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Final Report

Valuation in Eminent Domain as Affected by Zoning

A report submitted under ongoing NCHRP Project 20-6, "Right-of-Way and Legal Problems Arising Out of Highway Programs," for which the Highway Research Board is the agency conducting the research. The report was prepared by John C. Vance, HRB Counsel for Legal Research, principal investigator, serving under the Special Projects Area of the Board

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of special problems involving right-of-way acquisition and control as well as highway law in general. The value of real property must be determined in all right-of-way condemnation cases. The effect of zoning may be of utmost importance in the determination of such value. Problems arise when there is reasonable probability that in the near future the land in question will be rezoned. The report considers the various factors that have been recognized as being of evidentiary value in determining whether reasonable probability of rezoning exists, and under what circumstances evidence of such probability may be excluded.

A careful review of the research reported herein should help highway officials to better understand the many ramifications relating to the effect of zoning on the valuation of real property. Recognition of the legal questions described should help highway officials in the administration of their right-of-way acquisition program.

RESEARCH FINDINGS

Research findings are not to be confused with findings of the law. The monograph that follows constitutes the research findings from this study. *Because it is also the full text of the agency report, the statement above concerning loans of uncorrected draft copies of agency reports does not apply.*

I. INTRODUCTION

It is axiomatic that when private property is taken for a public purpose "just compensation" must be paid to the owner thereof. A clause requiring the payment of "just compensation" in eminent domain is found in the Fifth Amendment to the Constitution of the United States and in the constitutions of all but two states, where such language finds expression in terms of statute law. The courts have uniformly construed such clause as requiring, at a minimum, compensation equivalent to the value of the property taken.

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It is beyond the scope of this paper to consider the complex problems presented in arriving at a satisfactory definition of the work "value." Suffice it to say that notwithstanding the possibility that disparate meanings may be ascribed to the work "value" (*viz.*, "value to the owner" and "value to the taker") a measure of uniformity does exist in the case law, since in the usual and ordinary condemnation case (excluding cases involving special purpose properties, etc.) the term "value" has been quite generally construed by the courts to mean the "fair market value" of the property taken.

The term "fair market value" does not, of course, have any fixed and precise meaning insofar as ordinary usage is concerned. However, a common theme that unites most decisions in arriving at a definition of "fair market value," is the employment by the courts of the so-called "willing buyer - willing seller" test. This may be broadly stated as follows: Fair market value is the price that a willing buyer would pay to a willing seller in a voluntary sale, taking into consideration all uses to which the property is reasonably adapted and may practicably be put. This test, although often couched in somewhat different language, has received wide and general acceptance by the courts.1/

It is to be noted that under the statement of the rule value may not be restricted to the value of the property for the purpose for which it is actually used at the time of taking. The condemning tribunal may take into consideration all uses to which the property is reasonably adapted, and award compensation on the basis of the most advantageous and valuable, or the highest and best use of the property. As stated in 27 Am.Jur.2d, Eminent Domain, §280:

> The owner may show any uses, present or future, which are sufficiently practicable and probable as to be likely to influence the price which a present purchaser would give for the property.

It is obvious that the impact of zoning regulations and restrictions, as affecting present and future use of property, can be of paramount importance in negotiations for the sale of property that take place between a willing buyer and a willing seller. For example, it is common knowledge that property zoned residential does not ordinarily command as high a price in the open market as property zoned for commercial or industrial use. Thus, if property is zoned for residential use only, such fact, in the ordinary situation, will tend to depress market value and be a significant factor in determining the sale price agreed upon in arm's-length bargaining between a willing buyer and a willing seller. If, however, there appears a reasonable and practical probability that the land will in the near future be rezoned for a higher use, such fact will in the ordinary case tend to increase market value and augment the price agreed upon in a voluntary sale. Hence, it is to be presumed that the effect of zoning regulations, or the likelihood of change in the same, will be taken into consideration in negotiations for the sale of property conducted and carried out between a reasonably prudent buyer and a reasonably prudent seller. It follows that the impact of zoning restrictions not only bears on, but is in fact central, to the "willing buyer-willing seller" and "highest and best use" tests. It may be stated without qualification that fair market value and highest and best use cannot properly be determined without consideration of the effect of zoning regulations and restrictions on the present and future use of real property.

This fact has been recognized by the courts since the earliest decisions with a unanimity of view which is notable. It is wholly evident that the effect of zoning on valuation in condemnation cases may be of the utmost importance, both to the condemning authority and the condemnee, in terms of money awards made and received. In view of such cardinal import, it is perhaps somewhat surprising that legal questions relating to the impact of zoning on valuation have caused the courts so little practical difficulty over the years. Although complicated factual questions are disclosed by the cases (and are, of course, to be expected) the underlying legal principles announced and applied by the courts in the cases dealing with the interrelationship of zoning and valuation seem quite clear and explicit both in concept and in application. An exhaustive review of the cases reveals little or no fundamental disagreement on basic legal questions, as appears later herein.

Notwithstanding the general harmony of the decisions, it should be borne in mind that the matters under consideration are still in the growth stage. Use of the zoning mechanism, although now widespread, is a comparatively modern development. Zoning, or at least comprehensive zoning, is a legal device that is in the main identifiable with the jurisprudence of the 20th Century. It is to be noted, and perhaps emphasized, that each and all of the cases treated and set forth in this paper were decided subsequent to the landmark opinion of the Supreme Court of the United States

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1/ "Fair market value" is defined in 4 Nichols on Eminent Domain [3d Ed.] §12.2[1], as follows: "By fair market value is meant the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the land was adapted and might in reason be applied."

in Euclid v. Ambler, 272 U.S. 365, 71 L.Ed. 303, 47 S.Ct. 114, decided in 1926. A conspicuous number of cases hereinafter cited are identified by the courts as being cases of first impression, and many jurisdictions have as yet to pass on the questions that are the subject matter of review herein.

This paper sets forth the recognized rules with citation of appropriate authority in support thereof. Cases deemed to be peripheral or lacking in useful instruction are omitted, but an attempt is made to set forth all well-considered cases that have been reported as of the date of this writing.

There follows a brief synoptic outline of the scope of this paper, and the legal conclusions presented and set forth therein.

II. SCOPE AND SUMMARY

The provisions of existing zoning ordinances or enactments are admissible in evidence in a proceeding in eminent domain to show the effect thereof on the fair market value of the property taken (Sect. III). Admission of evidence to show the reasonable probability of a change in zoning classification in the near future does not constitute an impermissible collateral attack in condemnation on existing zoning law (Sect. IV). Evidence is admissible to show the reasonable probability of a change in zoning in the foreseeable future and may properly be considered in ascertaining the fair market value of the land proceeded against (Sect. V-A). The limitation is announced in some cases that valuation may not be predicated on rezoning as an accomplished fact, because no matter how probable rezoning may appear an element of uncertainty exists as to whether rezoning will in fact take place, and the impact of such risk factor on market value must be considered and evaluated (Sect. V-B). The burden of proof to show reasonable probability of rezoning rests on the landowner (Sect. VI). Whether the proof adduced is sufficient to present a question of fact for the jury rests with the court (Sect. VI). Factors that have been recognized as being of evidentiary value in determining whether a reasonable probability of rezoning does or does not exist include: (1) sales of comparables (Sect. VII-A); (2) change in character of neighborhood (Sect. VII-B); (3) actions in respect to zoning reclassification taken by the zoning authority prior to the taking (Sect. VII-C), and subsequent to the taking (Sect. VII-D); and (4) the provisions of a master plan for future zoning (Sect. VII-E). Evidence of the general devaluation of properties located in a buffer zone has been held to be of little weight in determining the reasonable probability of rezoning (Sect. VIII). It has been ruled that general knowledge of the imminence of condemnation is ground for the exclusion of evidence relating to the reasonable likelihood of a change in zoning (Sect. IX). The rule has been announced in a few cases that evidence of the reasonable probability of rezoning is inadmissible if the probability of rezoning results directly from the influence of the highway project for which the land is taken (Sect. X).

