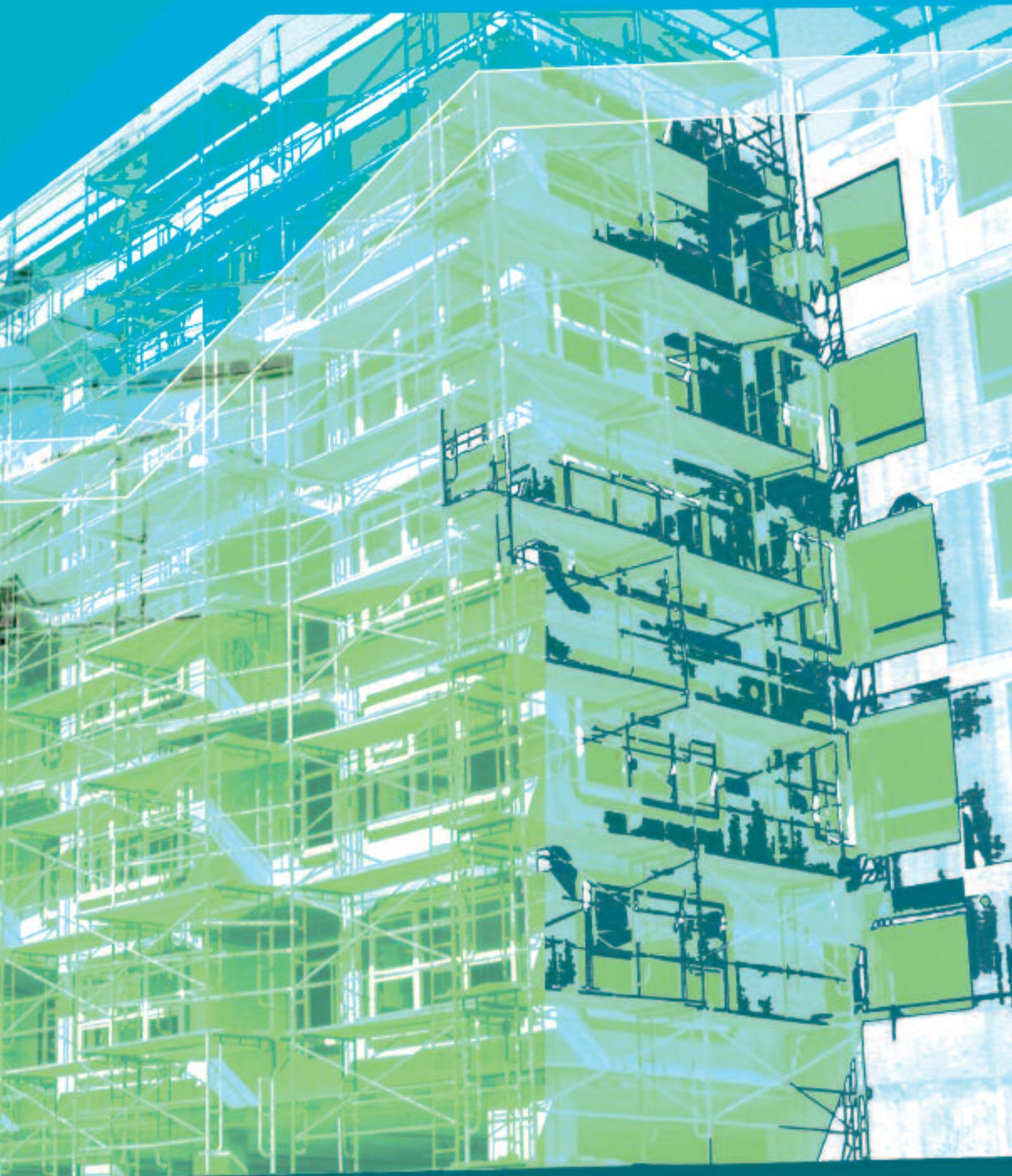




REAL ESTATE PROPERTY RIGHTS

BY MICHAEL WOLFF

In the past, rights to property have often been represented as a bundle of sticks, with each stick representing a right. Although certainly useful in a symbolic way, this visualization does not adequately portray what really goes on in today's complex three-dimensional real estate world of condominiums, time-shares, air rights, zoning, conservation easements, life estates, overlapping uses, etc. Rights to property can better be portrayed as layers, as in layers of a cake, with each layer representing a right. Each of these layers can not only have separate value as part of the whole, but also separate ownership. Thus, property may be considered as a volume.



Over the years, both as a real estate appraiser and as a real estate investor, I have had numerous opportunities to listen to and discuss with buyers, sellers, owners, lenders, real estate sales agents, developers, other appraisers, investors, speculators, landlords, and tenants the idea of real property rights. As a result of these discussions, I have found that most people look at the issue only from a personal wants standpoint or with political preconceptions and do not grasp the bigger picture or see the situation realistically. Even real estate professionals often fall into to this situation. Clearly more and better elucidation is needed. This treatise is an attempt to create a better understanding of the concept of real estate property rights, by portraying how ownership, land, improvements, property, and rights relate to each other.

