The Effect of Zoning on Valuation in Eminent Domain

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•APPRAISERS, right-of-way personnel and attorneys must understand the legal effect of zoning in eminent domain in order properly to evaluate, investigate, negotiate or litigate condemnation-zoning cases. It is particularly important that they discover and evaluate the kind of evidence which will be accepted by the courts if the case is tried.

The Illinois decisions are reviewed because they are typical of the decisions of the many jurisdictions which have not yet passed upon the major condemnation-zoning questions, such as reasonable probability of rezoning, zoning for the benefit of the condemnor, and collateral attack upon zoning ordinances. They are indicative of a general trend to permit the court or jury to consider evidence which has an influence upon market value. The decisions in all United States jurisdictions which have contributed in a significant manner in deciding these questions are also reviewed.

HIGHEST AND BEST USE

In an eminent domain proceeding the owner of land is entitled to its market value for its highest and best use. The accepted definition of highest and best use in Illinois is as follows:

> The owner of property appropriated for public use is entitled to its market value for the most profitable use for which it is available and any capacity for future use which may be anticipated with reasonable certainty though dependent upon circumstances which may possibly never occur, is competent to be considered by the jury if it in fact enhanced the market value of the land in its present condition and state of improvement. The future prospective use affecting value must be a present capacity for a use which may be anticipated with reasonable certainty and made the basis of an intelligent estimate of value.[1]

Under this definition, can a trial court permit a property owner to introduce evidence that there is a reasonable probability that his land will be rezoned to a higher use? Although the Supreme Court of Illinois has not specifically ruled on this question, there are decisions which indicate that such evidence can be admitted. Illinois holds that market value is the proper measure of compensation,[2] and that matters which affect market value can be considered by the jury.[3]

POSSIBILITY OF OBTAINING SPECIAL RIGHTS

Evidence as to the probability of obtaining legislative or administrative action which will enhance market value has been admitted in Illinois condemnation actions. In South

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[1] Crystal Lake Park Dist. v. Consumers Company, 313 Ill. 395 (1924). Accord, City of Chicago v. Jackson, 333 Ill. 345 (1929); Super-Power Co. v. Sommers, 352 Ill. 610 (1933).
[2] City of Chicago v. Farwell, 286 Ill. 415 (1919).
[3] See City of Chicago v. Sexton, 408 Ill. 351 (1951).

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Park Commissioners v. Ayer,[4] the land being condemned was separated from railroad tracks by a public alley but was not being served by switching facilities. In order to obtain switching facilities it would be necessary for the defendant to make a contract with one of the railroad companies and also obtain permission from the city council to build over or upon the alley. The court stated: "In determining the value of the ground, the owners thereof are entitled to have the jury take into consideration the possibility of effecting the needed arrangements. If that possibility adds to the value of the ground the owners are entitled to the addition."[5]

In Chicago and Western Indiana R. R. v. Heidenreich,[6] the jury was instructed that they had no right to assume that the city council would grant permission for a switch track to cross a street or alley so as to connect the defendant's property. Holding that the instruction was erroneous, the court stated: "There was evidence that a switch track could be run to the property if consented to by the city council, and the jury had a right to judge, from all the evidence, whether that fact added anything to the value of the property."[7]

In City of Chicago v. Sexton,[8] the trial court would not permit the defendant railroad to prove that a portion of its property could be sold or leased to outside interests. The condemnor claimed that such proof was improper unless the railroad had obtained approval of such disposition from the Illinois Commerce Commission in accordance with the statute.[9] The court reversed and remanded for a new trial on the ground that "the jury should be entitled to consider evidence as to the other uses to which this property could be put and to also consider the possibility of the Commerce Commission authorizing such use."[10]

Illinois does recognize that land restricted as to use cannot be valued for a use beyond the restriction.[11] However, it would appear that evidence of the probability of legislative or administrative relaxation of such restrictions may be considered by the jury in determining market value.

ADMISSIBILITY OF ZONING ORDINANCE

The zoning ordinance as a restriction on land use has been held admissible in condemnation cases in other states.[12] Without specifically ruling on admissibility, Illinois has accepted zoning ordinances as a factor in land value. The Illinois Supreme Court has (1) held that where the defendant claimed the highest and best use was for a filling station, the ordinance of the City of Chicago requiring "frontage consents" in establishing filling stations was admissible;[13] (2) held that where the condemnor proceeded under a misapprehension as to the correct zoning it was proper to allow the condemnor to reopen its case to present the true facts;[14] (3) held that the defendant could present evidence of use of a portion of the land for parking facilities as a nonconforming

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[4] 237 Ill. 211 (1908).
[5] Id. at 220.
[6] 254 Ill. 231 (1912).
[7] Id. at 243.
[8] 408 Ill. 351 (1951).
[9] Ill. Rev. Stat., ch. 114, § 174a.
[10] City of Chicago v. Sexton, 408 Ill. 351, 357 (1951).
[11] In Illinois Central R.R. v. City of Chicago, 141 Ill. 509 (1892), the City of Chicago levied a special assessment on railroad land which was restricted by statute for railroad use. The court stated at page 515: "In a proceeding to condemn lands for public purposes, where the lands are restricted by statute or the instrument under which the owner holds title, to a particular use, the measure of compensation to the owner for the lands taken will be their value to him for the special use to which the lands are restricted."
[12] Los Angeles City High School Dist. v. Hyatt, 249 Pac. 221 (Cal., 1926); City of Beverly Hills v. Anger, 15 P.2d 867 (Cal., 1932); State ex rel. McKelvey v. Styner, 72 P.2d 699 (Id. 1937); City of Tyler v. Ginn, 225 S.W.2d 997 (Tex., 1949).
[13] Forest Preserve Dist. v. Wike, 3 Ill.2d 49 (1954).
[14] Dept. of Public Works v. Drobnick, 14 Ill.2d 28 (1958).

use under the zoning ordinance;[15] (4) held that evidence of the sale of other property made prior to the adoption of the zoning ordinance was proper;[16] (5) held that evidence of the sale of other property zoned differently from the property being condemned was proper.[17]

REASONABLE PROBABILITY OF REZONING

Doctrine of Reasonable Probability

The doctrine of reasonable probability of rezoning in condemnation cases apparently began with the Ontario case of In re Gibson,[18] and was first applied in this country in City of Beverly Hills v. Anger.[19] It is well stated in People v. Dunn[20] as follows: "Where land is not presently available for a particular use by reason of a zoning ordinance or other restriction imposed by law, but the evidence tends to show a 'reasonable probability' of a change in the near future, the effect of such probability upon the minds of purchasers generally may be taken into consideration in fixing present market value." Although held inapplicable where the evidence is not adequate, this doctrine has been recognized in all states where the issue has been presented.[21] It has even been extended to evidence of the reasonable probability that a variance will be granted,[22] and that a special exception will be granted.[23]

It is clear that the doctrine involves some speculation. In his dissenting opinion in People v. Dunn, Justice Carter made the following observation: "In my opinion nothing could be more speculative than prospective action of a zoning authority. It is as changeable as the political fortunes of its members."[24] However, it is a form of speculation which is not generally condemned by the courts.[25] It can only be justified on the ground that it is the same speculation used by a prospective purchaser in determining the amount he should pay. The fact that rezoning "may not actually happen is not to say this possibility does not influence the market."[26]

In United States v. 50.8 Acres of Land,[27] the court stated: "To what extent the possibility or probability of a change would affect the value as of the date of taking is dependent upon the degree of probability, the imminence of the change, the effectiveness of the opposition, and other factors which are largely speculative and conjectural."

BURDEN OF PROOF

The burden of proof of the reasonable probability of a change in zoning has been held to be on the landowner.[28] Although many decisions on the question of reasonable

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[15] Forest Preserve Dist. v. Kercher, 394 Ill. 11, 22 (1946).
[16] Id. at 17.
[17] City of Evanston v. Piotrowicz, 20 Ill.2d 512, 170 N.E.2d 569 (1960). See § 12, infra.
[18] 28 Ont.L.R. 20, 11 D.L.R. 529 (1913).
[19] 294 Pac. 476 (Cal., 1930).
[20] 297 P.2d 964, 966 (Cal., 1956).
[21] The case of City of Euclid v. Lakeshore Co., 133 N.E.2d 372 (Ohio, 1956), where the court was faced with a statute excluding evidence of a use which would violate an ordinance, appeared to be an exception, but a subsequent Ohio case, In re Appropriation of Easement for Highway Purposes, 194 N.E.2d 582 (Ohio, 1963), held that the doctrine was applicable. See § 8(g) infra.
[22] School Dist. No. 13 of the Town of Huntington v. Wicks, 227 N.Y.S.2d 768 (1962).
[23] School Dist. No. 13 of the Town of Huntington v. Wicks, 227 N.Y.S.2d 768 (1962). The zoning ordinance gave the Board of Appeals the power to extend business uses back from an existing business district an additional distance not in excess of 50 feet. The court held that this was in the nature of a special exception and that the reasonable probability that it might be granted could be included as an element of value.
[24] 297 P.2d 964, 966 (Cal., 1956).
[25] In O'Neill v. State of Nebraska, Dept. of Roads, 118 N.W.2d 616 (1962), the court after approving the doctrine, pointed out on page 619: "It is of course true that involved was an entry into the realm of speculation, but it is one which is not condemned."
[26] Valley Stream Lawns, Inc. v. State of New York, 192 N.Y.S.2d 805, 808 (1959).
[27] 149 F.Supp. 749, 752 (E. Dist., N.Y., 1957).
[28] United States v. Certain Land in Baltimore County, Maryland, 209 F.Supp. 50 (D.C., Md., 1962).

probability of rezoning have not specifically mentioned the burden of proof, it is apparent that the burden has, in fact, been on the landowner.

