of a single individual or entity and have the same, or an integrated, highest and best use. Elements for consideration by the appraiser in making a determination in this regard are contiguity, or proximity, as it bears on the highest and best use of the property, unity of ownership, and unity of highest and best use. In most states, unity of ownership, contiguity, and unity of use are the three conditions that establish the larger parcel for the consideration of severance damages. In federal and some state cases, however, contiguity is sometimes subordinated to unitary use.*

The larger parcel test as described above has been followed by federal courts but has yet to be fully adopted in Ohio state courts. However, the Ohio Supreme Court in *Sowers v. Schaeffer* (1951), 155 Ohio St. 454, has explained that:

> *In the event there are several interests or estates in the parcel of real estate appropriated, the proper method of fixing the value of each interest or estate is to determine the value of the property as a whole, with a later apportionment of the amount awarded among the several owners according to their respective interests, rather than to take each interest or estate as a unit and fix the value thereof separately. The separate interests or estates as between the condemner and the owners are regarded as one estate.*

Thus, in Ohio, it is clear that the larger parcel is what is to be evaluated when fixing value and separate interests are not to be separately valued, per *Sowers v. Schaeffer*.

Appendix D
Synthesis Analysis

SYNTHESIS ANALYSIS

The ROC Task 6 Project research goal was to generally evaluate the existing legal precedence in "recent" eminent domain cases relative to compensability for takings of land and damages to the residual properties due to said takings. The White Paper Review provided under this Project supplied an in-depth analysis of the case law and trends found during the research phase. The below synthesis analysis provides an examination of the primary themes found from the research.

A. Jury Awards Trend Toward The Jury's Interpretation of Fairness Based on the Evidence

The above statement sounds axiomatic. However, the trend deduced from reviewing the cases analyzed in this research project provides support for this statement and information that the DOT should consider as it prosecutes eminent domain cases. The jury awards and settlements that are part of the public record show trends indicating juries ground their decisions on reasonable facts and reasonable expert opinions. Thus, if one side or the other presents an extreme position, the jury appears to mostly if not wholly discount that position. Conversely, if both sides present reasonable positions, the jury tends to gravitate toward a reasonably compromise in those positions.

These trends are useful to keep in mind when focusing on certain facts and aspects of a taking, when presenting expert testimony at trial and when evaluating settlement offers. The government should always provide both a reasonable position on the value of a taking and on damages to the residue if the landowner is presenting both those values and if those values are within the bounds of the law. For example, if a landowner is demanding damages for internal circuity when none exists under the law, there would be no need to provide a counter-valuation because the court should exclude that testimony. However, in another example, if the landowner provides admissible valuation of development potential, the government should provide a counter-valuation so the jury can gravitate toward a reasonable position rather than just having one side to rely upon.

Settlements reviewed during the research phase that are part of the public record reflect similar over-arching trends from jury verdicts as mentioned above. As ODOT enters settlement negotiations, it may wish to factor in the above trends when considering its offers.

B. Legal Precedent in Ohio is Reinforced by Reported Cases

Eminent domain has been a part of Ohio's juris prudence since the state first started building roads over 100 years ago. Caselaw has evolved over that time, but the evolution has been slow thanks in large part to the Ohio Constitution's deference toward the use of eminent domain for roadways that are free and open to the public, and due to the reasonable use of this power by government entities building these roads.

It should be of some comfort to learn that in the past few years there has been no major shift in eminent domain case law or interpretation of existing precedence; at least as to eminent domain for roadway right-of-way.

C. Some New Issues and Trends to Watch

Attorneys that practice in the eminent domain realm that represent well-funded clients have recently tried to "push the envelope" on necessity challenges. That appears to be a trend. And while the Ohio Revised Code Section 163.08 prohibits necessity challenges for ODOT-type projects, and it would still be prudent for ODOT to "shore up" its processes for quantifying and qualifying necessity and determinations by the Director that the project is needed.

This was manifest in both *Ohio Power Co. v. Burns*, 171 Ohio St.3d 84, 2022-Ohio-4713 and *Algoma Group, A Gen. Partnership v. Marchbanks,* 2024-Ohio-2342 (10th. Dist.). In those two cases, the landowners argued that the condemning authorities did not properly establish necessity and that the takings exceeded what was needed for the respective projects. *Burns* now requires additional effort and scrutiny by public utilities and the Power Siting Board when prosecuting eminent domain proceedings. *Algoma Group* did not change the law, but it was an attempt to follow the *Burns* precedent, and it may not be the last time aggressive landowner attorneys try to challenge the necessity and scope of the taking initiated by government.

Other than this trend, looking for angles for attorney fees and pushing changes to the Ohio Revised Code are the only other trends of note and concern. Attorneys' fees have been awarded for agricultural land that only remotely and infrequently was used for harvesting timber in *Wray v. Gahm Props*., 2018-Ohio-50, 103 N.E.3d 148 (4th Dist.). It is recommended that land uses that could possibly be considered agricultural be considered when appraising property and when evaluating possible costs and risks during settlement negotiations.