REAL PROPERTY

Real property has been defined as: “All interests, benefits, and rights inherent in the ownership of physical real estate; the bundle of rights with which the ownership or the real estate is endowed.”¹¹ Although some may argue nuances of meaning (which is not the intent here) real property is generally considered to be synonymous with real estate. Land and all things affixed to it, unless specifically exempt or separated out, are real property.

In the United States, ownership of real property entails with it both rights and obligations. These rights are protected by western cultural traditions, by federal and state laws, and by numerous court decisions. Although strong, these protections are not boundless, but subject to various limitations imposed by government and the rights of other property owners. These rights may be grouped into three categories:

1. **Ownership:** The right to sell, buy, bequeath, give, exchange, or lease in whole or part real property. The right to split property or transfer whole or fractional interests.
2. **Quiet Possession:** The right of an owner to possess property free of interference or encroachment from others, without due process of law and just compensation.
3. **Use:** The right of an owner to use his property as he sees fit, for example: extraction of minerals, development of agricultural products, construction of structures and roads, fencing, dwellings, residential, commercial, hold for investment, etc., within the constraints of law, custom, and contracts.

Complete ownership of property, i.e. ownership, quiet possession, and use, is typically referred to as “fee simple,” defined as the “absolute

ownership unencumbered by any other interest or estate, subject only to the limitations imposed by governmental powers of taxation, eminent domain, police power, and escheat.”¹² Thus, it may be considered to be the blend or the total of all the constituent rights, those that add to the estate less those that reduce it.

Do rights to property exist beyond fee simple? Certainly. However, such a discussion is beyond the scope of this analysis, as such rights approach equality with national sovereignty.

When assembled together real property rights are often thought of as a “bundle” of sticks – with each stick representing a right. Although traditional, this bundle concept is very vague and does not adequately portray what really goes on, especially in the modern world, since some rights are more important or more valuable than other rights and may vary in importance depending upon location within a property. More descriptively, property rights may be thought of as a series of layers, stacked one upon the other, like layers of a cake – over, in, and even beyond the surface area of a property. In other words, property can be thought of as a volume, with length and width, and rights measured vertically. What follows is a series of examples to help illustrate this concept.

FIGURE 1

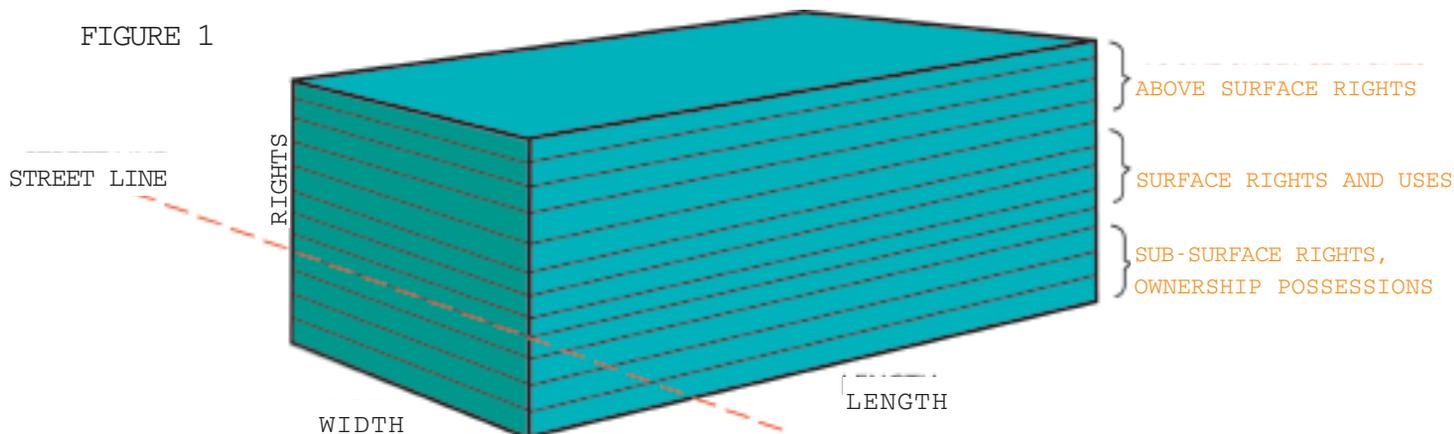
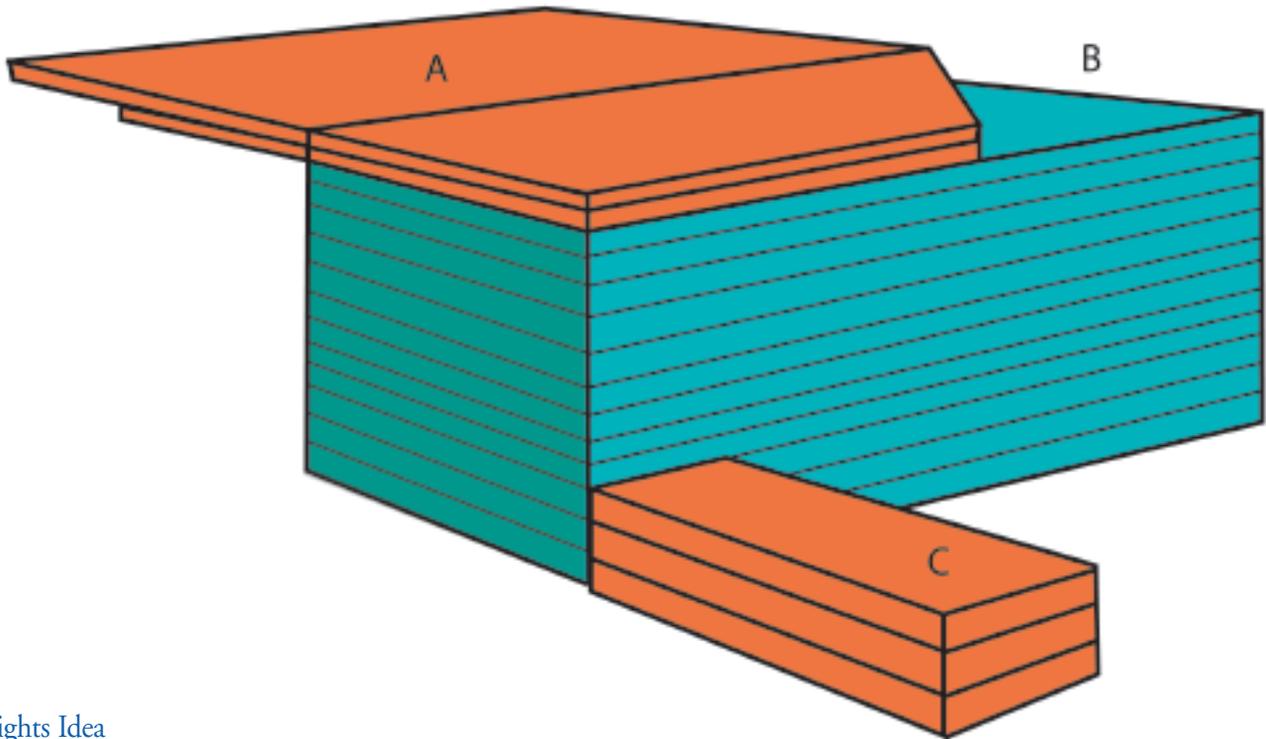