PRELIMINARY DETERMINATION BY THE COURT

In Board of Commissioners of State Inst. v. Tallahassee Bank and Trust Co.[29] the court held that where the evidence conclusively showed that the zoning ordinance imposed unreasonable and discriminatory restrictions on the property, there is no factual question to be determined by the jury and the matter should be determined by the judge as a matter of law.[30] However, in most cases the evidence is not so conclusive that rezoning can be determined to be an accomplished fact by the court, but must be submitted to a jury for a determination of its effect on value, if any.

Ordinarily a preliminary determination should be made by the court as to whether there is sufficient evidence to submit the question to the jury. In State of New Jersey v. Gorga,[31] the court stated: "Whether there is evidence of such probability to warrant submitting the issue to the jury, is in the first instance a question for the court as in the case of any other issue of fact." This procedure has been generally followed.[32] In State Roads Comm. v. Warriner,[33] the court stated:

> If the evidence offered proved to be insufficient to establish a reasonable probability of rezoning within a reasonable time after the date of taking, it would, we think, have been entirely in order for the trial court to have instructed the jury as to the insufficiency of such evidence and to have stated that no element or enhancement of market value could be based upon the mere possibility that at some time in the future a re-classification might occur.

If the court is satisfied from the evidence that there is no reasonable probability that existing zoning restrictions may be changed within a reasonable time, it should exclude evidence based on use for any purpose other than those to which it is restricted.[34]

PRESUMPTION AS TO VALIDITY OF PRESENT ZONING

In Illinois it would appear that the condemnor enjoys at least one presumption on zoning questions. The Supreme Court of Illinois has consistently held that there is a presumption as to the validity of a zoning ordinance, and that the municipality exercised its zoning power with discretion.[35] It is a presumption which is overcome "where the evidence shows a destruction of property value in the application of the ordinance and an absence of any reasonable basis in public welfare requiring the restriction and the resulting loss."[36] However, the uniform decisions in other jurisdictions make it clear that it is unnecessary to overcome this presumption if sufficient evidence is presented that the probability of rezoning has increased its market value.

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[29] 108 So.2d 74 (Fla., 1959).

[30] It should be noted that this case involved the question of zoning for the benefit of the condemnor which is discussed infra, § 14.

[31] 138 A.2d 833, 835 (1958).

[32] Long Beach City High School Dist. v. Stewart, 185 P.2d 585 (Cal., 1947); City of Austin v. Cannizzo, 267 S.W.2d 808 (Tex., 1954); In re Armory Site in Kansas City, 282 S.W.2d 464 (Mo., 1955); State of Missouri ex rel. State Highway Comm. v. Williams, 289 S.W.2d 64 (1956); Swift & Company v. Housing Authority of Plant City, 106 So.2d 616 (Fla., 1958).

[33] 128 A.2d 248, 251 (Md., 1957).

[34] Henslee v. State of Texas, 375 S.W.2d 474 (1963).

[35] This presumption extends in favor of both zoning and rezoning ordinances. Kinney v. City of Joliet, 411 Ill. 289, 103 N.E.2d 473 (1952); Bohan v. Village of Riverside, 9 Ill.2d 561, 138 N.E.2d 487 (1956).

[36] Illinois National Bank & Trust Co. v. The County of Winnebago, 19 Ill.2d 487, 492, 167 N.E.2d 401 (1960).

EVIDENCE AS TO PROBABILITY OF REZONING

Since the courts have adopted the rule that evidence may be admitted where there is a reasonable probability of rezoning, the outcome will turn upon the kind of evidence presented. Consequently, it is important to consider the rulings of the courts on various types of evidence.

Sales Indicating Rezoning Value

The best evidence of probability of rezoning is the sale of properties in the area at prices which indicate that the market is influenced by that probability. On the other hand, failure to present evidence of such influence has been considered one of the factors indicating that there is no probability of rezoning.[37] Evidence that a number of properties situated similarly to defendant's property had sold recently for inflated prices for uses other than residential, has been considered one of the factors indicating that there is a probability of rezoning.[38] However, the low purchase price of the condemned property in a recent sale has been considered evidence of the improbability of a change.[39]

In State of New Jersey v. Gorga,[40] the court made the following observation:

> The specific question is whether market value as of the date of taking may be affected by the prospect of an amendment of the zoning ordinance. Analytically, the question is one of fact. Abstractly considered, it would not matter whether the zoning change is probable or remotely possible if the parties to the sale would in fact be influenced thereby in fixing the price. And if there were sales close to the critical date of other property within the area which it is claimed should be rezoned, presumably the prices paid would reflect the actual effect of the likelihood of a change. But that theoretical situation rarely exists, and since the opportunity for unbridled speculation is apparent, rules must be formulated consonant with the principle that the owner shall receive the fair market value of the land for any use for which it has a commercial value in the immediate present or in reasonable anticipation in the near future.

Change in Character of Neighborhood

The reasonable probability of a zoning change may be shown by proof that there have been general changes in the neighborhood;[41] that the property is adaptable for similar industrial uses of the type in the neighborhood and is isolated from established residential districts, schools and churches;[42] that there has been a marked expansion of the commercial area toward the property;[43] that the area has become an industrial development to some extent;[44] that the property is actually located in a commercial area;[45] that there is a commercial trend in the vicinity of the property.[46] However, merely presenting evidence that nearby there exist buildings other than those permitted by the zoning regulations is not sufficient to remove from the realm of speculation the possibility of a change;[47] the same is true where the character of the community

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[37] State of Arizona ex rel. Morrison v. McMinn, 355 P.2d 900 (1960).
[38] People ex rel. Department of Public Works v. Donovan, 369 P.2d 1 (Cal., 1962).
[39] City of Euclid v. Lakeshore Company, 133 N.E.2d 372 (Ohio, 1956).
[40] 138 A.2d 833, 834 (1958).
[41] People ex rel. Department of Public Works v. Donovan, 369 P.2d 1 (Cal., 1962).
[42] State of Washington v. Motor Freight Terminals, Inc., 357 P.2d 861 (1960).
[43] State Roads Commission of Maryland v. Warriner, 128 A.2d 248 (1957); see Snyder v. Commonwealth of Pennsylvania, 192 A.2d 650 (Pa., 1963).
[44] Hall v. City of West Des Moines, 62 N.W.2d 734 (Iowa, 1954).
[45] State of Missouri ex rel. State Highway Comm. v. Williams, 289 S.W.2d 64 (1956).
[46] Papovitch v. State of New York, 235 N.Y.S.2d 97 (1962).
[47] In re Armory Site in Kansas City, 282 S.W.2d 464 (Mo., 1955).

was generally rural, there had been considerable residential construction and there had been no changes to industrial zoning for over 20 years.[48] Probability of rezoning is not shown where neither industry nor business has been invading the residential area involved.[49] A New York court considered as sufficient the economic and industrial growth of the area, the fact that the land was adjacent to two aluminum plants and the fact that a portion of one side was bounded by property of a power company.[50]

Rezoning Activity

In Long Beach City High School Dist. v. Stewart,[51] the court stated:

> The zoning ordinance classifying the property as residential was enacted only three years before the condemnation proceedings were started, and it clearly appears that the ordinance is in line with the natural development in such area. Nor is there the slightest suggestion that the ordinance was enacted for the purpose of defeating appellant in his just claims for compensation or that it was not enacted in the utmost good faith.

Where zoning of nearby property for commercial purposes had been recently denied for the third time and surrounding property was zoned residential, the court stated that the jury was entitled to assume that there would be no change in the zoning.[52] However, where there was evidence that the city authorities had considered rezoning the area, but had rejected any changes, at least temporarily, it was held that the defendant was not required to show that such authorities were contemplating zoning changes.[53]

Shortly before condemnation proceedings were filed, the property owner was denied rezoning which would allow him to use the property for recreational purposes. The condemnor contended that its value for recreational purposes could not be considered since it was zoned residential. Overruling the condemnor's objection, the court held that it would seem hardly reasonable for the petitioner to condemn it for recreational purposes and at the same moment maintain that had the petitioner not deemed it wise to take it for recreational purposes, the city would refuse to rezone it so that its owner could use it for the same purposes.[54]

In upholding a jury verdict indicating no probability of rezoning, an Arizona court pointed out that no attempt whatever had been made to rezone the property.[55] Where an application to rezone had been made six months before the taking, had neither been approved nor rejected but had been deferred for further study, and such zoning would not be inconsistent with the use of surrounding areas, it was held that there was reasonable probability of rezoning.[56]

Testimony of a witness that "all petitions for rezoning that have been made in this area had been allowed by the planning board," has been held proper.[57]

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[48] Heintz v. State of New York, 226 N.Y.S.2d 540 (1962).

[49] Long Beach City High School Dist. v. Stewart, 185 P.2d 585 (Cal., 1947).

[50] Brubaker v. State of New York, 236 N.Y.S.2d 395 (1963).

[51] 185 P.2d 585, 589 (Cal., 1947).

[52] County of Los Angeles v. Faus, 304 P.2d 257 (Cal., 1956), reversed on other grounds, 312 P.2d 680 (Cal., 1957). Where the property owner's application for rezoning had been denied and there was no other adequate basis in the record, there was no reasonable probability of change. Skodnek Industries v. State of New York, 250 N.Y.S.2d 246 (1964).

[53] People ex rel. Department of Public Works v. Donovan, 369 P.2d 1 (Cal., 1962).

[54] Board of Park Comm'rs, of City of Wichita v. Fitch, 337 P.2d 1034 (Kan., 1959).

