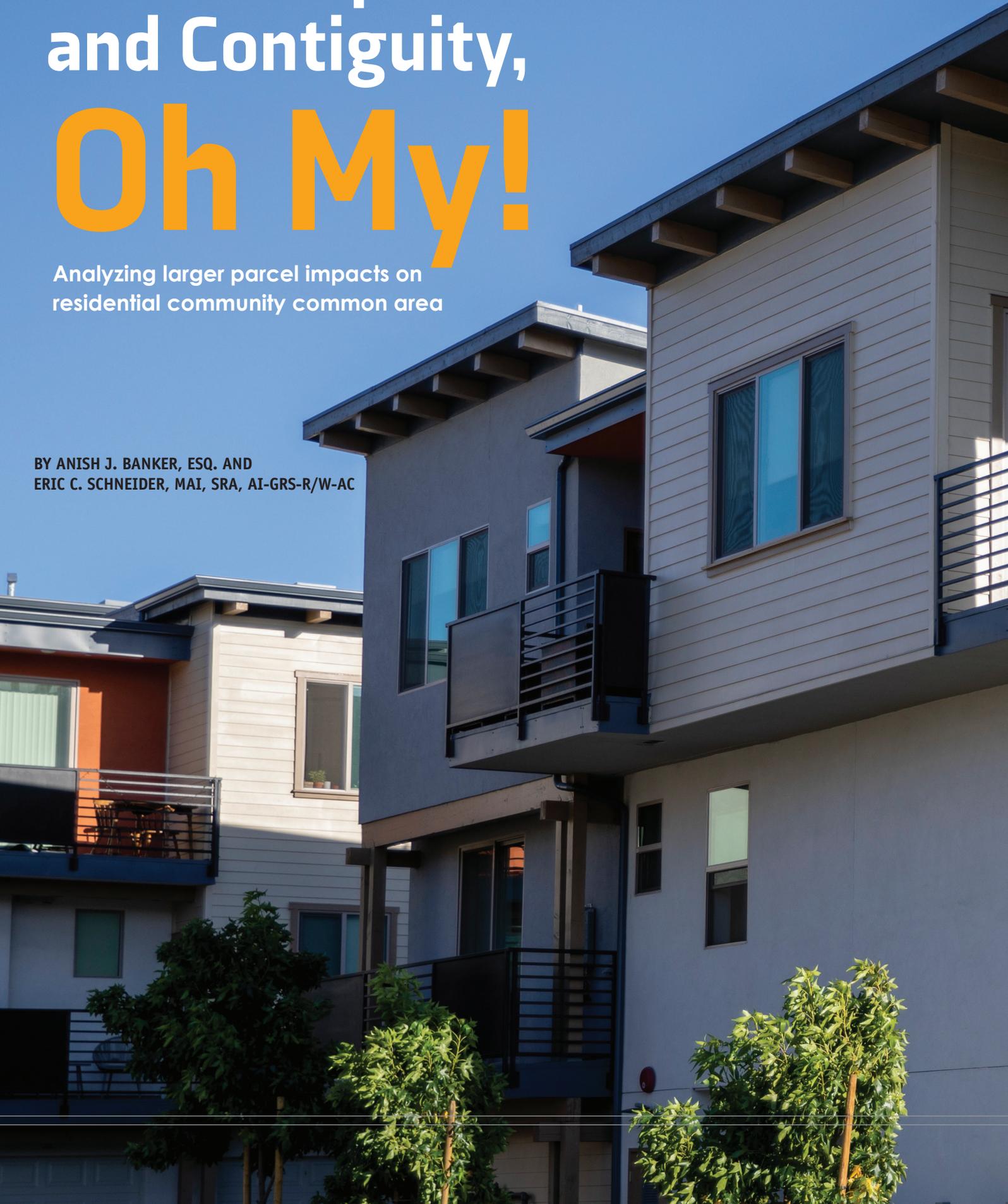


# Ownership and Use and Contiguity, Oh My!

Analyzing larger parcel impacts on  
residential community common area

BY ANISH J. BANKER, ESQ. AND  
ERIC C. SCHNEIDER, MAI, SRA, AI-GRS-R/W-AC





In built-out markets like those in Southern California, it is common for public agencies to acquire portions of improved properties that consist of common area, landscaping and/or vacant land. Prime examples include acquisitions of portions of business parks or residential subdivisions such as common interest developments. In addition, these larger developments may be vested in various ownerships, with examples including residential projects with several hundred individual ownerships that have appurtenant easement interests in and to the common areas (including land) that are shared by its residents.

However, what happens when the rights to be acquired involve only that common area? Who are the proper claimants? What are practitioners supposed to consider when potentially hundreds of owners have the right to just compensation based on an acquisition that may or may not directly affect those owners' properties?

Recently, we have been involved in several cases involving these types of scenarios and have continued to speak with colleagues around the country regarding methodologies to consider when such acquisitions are involved. In this article, we discuss these methodologies and relevant issues in California as well as highlight the impacts that practitioners need to think through when involved in such cases.