III. ADMISSIBILITY AND SCOPE OF EXISTING ZONING REGULATIONS

It appears to be clearly settled that existing zoning regulations or restrictions are admissible in evidence in a proceeding to condemn land affected thereby, and that the same may be taken into consideration by the jury or condemning tribunal in determining the fair market value of the property taken. The reason for what seems to be uniform judicial acceptance of this rule is evident; that is, zoning has or may have direct and immediate impact and effect on the determination of market value, notwithstanding that zoning regulations are subject to change.

The text authorities generally give the matter little more than summary treatment, presumably because the rule is sufficiently well established to escape being the subject of serious challenge in condemnation litigation.

Thus, it is stated in 27 Am.Jur.2d, Eminent Domain, §227:

> In the determination of the market value of land which has been condemned, existing zoning restrictions should be taken into consideration, since the availability or nonavailability of such lands for particular uses affects its market value. Thus, there seems to be no doubt that the zone within which premises lie by virtue of an ordinance or enactment establishing zones is to be taken into consideration in determining what is to be allowed in an eminent domain proceeding affecting those premises ....

In support of the rule as above stated see the following:

FEDERAL: United States v. Eden Memorial Park Association (1965, U.S.C.A. Cal.) 350 F.2d 933; United States v. 765.56 Acres of Land (1958, U.S.D.C., N.Y.) 164 F.Supp. 942; United States

v. 1,108 Acres of Land (1962, U.S.D.C., N.Y.) 204 F.Supp. 737; United States v. Certain Lands in Baltimore County (1962, U.S.D.C., Md.) 209 F.Supp. 50.

ARIZONA: State v. McMinn (1960) 88 Ariz. 261, 355 P.2d 900.

CALIFORNIA: Long Beach City High School District v. Stewart (1947) 30 Cal.2d 763, 185 P.2d 585; Los Angeles City High School District v. Hyatt (1926) 79 Cal.App. 270, 249 P. 221; City of Beverly Hills v. Anger (1932) 127 Cal.App. 223, 15 P.2d 867; City of La Mesa v. Tweed & Gambrell Planning Mill (1956) 146 Cal.App.2d 762, 304 P.2d 803; City of Menlo Park v. Artino (1957) 151 Cal.App.2d 261, 311 P.2d 135; People v. Graziadio (1964) 231 Cal.App.2d 525, 42 Cal. Rptr. 29; People v. Investors Diversified Services, Inc. (1968) 262 Cal.App.2d 367, 68 Cal. Rptr. 663.

IDAHO: State v. Styner (1937) 58 Idaho 233, 72 P.2d 699.

ILLINOIS: Forest Preserve District v. Kercher (1946) 394 Ill. 11, 66 N.E.2d 873; Forest Preserve District v. Wike (1954) 2 Ill.2d 49, 119 N.E.2d 734; Department of Public Works and Buildings v. Drobnick (1958) 14 Ill.2d 28, 150 N.E.2d 593.

LOUISIANA: State v. Bates (1961, La.App.) 129 So.2d 550.

MASSACHUSETTS: Robinson v. Commonwealth (1957) 335 Mass. 630, 141 N.E.2d 727.

MICHIGAN: City of St. Clair Shores v. Conley (1957) 350 Mich. 458, 86 N.W.2d 271.

MINNESOTA: State v. Pahl (1959) 254 Minn. 349, 95 N.W.2d 85.

NEBRASKA: Reller v. City of Lincoln (1963) 174 Neb. 638, 119 N.W.2d 59.

NEW JERSEY: Port of New York Authority v. Howell (1960) 59 N.J.Super. 343, 157 A.2d 731.

NEW YORK: Petition of Union Free School District (1965) 48 Misc.2d 189, 264 N.Y.S.2d 479.

TEXAS: Tyler v. Ginn (1949, Tex.Civ.App.) 225 S.W.2d 997.

WASHINGTON: State v. Motor Freight Terminals, Inc. (1960) 57 Wash.2d 442, 357 P.2d 861.

In State v. Motor Freight Terminals, Inc. (1960) 57 Wash.2d 442, 357 P.2d 861, a proceeding to condemn land for a freeway, the court said that it was conceded to be the law that in condemnation cases where there is no showing of a reasonable probability of change in existing zoning regulations "the values of property are limited to the uses for which it is available under the existing zoning regulations."

Similarly, in State v. Pahl (1959) 254 Minn. 349, 95 N.W.2d 85, in holding that valuation of land condemned for highway right-of-way must be determined in the light of the effect of an existing zoning ordinance, the court stated:

> Existing valid zoning ordinances may prescribe or limit those uses which may be considered in proving market value. Evidence of value for uses prohibited by an ordinance may be introduced and considered only where there is evidence showing a reasonable probability that the ordinance will be changed in the near future. The general rule is stated in 4 Nichols, Eminent Domain (3d Ed.) §12.322, as follows:
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> "Insofar as existing zoning restrictions circumscribe the available uses to which land may be devoted they unquestionably affect the market value of property, and no evidence of an enhanced value may be admitted where such enhanced value would be the result of a proscribed use."

In Tyler v. Ginn (1949, Tex.Civ.App.) 225 S.W.2d 997, where a narrow strip of the condemnee's home property was taken for the purpose of widening a state highway, and on appeal the trial judge's ruling excluding evidence of the existing zoning ordinance was held reversible error, the appellate court said that "the zoning ordinance was admissible either for or against the appellant or appellee for the reason that it might affect the market value of the property in question."

The case law makes it clear beyond doubt that existing zoning ordinances or enactments are admissible in evidence in condemnation proceedings to show the effect thereof on the fair market value

of the property taken. Such evidence may, of course, be offered by either party to a suit, and, depending on the thrust thereof, will be offered by condemnor to hold down and by condemnee to increase the amount of the verdict or award.

IV. COLLATERAL ATTACK ON ZONING ORDINANCES OR ENACTMENTS

In anticipation of discussion (Sect. V) of the cases dealing with the admissibility of evidence to show the reasonable probability of a change in zoning regulations, it is necessary to advert briefly to the matter of collateral attack in eminent domain on existing zoning regulations.

It appears to be the settled general rule that the validity of an existing zoning ordinance or enactment is not subject to collateral attack in a condemnation proceeding.

Illustrative of the rule is Robinson v. Commonwealth (1957) 335 Mass. 630, 141 N.E.2d 727, a proceeding to condemn land for a limited-access highway, wherein the sole question on appeal was whether the condemnee had the right at trial to attack the validity of certain zoning ordinances for the purpose of showing the value of the land if freed from the restrictions imposed by the ordinances. In sustaining the action of the lower court in excluding evidence of the increment in value which would obtain if zoning restrictions were removed, and holding that the validity of the ordinances was not subject to collateral attack in an eminent domain proceeding, the Supreme Judicial Court of Massachusetts, pointing out that direct attack would be proper in such other judicial proceeding as suit for declaratory relief, stated:

> The petitioner had ample opportunity to attack directly the ordinances if he had desired to do so....but in our opinion he could not at the trial of the petition for land damages...attack the zoning ordinances.