FIGURE 2



Basic Rights Idea

Using this idea of volume to represent a property's size, shape and rights, a graphic portrayal of property rights and ownership can be constructed.

Figure 1 portrays this volume and layers idea for a simple rectangular lot; that is, a lot which has no rights, such as easements, beyond its physical borders and no incursion of rights from other properties into it.

The lower layers might represent basic underlying rights, such as ownership and quiet possession. Above this could be represented mineral and water rights, excavation rights, etc. Still higher may be farming, construction of structures, roadways, etc. The highest layers would likely represent rights associated with height, such as: air rights, views, smoke, intangibles, etc. A right's thickness represents its importance relative to the other rights. All the rights taken together, less the rights retained/owned by other properties, represent a complete estate.

The rights layers shown in Figure 1 are shown for illustrative purpose. Individual layers can vary, depending upon the specific situation.

Complex Rights

Although the property rights represented in Figure 1 can be useful to conceptually visualize a simple situation, in reality most properties are subject to many factors that change the shape and arrangement of these layers. For example, access and/or utility easements through the property can modify the size, shape, and position of the layers; a property can have rights through other properties; etc.

Figure 2 demonstrates a more complex example of a property rights situation, with easement rights extending beyond the boundaries of the basic property, with easements owned by someone else extending into the basic property, and with underlying rights in an adjoining property. For example:

- Part A of the subject property might be an easement of some kind through the adjoining property (a scenic view or access easement perhaps);
- Part B could be a utility easement for a sewer line, electric power, etc. owned by someone else that enters into the basic property; and

- Part C could represent an underlying fee ownership in an adjoining lot which in turn has an easement or other rights over it.

Typically, legal descriptions define these components. However, rights or uses beyond or into the basic property can result from restrictions, limitations, or rights imposed by government or other parcels.

Property rights have been portrayed as a circular pie shaped diagram. This is useful only where rights are evenly distributed throughout the property, which is not usually the case. Setbacks, utilities, and other intangibles cannot be adequately portrayed in this fashion.

Partial Easement

When a portion of a property's rights is removed, such as through the creation of an easement, the remainder property takes on a different shape. An easement is "an interest in real property that conveys use, but not ownership, of a portion of an owner's property."³

Figure 3 shows what can happen by the creation of an easement.

- Part A is the portion left over after the removal of the rights associated with Part B. In condemnation, it is often called the remainder.
- Part B represents the rights removed. In condemnation, this is often called the “part taken” or simply the “taking.” The removed rights could represent a slope and/or drainage easement associated with roadway improvements resulting from condemnation, an area for utility lines, access way to an adjoining parcel, etc.