### **Problem Identification**

The beginning of any valuation assignment involves identifying the problem to be solved. In right of way and eminent domain matters, the problem to be solved typically pertains to the value of the rights to be acquired and understanding that any potential severance damages and benefits need to be reflected in the analysis. In order to solve this problem, valuers identify characteristics of the property that are relevant to the appraisal's intended use.

Such "relevant characteristics" can certainly include the area *physically* being impacted by an acquisition. In our case studies, portions of yard areas of certain residences and common area land were being impacted from a physical standpoint (fee acquisition of land, construction easements, etc.). However, of equal importance to proper problem identification in these instances are the *legal* characteristics of the properties. In other words, what property rights are being impacted by the acquisition? Does the acquisition involve more than just the physical area in question, or do other ownerships have appurtenant rights to the impacted areas?

## Larger Parcel Identification

One other part of problem identification (particularly for right of way and eminent domain matters) is identifying the larger parcel. When the property acquired is part of a *larger parcel*, the constitutional mandate of just compensation requires the appraiser to engage in a two-step analysis: Assess 1) the fair market value of the part(s) taken and 2) any and all damages to the remaining property resulting from either or both the severance of the part(s) taken from the remainder property and/or any damages accruing to the remainder property arising from the construction and use of the project. While the term “larger parcel” is not statutorily defined in California, there are established “tests,” or “unities,” to determine what constitutes the larger parcel. Whether property sought to be acquired is part of a larger parcel depends upon the presence of three unities: a) unity of title or ownership between the part taken and the remaining land; b) unity of use; and c) contiguity of the part taken to the remaining land. Each of these tests is crucial to analyze in order to ensure that the determination of the larger parcel is adequately supported.

The determination of what constitutes the larger parcel is complicated by the type of property being acquired, especially if that property is part of the common area of a larger development. In some cases, common area can be owned by a separate association that is owned by some or all of the residents of a community. Other times, the common area may be segmented into various lots that are under one or separate ownerships. The key is that when performing a larger parcel analysis, the three tests are analyzed appropriately. For example, while common area may not have an independent highest and use (e.g., a long, thin strip of land used for landscaping), there may be a unity of use with other residential uses. Put another way, there may be a long, thin strip of land in a residential project used for landscaping, and such landscaping may benefit nearby properties, providing aesthetic value, a buffer from incongruent uses, legally satisfying setback requirements, or some other reason not necessarily directly tied to the strip of land alone. This land may also be near existing properties (contiguity test) and may have common ownership or control.

More confusing, California Eminent Domain Law does *not* require a strict application of the unities. For example, unity of title exists if the same beneficial parties own, operate and/or manage the part taken and remainder property for a common use (see, e.g., *People ex rel Dept. of Pub. Works v. Nyrin* (1967) 256 Cal.App.2d 288, 295; *City of Stockton v. Ellingwood* (1929) 96 Cal. App. 708, 745; and *County of Santa Clara v. Curtner* (1966) 245 Cal.App.2d 730, 737.) In *Ellingwood*, the Court found that contiguous but separate parcels of property held by different owners could be considered as a larger parcel because the property

was held and operated by a partnership comprised of the property owners. According to the Court, “[i]n view of equity it is *immaterial* in whose name the legal title to the property stands, whether in the name of one partner or the names of all.” Likewise, in *Nyrin*, the Court of Appeal stated as a general rule: “the fact that several tracts are owned by different persons does not preclude them from being regarded as one where they are contiguous and are used in common by the owners under a contract or other arrangement.”

Like unity of ownership, the requirement of unity of use has been significantly liberalized. The determination of “unity of use” is not limited to the present and existing uses of the properties in question. As noted in *City of San Diego v. Neumann* ([1993] 6 Cal.4th 738, 757) where an owner holds title to several contiguous parcels having *different* uses and/or zoning, “all the separate lots can be considered collectively as the larger parcel if there is a reasonable probability that the commonly owned parcels will be available for development or use as an integrated economic unit in the reasonably near future.” In this case, the defendant owned three contiguous lots, one of which was being used as a trailer park and the other two of which were being leased to third parties for use as various small businesses, including an insurance office, a currency exchange and a used car lot. All three of the lots were separated by fencing and/or a 12-foot slope. The agency sought to condemn only the trailer park lot and, due to the lack of an existing common use and the fence/slope separation between the lots, argued that the “larger parcel” for purposes of determining just compensation for its taking should be limited to only a trailer park lot. The California Supreme Court disagreed, ruling that the determination of “unity of use” is *not* limited to the present and existing uses of the properties in question: “[C]ontiguous property held in common ownership but devoted to separate uses may nonetheless be valued by the market for an integrated use. When the government impairs the integrated use by taking some of the property, the property remaining declines in value, and the owner, under the constitutional guarantee of just compensation, should be compensated for that injury.”