See also Westchester County v. MacEwen (1932) 237 App.Div. 833, 260 N.Y.S. 875, where, in holding that the validity of a municipal zoning ordinance could not be collaterally attacked in a condemnation proceeding, the court stated:

> The claimant...cannot, in our opinion, have the validity of the zoning ordinance of the City of New Rochelle determined in this proceeding. Her remedy is by the institution of an action for a declaratory judgment.

Although it is quite clear that as a general rule the validity of a zoning ordinance or enactment cannot be collaterally attacked in a condemnation proceeding, it is at the same time equally clear that the submission of evidence as to a reasonable probability of future change in zoning regulations does not fall within the general rule. Evidence of such nature does not go the *validity* of existing zoning law, but rather to the possibility of *legislative change* in existing zoning law. Proof offered to show that a zoning ordinance is ill-suited or poorly adapted to present conditions does not challenge the validity of the ordinance, either as enacted in the first instance, or as applied to conditions arising subsequent to enactment.2/ Such evidence is offered for the sole purpose of showing the reasonable probability that the zoning authority will take appropriate official action in the near future to alter and amend existing zoning regulations so as to conform with and fairly reflect existing conditions.

In the great majority of the cases dealing with the admissibility of evidence to show reasonable probability of rezoning, the defense of collateral attack is not even asserted. However, in State v. Motor Freight Terminals, Inc. (1960) 57 Wash.2d 442, 357 P.2d 861, the issue was squarely before the court as to whether the submission of evidence as to the reasonable probability of a change in the existing zoning ordinance (from single-family residence to industrial) constituted a

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2/ As an example of attack on a zoning ordinance on the ground of initial invalidity see Bowling Green-Warren County Airport Board v. Long (1962, Ky.) 364 S.W.2d 167, an action to condemn land for airport purposes, where the ordinance was held void *ab initio* for failure to comply with the provisions of the enabling statute relating to notice and hearing. As an example of an ordinance held invalid as applied to conditions obtaining subsequent to enactment, see Robyns v. City of Dearborn (1954) 341 Mich. 495, 67 N.W.2d 718, wherein 22 years after enactment an ordinance was held unreasonable and confiscatory as to plaintiffs who acquired title after the passage of the ordinance. It may be noted in passing that in several cases, involving direct as opposed to collateral attack, the courts have been quick to strike down ordinances enacted with the clear purpose and intent of holding down property values in anticipation of condemnation. Such misguided (albeit well-intentioned) concern for the tax dollar at the expense of the individual has been vigorously condemned by the courts. See Kissinger v. City of Los Angeles (1958) 161 Cal.App.2d 454, 327 P.2d 10; Long v. Highland Park (1950) 329 Mich. 146, 45 N.W.2d 10; Henle v. City of Euclid (1954) 97 Ohio App. 258, 125 N.E.2d 355; State v. Gurda (1932) 209 Wis. 63, 243 N.W.317.

collateral attack. In this case an action was brought to condemn land for a freeway. The trial court found on weighing the evidence that there was a reasonable probability that the land would be rezoned from single-family residence use to commercial or industrial use. On the basis of such finding it made an award in the amount of $45,000. The State's witnesses placed a value of $3,500 on the property, premised on its use for single-family residence purposes. On appeal the State contended that the trial court's finding as to the reasonable probability of a zoning change constituted an improper collateral attack in condemnation. In rejecting this contention the Supreme Court of Washington stated:

> The trial court was of the opinion that a refusal to rezone... would be "arbitrary and capricious", and "outrageous."
>
> The state has construed these statements to be a collateral attack upon the present zoning ordinance and argues that the ordinance cannot be so attacked in this proceeding. The state misconceives the thrust of the trial court's statement. There is no collateral attack upon the zoning ordinance. If, considering all of the evidence, the present zoning is arbitrary, capricious and unreasonable, a trial court has a right to assume not the certainty, but the "reasonable probability" that a responsible body will do what reason and common sense dictate should be done. ... The trial court did not err in determining that ... there was a reasonable probability that the restriction on the tract in question would be removed in the near future; and, consequently, did not err in taking into consideration the effect of such a possibility upon the value of the tract .... (Underscoring supplied.)

The logic of the court in this representative case seems unassailable. It would appear to be clear beyond doubt that evidence of the reasonable possibility of rezoning may not be excluded in a condemnation proceeding on the ground that it constitutes an impermissible collateral attack on existing zoning.

V. ADMISSIBILITY AND EFFECT OF EVIDENCE AS TO A REASONABLE PROBABILITY OF REZONING

It is clearly established that in a proceeding in eminent domain evidence is admissible to show the reasonable probability that the land proceeded against will be rezoned in the near or forseeable future. There is a rather substantial body of case law so holding, and inasmuch as zoning is a comparatively modern legal device the cases are uniformly quite recent.

The rule is rooted in the previously discussed "willing buyer - willing seller" and "highest and best use" tests, and follows as a necessary result in the logical application thereof. That is to say, if there is a reasonable probability that land will be rezoned in the near future to a higher use, it is to be presumed that such fact would be taken into consideration in negotiations between a willing buyer and willing seller and have bearing on the sale price arrived at pursuant to arm's-length bargaining between them; and highest and best use clearly cannot fairly be determined without consideration of the reasonable probability that the property will be rezoned for a higher use in the near or foreseeable future.

In the development of the rule (since use of the zoning mechanism has become widespread) a significant limitation has been placed thereon by the decisions in a few cases, which pursue the reasoning and enunciate the rule as follows: No matter how probable the prospect of rezoning appears, an element of uncertainty always exists as to whether the zoning authority will in fact take the rezoning action which reason and common sense dictate that it should. This element of risk would be taken into consideration by a prospective buyer. Hence, he would discount the value of the property as if actually rezoned, in order to reflect the element of risk and uncertainty. He would pay at the most a premium for the probability of rezoning, in addition to the value of the property under existing zoning restrictions. It follows that property cannot be evaluated as though rezoning were already an accomplished fact. The decisions announcing this limitation are considered in Section V-B.

A. CASES RECOGNIZING RULE

In the following cases the courts have announced the rule that evidence is admissible in a proceeding in eminent domain to show the reasonable probability that the land condemned will be rezoned in the near or foreseeable future:

FEDERAL: United States v. Meadow Brook Club (1958, U.S.C.A., N.Y.) 259 F.2d 41; Wolff v. Commonwealth of Puerto Rico (1965, U.S.C.A., Puerto Rico) 341 F.2d 945; H & R Corporation v. District

of Columbia (1965, U.S.C.A., D.C.) 351 F.2d 740; United States v. Certain Lands in Baltimore County (1962, U.S.D.C., Md.) 209 F.Supp. 50.

ALABAMA: Sayers v. City of Mobile (1964) 276 Ala. 589, 165 So.2d 371.