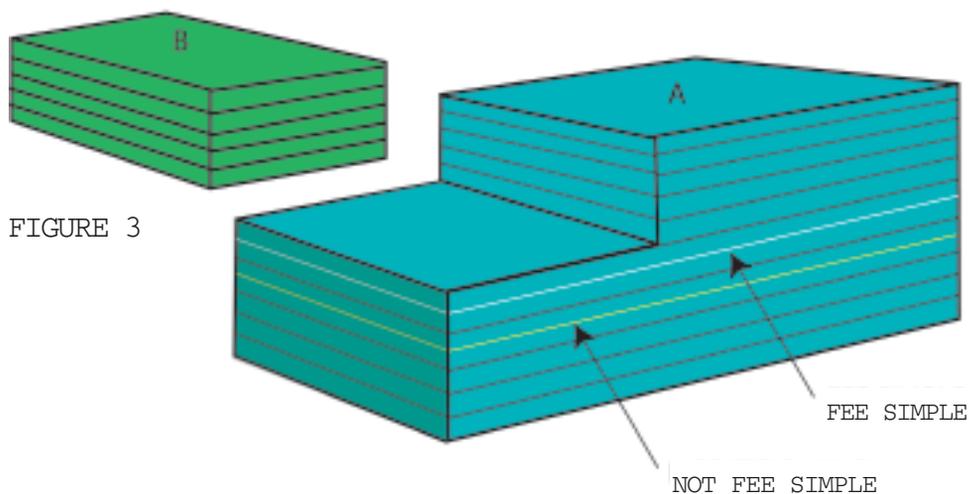
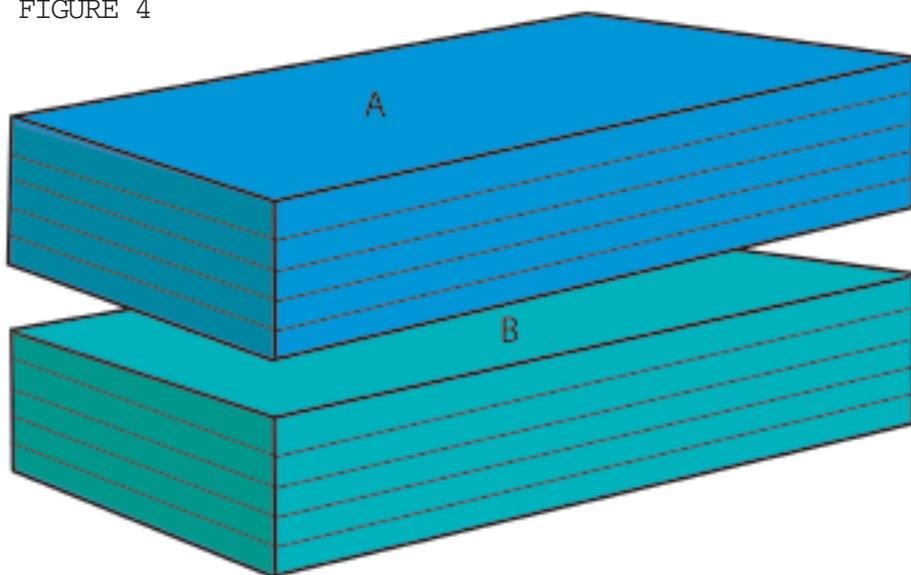


FIGURE 3

When an easement is created through a property (such as for access to another parcel or for drainage, or an embankment, signing, utilities, etc.), only a portion of the total rights is taken. The remainder parcel retains the underlying rights, whatever they may be.

Fee simple ownership is retained in the portion of Part A not impacted by the imposition of Part B and ownership under Part B is not fee simple. Thus, the remainder estate has both fee simple and less than fee simple components.

FIGURE 4



Separation of Rights Over an Entire Property

Sometimes other interests may be imposed upon or cover an entire parcel, such as deed restrictions, homeowners’ association requirements, conservation easements, leaseholds, building height restrictions, etc. As a consequence, basic fee simple rights may be reduced over the entire property. Figure 4 depicts a situation like this: Part A possibly represents an overlying easement, such as a conservation easement; and Part B the underlying rights.

The owner of the underlying estate, Part B, can utilize his property any way he sees fit, except as constrained by the overlying easement, Part A. Ownership of neither Part A nor Part B is fee simple; i.e. both estates are less than fee simple.

Time

Property rights can also vary with time. Most property rights exist in perpetuity, but some rights, such as leases, rentals, life estates, and timeshares exist only through time, i.e. for a limited duration within the underlying fee simple rights.