[55] State of Arizona ex rel. Morrison v. McMinn, 355 P.2d 900 (1960). The dissenting opinion in Snyder v. Commonwealth of Pennsylvania, 192 A.2d 650 (1963), noted that the property owner had not made application for a zoning change.

[56] In re Mackie's Petition, Mackie v. Eilender, 108 N.W.2d 755 (Mich., 1961). See also subsequent appeal of this case in 127 N.W.2d 890 (Mich., 1964).

[57] Barnes v. North Carolina State Highway Comm'n., 109 S.E.2d 219 (1959).

In 0.040 Acres of Land v. State of Delaware,[58] the defendants had the city clerk testify as to the history of all changes in the zoning ordinance in the general area of the property being condemned, indicating a general trend from residential to commercial use. Upon appeal the court held that the appraisers should have been permitted to consider the action of the city council with reference to past zoning applications.[59]

In Masten v. State of New York,[60] the court stated:

> The proof was that a number of business and commercial establishments existed in the neighborhood before the appropriation; that the highway traffic became increasingly heavy; that a large number of variances from the residential restrictions were granted before and after the appropriation and that, apparently, no applications therefor were denied. The State objected to the evidence as to variances and it is true that an occasional, isolated variance granted in the exercise of discretion would have little or no probative force; but here the effect is to evidence a condition and continuing trend that rendered early rezoning very nearly inevitable.

In Snyder v. Commonwealth of Pennsylvania,[61] the property owners' appraiser testified that property along both sides of the highway in adjacent municipalities had been zoned commercial and rapid commercial and institutional development was taking place; that in Churchill Borough, where the land being condemned was located, the only zoning change made prior to filing the condemnation suit was a rezoning for construction of a research and development plant; that there was a scarcity of land for commercial use in the area. With three justices dissenting, the Supreme Court of Pennsylvania held that this testimony was sufficient proof of a reasonable probability of rezoning.[62]

In Papovitch v. State of New York,[63] the land was zoned residential although adjacent areas were zoned for office building use and one abutting property had been granted a variance for the erection of a motel. Three months prior to the time the State acquired title to the property, the property owner made application to change the zoning to office building use and the planning board recommended the change. No further action was taken on the application because of the condemnation action. In addition, the land fronted on a main artery of travel in the county which lent itself and was, in fact, used for office buildings. The court held that there existed a strong probability that the zoning would have been changed in the immediate future to office building use.

In Heintz v. State of New York,[64] several members of the local planning boards in the area testified that at one time the planning board where the land was located considered changing the area to industrial, but such change depended upon the amount of acreage which would be devoted to a reservoir which was being planned for a power project in the area. No change was ever made by the planning board. Also, the authorities had recently refused to extend the industrial zoning of a chemical factory three miles away which had long been zoned industrial. There had been no changes to industrial zoning for over 20 years. Based upon this and other evidence the court concluded that there was only a remote possibility of a zoning change.[65]

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[58] 198 A.2d 7 (1964).
[59] Id. at 11.
[60] 206 N.Y.S.2d 672, 673 (1960).
[61] 192 A.2d 650 (1963)
[62] The court pointed out that "While there was no direct testimony that a zoning change was reasonably likely in the near future, there was sufficient evidence, including a view of the property and the surrounding area, from which the jury could so find." Id. at 652.
[63] 235 N.Y.S.2d 97 (1962).
[64] 226 N.Y.S.2d 540 (1962).
[65] Id. at 544.

In Rapid Transit Company v. United States,[66] an attempt to rezone from residential to commercial had failed[67] and no other efforts to obtain reclassification had been made. The court stated on page 466:

> However the landowner called several witnesses who were familiar with the policy and attitude of the Lawrence zoning commission each of whom expressed the opinion that an application to rezone to "C" (multiple dwellings) would be favorably considered and that the land had a higher potential for successful development as a site for two and four unit housing. This opinion evidence indicating a reasonable probability that a favorable rezoning classification could be obtained was not directly contradicted and was a proper and indeed necessary factor for the trier of the facts to consider in determining the value of the condemned land. McCandless v. United States, 298 U.S. 342, 56 S.Ct. 764, 80 L.Ed. 1205.

Must Be Proof That Rezoning Will Enhance Value

It has been pointed out that "zoning does not create value; it permits the realization of potential value."[68] Consequently, the rezoning of land will add nothing to its value if there is no demand for the higher use in the area, or if there is a large amount of available land in the area which is already zoned for the higher use.

Where the plaintiff failed to offer proof that a commercial use would be the highest and best use of the property or that the change would enhance its value, it was held that the question of reasonable probability of rezoning was properly withheld from the jury.[69] The court stated that the defendant must prove that his "property was adaptable for a use other than that for which it was zoned at the time of the 'taking', and which use it was or in all reasonable probability would have become available within the reasonable future."[70] Even though the property was zoned for heavy and light industrial use, it has been held that there was no substantial testimony that the property was suitable or in demand for heavy or light industry.[71] Where there was no proof of a demand for industrial property, industrial sites were available in neighboring towns and there was no industrial or commercial activity in the general vicinity of the land involved, it was held that there was no reasonable probability of rezoning.[72]

Zoning After the Date of Taking

In Illinois market value is determined as of the date of filing the petition to condemn,[73] and ordinarily evidence of matters which occur after such date is not admissible.[74] However, zoning after the date of taking has been considered in determining reasonable probability of rezoning. In State of New Jersey v. Gorga[75] the court stated:

> We agree with the Appellate Division that an amendment of the ordinance which came into being after the date of taking should not be excluded solely because of the time sequence. But such evidence should be carefully confined to its proper role. It may serve only to support the reasonableness of the

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[66] 295 F.2d 465 (C.A. 10th, 1961).

[67] Apparently commercial zoning was refused because of an informal but pre-existing agreement between officials of the City of Lawrence, Kan., and officials of the University of Kansas which was located near the subject property. Id. at 466.

[68] United States v. Certain Land in Baltimore County, Maryland, 209 F.Supp. 50, 54 (D.C., Md., 1962).

[69] Continental Development Corp. v. State of Texas, 337 S.W.2d 371 (1960).

[70] Id. at 374.

[71] Union Electric Co. of Missouri v. McNulty, 344 S.W.2d 37 (1961). Accord, United States v. 1,108 Acres of Land, 204 F.Supp. 737 (E. Dist., N.Y., 1962).

[72] Heintz v. State of New York, 226 N.Y.S.2d 540 (1962).

[73] City of Chicago v. Riley, 16 Ill.2d 257 (1959); Dept. of Public Works v. Bohne, 415 Ill. 253 (1953); Eckhoff v. Forest Preserve Dist., 377 Ill. 208 (1941).

[74] Edlin v. Security Insurance Co., 269 F.2d 159 (7th Cir., 1959).

[75] 138 A.2d 833, 835 (1958).

> factual claim that on the date of taking the parties to a voluntary sale would have recognized and been influenced by the probability of an amendment in the near future in fixing the selling price. The fact would still remain that on the date of taking the property was otherwise zoned, and the value as of that date must still be reached on the basis of facts as they then would have appeared to and been evaluated by the mythical buyer and seller.

The Gorga case has been generally followed in Masten v. State of New York[76] and United States v. 50.8 Acres of Land.[77]

A somewhat reverse situation exists where there was no zoning at the time of the taking and a restrictive zoning ordinance is passed after the time of taking. Under such conditions it has been held that the trial judge's charge that "You may take into consideration the fact that the Howard County Zoning Laws had not become operative at the time the property was taken, so that at that time it could have been utilized or sold for any purpose the owner decided to utilize or sell it," was correct.[78] However, in a similar situation the court indicated that it was erroneous for an expert witness to take into consideration zoning regulations adopted after the date of taking where there was no evidence that the land was suitable or in demand for industrial use.[79]

Consideration of a change in zoning after the date of taking has also been condemned.[80] In Williams v. City and County of Denver,[81] the court refused to consider a zoning change after the date of taking, pointing out that if the rezoning happened to devalue the property instead of raising it, then it obviously would be unjust to assess such diminution against the property owner; that fair compensation in condemnation cases does not include speculative values either lowering or raising the compensation to be paid. Apparently there was some evidence in the Williams case that the subsequent rezoning was brought about by the acquisition or improvement to be made by the condemnor. The decision was qualified somewhat by the following statement:[82]

> It may be that under some circumstances evidence of a probable change in zoning may be admitted where such change is unrelated to the acquisition of the subject property. However, where the change in zoning results from the taking of the subject property, as is the case here, it is not admissible under the authority we have previously cited herein.

The mere fact that the land is being taken for a power plant, does not establish reasonable probability of rezoning for an industrial use generally.[83]

Suppose land zoned for residential use is condemned for urban renewal purposes and is later rezoned to commercial and sold to private individuals for commercial development. Would this be a change in zoning which is not admissible because it resulted from the taking of the property? Would the result be any different if prior to the taking the urban renewal authority had adopted a re-use plan which designated it for commercial use?

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[76] 206 N.Y.S.2d 672 (1960).
[77] 149 F.Supp. 749 (E.D., N.Y., 1957), affirmed United States v. Meadow Brook Club, 259 F.2d 41 (C.A.2d, 1958), certiorari denied 358 U.S. 921, 79 S.Ct. 290, 3 L.Ed.2d 239 (1958).
[78] Reindollar v. Kaiser, 73 A.2d 493 (Md., 1950).
[79] Union Electric Co. of Missouri v. McNulty, 344 S.W.2d 37 (1961).
[80] Travis v. United States, 287 F.2d 916 (U.S. Ct. Cl., 1961); Williams v. City and County of Denver, 363 P.2d 171 (Colo., 1961).
[81] 363 P.2d 171 (Colo., 1961).
[82] Id. at 175.
[83] Union Electric Co. v. Saale, 377 S.W.2d 427 (Mo., 1964).