CALIFORNIA: Long Beach City High School District v. Stewart (1947) 30 Cal.2d 763, 185 P.2d 585; People v. Dunn (1956) 46 Cal.2d 639, 297 P.2d 964; People v. Donovan (1962) 57 Cal.2d 346, 19 Cal.Rptr. 473, 369 P.2d 1; City of Menlo Park v. Artino (1957) 151 Cal.App.2d 261, 311 P.2d 135; Redondo Beach School District v. Flodine (1957) 153 Cal.App.2d 437, 314 P.2d 581; People v. Hurd (1962) 205 Cal.App.2d 16, 23 Cal.Rptr. 67; People v. Graziadio (1964) 231 Cal.App.2d 525, 42 Cal.Rptr. 29; People v. Arthofer (1966) 245 Cal.App.2d 454, 54 Cal.Rptr. 878; People v. Investors Diversified Services Inc. (1968) 262 Cal.App.2d 367, 68 Cal.Rptr. 663; Regents of University of California v. Morris (1968) 266 Cal.App.2d 616, 72 Cal.Rptr. 406.

CONNECTICUT: Budney v. Ives (1968) 156 Conn. 83, 239 A.2d 482.

DELAWARE: Board of Education v. 13 Acres of Land (1957) 50 Del. 387, 131 A.2d 180; 0.040 Acres of Land v. State (1964, Del.) 198 A.2d 7.

FLORIDA: Board of Commissioners of State Institutions v. Tallahassee Bank & Trust Company (1958, Fla.App.) 108 So.2d 762.

GEORGIA: State Highway Department v. Hurt (1970, Ga.App.) 173 S.E.2d 279.

ILLINOIS: Department of Public Works and Buildings v. Rogers (1968) 39 Ill.2d 109, 233 N.E.2d 409; Park District of Highland Park v. Becker (1965) 60 Ill.App.2d 463, 208 N.E.2d 621; Lombard Park District v. Chicago Title and Trust Company (1968) 103 Ill.App.2d 1, 242 N.E.2d 440.

IOWA: Hall v. City of West Des Moines (1954) 245 Iowa 458, 62 N.W.2d 734.

KANSAS: Vic Regnier Builders, Inc. v. Linwood School District (1962) 189 Kan. 360, 369 P.2d 316.

KENTUCKY: Chitwood v. Commonwealth (1965, Ky.) 391 S.W.2d 381.

LOUISIANA: City of Monroe v. Nastasi (1965, La.App.) 175 So.2d 681.

MARYLAND: State Roads Commission v. Warriner (1957) 211 Md. 480, 128 A.2d 248; Bergman v. State Roads Commission (1958) 218 Md. 137, 146 A.2d 48.

MICHIGAN: Mackie v. Eilender (1961) 362 Mich. 697, 108 N.W.2d 755.

MINNESOTA: State v. Pahl (1959) 254 Minn. 349, 95 N.W.2d 85.

MISSOURI: State v. Williams (1956, Mo.) 289 S.W.2d 64; Union Electric Company v. Saale (1964, Mo.) 377 S.W.2d 427.

NEW JERSEY: State v. Gorga (1957) 26 N.J. 113, 138 A.2d 833; State v. Speare (1965) 86 N.J.Super. 565, 207 A.2d 552.

NEW YORK: Genesee Valley Union Trust Company v. State (1961) 9 N.Y.2d 795, 175 N.E.2d 166; Valley Stream Lawns, Inc. v. State (1959) 9 App.Div.2d 149, 192 N.Y.S.2d 805; Masten v. State (1960) 11 App.Div.2d 370, 206 N.Y.S.2d 672; Dennis v. State (1965) 24 App.Div.2d 924, 264 N.Y.S.2d 674; Matter of Village of Garden City (1956) 9 Misc.2d 693, 167 N.Y.S.2d 166; Nelkin v. Oyster Bay (1958) 14 Misc.2d 764, 181 N.Y.S.2d 833; Albany Country Club v. State (1962) 37 Misc.2d 134, 235 N.Y.S.2d 684; Papovitch v. State (1962) 37 Misc.2d 994, 235 N.Y.S.2d 97, Yochmowitz v. State (1965) 47 Misc.2d 85, 262 N.Y.S.2d 229.

NORTH CAROLINA: Barnes v. North Carolina State Highway Commission (1959) 250 N.C. 378, 109 S.E.2d 219. State Highway Commission v. Hamilton (1969) 5 N.C.App. 360, 168 S.E.2d 419.

OREGON: State Highway Commission v. Oswalt (1970, Ore.App.) 463 P.2d 602.

TEXAS: City of Austin v. Cannizzo (1954) 153 Tex. 324, 267 S.W.2d 808; State v. Rankin (1969, Tex. Civ. App.) 445 S.W.2d 581.

UTAH: State v. Jacobs (1964) 16 Utah 2d 167, 397 P.2d 463.

WASHINGTON: State v. Motor Freight Terminals, Inc. (1960) 57 Wash.2d 442, 357 P.2d 861.

The rule that in the ascertainment of market value in eminent domain there may be shown in evidence the reasonable probability that the condemned land will be rezoned (sometimes referred to as the "Texas rule") was adopted by the Supreme Court of Texas in City of Austin v. Cannizzo (1954) 153 Tex. 324, 267 S.W.2d 808, one of the earliest decisions in which a court of last resort took the matter under review. Cannizzo was an action to condemn a certain tract or parcel of land for school purposes. Appeal was taken from judgment entered by the lower court on a verdict in the amount of $25,000, on the ground, *inter alia*, that error was committed at the trial in "permitting the jury to consider evidence of the adaptability of the 4.57-acre parcel for commercial purposes, despite the undisputed fact that commercial use would violate valid existing city zoning restrictions on the area."

In ruling that the admission of such evidence did not constitute error, the Supreme Court of Texas stated:

> If the trial judge is satisfied from the evidence as a whole that there is no reasonable probability that existing restrictions may be lifted within a reasonable time, he should exclude evidence of value based on use for any purpose other than those to which it is restricted. On the other hand, if it appears reasonably probable to the trial judge that the wants and needs of the particular community may result, within a reasonable time, in the lifting of restrictions, he should admit testimony of present value based on prospective use of the property for purposes not then available....
>
> Without detailing all the facts in this case which prompt our conclusion, we think the trial court was correct in admitting evidence of the suitability and adaptability of a small part of the property involved for a shopping center. The testimony offered by respondents on the phase of the case was limited to the present value of the prospective use of the property as a shopping center, it being admitted that there was then in existence a zoning ordinance which prohibited its use for that purpose. The jury could weigh the effect of the restriction against the prospective use. They could weigh also the fact that in the entire large area in question, which is fairly remote from the center of Austin, there is nothing resembling a shopping center, and considering the undoubted trend toward such developments, could consider the reasonable probability, if any, that these facts might bring about a rezoning of the property within the reasonable future to make it available for use as a shopping center.