Figure 5 illustrates an example of this:

- Part A represents a time-limited estate (such as a residential rental unit), from its

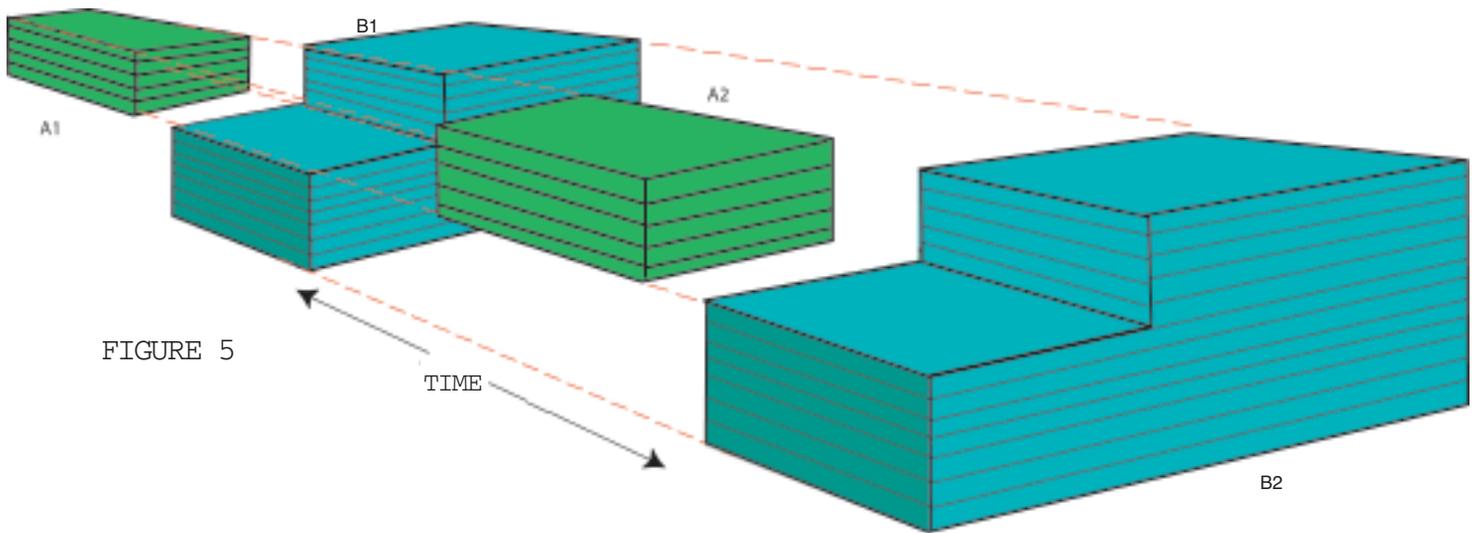


FIGURE 5

inception at time A1 (which could be the beginning of a lease term, for example) to its termination at time A2 (which could be the ending of a lease term).

- Part B represents the underlying estate. B1 is this estate immediately after the creation of the time estate, and B2 immediately before the termination of the time estate. Immediately before and after the time estate, the whole property would look like the property represented in Figure 1.

Condos and Common Areas

Property can be held both individually and in common at the same time. Condominiums and townhouses typically fit this scenario.

Figure 6 below shows such a situation:

- Part A represents the common elements, in, on, and over the land, collectively owned by the owners of the B parts.
- The B parts represent individually owned units, with no common elements.

Rights Can Vary With Location

Up to this point, property rights have been evaluated as uniform layers, i.e. each individual right being equally distributed throughout its portion of a property. However, the importance of individual rights can vary from one specific location within a property to another, especially in larger parcels. In fact, some layers may not span the entire area of a property at all; some may gradually increase or decrease in importance; some may abruptly change; and so forth.

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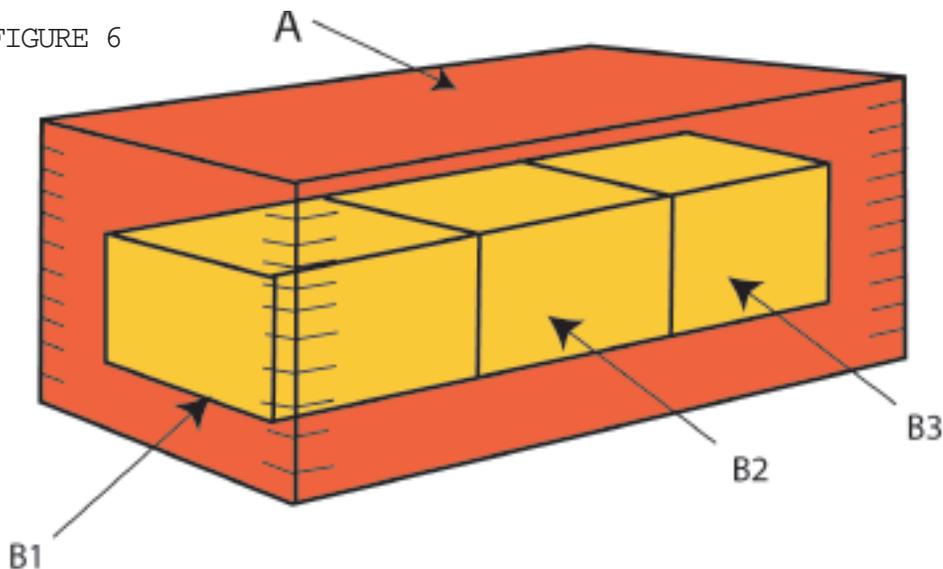
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FIGURE 6



