ORANGE COUNTY CHAPTER 67
BUNDLE OF WRITES
INTERNATIONAL RIGHT OF WAY ASSOCIATION

18101 Von Karman, Suite 1800
Irvine, CA 92612
www.irwa67.org

CONCEPTUAL SITE PLANS IN THE EMINENT DOMAIN PROCESS

Conceptual site plans can play a significant role in the eminent domain process. They are used to demonstrate the physical feasibility of land use development scenarios and their potential to satisfy the local requirements necessary for approval in the "before condition." In this way they further help the finder of fact (often a jury) to better visualize the use of the property in reaching their conclusions regarding "highest and best use."

Land planners, architects and civil engineers are commonly called upon as experts to perform this work. Plans are typically prepared and characterized as "conceptual" to avoid being held inadmissible in court on the grounds that they lead to the valuation of property for a "specific purpose." Plans can initially be very basic for cost efficiency, and later graphically enhanced if desired for presentation purposes.

Plan preparation requires knowledge of the property in terms of its physical characteristics, accessibility to streets and other infrastructure, surrounding land use, local planning regulations, and environmental conditions. A variety of public documents are available that provide useful baseline information, including aerial photos, infrastructure maps, general plan, zoning regulations, environmental impact reports, etc. It is also important for the site planner to interview local planning officials to better understand the planning environment in which the property is located.

In addition to "highest and best use," conceptual site plans are used for related eminent domain matters, including "assemblage of parcels," severance damages and overcoming physical site constraints. Recent condemnation disputes in California where plans played an important role in resolving such issues prior to going to trial are summarized below as case studies.

Highest and Best Use – "Highest and best use" feasibility studies sometimes rely upon the probability of a rezoning to a higher and more profitable land use. These studies can be supported by conceptual site plans illustrating that certain densities or intensities of use could have been physically feasible, and would probably have been approved by the local agency in the "before condition."

The "highest and best use" case study (Figure 1) involves the taking of a parcel for public transportation purposes. Five scenarios were prepared on behalf of the condemning agency to help explore the physical feasibility and legal permissibility. The Figure 1 scenario illustrates an office complex, including the required landscaping and parking and a design solution to the site's restricted vehicular access conditions. It further illustrates the maximum developmental intensity that could have been achieved for an office use at this specific site, i.e., amount of total floor area.

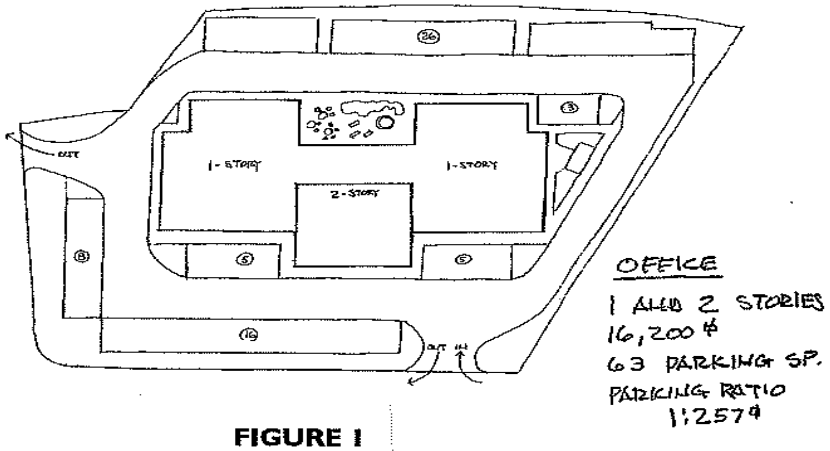

FIGURE 1

Assemblage of Parcels – The "assemblage theory" involves the combination of two or more adjacent parcels under different ownership for the determination of "highest and best use." This can be used to show that combined properties may result in a higher use with greater value than would the single condemned parcel by itself. A higher recovery for the condemned parcel may then be possible when considered as part of the larger combined parcel area. The party supporting this position carries the burden of proof to demonstrate that the joinder of parcels is "reasonably practicable."