The rule announced in Cannizzo has been applied in a number of cases relating to condemnation of land for highway purposes. Budney v. Ives (1968) 156 Conn. 83, 239 A.2d 482, was an action to condemn a 3.85-acre tract of land for the purpose of making improvements to I-84. The property was situated in an area zoned rural residential. The referee assessed damages in the amount of $134,750, based on a finding of reasonable probability that the area would be rezoned to permit a motel. In response to a motion by condemnor, the referee made an alternative finding that the fair market value of the property would be in the amount of $16,800 if valuation were made on the basis of rural residential use only. Condemnor appealed from a judgment in the amount of $134,750, and assigned as primary error "that the referee erroneously based his conclusion as to value on the premise that he could consider the reasonable likelihood or strong probability of a zone change to permit a commercial or industrial use of the property, whereas...the referee was bound in law to value the property as it was in fact zoned on the date of condemnation." In affirming the judgment below, the Supreme Court of Connecticut stated:

> We have not previously been called upon to decide whether the reasonable probability of a change in zoning restrictions may be considered in the determination of just compensation for property taken by eminent domain. The answer is to be found in the application of the general rule for the assessment of damages in condemnation cases....
>
> It cannot be doubted that both a prospective purchaser and a seller on the open market would consider the probability of a change in zoning restrictions affecting property which they considered buying and selling where such a change was reasonably probable in the reasonably near future. Accordingly, where such a change is reasonably probable and not merely a remote or speculative possibility, the probability may properly be considered in the determination of the fair value of property taken by eminent domain....
>
> It must...be recognized that, although the possibility of a change in zoning requirements always exists in some degree, it must often be difficult to prove that such a possibility has become a reasonable probability. Wishful

> thinking, optimistic conjecture, speculation, rumor and unfounded prognostications do not furnish a proper basis for a finding that a litigant has proved the reasonable probability of a future change in zone. Because of the uncertainties necessarily attending the determination of the happening of such an event in the future, claims and evidence regarding the probability must be scrutinized with care and examined with caution. Nevertheless, if such a reasonable probability is proved, it is proper fact to be considered in the determination of the fair market value of property taken by condemnation proceedings.

In State Roads Commission v. Warriner (1957) 211 Md. 480, 128 A.2d 248, an action to condemn land for highway purposes, the court stated the question for decision as follows:

> The principal question in this case is whether or not a possible future zoning reclassification of a piece of property might properly be submitted for the consideration of the jury in determining the fair market value of the land at the time of its being taken for public use under eminent domain proceedings.

In answering the question in the affirmative the Court of Appeals of Maryland said:

> The question has not previously been passed upon by this Court, but the rule is recognized both by text writers and by numerous cases in other jurisdictions that evidence of a reasonable probability of a change in zoning classification within a reasonable time may properly be admitted and its influence upon market value at the time of the taking may be taken into account .... We think that the rule above stated is correct.

In holding that evidence of the reasonable probability of a zoning reclassification might be considered in the determination of market value in a proceeding to condemn lands for a highway improvement, the court, in State v. Speare (1964) 86 N.J.Super. 565, 207 A.2d 552, said:

> We deal here with the fair market value ... which would be agreed upon voluntarily between a hypothetical owner willing to sell and a hypothetical buyer willing to purchase, neither being under compulsion .... The owner of condemned land is entitled to receive the fair market value of his land for any purpose for which it has commercial value in the immediate present or in reasonable anticipation in the near future .... if the parties to a voluntary transaction in agreeing upon the price as of the date of the taking, would give recognition to the reasonable probability of a zoning amendment ... such ... may be shown as bearing upon the value.

B. LACK OF CERTAINTY OF REZONING AS AFFECTING VALUATION

As previously mentioned, the general rule that reasonable probability of zoning reclassification may be considered in determining market value in eminent domain has been narrowed (or more closely defined) in a few cases that announce the caveat that evaluation cannot be made as if rezoning were an accomplished fact. These cases take the view that no matter how probable zoning reclassification may appear, an element of uncertainty always exists as to whether the zoning authority will in fact take action to effect a reclassification. The courts adhering to this view reason that a prospective buyer would discount the market value which would obtain if the land were in fact rezoned, to reflect such element of risk, and consequently that in the employment of the "willing buyer - willing seller" test, valuation may not be made as if rezoning were already an accomplished fact.

This limitation on the general rule was spelled out in State v. Gorga (1957) 26 N.J. 113, 138 A.2d 833, an action to condemn land for highway purposes, as follows:

> It is generally agreed that if as of the date of taking there is a reasonable probability of a change in the zoning ordinance in the near future, the influence of that circumstance upon the market value of that date may be shown....
>
> 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 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....
>
> 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 to 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.

In Dennis v. State (1965) 24 App.Div.2d 924, 264 N.Y.S.2d 674, a proceeding to condemn land for the New York Thruway, the court said in respect to the effect on valuation of the prospect of rezoning:

> The probability of an imminent zoning change can be considered in evaluating the property, if substantiated by the record, but necessarily requires a discount from full commercial value.

Similarly, in Chitwood v. Commonwealth (1965, Ky.) 391 S.W.2d 381, the court said in respect to the effect to be accorded the reasonable probability of rezoning:

> When evidence has been introduced tending to show enough prospect of rezoning to affect the price a willing buyer would have paid and a willing buyer would have accepted for a piece of property (whether immediately before or immediately after the taking, as the case may be), a valuation witness may take that circumstance into consideration, but he may not testify what the property would be worth in the event of such rezoning...
>
> ...witnesses must not be permitted to say or suggest what the value would be if the property were zoned differently from the classification existing at the time in question, and the jury should be admonished that the question of whether there was a reasonable probability of a zoning reclassification in the near future should be considered only to the extent of its influence, if any, upon the price a willing buyer would have paid and a willing seller would have accepted for the property....

To the same effect see:

FEDERAL: United States v. 50.8 Acres of Land (1957, U.S. D.C., N.Y.) 149 F.Supp. 749.

ARIZONA: State v. McMinn (1960) 88 Ariz. 261, 355 P.2d 900.

MARYLAND: Hutchison v. Baltimore Gas and Electric Company (1966) 241 Md. 329, 216 A.2d 573; Burton v. State Roads Commission (1968) 251 Md. 403, 247 A.2d 718.

MISSOURI: Union Electric Company v. Saale (1964, Mo.) 377 S.W.2d 427.

NEW YORK: Masten v. State (1960) 11 App.Div.2d 370, 206 N.Y.S.2d 672; Albany Country Club v. State (1962) 37 Misc.2d 134, 235 N.Y.S.2d 684; Papovitch v. State (1962) 37 Misc.2d 994, 235 N.Y.S. 2d 97.

NORTH CAROLINA: Barnes v. North Carolina State Highway Commission (1959) 250 N.C. 378, 109 S.E.2d 219.

PENNSYLVANIA: Snyder v. Commonwealth (1963) 412 Pa. 15, 192 A.2d 650.

We have not found any case that adopts or suggests any formula which might be employed to arrive at the amount of required discount. The limitation on the general rule is directed to the poles of permissible expert testimony; i.e., opinion evidence may be given as to the amount of premium attributable to the reasonable prospect of rezoning that would be placed in the open market on the value of property under existing restrictions, but opinion evidence may not be given as to market value premised on rezoning as an accomplished fact.

It hardly needs statement that such limitation on the general rule may have appreciable monetary significance where valuation is predicated on the removel of existing restrictions.

VI. BURDEN OF PROOF; SUFFICIENCY OF EVIDENCE

It is uniformly held that the burden of proof to show the reasonable probability of rezoning rests on the owner of the condemned land. United States v. Certain Lands in Baltimore County (1962, U.S.D.C., Md.) 209 F.Supp. 50; People v. Arthofer (1966) 245 Cal.App.2d 454, 54 Cal.Rptr. 878; Lombard Park District v. Chicago Title and Trust Company (1968) 103 Ill.App.2d 1, 242 N.E.2d 440. Whether the proof adduced as to the reasonable probability of a change in zoning is sufficient to present a question for the jury is a matter for the court. State v. Gorga (1957) 26 N.J. 113, 138 A.2d 833.