The rights diagrammed in Figure 7 demonstrate how they can vary with location within a property. For example:

- Part A: The significance of the rights shown increase steadily as they get closer to the front of the property; a situation like this could reflect a commercial retail property, where roadway frontage may be significant.
- Part B: If a property straddles more than one zoning classification, a given right's significance

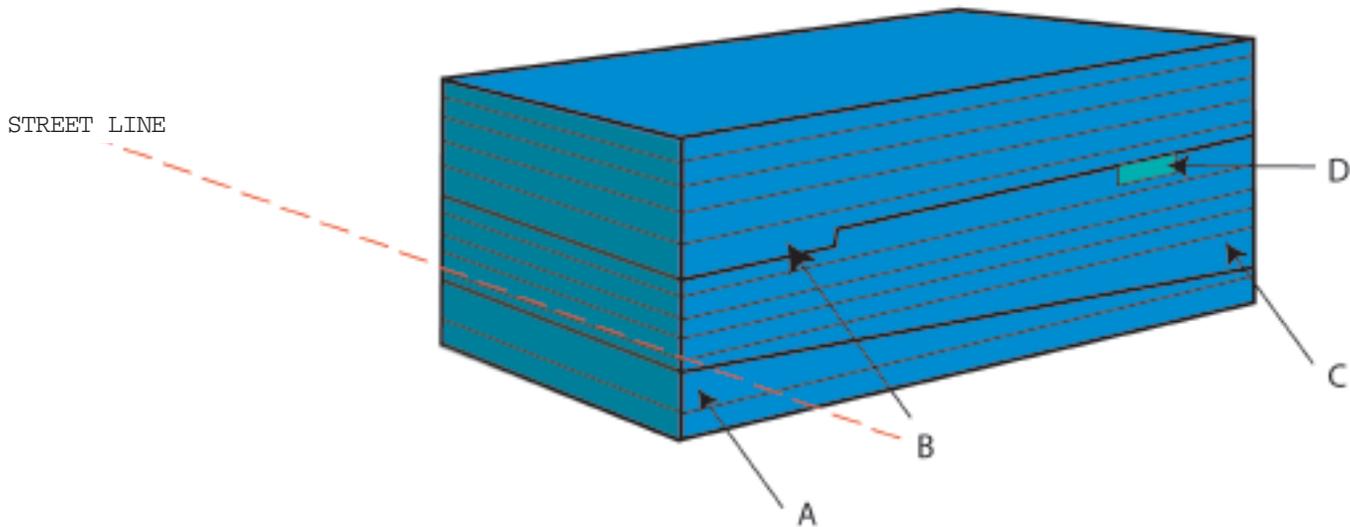
may change abruptly at the line of the zoning change.

- Part C: The importance of some rights may increase as they get farther away from a roadway, such as with some residential properties.
- Part D: Some rights may exist only in small portions of a property, which might represent a well site for cattle grazing or an interest owned by someone else.

CASE STUDY: USEFULNESS

Having evaluated how the ownership of property can be portrayed three-dimensionally, a specific example might be useful to aid understanding. Below is a common eminent domain situation, that is, a partial taking of rights, appraisal situation. Included also are two property rights diagrams (Figures 8 and 9), showing the before and the after situations.

FIGURE 7



The Problem

A local city needs to make roadway improvements, together with enhanced drainage, that will impact several lots, including the subject herein.

The Subject

The subject is an approximately level vacant lot that has a small wash cutting through its northeast corner. Periodically, water will overflow onto the street from this channel. This lot has 70 feet of street frontage and is 100 feet deep.

The street is paved with roll curbing and no sidewalks. All existing roadway improvements are entirely within the existing right of way.

There is an existing overhead power easement within the subject property that overlaps the proposed easement. It is 15 feet wide and runs along the entire north edge of the property. Side setbacks are 10 feet and the front setback is 20 feet. There are no vegetation or landscaping issues of consequence.

Drainage Easement

In order to rectify this drainage problem, the city will need to acquire an easement through the subject lot. The engineers have determined that an easement 15 feet wide (street frontage) and 30 feet deep (along north side), within the subject property will be sufficient to construct the proposed improvements.

City work crews will remove debris, reform the channel slightly and install riprap. The workmen will be able to perform all their work within the proposed easement and the existing right of way; so, no temporary construction easement will be needed.

Analysis

The proposed drainage easement is entirely overlapped by the overhead power easement and partly by the setbacks. The proposed drainage easement will not impact zoning, setbacks, or development of the property.

Figure 8 shows the approximate before situation.

Figure 9 shows how the proposed drainage easement will impact the subject property.

