How Do I Appraise Temporary Construction Easements?

Part Two

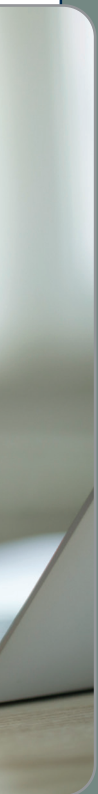
BY DAVID BURGOYNE, SR/WA, R/W-AC, ASA AND BRIAN O'NEILL, SR/WA, R/W-AC, AI-GRS

Brian A. O'Neill, SR/WA, R/W-AC, AI-GRS, and David E. Burgoyne, SR/WA, R/W-AC, ASA, are cofounders of National Right of Way Review Appraisal (NR/WRA). Their company routinely provides review appraisals of acquisition appraisals for both large and small right of way projects throughout the USA.

Brian has been exclusively involved in right of way appraisal and review for 27 years. He is a resident of Boise, Idaho, and in his free time, enjoys skiing, biking, golfing, shooting and auto racing.

David has been involved in right of way appraisal and review for 39 years. He is a resident of southeast Michigan, a CLIMB and PEAK Certified Instructor for IRWA and an AQB Certified USPAP Instructor. He has no free time.

Together, they are the authors behind *Ask an Appraisal Reviewer.*



David's Answer:

We published "How Do I Appraise Temporary Construction Easements? Part One" back in the July/August 2023 issue. This article is a continuation of the series, and three new issues will be discussed. These include 1) whether to use the land/rental value that applies before or after the taking, 2) how to evaluate circumstances where a TCE has a broader impact on the entire remainder and 3) how to deal with situations where the TCE is of limited duration but can occur at any time over a longer period (often called a floating easement).

In Part One, we discussed how most easements run with the land and are permanent. However, a temporary easement is different in that it is an easement that expires. These easements are used for a multitude of reasons. Some interests that can be acquired include uses such as grading permits and rights of entry, which are generally temporary easements of more limited duration, for soil, environmental or other suitability testing, and commonly occur BEFORE the acquisition. Other temporary easements are often used for construction or temporary workspace (TCE). These TCEs are normally only for a year or two, expiring upon completion of construction, and occur AFTER the acquisition. Temporary easements are a unique part of right of way appraisal and are commonly encountered.

TCEs are commonly appraised by paying the property owner a reasonable return on the value of the portion of the site that is being encumbered by the easement. The Uniform Appraisal Standards for Federal Land Acquisition (UASFLA or the Yellow Book) states on page 42, "even though technically incorrect, (this) shortcut is generally acceptable to agencies because of the nominal nature of TCE acquisition and the cost/time savings associated with the shortcut. However, appraisers must recognize that the shortcut methodology will be fund unacceptable under these Standards if the indicated compensation is more than nominal." The correct method for valuing TCEs is generally using rental concepts.

Now that we've gone over the basics of TCEs, we'll address the three issues.

1. Do you use the land/rental value that applies BEFORE or AFTER the taking?

As it is with most appraisal questions, it depends. There can be situations where it is appropriate to use the before unit rate from an appraisal standpoint. If the easement occurs before the taking (or the vesting of title and/or date of value to which payment is applied), it may be appropriate to use the before value. For example, if the TCE is for testing purposes that predates the taking, or if damages to the subject property are delayed to some point in the future (based on legal or construction issues), it may be appropriate to use the before value. Also, some jurisdictions use the before land value for calculating the value of TCEs. This is a policy decision, not an appraisal one, as required by the jurisdiction (or agency policy).

If the TCE occurs after the taking, then it impacts the property in the after condition and the after value should be used. In an appraisal where the highest and best use of the property after the taking is different than before the taking, or in an appraisal where the remainder has been damaged by the permanent taking, it is important to apply the land or rental values to the property after the taking. In short, if one has already compensated the property owner for damage, the authority should pay rent on the damaged property. The bottom line is to use the unit rate that applies during the time of the TCE.