Desirability for Use Under Present Zoning

Evidence that the property is not desirable for the purpose for which it is zoned has been admitted as an important factor on the question of probability of rezoning.[84] The Supreme Court of Illinois has consistently held this to be one of the factors in determining whether the zoning classification is unconstitutional as to the property involved.[85]

Need for Change in Zoning Standards

In City of Euclid v. Lakeshore Co.,[86] the property owners claimed that the zoning ordinance was antiquated, that the neighborhood was experiencing rapid growth and that there was need for further retail development and multifamily units in the area. Rejecting this claim the court pointed out:[87]

> In all events a city is not required to lessen its zoning standards because of increased demands for home sites in the community and such demands cannot be the foundation for a claim that reasonable administration of the zoning laws would require a reduction of zoning classifications to make way for a greater concentration of population. Only where zoning restrictions fall into disuse can such claims be made.

Since there was no evidence that there was a reasonable probability of rezoning, the court refused to speculate as to the legislative policy of the municipal council. The court pointed out that the legislative policy of the State of Ohio was clearly fixed by Section 719.09 of the Revised Code of Ohio which contained the following provision: "In arriving at such assessment of compensation for such lot or parcel, any use or occupancy which is in violation of any statute or ordinance, be excluded from consideration in determining fair market value."[88] However, a subsequent Ohio opinion[89] distinguished the City of Euclid case on the ground that there was no evidence of reasonable probability of rezoning and held that the doctrine was applicable in Ohio.

Official Plan for Future Development

Zoning ordinances commonly provide that territory which is annexed to the municipality shall be automatically classified as residential.[90] This is to provide restrictions on the use of the annexed area until the zoning authority can consider its proper zoning classification. It is not necessarily intended to be a permanent zoning classification.

In State of Missouri ex rel. State Highway Comm. v. Williams,[91] the property was zoned residential at the time it was annexed to the city. Evidence was introduced that

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[84] State of Washington v. Motor Freight Terminals, Inc., 357 P.2d 861 (1960).

[85] Atkins v. County of Cook, 18 Ill.2d 287, 163 N.E.2d 826 (1960).

[86] 133 N.E.2d 372 (Ohio, 1956).

[87] Id. at 380.

[88] This statute goes much further than Section 9.5 of The Eminent Domain Act (Ill. Rev. Stat. ch. 47, § 9.5) which provides: "Evidence is admissible as to (1) any unsafe, unsanitary, substandard or other illegal condition, use or occupancy of the property; (2) the effect of such condition on income from the property; and (3) the reasonable cost of causing the property to be placed in a legal condition, use or occupancy. Such evidence is admissible notwithstanding the absence of any official action taken to require the correction or abatement of any such illegal condition, use or occupancy." It is clear that the Illinois statute applies only to existing illegal uses.

[89] In re Appropriation of Easement for Highway Purposes, 194 N.E.2d 582 (1963).

[90] Section III D of the Zoning Ordinance of the City of Decatur, Illinois (Ord. No. 3512) provides: "All territory which may hereafter be annexed to the City of Decatur shall be automatically classified in the R-1 Single-family District until otherwise changed by ordinance, after public hearing."

[91] 289 S.W.2d 64 (1956). See Sayers v. City of Mobile, 165 So.2d 371 (Ala., 1964).

the city plan commission had prepared a master plan for rezoning all annexed areas which designated the property as commercial, and that it was in a commercial area. The court held that there was substantial evidence that the zoning would soon be changed to commercial.

In Board of Park Comm'rs of City of Wichita v. Fitch,[92] the court stated: "It seems to have been established beyond dispute that when the land is taken into the city, it is automatically zoned for residential property use, and then is later subject to be rezoned in accordance with its best use, if that accords with the city's master plan." Holding that there was no reasonable probability of rezoning to industrial use, it was pointed out that a development plan had been submitted to the town authorities by consultants employed for that purpose; that most of the subject property was located in an area designated as residential in the development plan.[93]

Minutes of Zoning Body

In People v. Dunn,[94] the court admitted in evidence a certified copy of the minutes of the city council which summarized the discussion of the council prior to the rezoning of one parcel owned by the defendant. The defendant claimed that there was a reasonable probability of rezoning the remainder of his property. The court held that the minutes were admissible on this question since the reasons assigned by the council for rezoning the one parcel would be much more persuasive for rezoning the remainder of the defendant's property.

Buffer Zone

In State of Louisana v. McDuffie,[95] the condemnor claimed that a strip of land immediately to the rear of the filling station on the defendant's property, even though it was zoned commercial, should not be regarded as commercial for purposes of valuation, but rather that it should be regarded as a "buffer zone" between the developed commercial property and the residential property on the south. The Supreme Court agreed with the trial judge that the highest and best use of the property was for commercial purposes and as such it was worth considerably more than it would be as a "buffer zone."

In State of Arizona ex rel. Morrison v. McMinn,[96] the court stated:

> Although there was evidence that this property was not very desirable for residential purposes, this is not at all uncommon for properties on the fringe of a residential zone forming the buffer between industrial and residential zones. Such fringe devaluation has little weight in showing a possible zoning change, unless it is accompanied by a general invasion of the residential zone by nonconforming industrial uses.

Speculative and Hearsay Evidence

Although all evidence of the probability of rezoning is speculative in nature, the courts do require some kind of proof. A witness cannot be asked "would there be any difficulty," based upon his examination, in changing the zoning.[97] Where a witness testified that he assumed zoning changes would be made to accommodate a higher use of the land, the court held that such assumption is not enough and must be rejected as being speculative.[98] A California court accepted the testimony of an appraiser who

[92] 337 P.2d 1034, 1037 (Kan., 1959).
[93] Heintz v. State of New York, 226 N.Y.S.2d 540 (1962).
[94] 287 P.2d 161 (Cal., 1955).
[95] 123 So.2d 93 (1960).
[96] 355 P.2d 900 (1960).
[97] Redondo Beach School Dist. v. Flodine, 314 P.2d 581 (Cal., 1957).
[98] Hietpas v. State of Wisconsin, 130 N.W.2d 248, 252 (1964).

testified that "He had talked on two different occasions 'to the men' in the zoning department of the city, and from the conversation he had with them he formed the opinion that it was reasonable to assume that there would 'be rezoning'."[99] Where the proposed use would require obtaining a right of access it was held too uncertain.[100] It would seem that the jury is allowed to speculate, but it must be provided with some kind of evidence.

In People v. Gangi Corp.,[101] the defendant claimed that error was committed in permitting the condemnor's appraiser to testify that he considered only R-1 zoning because he had heard the city council state that they would not change the zoning. Holding that this was not error, the court stated:[102]

> An integral part of an expert's work is to obtain all possible information, data, detail and material which will aid him in arriving at an opinion. Much of the source material will be in and of itself inadmissible evidence but this fact does not preclude him from using it in arriving at an opinion. All of the factors he has gained are weighed and given the sanction of his experience in his expressing an opinion. It is proper for the expert when called as a witness to detail the facts upon which his conclusion or opinion is based and this is true even though his opinion is based entirely on knowledge gained from inadmissible sources.

Qualification of Witnesses

A witness who is an expert on real estate valuation generally, but not on zoning, is qualified to testify as to the reasonable probability of rezoning.[103] In 0.040 Acres of Land v. State of Delaware,[104] the court stated:

> The trial judge rejected in toto the testimony of defendant's appraisers on the basis that they were not endowed with the special qualifications which enable them to render an opinion on the reasonable probability of a change in a zoning ordinance. Consequently, the trial judge was of the opinion that a member of a zoning body was essential or at least a letter from the zoning body indicating the likelihood of a change in zoning ordinance in this area was required before any instruction to the commission would be justified.
>
> The mere fact that neither appraiser ever sat on a zoning board did not tend to disqualify either of them to testify as to the trends in the area, the best use of the land, and the bases on which each arrived at a decision on valuation.

IMPROPER TO VALUE AS IF REZONING IS ACCOMPLISHED

In State of New Jersey v. Gorga,[105] the court stated:

> The important caveat is that the true issue is not the value of the property for the use which would be permitted if the amendment were adopted. Zoning amendments are routinely made or granted. A purchaser in a voluntary transaction would rarely

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[99] People v. Hurd, 23 Cal.Rptr. 67, 70 (1962).
[100] Altman v. Hill, 129 A.2d 358 (Conn., 1957).
[101] 15 Cal.Rptr. 19 (1961).
[102] Id. at 25.
[103] Snyder v. Commonwealth of Pennsylvania, 192 A.2d 650 (1963).
[104] 198 A.2d 7, 11 (1964).
[105] 138 A.2d 833, 835 (1958).

> pay the price the property would be worth if the amendment were an accomplished fact. No matter how probable an amendment may seem, an element of uncertainty remains and has its impact upon the selling price. At most a buyer would pay a premium for that probability in addition to what the property is worth under the restrictions of the existing ordinance. In permitting proof of a probable amendment, the law merely seeks to recognize a fact, if it does exist. In short if the parties to a voluntary transaction would as of the date of taking give recognition to the probability of a zoning amendment in agreeing upon the value, the law will recognize the truth.
>
> Here defendants' testimony was confined to the value the property would have if it were rezoned. No testimony was directed to the target, what a willing buyer would pay a willing seller as of the date of taking for the property as then zoned, taking into account the probability, as it then appeared, of an amendment in the near future. In support of his opinion of the then market value, an expert may advert to the value the property would have if rezoned, but only by way of explaining his opinion of the existing market value.