Conclusion

No effort has been made here to estimate the value impact caused by the easement taking, but instead the purpose of this treatise is to demonstrate how the subject property rights have changed. Clearly, as shown in Figures 8 and 9, the subject property is smaller after the imposition of the drainage easement than before.

After imposition of the drainage easement, the subject property owner still retains some rights in the drainage area. Not all rights are lost by the taking.

HOW MANY RIGHTS

In the beginning of this analysis, three broad categories of property rights were identified: ownership, quiet possession and use. But these are only categorical groupings. Within each, many individual rights are located, which may be represented as layers within

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BEFORE DRAINAGE EASEMENT

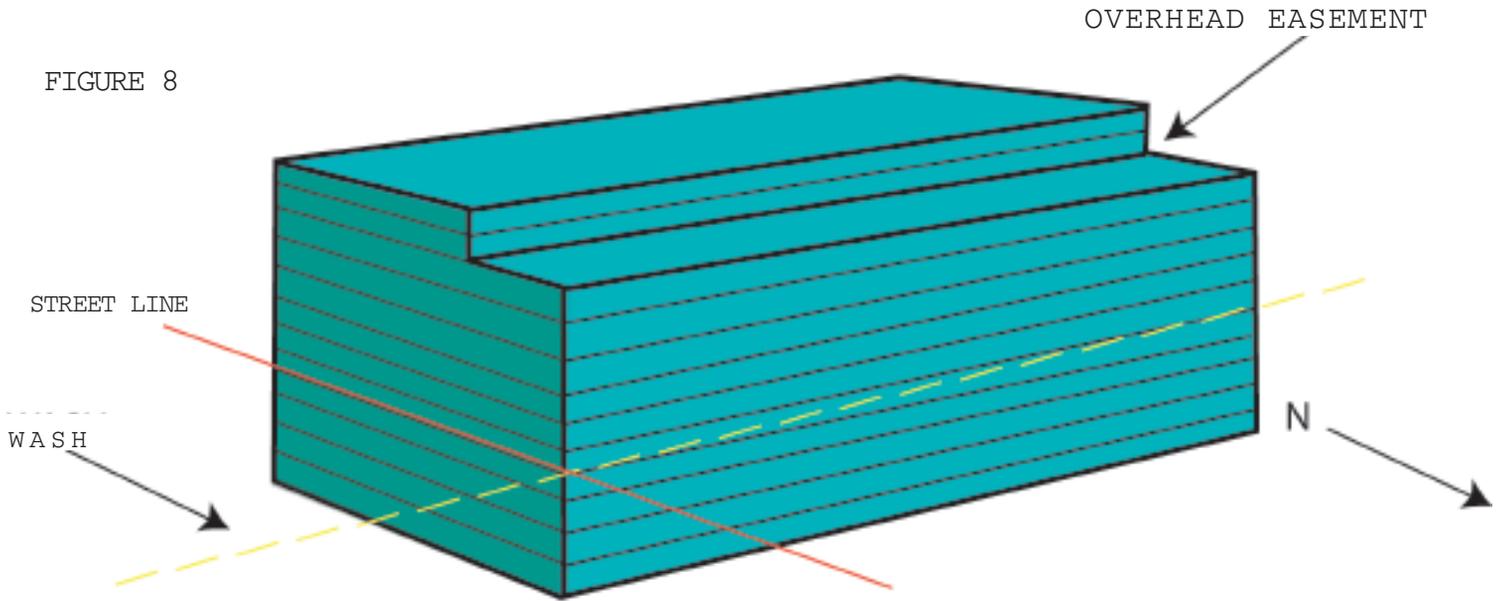


FIGURE 8

a property; thus, creating the concept that property has volume, not just surface.