2. How do you evaluate circumstances where a TCE has a broader impact on the entire remainder?

UASFLA makes it very clear that evaluating TCEs is part of valuing the subject property after the taking and the rent loss should be applied as an adjustment to the value of the remainder after the taking and not as something added to the difference between the before and after values. It is not a separate calculation to just append to the end of the appraisal report. However, simply determining a fair market rental for the land is sometimes not adequate. There are obviously times when a temporary easement has a very significant impact on the remainder after the taking and not just the area within the TCE. Some are straightforward and others are not.

Again, from UASFLA on page 42, "Damages that evolve from TCEs are usually based on the economic or market rent of the affected area for the term of the temporary easement."

For example, if a TCE cuts off or temporarily denies access to all or a large part of the property, it may be necessary to apply rental concepts to or even discount the entire remainder of the property. And this could be for years. A TCE may restrict the highest and best use of the unencumbered portion of the property during the term of the TCE. A long enough TCE could even result in a change in highest and best use. In these cases, it may be necessary to apply a rent loss to all lands so affected.

TCEs could result in significant costs to cure as well, which may involve the need to acquire temporary access rights or build temporary structures such as drives or irrigation for the period of the TCE. Sometimes rental concepts need to be applied not just to the land temporarily taken by the TCE but to more land or even buildings that are necessary to continue operating the property (or a business) without interruption.

3. How do you address situations where the TCE is of limited duration but can occur at any time over a longer period, often called a floating easement?

The "floating" easement is a TCE that is in place for a period of years, but its use is restricted to a more limited period of time, perhaps only a few months. In this case, there is an argument that the market rental-based compensation for the entire two years would be less for those periods of time that the TCE is not actually being used. The Washington State DOT (thanks, Andrew) has a written policy regarding this memorialized in their memo "Floating Temporary Easement Valuation" dated May 6, 2019:

> *"Often, projects will need rights to use a property for a limited amount of time, but not know specifically when that time period will be. Floating easements were created as a way to specify that the project would be occupied for a shorter time than the length of the project, but exactly when, is unknown. Additionally, this method of securing rights is seen by some as cost savings to the project.*
>
> *In the valuation of temporary easements with a floating active occupancy component, it is necessary to consider the impacts of the entire duration of the easement as well as the impacts during the active occupancy period. This is not to say that the impacts will necessarily be consistent over the duration, however, they could be.*
>
> *It is important to see the specific easement language that is used in the conveyance document and assess how the market would react to the impact of all the easement components. To simply assign value to the active occupancy term will often result in under-compensation to the property owner. To simply value the entire duration as if it were actively occupied may result in over-compensation to the property owner. Critical thinking and reasoning must be applied to each easement to properly value the actual property rights being conveyed by the easement document, not the intent of the easement as explained or described by an engineer, environmental biologist, or other project representative."*

I tend to disagree with this policy, as I think full value should be applied to the entire period. For example, consider a standard office lease. The renter is required to pay full rent the entirety of the lease regardless of actually using the office space or not. If the condemning authority has the right to use the TCE at any time during the longer period, then the owner does not have full use of the property for that entire time.

As you can see, the valuation of TCEs is not a simple process and many factors can affect fair market rental of the subject property.

Brian's Answer:

There are multiple ways to skin these cats, particularly in cases where land is not typically rented on short-term bases. For instance, do we discount to NPV for all TCEs or just ones lasting longer than a certain period, do we use the before value or the after? As with most of appraisal the important function when dealing with a complex matter is to disclose what, how, and by what authority (why) you are doing what you are doing. Do not presume your intended users or reviewers already know these things, and simply because you've always done it that way or because your buddy does it that way is generally insufficient. Take a sentence or two to explain your method, your report will be objectively better and more credible.

Stay tuned for our next two columns, which will focus on damages and benefits related to parcel size and configuration, as well as project influence and its impact on damages and benefits.

???

Have a burning question about appraisal review or appraisal? Ask an Appraisal Reviewer is open for questions or topics to tackle! Scan the QR code or email **ask@NRWRA.com** to submit your question today.