This rule has been generally followed,[106] except in those cases where the zoning authorities have used zoning restrictions to hold down the cost of subsequent acquisition.[107]

In United States v. 50.8 Acres of Land,[108] the court stated: "To what extent the possibility or probability of a change would affect the value as of the date of taking is dependent upon the degree of probability, the imminence of the change, the effectiveness of the opposition, and other factors which are largely speculative and conjectural."

In Papovitch v. State of New York,[109] the court stated: "The correct measure of damage is to give to the residential value a premium based on the fact that a purchaser would pay more having the likelihood of a zoning change in mind." Even when the condemnor and the condemnee agreed that the probability of a zoning change to commercial was excellent, the court held that an element of uncertainty remained which had an impact upon the selling price.[110]

USE PERMITTED BY ZONING TOO REMOTE

It is generally understood that property which is not subject to zoning regulation cannot be valued for a use for which it is not suited. Likewise, there is no reason that property zoned for commercial use must be valued as commercial property if it is not suitable for commercial use. In other words, the zoning of the property is not a legal determination of its highest and best use. This has been recognized in a recent Iowa case.[111] The fact that the owner had not seen fit to use his property for some business development permissible under its zoning has been held to be evidence which can be considered on the issue of the most advantageous use, but it is not conclusive.[112]

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[106] State of Arizona ex rel. Morrison v. McMinn, 355 P.2d 900 (1960); United States v. 50.8 Acres of Land, 149 F.Supp. 749 (E. Dist., N.Y., 1957); Snyder v. Commonwealth of Pennsylvania, 192 A.2d 650 (1963).

[107] See § 14.

[108] 149 F.Supp. 749, 752 (E. Dist., N.Y., 1957).

[109] 235 N.Y.S.2d 97, 99 (1962).

[110] Albany Country Club v. State of New York, 235 N.Y.S.2d 684 (1962), affirmed in Albany Country Club v. State of New York, 241 N.Y.S.2d 604 (1963) although the court increased the front foot value.

[111] Kaperonis v. Iowa State Highway Comm., 99 N.W.2d 284 (1959).

[112] Utech v. City of Milwaukee, 101 N.W.2d 57 (Wis., 1960).

BENEFITS WHICH OFFSET DAMAGES

It has long been established in Illinois that where property not taken is damaged, the amount of damage can be offset by the amount of benefits which the property receives as a result of the improvement. [113] California has held that evidence of the reasonable probability of rezoning the property not taken, including the effect of the construction of the improvement upon rezoning, is proper in determining the amount of such benefits. [114]

NONCONFORMING USES

It appears that ordinance provisions as to elimination of and restrictions on nonconforming uses are admissible to the same extent as zoning restrictions.

Elimination Provisions

In City of La Mesa v. Tweed and Gambrell Planning Mill, [115] the defendants' predecessors in interest purchased the land in 1936, located along a railroad track in the city and built a planning mill on the easterly half thereof, which was zoned for industrial use. The westerly half was zoned R-2 (two-family residence). Four years later, after obtaining a variance permit, additional structures were erected on the westerly half, so that the planning mill covered the entire property.

In 1945, the city adopted Ordinance No. 265 which zoned the property R-1 (one-family residence) and permitted the continuance of nonconforming uses existing at the time of its passage, provided that any nonconforming building should not be "enlarged, extended, reconstructed or structurally altered" excepting alterations or replacements within any twelve month period not exceeding 25 percent of the building's assessed valuation; directing that if any nonconforming building should be damaged to the extent of more than 75 percent of the assessed value, the nonconforming use should terminate.

In 1955, the city adopted Ordinance No. 618 which zoned the property R-3 (multiple-family residence) and permitted the continuance of a nonconforming use; provided for an amortization plan for the termination of nonconforming uses; prohibited structural alterations to nonconforming buildings, except those provided by law, and excepting those destroyed to the extent of not more than 50 percent of their replacement value; expressly repealed Ordinance No. 265. Under the amortization plan nonconforming uses such as the defendants would terminate upon the expiration of twenty years from the date of construction, but, in no case, less than five years after notification by the City Council.

The master plan study which prompted the adoption of Ordinance No. 618 also resulted in a decision to extend a street, requiring the acquisition of a 40-ft strip of the defendants' land.

Approximately a year prior to the adoption of Ordinance No. 618 the city acquired all of the property in the block where defendants' property was located, and then started negotiations to acquire the 40-ft right-of-way from the defendants. Included in these negotiations was a proposal to reconstruct a part of defendants' planing mill on property which the city theretofore has acquired. Under this proposal it would have been necessary to zone the premises for an industrial use. Since an agreement was not reached, the city terminated negotiations on February 23, 1955, and on April 26, 1955, enacted Ordinance No. 618; and on June 30, 1955, filed the condemnation action; and on September 21, 1955, notified the defendants to terminate their nonconforming use within five years.

The buildings upon the property had an estimated remaining economic life of twenty-one years from the time of the adoption of Ordinance No. 618. Yet the city council ordered their termination within five years. The planning consultants employed by the city believed that the block in which the defendants' property was

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[113] Capital Building Co. v. City of Chicago, 399 Ill. 113 (1948).
[114] People v. Hurd, 23 Cal.Rptr. 67 (1962).
[115] 304 P.2d 803 (Cal., 1956).

situated eventually should be used as part of a civic center, but recommended that, for the time being, it should be zoned for professional business purposes, which would act as a buffer between the adjoining commercial and residential zones.

The trial court held that the amortization provisions of Ordinance No. 618 were unconstitutional. Upholding this ruling the District Court of Appeal stated on page 808:

> In order to effect its change of plans, which would permit only a residential use of defendants' land during the interim period awaiting the creation of a civic center, the city, by its ordinance, requires the defendants, within five years, to liquidate their investment which has an estimated remaining twenty-one years of economic life, although shortly before the adoption of that ordinance, the land in question was considered a proper subject for classification as an industrial site; was recommended by the planning consultants for inclusion within a professional zone; is bordered on the east by a railroad track; and surrounded on three sides by industrial and commerical businesses. This is unreasonable and arbitrary.

It should be noted that the court sustained a collateral attack on the zoning ordinance.[116] A portion of the ordinance was declared invalid in the condemnation proceeding, to the extent that it affected the value or damage to the defendants' property.

Restrictions on Nonconforming Buildings

In State of Minnesota v. Pahl,[117] the building on the property was 133 feet wide, 200 feet deep and was set back 37 feet from the existing right-of-way line of the highway—Figure 1. The petitioner condemned the front 72 feet of the property, which took 35 feet off of the front of the building. The portion of the building taken included its more important components such as the heating system, plumbing and water, lavatory, display room, offices and lunchroom. The balance of the building was used as a warehouse.

After the building was built the city adopted a zoning ordinance which placed it in an industrial zone and required a minimum setback of 60 feet from the street line. This ordinance made the building nonconforming as to the setback requirement, but it was conforming in that it was used for industrial purposes as required by the ordinance.

With respect to nonconforming uses the ordinance provided that the lawful use of any land or building existing at the time of its adoption may be continued although such use does not conform with the regulations for such district, provided that no such nonconforming use be altered or extended to occupy a greater area of land than that occupied by such use at the time of its adoption; that if such nonconforming use ceases for a period of one year, any subsequent use shall be in conformity to the regulations of the ordinance; that no such nonconforming use, if once changed to a use permitted in the district, shall be changed back to a nonconforming use; that if a nonconforming structure is substantially destroyed, then the land on which it is located shall thereafter be subject to all regulations of the ordinance. The ordinance further provided for procedure by which application may be made for special-use permits and exceptions to the ordinance if they involve minor variations and in certain cases involving unnecessary hardship.[118]

The condemnor based its valuation on the theory that the defendants would only be required to reestablish their building 37 feet back from the new right-of-way line, which would result in the destruction of the front 72 feet. The trial court held that the taking resulted in a "substantial destruction" of the building and that, according to

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[116] See § 13.

[117] 95 N.W.2d 85 (1959).

[118] Such provisions as to nonconforming uses are typical of most zoning ordinances. See Section XXII of the Zoning Ordinance of the City of Decatur, Illinois (Ord. No. 3512).

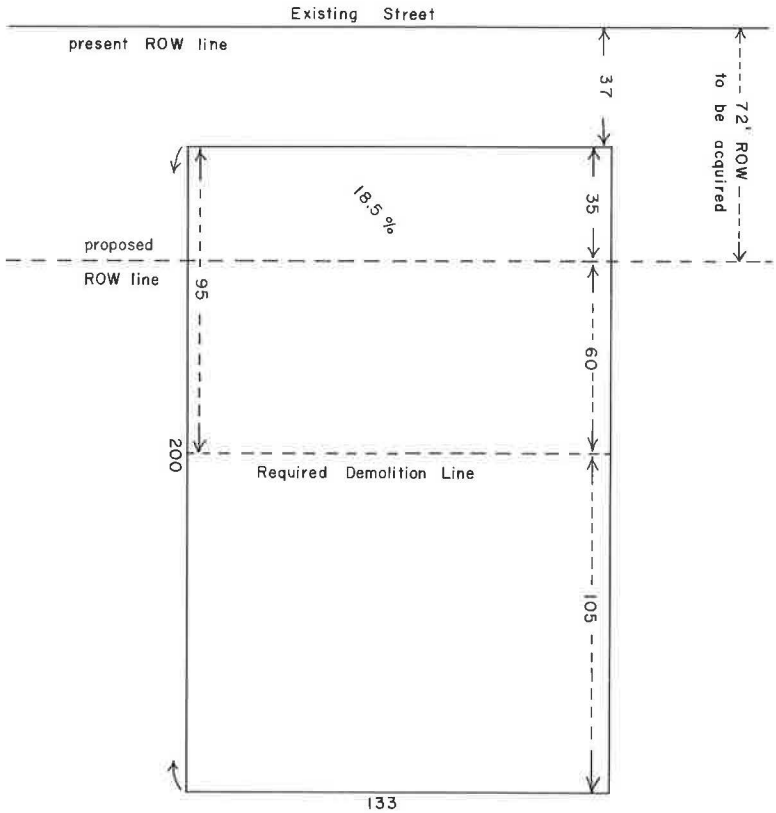

Figure 1. State of Minnesota v. Pahl, 95 N.W.2d 85 (1959)—front yard requirement 60 ft.

the terms of the ordinance, the building, if it were to remain, had to comply with the 60-ft setback provision. In other words, the taking would ultimately result in the destruction of the front 95 feet of the building.