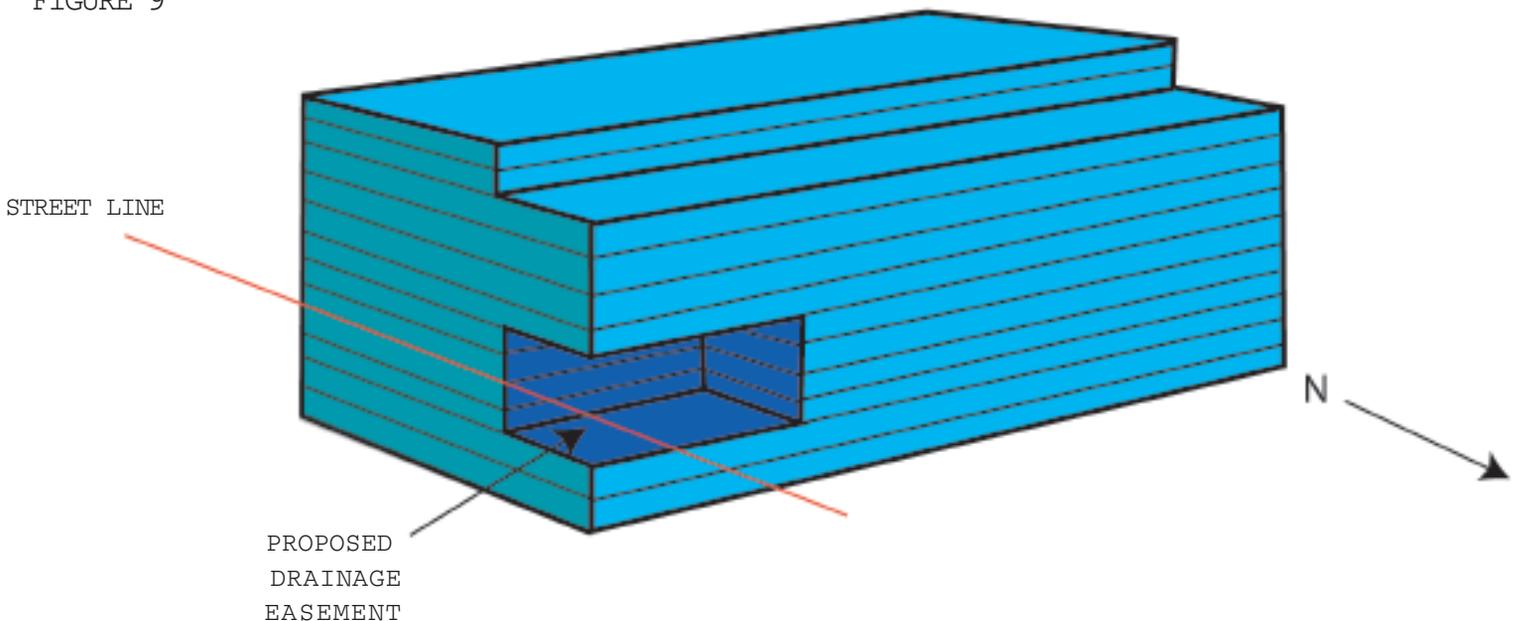
The number of rights/layers is virtually unlimited and can range from minutiae to broad concepts. Each layer can be as thin or as thick as the number of components one wishes to include in them, or, more importantly, as circumstances may dictate. For example, a residential analysis may combine

construction setbacks with zoning issues while a commercial analysis may combine setbacks with development potential.

Property rights can be broken down into many components, such as building construction size, quality, materials, height, and design, color; landscaping design and vegetation; vehicular use, storage and type; access to roadways; signs

and billboards; lighting; parking; commercial, residential, industrial, and office uses; views and obstructions; lot splitting and subdividing; and easements. Each of these items can be considered a right or group of rights and may be analyzed individually, as individual situations dictate. Ultimately reasonableness and the issues within a specific situation is the only guide to the number and size of the layers of rights.

FIGURE 9



DIVISION OF REAL PROPERTY

Property can be divided in many ways and into many parts. As we have already seen, rights to property can be divided or separated into various layers, and each layer can have not only a separate value but also separate ownerships. But there are also other ways to divide property: a property can be physically divided; and/or ownership can be divided between different people or entities, each having in turn different elements. Thus, subdividing of real property can be grouped into three broad categories: the physical land, the ownership, and the property rights.

- **Land:** The actual physical splitting of land is what people think of most often, when the topic of dividing, subdividing, or splitting property is considered. A fence, for example, is the symbol that best represents the separation of one property from another. The physical splitting of property is, however, not quite as easy as one might think. Consider the property shown in Figure 2. This is a complex property, which also includes various easements, into and out of the subject property. Thus, splitting it would result in sub-properties with various easements being created. Merely drawing a line on the ground would not adequately portray the resultant subdivided parcels. Such a resultant split might also cause new easements

through one or more of the sub-parcels to be created.

Thus, a property can be physically split while ownership and rights remain unchanged.

- **Ownership:** Adding one or more owners to a given property, such as through a sale, effectively splits it. For example, if I own a parcel and convey to you an undivided half interest, the remaining parcel now has two owners. Thus, a form of property division has occurred.
- **Rights:** As has already been shown extensively in this treatise, through the concept of layers, rights to property can be conveyed, that is divided, to others. An easement is a good example here; it creates two ownerships to the same property: the underlying owner and the easement holder.

Measurement of Rights

It is reasonable to assume that some rights or groupings of rights have more importance than others and should, therefore, form thicker layers than other rights of lesser importance.

Some may argue that property rights are inherently political in nature and should be measured accordingly. Others may say that sociological issues are

paramount. There are a number of such non-economic possibilities, but these tend to be esoteric in character and not readily measurable.

From the standpoint of real estate market economics, the size of the rights layers can best be measured as components of market value using standard appraisal analytical and comparative techniques, such as matched pairs, point system, extraction, statistics, surveys, etc. Thus, a layer's thickness can be reflected by its value contribution.

CONCLUSION

Though the concept of property rights as layers does not necessarily solve all appraisal analysis problems, it does provide an alternative view and hopefully aids understanding, especially for partial takings of rights through condemnation. ❖

REFERENCES

- ¹The Dictionary of Real Estate Appraisal, 4th Edition, by the Appraisal Institute, page 234.
- ²Ibid. page 113.
- ³Ibid. page 90.

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