The assemblage of parcels case study (Figure 2) involves the condemnation of a single parcel in conjunction with a roadway realignment project. It focuses however on the combining of two parcels, the one that was being condemned and a second located adjacent to it that was already owned by the condemning agency. The private landowner used the "assemblage theory" to establish the physical feasibility and legal permissibility of a service station as the highest and best use. The Figure 2 site plan scenario includes sheltered gas pumps, convenience market, carwash and parking. This scenario further involved the resolution of constraints relating to two major earthquake fault-lines that traversed the site and restricted driveway access.

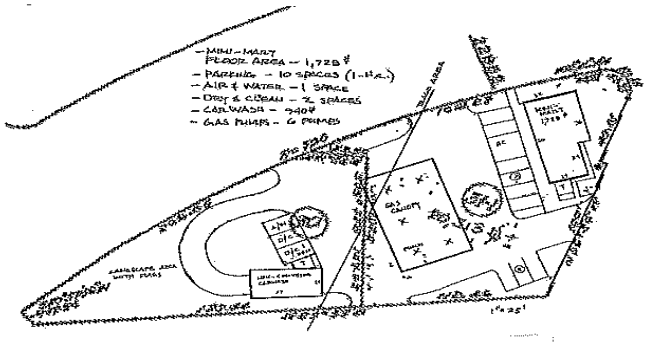

FIGURE 2

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Severance Damages – Severance damages can come into play in cases involving a taking of land where the agency's valuation does not contemplate full development of a partially developed site. Here, conceptual plans that maximize the development expansion potential and meet the local regulations for project approval in the "before condition" can be used to demonstrate "highest and best use." For example, a site plan could show that it would have been reasonably probable to expand a commercial building while providing the parking, setbacks, etc. required for local planning approval.

Overcoming Physical Site Constraints – Feasibility studies can also involve conceptual site plans to demonstrate the constraints on development created by the site's physical conditions. Physical constraints can impact both the "highest and best use" as well as the density or intensity of use. Condemning agencies sometimes use site plans to project discounted costs for mitigating such constraints, i.e., earthquake fault-lines, contaminated soils, etc. On the other hand, private landowners can use site plans to demonstrate how physical constraints might otherwise be cost-effectively mitigated in order to allow for a higher use.

The physical constraints case study (Figure 3) involves the determination of "highest and best use" and maximum intensity of use for the condemnation of a parcel for transportation purposes. Although the property was designated by the general plan as a transportation corridor, its highest and best use absent the transportation project, was agreed by both parties to be multi-family residential. The extent of potential development for this "in-fill" site in the "before condition" however was clouded by the existence of two earthquake fault-lines, poor vehicular access, and the precedent set by the existing limited housing density that surrounded the site. In this case, the condemning agency's feasibility study included a conceptual site plan that helped determine the maximum number of units that could have been developed in the "before condition," given the constraining physical site conditions.

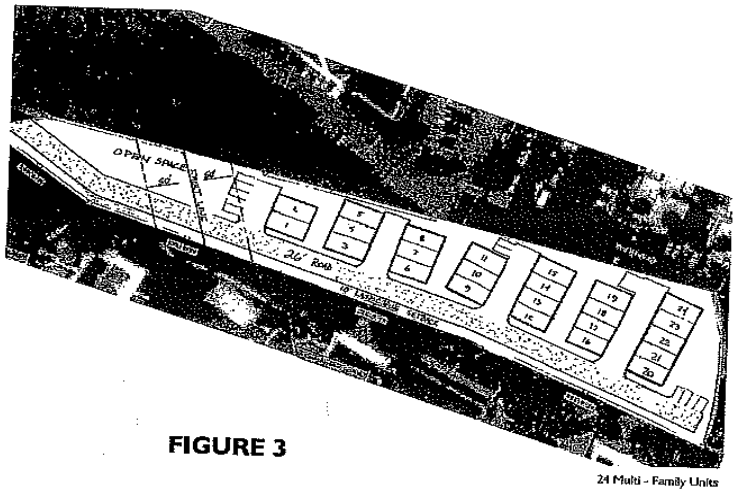

FIGURE 3

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Conclusion - Conceptual site plans can assist the trier of fact in determining the "highest and best use" of a property by demonstrating the site's physical development feasibility as well as its potential to satisfy local requirements for project approval in the "before condition." They can also be used to support arguments for and against assemblage, severance damages and site physical constraint limitation disputes.

Wayne Rasmussen, Rasmussen Planning, Inc., www.rasplan.com