

Evaluating The Highest And Best Use Of Real Estate In Condemnation Cases

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The sole issue in the vast majority of condemnation cases involves the determination of the appropriate amount of just compensation the condemning authority must pay the property owner. As such, eminent domain matters usually become contests between two expert real estate appraisers. Before an appraiser can determine the type of market data that will ultimately be compared to the subject property in order to reach a conclusion of value, the appraiser must determine how the property could ultimately be used to generate the greatest market value. This is the process of determining the highest and best use of the property ("HBU").

SJI 2d 90.09 defines HBU as "the most profitable and advantageous use the owner may make of the property even if the property is presently used for a different purpose or is vacant, so long as there is a market demand for such use." Despite the fact that SJI 2d 90.09 is the shortest standard jury instruction relating to eminent domain, a number of special rules that apply in condemnation cases lead to many hotly disputed cases that focus on HBU issues. This article discusses the special rules that apply when determining HBU in the eminent domain context.

Disregarding The Effect Of The Taking

MCL 213.70 codifies federal and state precedents by providing that property "shall be valued in all cases as though the acquisition had not been contemplated." Under this rule, the jury must consider and disregard any "conditions

which may exist in [the] area resulting from the prospect of condemnation for this project and [resulting from] the other proceedings leading up to this condemnation case." SJI 2d 90.15.

This rule leads to fair results for both condemning authorities and property



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owners. For example, it would not be fair to a condemning authority to force it to pay more for property because its project spurred increased value in the area, such as a new highway interchange in a rural area with poor access prior to the project. Similarly, it is unfair to punish a property owner due to the uncertainty surrounding the pendency of a condemnation project and stifled demand in the area. Therefore, "it is an established rule of condemnation law that the value of an interest in property is to be determined without regard to any enhancement or reduction of value attributable to condemnation or threat of condemnation." *Highway Commissioner v. L & L Concession Co.*, 31 Mich App 222, 226, (1971). Preliminary activities such as the "discussion, planning,

authorization, [and] funding” of a project that “serve to thoroughly advertise the impending condemnation in the affected neighborhood” are a part of the contemplation of the project that must be disregarded. *United States v. 8,968.06 Acres of Land*, 326 F Supp 546, 549 (S.D. Tex. 1971).

In *In re Acquisition of 306 Garfield*, 207 Mich App. 169, (1994), the property owner operated a business that was destroyed by fire prior to its acquisition. The owner “did not repair the property after the fire because she was aware, even before the fire occurred, that the VA intended to build a hospital there,” and to condemn her land for that project. *Id.* at 175. The trial court valued the property as though the business remained in operation because any contrary ruling would have ignored the “admonition to value the property as though the acquisition had not been contemplated.” *Id.* at 184. This case demonstrates that the feasibility of adopting a particular HBU after the market became aware of the threat of condemnation is irrelevant to determining market value.

The Scope Of The Project Rule

A letter of credit is a promise by The scope of the project rule is often confused with the rule requiring appraisers to disregard the effect of the project. According to the scope of the project rule, if a project is expanded beyond its original scope or a second project is implemented, the appraiser may consider the effect that the original project

had on the HBU and value of the property. While this may seem to contradict the rule that the effect of the project must be disregarded, these doctrines are consistent. The scope of the project rule entails a factual determination of what must be disregarded – if a prior condemnation occurred that was outside of the scope of the project requiring the new acquisition, the prior, discrete project or phase may be considered.

In *Reynolds v. United States*, 397 US 14, 17 (1970) the United States Supreme Court recognized that “the development of a public project may also lead to enhancement in the market value of neighboring land that is not covered by the project itself. And if that land is later condemned, whether for an extension of the existing project or for some other public purpose, the general rule of just compensation requires that such enhancement in value be wholly taken into account, since fair market value is generally to be determined with due consideration of all available economic uses of the property at the time of the taking.”

In *Reynolds*, the scope of the project rule affected the HBU of a portion of the condemned property to a great degree. The original project called for the creation of a reservoir in an area that had been vacant property of questionable value. If the additional property was outside the scope of the project, then the HBU was as waterfront, development property bordering the new reservoir. However, if the original project included

all the condemned property, then its value would be based upon vacant, scrubland. This determination resulted in a significant difference in the value of the property.

The Reasonable Possibility Of Rezoning Or Obtaining A Variance

The potential of rezoning condemned property is a key issue in determining HBU. While a property may be physically suited for a number of different uses, the local municipality will limit the number of legally permissible uses based upon the zoning classification that it applies. However, an appraiser is not locked into the zoning classification that existed on the date of taking and can consider alternative uses if there was a reasonable possibility that the property could be rezoned.

According to SJI 2d 90.10, “if there was a reasonable possibility, absent the threat of this condemnation case, that the zoning classification would have been changed, you should consider this possibility in arriving at the value of the property on the date of taking. In order to affect the value of the property, the possibility of rezoning must be real enough to have caused a prudent prospective buyer to pay more for the property than he or she would otherwise pay.” It is noteworthy that Michigan adopted a “reasonable possibility” standard, as opposed to the reasonable probability standard applied in many other jurisdictions. *State Highway Comm’n v. Eilender*, 362 Mich 697 (1961).

SJI 2d 90.11 carries the rule one step further. “You should ignore a refusal to rezone unless you believe that the request to rezone would also have been denied even in the absence of the condemnation.” Property values cannot be “artificially depress[ed]” to allow a condemnation to occur “at a lower price.”

Factors that may be considered to determine whether rezoning was possible include “nearby property growth, growth patterns, change of use patterns and character of neighborhood, demand within the area for certain types of land use, sales of related or similar properties at prices reflecting anticipated rezoning, physical characteristics of the subject and of nearby properties, and under certain circumstances, the age of the zoning ordinance.”

Department of Transportation of the State of Illinois v. First Bank of Schaumburg, 631 NE2d 1145 (Ill App Ct 1992).

Further, *Department of Transportation v. Van Elslander*, 460 Mich 127, (1999) applied the same reasonable possibility standard found in the context of

rezoning to the ability to obtain a zoning variance.

Assemblage Of Multiple Parcels

Assemblage consists of the private acquisition and combination of multiple parcels to create a larger, more valuable property. Assemblage often occurs to create a larger property that can support a more intense development or to improve the access or shape of a development. These factors are keys to evaluating HBU.

In *Consumers Power Company v. Allegan State Bank*, 388 Mich 568, 577 (1972), the Michigan Supreme Court recognized that assemblage should be considered in determining HBU. “The possibility of assembly without eminent domain is a question of fact... [The fact finder should] make a factual determination of the probability of assemblage within a reasonable time at a reasonable price.” The applicable standard is unclear from this case because the Supreme Court references the possibility, probability and potential of assemblage within the same paragraph. However,

in *City of Allegan v Vonasek*, 259 Mich 310, (1932) the court reversed the decision of the trial court because it improperly instructed the fact finder that “there must be something more than a possibility; there must be a reasonable probability” of assemblage. Therefore, a reasonable possibility standard should be applied when evaluating HBU involving assemblage, as is done with rezoning.

Conclusion

While the definition of HBU is simple on its face, a proper evaluation of the issue becomes more complex in many cases. To determine the HBU, the appraiser must disregard the effect of the taking and consider the possibility of rezoning, obtaining a variance or assembling other property. These rules are designed to insure that “[t]he owner is to be put in the same position monetarily as he would have been [in] if his property had not been taken.” *Reynolds*, supra, at 16.

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