VII. FACTORS TO BE CONSIDERED IN DETERMINING THE FACT OF REASONABLE PROBABILITY OF REZONING

The question of whether reasonable probability of rezoning exists is one of fact, and it is, of course, clear that evidence based on conjecture, speculation, rumor or unfounded hearsay, cannot support a finding of the reasonable probability of a zoning change.3/

It is less clear, however, as to the precise factors that will be recognized as being of evidentiary value. The lack of clarity exists not so much by reason of inherent difficulties as by reason of the fact that the case law to date specifically identifying those factors which are judicially cognizable as being of probative value is quite limited. The appellate courts have tended to dwell more on the underlying question of whether evidence of the reasonable probability of rezoning is admissible, and less on the demands and requisites of proof at the trial stage.

However, certain clear directions are indicated by the existing case law. These proceed along wholly predictable lines. For example, reason and common sense dictate that sales of comparables showing enhancement in value due to anticipated rezoning should be of solid evidentiary value in determining the reasonable probability of rezoning, and there is some supportive case law to this effect. Change in the character of the neighborhood and the uses to which it is put should be competent evidence of the need for and reasonable prospect of rezoning, and a few cases so hold. Likewise, rezoning activity in the area or nearby areas should be strongly indicative of impending change in zoning classification, and some case law so recognizes.

A summarization of factors that might properly be taken into consideration in determining the reasonable probability of rezoning was made by the court in Lombard Park District v. Chicago Title and Trust Company (1968) 103 Ill.App.2d 1, 242 N.E.2d 440. The court said:

> Without purporting to set forth all such factors, some of the significant factors may be the rezoning of nearby property, growth patterns, change of use patterns and character of neighborhood, demand within the area for certain types of land use, sales of related or similar properties at prices reflecting anticipated rezoning, physical characteristics of the subject and of nearby properties and, under proper circumstnaces, the age of the zoning ordinance.

Although some of the foregoing factors do not appear to have been expressly recognized in other cases, it is submitted that all are grounded in logic and reason, and that the above statement constitutes a useful and accurate summation of salient factors that are or should be of unquestionable evidentiary value in making determination of the reasonable probability of rezoning.

A. SALES OF COMPARABLES

The purchase price paid for comparables has been recognized as competent evidence bearing on the reasonable probability of rezoning.

In City of Monroe v. Nastasi (1965, La.App.) 175 So.2d 681, the condemnor's witnesses valued the property *sub judice* at $33,800 and condemnees' witnesses fixed the value at $86,600 and $87,700. The side variance in valuation was due to the fact that condemnor's witnesses predicated their appraisals on multiple-family residence use, as provided by existing zoning restrictions, and condemnees' witnesses based their appraisals on the prospect of reclassification to commercial use. In

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3/ Budney v. Ives (1968) 156 Conn. 83, 239 A.2d 482; Lombard Park District v. Chicago Title and Trust Company (1968) 103 Ill.App.2d 1, 242 N.E.2d 440; City of Monroe v. Hobbs (1964, La.App.) 168 So.2d 852; City of Euclid v. Lakeshore Company (1956) 102 Ohio App.96, 133 N.E.2d 372; Board of Education v. Graham (1968) 15 Ohio App.2d 196, 239 N.E.2d 752; Hietpas v. State (1964) 24 Wis.2d 650, 130 N.W.2d 248.

holding that the evidence supported a finding of the reasonable probability of reclassification for commercial use, the court placed strong emphasis on the sales of comparables. It stated:

> So-called comparable sales were used by the expert witnesses. After thorough examination of the record we have come to the conclusion that the ...true comparable was the private sale of ... property, located some three blocks distant from the subject property, made ... for a total consideration of $76,000.

The court noted that the comparable sale was made contigent upon rezoning for commercial use.

In holding that the evidence submitted at trial was sufficient to entitle the condemnee to an instruction permitting the jury to consider whether there was a reasonable probability of the rezoning of condemnee's property to a higher use, the court in People v. Donovan (1962) 57 Cal.2d 346, 19 Cal.Rptr. 473, 369 P.2d 1, relied on the fact that a number of witnesses had testified that properties "situated similarly to defendant's property ... and zoned (residential) had been sold recently for inflated prices for uses other than residential."

Obversely, in holding that the evidence was insufficient to constitute a showing of the reasonable probability of a zoning change, the court in State v. McMinn (1960) 88 Ariz. 261, 355 P.2d 900, supported its ruling by noting that "no property had been sold in the area before the date of the taking for a price that would indicate the buyers and sellers of property in that zone ever contemplated any change in the zoning ordinance."

B. CHANGE IN CHARACTER OF NEIGHBORHOOD

A change in neighborhood growth patterns and the uses to which property is put has been recognized as competent evidence bearing on the reasonable likelihood of rezoning.

Thus, in Brubaker v. State (1963) 17 App.Div.2d 519, 236 N.Y.S.2d 395, where the appellate court sustained a valuation based on industrial use of property zoned agricultural at the time of taking, the growth of the area for industrial use was emphasized, the court pointing out that the evidence disclosed that the condemned property was bordered on the south and west by manufacturing plants and on the north by the property of a public utility.

Likewise, in Papovitch v. State (1962) 37 Misc.2d 994, 235 N.Y.S.2d 97, in finding that there existed a reasonable probability of change in zoning from residential to office building use, the court laid stress on the fact that surrounding and abutting properties were being put to uses other than residential.

In sustaining the action of the trial court in permitting the jury to consider the reasonable probability of a change in zoning classification from agricultural to industrial, the court in Hall v. City of West Des Moines (1954) 245 Iowa 458, 62 N.W.2d 734, pointed to the progressive change of the area towards industrial use. It stated:

> In the case at bar there is evidence of some industrial growth near the land in question. The Penn-Dixie plant adjoining on the east is a large one, although it was there when the zoning ordinance was enacted. The extensive operations of the Concrete Materials Company have commenced in recent years. The Rock Island Railroad tracks run along the southeast side of the tract, and the plant of the Perlite Company is not far away. There is evidence sufficient to permit the jury to find the territory is becoming an industrial development to some extent at least. We think the question of adaptability for industrial uses, with possible revision of the zoning ordinances, as an element of value to be taken into consideration was a proper one to be submitted as the trial court did.

Lloyd v. State (1967, Okla.) 428 P.2d 261, was an action to condemn land for a limited-access highway. In ruling that the lower court properly allowed the introduction of evidence as to the reasonable probability of a change in zoning restrictions affecting the subject property, the Supreme Court of Oklahoma said that "evidence of plausible and probable changes in the character of the neighborhood" constituted a matter of "evidentiary significance."

In ruling that the evidence submitted at trial was "sufficient to meet the test of at least a reasonable probability of reclassification within a reasonable time," the court in State Roads Commission v. Warriner (1957) 211 Md. 480, 128 A.2d 248, cited as being viable proof "the marked expansion of (the) commercial area ... towards the (condemned) tract."

In People v. Donovan (1962) 57 Cal.2d 346, Cal.Rptr. 473, 369 P.2d 1, involving condemnation of land for a freeway, the court said:

> The reasonable probability of a zoning change may be shown by a variety of factors, including neighborhood changes and general changes in land use....
> ...defendant's theory of the case was that because of the changes in the character which the neighborhood had undergone she could reasonably expect that her property would be upgraded in zoning and use. There was sufficient evidence to support her theory, and she was entitled to an instruction which would have permitted the jury to consider that theory.