Affirming the order denying a new trial, the court resolved the four basic issues of the case as follows:

1. Even though only 18.5 percent of the total area of the building was actually taken and even though the portion of the building remaining was worth more than the part taken, the court held that there was substantial destruction within the meaning of the ordinance. The nature and character of the portion taken was considered more important than percentage of area or value.

2. The court denied the condemnor's claim that the defendants would be entitled to build the same distance from the new right-of-way line as their building was from the old right-of-way line and that condemnation, even though it caused a substantial destruction of the building, could not deprive the defendants of that right. The condemnor claimed that Connor v. Township of Chanhassen,[119] was controlling on this question. The court distinguished that case in the following manner:

> In that proceeding the owner of a certain property, part of which had been condemned by the state to widen a highway, sought a declaratory judgment declaring a zoning ordinance for the township

[119] 81 N.W.2d 789 (Minn., 1957).

of Chanhassen unconstitutional. The owners of the property maintained a general repair shop on the premises. A zoning ordinance was passed in March 1952, and according to its terms the owners' shop constituted a nonconforming use of the land. However, any lawful use of the land at the time the ordinance was adopted could be continued, even though it was a nonconforming use, as long as it was not extended to occupy a greater area of land, was not moved to another part of the land, or was not rebuilt after being 50 percent or more destroyed. The tract of land involved amounted to one acre. The condemnation proceeding covered the front one-fourth of the tract on which was situated the building where the owners operated their business. After the taking, the building in which the nonconforming use was conducted was rebuilt on a portion of the balance of the tract. This was contrary to the provisions of the ordinance which prohibited any nonconforming use to "be moved to any other part of the parcel of land upon which the same was conducted at the time of the adoption of this plan." Under the record in that proceeding there was nothing to warrant the assumption that the price paid for condemnation also included the compensation to the plaintiffs (owners) for the loss of the right to continue their business. In fact the state is not required to pay the owner for damages from interruption of business and good will. Connor v. Township of Chanhassen, supra, and cases cited therein.

We held, under those circumstances, where the owner could not be compensated for the loss of his business, that if the condemnation by the state gave effect to the prohibition of the ordinance so as to deprive the owners of the right to continue the operation of such business on the remaining portion of the tract, such an interpretation would constitute an unreasonable police regulation restricting the right of use of plaintiffs' property for business purposes contrary to the provisions of the constitution.

We do not consider that case controlling here because that case involved an element of damages in the loss of a right to continue a business for which the owner could not be compensated, whereas in the instant case compensation can be given under eminent domain. We accordingly hold that under the circumstances here a partial taking under condemnation by the state does give effect to the provisions of a zoning ordinance requiring compliance with the setback provisions when there is a "substantial destruction" of the building which is subject to the ordinance.

3. The court held that where the defendants are required to remove 60 feet of their building, in addition to 35 feet which is actually acquired, in order to comply with the set back requirements, the damage for removal of this 60 feet is compensable. The court cited the Illinois case of West Chicago Masonic Ass'n v. City of Chicago,[120] as authority that evidence of ordinance restrictions on rebuilding may be considered.

4. The court held that the defendants did not have a duty to apply for a variance permit to allow them to maintain the remainder of their building less than 60 feet from the new right-of-way line. While recognizing that the doctrine of "avoidable consequences" is applicable to the owner in a condemnation proceeding,[121] the court held

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[120] 215 Ill. 278 (1905). The condemnor took 35 feet from the front of the building. Evidence was introduced that the walls were not as heavy as required by the city building ordinance and that in case of reconstruction the walls would have to be heavily reinforced to comply with the ordinance. In computing the value of the remaining structure and the cost of reconstruction it was held error not to instruct the jury that if the remainder of the building was susceptible of reconstruction it would have to be re-constructed subject to the ordinance of the City of Chicago regarding the erection of buildings.

[121] The court cited Kelly v. Chicago Park Dist., 409 Ill. 91, 98 (1951) where the court stated that the principle of "avoidable consequences": ". . . finds its application in virtually every type of case in which the recovery of a money judgment or award is authorized."

that it was reasonable for the defendants to conclude that a permit would not be granted because the variance of some 23 feet could not reasonably be considered minor; there was no undue hardship indicated because compliance with the setback provision only required the destruction of a portion of the building used for warehouse purposes which only involved bare walls and floor; and further, the village council had indicated by resolution that the setback provision would be enforced.

Relocation of Nonconforming Uses

Where the condemnor took the portion of a tract on which nonconforming advertising signs were located, it was held that the signs could not be relocated in a similar manner on another part of the tract which was not taken.[122] However, it has been held that where nonconforming commercial buildings are located on the part taken, there is no abandonment of the nonconforming use so as to prohibit the owner from rebuilding and continuing the nonconforming use on the portion of the tract not taken.[123]

Permit to Extend Period of Nonconforming Use

Where a nonconforming building was being used under a city permit which expired after a twenty-one year period, the court held that in determining value it was proper to consider testimony that the city might grant a ten year extension.[124]

COMPARABLE SALES WHERE ZONING IS DIFFERENT

The Supreme Court of Illinois has held that the trial court did not abuse its discretion in permitting evidence of the sale of properties zoned differently than the property being condemned where the property and the conditions of the sale met the usual qualifications.[125] However, the same court held that it was error to permit cross-examination of a witness as to the value of other property where there was no foundation proof of its similarity and where the zoning was not the same.[126]

In Maryland it was held that the sale of two properties were comparable even though they were zoned residential while the condemned property was zoned commercial. The court pointed out that after their sale, but a year before the trial, they were rezoned to commercial and that the probability of rezoning may be taken into consideration.[127]

COLLATERAL ATTACK ON ZONING ORDINANCE

In Robinson v. Commonwealth,[128] the owner contended that the zoning ordinance was invalid as applied to the land being taken and attempted to prove that if freed from

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[122] City of New York v. Seel, 190 N.Y.S.2d 865 (1959), reversing 177 N.Y.S.2d 56 (1958). Two of the five justices dissented on the ground that the relocation on the same property for which the permits were originally issued was not an erection or structural alteration in violation of the zoning resolution. The signs were originally located prior to the passage of a zoning resolution which prohibited advertising signs within 200 feet of an arterial highway.

[123] 440 East 102nd Street Corp. v. Murdock, 34 N.E.2d 329 (N.Y., 1941); Connor v. Township of Chanhassen, 81 N.W.2d 789 (Minn., 1957).

[124] Gottfried v. State of New York, 218 N.Y.S.2d 286 (1961).

[125] City of Evanston v. Piotrowicz, 20 Ill.2d 512 (1960) (Other sales were for cash, were within two blocks of the subject property, were reasonably similar in size, and were sold within one to three years of the proceeding); Forest Preserve Dist. v. Kercher, 394 Ill. 11 (1946) (Other land was similar in locality and in the lay of the land. The court held that while dissimilarities did exist there was a reasonable basis for comparison.); City of Chicago v. Vaccarro, 408 Ill. 587 (1951) (Reasonable basis for comparison did exist.).

[126] Forest Preserve Dist. v. Chilvers, 344 Ill. 573 (1931) (The other property was zoned for apartments and was improved with an apartment building, while the property being condemned was zoned for single family residences and was improved with a structure used by the owners as a dwelling and boat house.).

[127] Bergeman v. State Roads Comm. of Maryland, 146 A.2d 48 (1958).

[128] 141 N.E.2d 727 (Mass., 1957).

its residential classification, it would have substantial value and that otherwise it was worthless. The trial court excluded such evidence and upon appeal the ruling was affirmed. The court held that the owner had ample opportunity to attack directly the ordinance if he had desired to do so; that he could not attack it at the condemnation trial. Earlier New York cases held to the same effect.[129] In other words, there can be no collateral attack upon a zoning ordinance in a condemnation proceeding. However, it has been held that permitting evidence of probability of rezoning does not constitute a collateral attack.[130]

Further inroads upon the prohibition against collateral attack have been made in Florida. In Board of Comm'rs of State Institutions v. Tallahassee Bank and Trust Co.[131] the defendants in a condemnation proceeding attempted by their answers to attack the validity of the zoning ordinance of the city of Tallahassee. The trial court held that it constituted an improper collateral attack and on appeal that ruling was approved. However, in a pretrial conference the trial court held that since the city was a party to the action, and since the other interested parties were before the court, the validity of the ordinance and its proper application should be determined as an incident to the condemnation proceedings. The defendants were than allowed to file cross-claims for declaratory relief in law adjudicating the validity and application of the ordinance, and the condemnor and the city were ordered to answer the cross-claims. The condemnor sought certiorari to review the order of the trial court denying its motions to strike and dismiss the cross-claims. The court denied certiorari on the ground that it was a procedure which would indirectly permit a collateral attack and pointed out that if evidence of reasonable probability of rezoning is presented to the jury there will be no necessity of determining the validity of the ordinance.

