

# A CASE OF FLOODWAY ROBBERY

## Bargaining for Relocatable Easements in Flood Channels

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*"Land, n. A part of the earth's surface, considered as property. The theory that land is property subject to private ownership and control is the foundation of modern society and is eminently worthy of the superstructure. Carried to its logical conclusion, it means that some have the right to prevent others from living; for the right to own implies the right to exclusively occupy; and in fact laws of trespass are enacted wherever the property (or easement) in land is recognized. It follows that if the whole area of terra firma is owned by A, B and C, there will be no place for D, E and F to be born, or, born as trespassers, to exist." (Ambrose Bierce, The Devil's Dictionary: Unabridged, 1993: 68).*

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Does the charge assessed for water, sewer, or natural gas utility crossing easements in improved flood channels in urban areas amount to "floodway robbery" in comparison with the term "highway robbery?" Should a municipal water or sewer district or natural gas utility be able to get a free ride by co-locating its underground pipelines in the underutilized portions of an improved flood channel with only a nominal charge? Or should flood districts be able to obtain a "hold-out" price based on a percentage of the land value "across the fence" from the flood right of way for the avoided higher cost to place underground utilities in adjacent private property? It is difficult to answer these questions because a flood control channel is a unique type of right of way.

As will be shown, the correct answer to this controversy is that a percentage of Across-the-Fence (ATF) value or Corridor Value is never an appropriate

basis for monetary compensation for the granting of subordinate or relocatable easements in flood right of ways. But because land within flood ways has a relatively low market value, the compensation for a subordinate easement in a flood channel will likely be insufficient to cover the burden of relocation of underground utility lines by the flood agency. Relocatable easements, where the holder of the easement agrees to relocate its utility lines at the request of the property owner, present an even greater valuation problem. Easements that are subordinate and relocatable do not impact the underlying market value of the land at all. Such easements must be bargained for.

The only economic basis for relocatable easements is to bargain based on the cost savings that routing utility lines through the flood channel offers (i.e., Alternate Route Method).

Power line  
right of way  
substitues for  
ATF Value



Flood channel  
does not  
substitute  
for AFT Value



Lateral gas line  
easement crossing  
improved flood  
channel



Utilities co-located in  
road easements over  
flood channels are  
allowed without  
compensation under  
the highway act



**WHOSE SUBSTITUTION PREVAILS?**

The central issue in this controversy is the market Principle of Substitution. The Principle of Substitution is defined as:

*"A valuation principle that states that a prudent purchaser would pay no more for real property than the cost of acquiring an equally desirable substitute on the open market. The Principle of Substitution presumes that the purchaser will consider the alternatives available to him or her that he or she will act rationally or prudently on the basis of his information about those alternatives and that time is not a significant factor. Substitution may assume the form of the purchaser of an existing property, with the same utility."*<sup>1</sup>

Whose substitution prevails in the situation of a utility easement in a flood channel right of way? Is it the substitution of the public utility buyers who would otherwise have to assemble their own utility corridor? Or is it the substitution of the seller whose property is impacted by an easement? To complicate the issue, how do you value a fractional property

floodway is typically designated as non-buildable. The area between the watercourse and the embankment is considered buildable at low densities but only if the building pad is raised above the flood elevation. Across-the-Fence (ATF) land is generally defined as land adjacent to an improved concrete lined flood channel in an urban area that may have been removed from the flood plain and has been legally zoned for development at urban densities.

By necessity a flood channel must follow a natural watercourse. The undeniable fact is that flood ways are immovable and non-replaceable. Other types of transportation corridors do not necessarily have to follow natural terrain, as does a flood channel.

Many different types of land can substitute for use as a railroad, freeway, highway, pipeline, or power line right of way. Of course, there are some exceptions such as land with unstable soils that is unsuitable for location of lifeline utility pipelines. But even some of these natural barriers can be surmounted by tunneling (i.e., pipelines and roads), by spanning utilities over mountains (i.e., electric transmission towers), or by resilient engineering design and hardening.

The issue of substitution of use arises in built-out urban areas where there typically is little if any land available for location of underground utility lines. But the legal definition of Market Value excludes the buyer's necessity to acquire easements in an existing utility right of way in lieu of having to acquire substitute land "across the fence." The fact that a public utility may be forced to acquire easements in another right of way rather than private property typically cannot be considered for market valuation purposes.

Moreover, flood channels are usually not considered "transportation corridors." For flood channels to be considered as a "navigable servitude" they must form a continuous waterway over which commerce may be carried. Flood channels are not designed to accommodate boat or barge traffic. And only under unusual circumstances can flood channels be alternatively used as an elevated vehicular transportation corridor. If the air rights over a flood channel have been legally subdivided and sold to a third party for construction of an elevated roadway, then it may be possible to consider a portion of the flood property as a transportation corridor.<sup>3</sup>

Considering flood channels as substitute canals for conveying raw domestic water to groundwater recharge basins in urban areas is a conceivable secondary longitudinal use of a flood channel as a transportation corridor. But typically water agencies have the right to convey water through flood channels without cost because it is a natural waterway.

**WHAT SELLER LOST, NOT WHAT BUYER GAINED FOR LATERAL EASEMENTS**

To properly estimate the Market Value of an underground utility easement within a flood channel, it must first be understood that there is no market for easements. Because easements represent burdens placed on real estate, they can only be valued by their impact on the property's hypothetical open Market Value.

**FLOODWAYS HAVE A NON-ADAPTABLE USE**

There are different zones of flood land. A flood plain is the land along a natural watercourse subject to overflow and flooding and the adjacent land along the embankments. A

right such as an easement in a natural flood way that is by definition a non-replaceable type of property because floodways are immovable?

Or should a flood agency be able to recoup some of its past capital outlay for channelization of flood ways into narrow concrete hydraulic canals that takes storm water from surrounding properties and removes the adjacent properties from the flood path? In other words, can a flood agency retroactively recover a "special benefit" or "general benefit" to surrounding properties (i.e., can it be reimbursed for a "giving" rather than a "taking"?)

Nearly all of the literature on the valuation of public utility easements assumes that such easements are the dominant type where the rights of the owner of the easement are paramount over that of the underlying property owner.<sup>2</sup>