The court said in People v. Arthofer (1966) 245 Cal.App.2d 454, 54 Cal.Rptr. 878:

> Plausible and probable changes in the character of the neighborhood and in the zoning restrictions in an area constitute factors which a buyer would consider in arriving at an opinion as to fair market value .... The reasonable probability of a zoning change may be shown by a variety of factors including neighborhood changes and general changes in land use.

However, the mere showing that there are other land uses in the area without proof that existing zoning restrictions were altered to accommodate such uses, cannot be taken to be evidence of the likelihood of a zoning change. In Re Armory Site in Kansas City (1955, Mo.) 282 S.W.2d 464, involved the condemnation of land zoned for two-family residences. Condemnee introduced evidence showing that there were located in the nearby area a large church and a garden-type apartment development, but no proof was offered to show that existing zoning restrictions were changed to authorize such uses. In holding that the evidence did not establish a reasonable likelihood of change in zoning, the court said:

> Merely presenting evidence that nearby there exist buildings other than those permitted by the present zoning regulations is not sufficient to remove from the realm of speculation the possibility of a change in the zoning regulations....

C. PRIOR ACTION OF ZONING AUTHORITY AS EVIDENCING PROBABILITY OF ZONING CHANGE

The prior activity of the zoning authority in respect to the rezoning of the subject property, or nearby lands, has been recognized as evidence bearing on the presence, or absence, of the reasonable probability of a change in zoning.

0.040 Acres of Land v. State (1964, Del.) 198 A.2d 7, was an action to condemn land for the widening of a highway. The property was zoned residential, and condemnee sought to establish by the testimony of expert witnesses that there was a reasonable probability that the land would be rezoned in the near future to permit commercial use. The trial court refused to allow the condemnation commission to consider such testimony. In reversing the remanding, the Supreme Court of Delaware made a review of the history of eight prior applications for rezoning of nearby properties from residential to commercial or industrial use, and concluded that the proferred expert testimony in respect thereto should have been allowed. It stated that "the zoning applications and other evidence ... created an issue of act for the commission under the facts and circumstances of this case."

The court in Barnes v. North Carolina State Highway Commission (1959) 250 N.C. 378, 109 S.E.2d 219, upheld an instruction permitting the jury to take into consideration in arriving at fair market value the reasonable probability of a change in zoning, and in so doing made reference to testimony given at the trial to the effect that all prior petitions for rezoning of property in the area had been granted.

In City of Monroe v. Nastasi (1965, La.App.) 175 So.2d 681, the court stated that in determining whether there was reasonable probability of rezoning classification consideration must be given to the fact that a change in classification had already been effected in respect to comparable property.

Conversely, it has been held that the absence of prior rezoning activity was a material factor showing the lack of reasonable probability of a zoning change in the near future.

Thus, in Heintz v. State (1962) 32 Misc.2d 1025, 226 N.Y.S.2d 540, in ruling that the evidence did not support a finding of reasonable probability of rezoning, the court pointed to the fact that there had been no zoning changes in the area for a period of more than 20 years.

Similarly, in Jacobs v. State (1964, Tex.Civ.App.) 384 S.W.2d 438, a ruling of the lower court refusing to permit the jury to consider the question of the reasonable probability of rezoning was upheld by the appellate court on the ground, *inter alia*, that over a nine-year period condemnee had made three requests for a reclassification from residential to commercial, and none of such requests had been granted by the zoning authority.

In State v. McMinn (1960) 88 Ariz. 261, 355 P.2d 900, the Supreme Court of Arizona observed that the verdict clearly reflected that the jury had rejected condemnee's contention that there was a reasonable probability of change in zoning from residential to commercial. In reversing the trial court's action in vacating judgment entered on the verdict and granting a motion for a new trial, the appellate court relied on the fact that "no property had been sold in the area before the date of the taking for a price that would indicate the buyers and sellers of property in that zone ever contemplated any change in the zoning ordinance."

D. REZONING SUBSEQUENT TO THE TAKING

It has been held that rezoning subsequent to the date of taking may be considered in making determination of the reasonable probability of rezoning as of the time of taking.

The court so ruled in State v. Gorga (1958) 26 N.J. 113, 138 A.2d 833, stating that evidence of rezoning after the date of the taking should not be excluded solely because of the time sequence. The court cautioned, however, that such evidence must be carefully confined to its proper role, and could serve only to support the reasonableness of the factual claim that on the date of the taking the parties to a voluntary sale would have been influenced by the probability of an amendment to the existing zoning law. The court emphasized that:

> 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.

E. MASTER PLAN

It has been indicated that the effect of a master plan for future development adopted by the zoning authority may be taken into consideration in determining the reasonable probability of rezoning.

Thus, in State v. Williams (1956, Mo.) 289 S.W.2d 64, in ruling that the evidence supported a finding of the reasonable likelihood of rezoning, the court took note of the fact that the city planning commission had prepared a master plan for rezoning showing that the subject property (zoned residential at the time of taking) was included in an area to be rezoned for commercial use.

VIII. FRINGE PROPERTIES

The fact that properties located on the fringe of a residential area are generally depreciated in value has been held to be of little weight in determining the reasonable prospect of the rezoning of the affected area and the subject property situate therein.

The court observed in State v. McMinn (1960) 88 Ariz. 261, 355 P.2d 900, that it "is not at all uncommon for properties on the fringe of a residential zone forming the buffer between industrial and residential zones" to show diminution in value, and added that such "fringe devaluation has little weight in showing a possible zoning change."

IX. EFFECT OF FOREKNOWLEDGE OF CONDEMNATION

The fact that it was common knowledge in the community that the subject property would be condemned has been held to be proper ground for the exclusion of evidence relating to the reasonable probability of a zoning change, on the theory that inasmuch as the imminence of the taking was generally known, a prospective buyer would attach no significance to the removal of the zoning restrictions.

Such result was reached in State v. Jacobs (1964) 16 Utah 2d 167, 397, P.2d 463, wherein the court concluded that "the probability of the zoning restrictions being removed would have no appreciable influence upon the market value of the property at the time of taking."

It may be noted that Jacobs appears to be the only case that has adopted this rationale to support the exclusion of evidence pertaining to the reasonable probability of a change in zoning regulations.

X. ADMISSIBILITY OF EVIDENCE OF REASONABLE PROBABILITY OF REZONING WHERE PROBABILITY OF ZONING RECLASSIFICATION RESULTS FROM THE INFLUENCE OF THE HIGHWAY PROJECT FOR WHICH THE LAND IS TAKEN

In a prior paper, entitled "Valuation Changes Resulting from Influence of Public Improvements" *(NCHRP Research Results Digest No. 11)*, the question was considered whether in the ascertainment of fair market value in eminent domain, evidence of enhancement or diminution in value, which is directly attributable to the influence of the public improvement for which the land is taken, may be admitted, or is required to be excluded in the determination of the value of the condemned property. The question is not free from difficulty and, as shown in *Digest No. 11*, the courts have pursued different theories and reached divergent results. It is beyond the scope of this paper to reexamine this question, it being sufficient for the present purposes to point out that the rule has been adopted in many jurisdictions that neither enhancement nor diminution in value may be considered where increase or decrease in value of the subject property can be shown to result directly from the impact of the public improvement for which the land is proceeded against.

In a few cases this rule has been used as the premise for and bottomed the holding that the reasonable probability of rezoning may *not* be considered in determining market value, if such reasonable probability of rezoning is directly attributable to the influence of the highway improvement for which the land is taken. The significance and importance of this rule for attorneys representing the condemnor hardly needs statement. The following cases are illustrative.