The case was subsequently tried before a jury and the condemnor appealed from the final judgment.[132] The opinion on the second appeal clearly indicated that the prohibition of collateral attack had some exceptions. The condemnor claimed "That the filing of a condemnation suit ipso facto exclusively precludes any attack by a landowner upon the validity of zoning regulations."[133] The court observed on page 81 of the opinion: "It appears to us that it would be totally unjustifiable to hold that the condemning authority could rely on the restrictive provisions of a zoning ordinance to depress land values and in the same litigation deny to the property owner an opportunity to defend himself and his property against the asserted ordinance on the ground of its alleged invalidity." The condemnor's argument that municipal ordinances cannot be subjected to collateral attack was more directly answered on page 82 of the opinion:

> In the first place in the instant case any assault on the validity of the ordinance as such was a direct assault so far as the City of Tallahassee was concerned. This is so for the simple reason that the City of Tallahassee was already a party to this cause and was named a co-defendant and was accorded a full opportunity to defend its ordinance against the assault. Moreover the position of the appellee property owners simply is that they were not leveling a general attack on the validity of the ordinance. They merely questioned, as they had a right to do, the application of the restrictions of the ordinance to the particular property here involved as a limitation on evidence as to value. Incidentally the City of Tallahassee as such is not a party to this appeal.

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[129] MacEwen v. City of New Rochelle, 267 N.Y.S. 36 (1933); Westchester County v. MacEwen, 260 N.Y.S. 875 (1932).

[130] State of Washington v. Motor Freight Terminals, Inc., 357 P.2d 861 (1960).

[131] 100 So.2d 67 (Fla., 1958).

[132] Board of Commr's. of State Institutions v. Tallahassee Bank & Trust Co., 108 So.2d 74 (Fla., 1959).

[133] Id. at 81.

Another form of collateral attack upon a zoning ordinance occurs where the court refuses to enforce the ordinance provisions for elimination of nonconforming uses.[134]

Where the zoning ordinance was not enacted in accordance with the provisions of the enabling statute, it was held that it could be collaterally attacked by the defendant in a condemnation suit on the ground that it is void.[135]

ZONING FOR THE BENEFIT OF THE CONDEMNOR

A more extreme situation exists where a zoning regulation is adopted or rezoning denied by the condemnor (or another cooperating public body) for the purpose of decreasing land value or preventing its utilization in order to lower acquisition costs in eminent domain proceedings. Such action has been condemned in numerous cases.[136] The courts have considered this situation extreme because it contains positive elements of confiscation and denial of basic constitutional rights.

In Board of Comm'rs of State Institutions v. Tallahassee Bank and Trust Co.,[137] the condemnor appealed on the ground that the trial court ignored the zoning restrictions on the property. The State of Florida had employed a city planner to advise it on the development of a Capitol Center. Simultaneously, the same city planner was employed by the City of Tallahassee to advise it on a comprehensive zoning plan. He made his report to both the city and the state and they shared in paying the expense. The report stated that unless measures were taken to prevent it, private property would be utilized for business purposes within the Capitol Center area; that unless restrained it would seriously increase the cost of acquisition when, and if, the state used its power of eminent domain; that zoning regulations should prohibit the construction of business and commercial buildings in order to avoid this increased cost of acquisition. Zoning regulations were adopted by the city which prohibited commercial buildings and the public records of both the state and the city clearly indicated that zoning was employed to restrict private development of the Capitol Center area. The condemnor claimed that the courts may not determine the motives of the legislative body which passed the ordinance. The court answered this claim in the following manner:[138]

> There is abounding evidence of excessively exuberant civic enthusiasm. However, we are not inclined to commend an arbitrary exercise of the police power by one branch of government in order to pave the way for a less expensive exercise of the power of eminent domain by another branch to the detriment of the private property owner. Even when adorned with a mantle of civic improvement we cannot conceive of a policy of government afflicted with greater potentials for abuse of the private citizen. The only difficulty with the desires of all of the officials as well as the effort which they put forth to effectuate their wishes, simply was that out of their ambition to construct an attractive Captiol Center that would be a

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[134] City of La Mesa v. Tweed & Gambrell Planning Mill, 304 P.2d 803 (Cal., 1956), discussed in § 11 (a).

[135] Bowling Green-Warren County Airport Bd. v. Long, 364 S.W.2d 167 (Ky., 1962). In order to minimize the damages to the defendant's land, the condemnor offered in evidence a zoning ordinance to show that the land in the immediate vicinity of the proposed runway was already subject to restrictions. The Court heard evidence in chambers that notice of the public hearing on the proposed adoption of the zoning ordinance was not published as required by statute.

[136] Robertson v. City of Salem, 191 F.Supp. 604 (Dist. Ct. Oreg., 1961); Grand Trunk Western R. R. Co. v. City of Detroit, 40 N.W.2d 195 (Mich., 1949); Long v. City of Highland Park, 45 N.W.2d 10 (Mich., 1950); Robyns v. City of Dearborn, 67 N.W.2d 718 (Mich., 1954); State ex rel. Tingley v. Gurda, 243 N.W. 317 (Wis., 1932); Kissinger v. City of Los Angeles, 327 P.2d 10 (Cal., 1958); Henle v. City of Euclid, 125 N.E.2d 355 (Ohio, 1954); In re Gibson, 28 Ont.L.R., 11 D.L.R. 529 (1913); Board of Comm'rs. of State Institutions v. Tallahassee Bank and Trust Co., 108 So.2d 74 (Fla., 1959).

[137] 108 So.2d 74 (Fla., 1959).

[138] Id. at 85.

> credit to all of Florida they imposed upon certain private property owners in the involved area the burden of suffering what amounted to an arbitrary and unreasonable restraint on the use of their property.

In Robertson v. City of Salem,[139] the city zoned an area of land so as to prohibit commercial development although it was located within a predominately commercial area. The evidence indicated that it was zoned at the request of the State of Oregon so as to hold down the cost of acquiring land for state office buildings. The property owner filed a declaratory judgment action against the city to determine the validity of the ordinance. Holding the zoning ordinance void as to the property owner, the court stated:[140]

> Paraphrasing the language of Kissinger, this Court is of the opinion that Ordinance No. 4578 is arbitrary and discriminatory and that it is, in effect, an attempt on the part of Salem to use its police power to take Robertson's property without due process of law and without payment of just compensation for the taking, and therefore violative of the guarantees of the Constitutions of the United States and the State of Oregon, and, hence, void as to Robertson.

In Kissinger v. City of Los Angeles,[141] the property owner had started building apartment buildings on his property when he was advised that a portion of the property would be condemned for airport purposes. At the same time the city rezoned his property from R-3 to R-1 by an ordinance which specifically stated that it was to avoid undue density of population in the airport area. Pointing out that other properties in the area were not rezoned from R-3 to R-1, the court held that the obvious purpose of the ordinance was to prevent the improvement of the property so that it could be acquired for a lesser price; that such action was a taking of property without compensation and without due process of law.[142]

NECESSITY OF DETERMINATION BY JURY

Ordinarily, the question of reasonable probability of rezoning should be submitted to a jury. However, there are factual situations where it has been held that as a matter of law the court can hold that the existing zoning is void as to the property involved. It is virtually the same question as whether a collateral attack on a zoning ordinance will be permitted in a condemnation proceeding.[143]

In Board of Comm'rs of State Institutions v. Tallahassee Bank and Trust Co.,[144] the condemnor claimed that the question of whether the zoning ordinance was unreasonably restrictive should be submitted to the jury, and cited cases involving reasonable probability of rezoning. Holding that the facts of the case[145] took it out of the reasonable probability category, the court stated on page 83:

> The record in the instant case reflected almost conclusively and certainly beyond dispute that the existing zoning ordinance imposed unreasonable and discriminatory restrictions on the use of the particular property involved. Indulging the established presumption that public officials will do their duty, we

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[139] 191 F.Supp. 604 (Dist. Ct. Ore., 1961).
[140] Id. at 612.
[141] 327 P.2d 10 (Cal., 1958).
[142] Cf. State ex rel. Tingley v. Gurda, 243 N.W. 317 (Wis., 1932).
[143] See § 13.
[144] 108 So.2d 74 (Fla., 1959).
[145] See § 14.

> think that this record beyond all doubt would have sustained a judicial conclusion as a matter of law that the municipal officials would within the foreseeable future adjust the requirements of the ordinance so as to liberalize the uses to which the property might be put. We think under such circumstances the so-called reasonable probability of a change in the ordinance ceases to be a factual conclusion alone for jury determination. Like any other conclusion it becomes one of law for determination by the judge if the factual aspects of the matter are so clear and indisputable that only one legal conclusion can be reached.

The validity of a zoning ordinance provision eliminating nonconforming uses has been determined by the court as a matter of law in a condemnation case.[146] If the validity of a zoning regulation can be determined in a condemnation action, it seems clear that it should be determined by the court as a matter of law. Although this question has not been raised in an Illinois condemnation case, the validity of a zoning regulation as applied to a particular property has always been determined by the court as a matter of law.[147]

JURY INSTRUCTIONS ON ZONING

The following jury instructions on zoning in eminent domain cases have been approved:

> You are instructed that the term "market value" is the price which the property would bring when it is offered for sale by one who desires, but is not obliged to sell, and is bought by one who is under no necessity of buying it, taking into consideration all of the uses to which it is reasonably adaptable and for which it either is or in all reasonable probability will become available within the reasonable future.[148] Compensation awarded when land is taken by eminent domain is the market value of the land for any use to which it is adapted and for which it is available. If, therefore, the land is not presently available for a particular use by reason of a zoning ordinance or other restrictions imposed by law, but if you find from the evidence that there was a reasonable probability of a change in the near future in the zoning ordinance, or other restrictions, then the effect of such probability on the minds of purchasers generally should be taken into consideration in fixing the present market value of it.[149]
>
> The jury was advised if it found that the best adaptable use to which the land could have been put at the time of the condemnation was a use other than that for which it was zoned at the time and that there was a reasonable probability on September 4, 1959,

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[146] City of La Mesa v. Tweed & Gambrell Planning Mill, 304 P.2d 803 (Cal., 1956), discussed in § 11 (a).