Finally, the third prerequisite, contiguity, does not require the part taken and remainder property to be physically contiguous. To the contrary, constructive contiguity may be substituted for physical contiguity. As noted in *City of Los Angeles v. Wolfe*, ([1971] 6 Cal.3d 326, 336-337), “[t]he law, generally speaking, is that where there is actual and existing unity of use and purpose, the separation of the tracts in question ... is without legal consequence so long as there is an actual lawfully used means of access between the tracts.” In determining whether contiguity exists, consideration is given to the nature of the ownership of any land that lies between the part taken and the remainder property. *The case People v. Thompson* ([1954] 43 Cal.2d 13, 25) further states that commonly owned parcels that are separated by a public



road easement are contiguous for purposes of determining the larger parcel if the common owner also holds title to the underlying fee to the public road.

These cases highlight the complexity of determining the larger parcel. Despite these tests, there are nuances with how the unities are to be considered when making such a determination.

### Case Studies

There are two case studies that shed light on the importance of analyzing the relevant characteristics of a property and properly identifying the larger parcel. The first involves a residential condominium project in Orange County, California. The residential project consisted of several “lots” comprising the development, with each lot improved with a four-unit building. Each lot is owned in common by the owners of the four air space condominium units, but some of the land consists of “restricted common areas” (private use areas or yard areas) that are reserved for use by the units via an appurtenant easement. The residential project in this case included several lots (and several four-unit condominium buildings) located along a freeway, separated by a soundwall.

The infrastructure project involved widening a freeway. This widening necessitated a temporary construction easement along a portion of the residential condominium project

to remove an existing soundwall and reconstruct a new soundwall in existing right of way. For this infrastructure project, there would be a physical impact of the yard area of one of the units, but the widening project would also impact some of the common area on each lot, of which each of the four condominium owners had an interest in.

The other issue was that even though the project physically impacted the yard area of one unit on a temporary basis, the other three units had the potential to be compensated for not only the part taken (temporary easement on common area land) but damages and/or benefits to each of the four units as a result of the project. The soundwall was going to be down for a period of time, and heavy construction would be taking place proximate to the community, meaning that there were possible severance damages during and after construction based on noise and vibration issues, among other potential issues. The characteristics of the new soundwall and any potential benefits would have to be analyzed as well. Moreover, there were questions regarding whether units not physically or legally impacted (no appurtenant rights) would be necessary to consider in the valuation analysis.

The second case study involved a residential townhome community located adjacent to the same freeway that was being expanded. In this case, a soundwall was being rebuilt only on community property to facilitate the expansion of the freeway, with the soundwall being moved closer



to the residences. This portion of the project also necessitated other types of permanent and temporary easements on common area land. For the most part, all of the acquisition area was located in land owned by a homeowner's association (HOA). The common area considered as such were areas located outside of individual owners' lots, including lawns, landscaping, pools, recreational vehicle spaces, and interior sidewalks in the community, among other items.

In this case, pursuant to the common interest development's conditions, covenants and restrictions (CC&Rs), each of the 500+homeowners, identified as "members" (or property owners), had a vested inseparable property interest in and to the common areas owned by the HOA in the form of easement interests of enjoyment and use for the benefit of their respective townhomes. In other words, there were potentially hundreds of larger parcels that each had an interest in the area being acquired; and therefore a claim for just compensation based on how the taking of their easement interests impacted their respective townhomes. Based on this information, the analysis involved a valuation of rights to be acquired, which considered the fact that the land served part of a greater community and was not independently developable or could be intensively used. More importantly, an analysis was necessary to determine what impact, if any, the widening project had on the community and each residence. While there may have been some units located directly adjacent to the construction activity, there was the possibility of other nearby units in the community being impacted as well due to construction activity.

## Takeaways

An acquisition of property rights for an infrastructure project can be complex. However, with any project or case, it is necessary to properly lay the foundation and identify not only the problem to be solved but also any relevant characteristics, both physical and legal. This requires carefully analyzing what the valuation problem is, supporting a conclusion of the larger parcel and analyzing any impacts caused by the project (positive or negative). Further, it is necessary to engage the proper professionals (legal, valuation, etc.) at the onset that understand the complexities of determining the larger parcel and helping the client to the process. This not only protects the interests of the public agency but also helps to ensure that property owners receive their constitutional right of just compensation. ✪



*Anish J. Banker, Esq., is a partner at Palmieri, Hennessey & Leifer, LLP. An accomplished civil litigator, Anish has extensive experience in handling a wide array of general and complex commercial, real estate and business litigation matters. His practice is concentrated primarily on eminent domain, inverse condemnation and related real estate litigation and valuation disputes, including landlord-tenant disputes.*



*Eric C. Schneider, MAI, SRA, AI-GRS, R/W-AC, is the principal of Schneider Valuation Consultants, Inc. Based in San Diego, California, he has extensive valuation and consulting experience involving commercial and residential real estate throughout California and in states across the nation. He specializes in forensic appraisal review and providing services for litigation support and disputed real estate matters.*