State v. Kruger (1969, Wash.) 459 P.2d 648, was an action to condemn property for the construction of a highway connecting I-5 and the Boeing plant in Seattle, Wash. The property was zoned for single-family residence use. The landowner sought to show the reasonable probability that the land would be rezoned in the near future to permit other uses. The trial court instructed the jury as follows:

> You are to value the property in view of the uses permitted under the present zoning. However, if you find there is a reasonable probability that the zoning will be changed in the near future, you may consider the effect of such probability on the fair market value of the property.

The state did not except to this instruction, but did except to the failure of the court to give the following requested instruction:

> You may not, however, consider any effect on said zoning created by the project for which the property is being acquired.

The state moved for a new trial, which motion was granted by the trial court. On appeal the Supreme Court of Washington ruled as follows:

> Even if we accept the view that there was sufficient evidence to permit the jury to find that there was a reasonable probability of a change in zoning ... we must nevertheless affirm the granting of the motion for a new trial, the reason for reversal being the failure to instruct as requested by the state that in considering the probability of rezoning the jury could not take into consideration the project for which the property was being acquired by the state.
>
> In the Motor Freight Terminals case, we recognized an exception to the rule that in condemnation proceedings the values of the property are limited to the uses for which it is available under the existing zoning regulations. That exception was, at ... 357 P.2d at 862:
>
> "When a particular use of the property, to which it is adapted, is prohibited or restricted by law, but there is a reasonable probability that the prohibition will be modified or removed in the near future, the effect of such probability upon the value of the property may be taken into consideration."
>
> There has developed, however, a generally recognized limitation to that exception which it was not necessary to discuss in the Motor Freight Terminals case, and which has received general recognition since our opinion in that case; i.e.,

> "The probability of rezoning or even an actual change in zoning which results from the fact that the project which is the basis for the taking was impending cannot be taken into account in valuing property in the condemnation proceeding." ...
>
> The state requested the trial court to include this limitation in its instruction and that request should have been granted. Without this limitation the jury could, and we suspect did, take into account the Casino Road project in determining whether there was a probability of rezoning.
>
> The trial court erred in refusing the limitation proposed by the state, and corrected the error by granting a new trial. The granting of a new trial is affirmed.

In Williams v. City and County of Denver (1961) 147 Colo. 195, 363 P.2d 171, a petition in condemnation was filed to acquire certain parcels of land for the construction of the Valley Highway within the corporate limits of the City of Denver. The properties were rezoned from a lower to a higher use subsequent to the date of filing the petition and before the date of trial. The property owners contended that they were entitled to have the property valued on the basis of the subsequently permitted higher use.

The Supreme Court of Colorado first considered the question whether enhancement in value due to a public improvement is allowable, and ruled that it was not. It then went on to hold that evidence of a probable change in zoning is inadmissible where the probability of reclassification is due to the public improvement for which the land is taken. It stated:

> As defendants suggest in their brief, the ruling of the trial judge on this point was a refinement of his ruling on the previous issue submitted to us. Paragraph C of the pretrial order reads as follows:
>
> "No evidence of a change of zoning of adjacent property (even though such probability of change of zoning is reflected in the value of such properties) shall be admissible if such probability of change in zoning arose subsequent to the filing of this action as a result of the proposed construction or actual construction of the public work."
>
> We reach this decision by virtue of the same authority that led us to our conclusion on the first issue - if the rezoning happened to devalue the property instead of raising it, as defendants contend here, then it obviously would be unjust to defendants to assess such diminution against them. Fair compensation in condemnation cases does not include speculative values either lowering or raising the compensation paid....
>
> 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....

People v. Arthofer (1966) 245 Cal.App.2d 454, 54 Cal.Rptr. 878, was an action in eminent domain to condemn for freeway purposes an unimproved tract or parcel of land. The land was zoned R-1, which classification permitted the construction of single-family residence dwellings. The defendant landowners sought to prove that there was a reasonable probability that the land would be rezoned R-3, which would have permitted the construction of apartments, day-care nurseries, private clubs, rest homes, and private schools. The question was before the District Court of Appeal as to whether testimony was admissible at the trial as to the reasonable probability of a change in zoning from R-1 to R-3, where it appeared that the probability of a change in zoning was the result of the highway project for which the land was proceeded against. In holding such testimony inadmissible, the court stated:

> The law is ... clear that in forming an opinion as to reasonable probability of zone change, a witness must exclude all consideration of the effect of the proposed improvement, and knowledge of the pending improvement may not be considered as a factor in determining the fair market value .... Simply stated, the rule is that any testimony of reasonable probability of zone change may not take into account the proposed freeway or any influence arising therefrom .... The probability of rezoning or even an actual change in zoning which results from the fact that the project which is the basis for the taking was impending cannot be taken into account in valuing the property in a condemnation proceeding .... In the instant case, the subject property had been within the scope of the

proposed freeway since May 1960. Therefore, changes in land use, to the extent that they were influenced by the proposed improvement, were properly excluded from consideration in evaluating the property taken.

XI. CONCLUSION

Although it will not serve a useful purpose to recapitulate in detail the matters covered herein, the following may be noted: It is evident that in the usual and ordinary situation the rule that existing zoning restrictions may be considered in ascertaining market value will operate to the benefit of the condemnor. The rule that reasonable probability of rezoning may be shown will ordinarily enure to the benefit of the condemnee. However, the reverse of such situations is possible, depending on the facts and the operative effect of zoning restrictions or the likelihood of their removal. Where the probability of rezoning to a higher use is clearly apparent to the condemning authority at the negotiation stage, the possibility of an award in condemnation considerably in excess of the market value of property under existing restrictions should be carefully weighed. Where the reasonable probability of rezoning is sought to be established at trial, attorneys for the condemnor should bear in mind the limitation that valuation may not be predicated on rezoning as an accomplished fact. The testimony of expert witnesses should be carefully confined to their opinion as to the premium that would be placed on the market value of property under existing restrictions as a result of the reasonable probability of rezoning. The factors that may be considered in determining the reasonable likelihood of rezoning are as yet not clearly enunciated by the courts over a broad spectrum, and the competency of evidence offered to prove the reasonable prospect of rezoning to a higher use should be subjected to careful questioning and scrutiny.

The rule that evidence of reasonable probability of rezoning is inadmissible if such probability is the direct result of the highway project itself obviously is of major importance to attorneys for state highway departments. As previously shown this rule has been announced in but a few jurisdictions. On the other hand, it has been rejected in none. It is suggested that in cases involving the reasonable probability of rezoning, highway lawyers be on the lookout for any plausible evidence that the probability of rezoning is directly attributable to the highway project. The adoption of such rule, of course, will not be of benefit in all cases where reasonable probability of rezoning is involved. However, once the rule is established in a given jurisdiction it would seem virtually inevitable that over a span of years considerable savings will be effected in a substantial number of highway condemnation cases where rezoning from a lower to a higher use is demonstrably the direct result of highway construction.

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APPLICATIONS

The foregoing research should prove helpful to highway administrators, their legal counsels, right-of-way engineers, appraisers, and review appraisers. Highway officials are urged to review their right-of-way acquisition programs to determine how this research can effectively be incorporated in a meaningful way. Attorneys should find this paper especially useful in their work as an easy and concise reference document in eminent domain litigation cases.