[147] Usually through a declaratory judgment action (See American National Bank & Trust Co. v. County of Cook, 27 Ill.2d 468 (1963)), a suit in equity to set it aside as a cloud on the title and to enjoin its enforcement (See LaSalle National Bank v. City of Chicago, 27 Ill.2d 278 (1963)), or a mandamus to compel the issuance of a building permit coupled with an injunction to enjoin interference (See People ex rel. Chicago Title & Trust Co. v. Village of Elmwood Park, 27 Ill.2d 177 (1963)).

[148] City of Austin v. Cannizzo, 267 S.W.2d 808 (Tex., 1954). This instruction was also approved in a case where there was no evidence of a probable change in zoning but a city permit was required. State of Texas v. Albright, 337 S.W.2d 509 (1960).

[149] State of Arizona ex rel. Morrison v. McMinn, 355 P.2d 900 (1960). A similar charge was given, without appellate determination of its correctness in Board of Education of Claymont Special School Dist. v. 13 Acres of Land, 131 A.2d 180 (Dela., 1957).

of its being later rezoned to permit such use, then it might consider such fact in determining fair market value of the property insofar as that use tended to affect the immediate value of the property.[150]

In arriving at your verdict as to the fair market value of the property you may take into consideration the reasonable probability of a change of the zoning ordinance in the near future and the influence that that circumstance might have on the value of the land.[151] If you should find from the evidence introduced that there is a reasonable probability of a change in the existing zoning restrictions which now restricts the use of any of the property here being condemned, you may consider the effect of such probability of a change in the zoning restrictions on the minds of purchasers generally in fixing the market value of the property.[152]

The enactment of a zoning ordinance which is adopted by a city in good faith and which actually does affect the market value of real property is competent evidence in behalf of the city in a subsequent suit for condemnation of the property for public use. The city is not estopped from proving the actual market value of the property merely because its enforcement of police regulations may have affected the value of the property.[153]

You may take into consideration the fact that the Howard County Zoning Laws had not become operative at the time the property was taken, so that at that time it could have been utilized or sold for any purpose the owner decided to utilize or sell it.[154]

At the same time, Gentlemen, I charge you that while you may, in determining the value of the property condemned, consider all uses to which it might reasonably be put, the mere possibility, if you should find from the evidence that such existed, that it might in the future have been put to some use not permitted under the applicable zoning ordinance affecting the property at the time of the taking, that is on June 8, 1961, is not enough to authorize you to consider the effect of such a possibility in determining the value of the land.

If, however, there is a possibility or a probability that the zoning restrictions may in the future be repealed or amended so as to permit the use in question, such likelihood may be considered if the prospect of such repeal or amendment is sufficiently likely as to have an appreciable influence on the present market value. Such possible change in zoning regulations must not be remote or speculative.

I charge you further that in such an event the property must not be evaluated as though the rezoning were already an accomplished fact, but it must be evaluated by the existing zoning regulations and consideration given to the impact upon the market value in the event of a change in the zoning regulations. The question of the existence of a reasonable possibility or probability of a change in zoning regulations is a question of fact and it is for your sole determination.[155]

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[150] Vic Regnier Builders, Inc. v. Linwood School Dist. No. 1, 369 P.2d 316 (Kan., 1962).

[151] Barnes v. North Carolina State Highway Comm., 109 S.E.2d 219 (1959), (although this instruction was not specifically discussed, the court approved the admission of evidence as to reasonable probability of rezoning and held that there was no error.).

[152] City of Menlo Park v. Artino, 311 P.2d 135 (Cal., 1957).

[153] City of Menlo Park v. Artino, 311 P.2d 135 (Cal., 1957), (The court also gave an instruction as to reasonable probability of rezoning, see note 118.).

[154] Reindollar v. Kaiser, 73 A.2d 493 (Md., 1950), See § 8 (e).

[155] Civils v. Fulton County, 134 S.E.2d 453 (Ga., 1963).

The following instructions were not approved:

> You are instructed that in determining the highest and best use of defendants' property that you are not limited by the use presently being made of the property, nor by the particular zoning presently on the property, but you should consider the uses for which the land is adapted and for which it is available and the reasonable probability that the zoning will be changed for the use to which said land is adapted and available.[156] You are instructed that in determining the highest and best use of defendants' property that you are not limited by the use presently being made of the property, nor by the particular zoning presently on the property, but you should consider the uses for which the land is adapted and for which it is available and the reasonable probability that the zoning will be changed for the use to which said land is adapted and available.[157]
>
> In determining the market value of the property taken, you are not limited to a consideration of the use to which the owner was putting the land, but you should take into consideration all the uses to which the property was adapted and for which it was available, including the highest possible use to which it could reasonably be put. . . . Only R-1 is involved here. . . as a matter of law, in this case the Court instructs the jury that at all times referred to in the evidence in this case the only lawful use that could be made of this property was for single family residence.[158]

It was held that the trial court properly refused an instruction which stated that, in determining the reasonable market value of the property, the jury should consider the zoning ordinances of the city and "You shall not take into consideration the future possibility of a change in said zoning ordinance."[159]

As to benefits which offset damages,[160] it was held that the following instruction was properly refused by the trial court:[161] "Prospective enhancement in value of the remaining property or any part thereof, if any there be, which can occur, if at all, only after a change of zone or a zone variance is not a proper basis for a finding of special benefits and should therefore be entirely disregarded by you."

In the same case, the following instructions were given at the request of the property owners and were quoted by the court without specific approval or disapproval:[162]

> No change of zone or zone variance will result only from the mere construction of the improvement herein.
>
> The property involved herein is zoned R1 pursuant to the zoning ordinances of the City of Los Angeles. No part of the remaining property can be legally used for multiple residential or commercial purposes except after a zone change or a zone variance.

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[156] People v. Gangi Corp., 15 Cal.Rptr. 19 (1961), (failed to define how far distant in the future, failed to name the hypothetical new zone, duplicated other given instructions, and there was insufficient evidence that the governing body would change the zoning).

[157] People ex rel. Dept. of Public Works v. Donovan, 369 P.2d 1 (Cal., 1962), (failed to set an express time limit on the probability of a zoning change and contained the possible implication that the court had concluded as a matter of law that there was a reasonable probability of a zoning change).

[158] People ex rel. Dept. of Public Works v. Donovan, 369 P.2d 1 (Cal., 1962), (did not recognize reasonable probability of rezoning).

[159] State of Missouri ex rel. State Highway Comm., 289 S.W.2d 64 (1956).

[160] See § 10.1.

[161] People v. Hurd, 23 Cal.Rptr. 67, 72 (1962).

[162] Id at 72.

CONDITIONS ATTACHED TO REZONING OR A VARIANCE

In Rand v. City of New York, [163] the property owner sought a declaratory judgment to have a city law declared unconstitutional in its application to her property. [164] The Board of Estimate adopted a map laying out the confines of a proposed street which encompassed more than 80 percent of the plaintiff's property. The plaintiff applied for a building permit to erect a garage and her application was denied on the ground that the erection of a garage in the bed of a mapped street is forbidden by city law. Thereafter, plaintiff requested a variance and after a hearing it was granted on condition "that in the event of condemnation the cost shall be amortized over a term of ten years at the rate of ten percent per year starting from the completion of the building." The uncontroverted evidence was that the building would have a minimum useful life of 50 years. Granting the plaintiff's motion for a summary judgment, the court stated on pages 755-756: "If the defendants have so restricted plaintiff's use of her property that it cannot be used for any reasonable purpose for an indefinite period of time, then they have acted beyond the bounds of permissive regulation and their action constitutes a taking of the property. Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 232, 15 N.E.2d 587, 117 A.L.R. 1110."

However, in In re Rosedale Avenue, City of New York, [165] the property owners asked that their property be rezoned from residential and restricted retail use to a retail use and signed an agreement waiving any enhancement of damages by reason of the use change should the property be taken within ten years for a proposed street widening. They further agreed that in event of such taking their claim would be limited to the value of the property as residentially zoned and that the agreement would constitute a covenant running with the land. Noting that the rezoning was granted without imposing a condition for making the change, it was held that the agreement was binding.

CONCLUSION

The doctrine of reasonable probability of rezoning has been adopted in all United States jurisdictions where it has been asserted and will probably be adopted in the remaining United States jurisdictions. Since probability of rezoning is a factor in determining market value, the condemnor should accept it and concentrate its efforts upon the discovery and evaluation of the evidence which is admissible in event of trial. The condemnor must also recognize that the courts are beginning to take a liberal approach upon such condemnation-zoning questions as the effect of condemnation upon restrictions on nonconforming uses, collateral attack upon a zoning ordinance, and zoning for the benefit of the condemnor.

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[163] 155 N.Y.S.2d 753 (1956).
[164] See also Vangellow v. City of Rochester, 71 N.Y.S.2d 672 (1947).
[165] 243 N.Y.S.2d 814 (1963).