

Principles of Compensation in Eminent Domain - Michigan Bar Journal, December 1994,
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The ability of the government to acquire title to property for public use by condemning it through the power of eminent domain has been constitutionally provident.

Equally recognized is the right of the property owner to be compensated for the loss of property. In Michigan, the competing rights of the government and the individual in eminent domain proceedings are set forth in the Uniform Condemnation Procedures Act.¹

The question the judicial system is called upon to determine in eminent domain proceedings usually pertains to the issue of what constitutes just compensation for a taking of an individual parcel of property, including the value of structures, easements, and property rights. The basic principle is that the owner of property should be placed in the same position as if the condemnation had not occurred.² This concept has been incorporated in the Standard Jury Instructions:

Whenever private property is taken for a public purpose, the constitution commands that the owner shall be paid just compensation. Just compensation is the amount of money which will put the person whose property has been taken in as good a position as the person would have been in had the taking not occurred. SJ12d 90.05.

The determination of just compensation includes the value of movable fixtures and the detach-reattach cost of those fixtures,³ business interruption damages, as well as other compensable elements based upon theories of law now encapsulated in the Standard Jury Instructions ("SJI"). These include consideration of the potential for rezoning, SJ1 90.10, and highest and best use of the property, SJ1 90.09.

There is a reasonable claim that owners may show the difficulty of replacement by introducing the inadequacy of a condemnor's offer and the trouble in procuring other properties comparable to those appropriated.

The special importance that Michigan places in protecting an individual's property rights is illustrated by a comparison of the Michigan definition of just compensation with that of the American Institute of Appraisers ("AIA"), which promulgates standards for appraisals, including condemnation appraisals. The AIA defines just compensation as "the payment of market value of the real estate which was taken."⁴

In determining the measure of damages, Michigan courts consider not only fair market value, but also the highest and best use of the subject property.⁵

FAIR MARKET VALUE-DEFINITIONS AND FACTORS

The highest courts of most states have handed down definitions of fair market value to be applied in state court trials. These definitions have been subject to frequent change. Additionally, numerous definitions of market value have been devised over the years by professional organizations, governmental bodies, etc.

Michigan Standard Jury Instruction 90.06 sets forth a definition of fair market value in eminent

domain actions:

Your award must be based upon the market value as of the date of taking.

A. The highest price estimated in terms of money that the property will bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser buying with knowledge of all of the uses and purposes to which it is adapted and for which it is capable of being used.

Again, when compared to the AIA definition of fair market value, Michigan law provides a greater measure of protection for the property owner. The AIA definition requires only the "most probable price in terms of money . . ." as opposed to the highest price, and makes no mention of possible uses or adaptability.⁶

The Comparable Approach

The fact finder may look to the value of properties similar to the property at issue in determining fair market value. Whether the properties are sufficiently similar to have some bearing on value rests in the sound discretion of the trial court.⁷

The standard has traditionally been broad in allowing evidence to be admitted and relied upon in determining what is a comparable property. For example, similar property of different size and an entirely different locality may be admissible. It is sufficient if the property referred to has a resemblance.⁸

Michigan courts have consistently held that it is the opinion testimony of witnesses that determines the value of comparable property. *Comm of Conservation v Hane*, 248 Mich 473,477 (1983), is frequently cited for this proposition.

We hold that knowledge of specific sales of similar character may be employed by a witness informing an opinion of other lands equally circumstanced, but other specific sales of similar land and prices paid therefor may not be introduced as substantive value of the particular parcel.

The limitation of the comparable sales approach provided by *Hane* was that the purchase price paid for comparable property was not admissible as part of the direct examination of an expert witness. However, the decision in *Hane* may have been modified by Michigan Rule of Evidence 705, which allows sale prices to be introduced on direct examination.

Additionally, it is within the discretion of the trial court to determine whether a sale used for comparison took place within a reasonable time of the proposed taking. Any objection to the sale as remote in time must be made at the trial level and not for the first time on appeal.⁹

Admissibility of Recent Sales

Recent sales of the subject property are nearly always admissible. A sales price is considered competent evidence to show fair market value as long as the sale otherwise fulfills the fair market value standard and is "voluntary, not too remote in time, and not otherwise shown to have no probative value."¹⁰

The burden is on the party challenging presentation of the recent purchase to show that the sale is remote in time or that there are other factors that make the transaction something other than

arms length. It is within the discretion of the trial court to determine admissibility of recent sales evidence, and a trial court's ruling on such evidence will not be disturbed on appeal absent an abuse of discretion.¹¹

To make a recent sale relevant, courts have relied upon *McGuire* to look at the length of time since the sale, as well as the demographic factors.

If the physical and economic conditions are not similar the price paid is not relevant to the fair market value of the property at the time of taking. *Bd of Co Comm'rs v GLS Leas Co Inc*, 394 Mich 126; 229 NW2d 187(1970).

The *McGuire* Court did note that where there is a substantial fluctuation of economic and physical conditions over a lengthy period of time since the date of sale, the purchase price is patently inadmissible. However, the "recent in time" test of *McGuire* will not apply where property is completely changed in use or was totally remodeled after purchase.

In determining the measure of damages, Michigan courts consider not only fair market value, but also the highest and best use of the subject property.

An example of a substantial fluctuation would be a situation in which the condemnor's own appraisal recognizes that the fair market value of the property is different than a recent purchase price. Where there has been tremendous movement in value, even over a short period of time, the subject property's purchase price will be inadmissible.

Admissibility of Costs

In the case of *City of Fenton v Lutz*, 73 Mich App 117; 250 NW2d 579 (1977), the owner of the property presented testimony of his replacement costs. The court, in dicta, ruled that although the testimony was improper, it was harmless error. Since that time, condemnors have frequently taken the position that any effort to show a replacement cost, with proper adjustments, was violative of the rules of evidence and therefore prejudicial.

The facts underlying *Lutz* leave the condemnor's objection suspect because the owner in *Lutz* did not attempt to make adjustments. The better rule would be to apply the same basic test applied to other fair market estimations of value. By allowing for adjustments of time, location, size, condition, and other factors relating to fair market value, replacement costs could be utilized as part of the just compensation process.

There is a reasonable claim that owners may show the difficulty of replacement by introducing the inadequacy of a condemnor's offer and the trouble in procuring other properties comparable to those appropriated. This is contrary to *Lutz*.¹²

Remodeling costs are a different matter. They are usually considered inadmissible because the increase in value of the property is speculative. One exception may be a tenant testifying that improvements and remodeling would increase revenue, thereby increasing the fair market value of the leasehold.¹³

Utilization of Capitalization of Income

Capitalization of income as a method of valuation may properly be introduced as evidence and considered competent before the fact finder.¹⁴

The courts have also recognized that capitalization of income depends on more factors than a strict rate of return and that these elements are questions the jury has a right to consider.¹⁵

Admissibility of Offers to Purchase

Western Michigan Univ v Slavin, 381 Mich 23, 30; 158 NW2d 884 (1968), cogently outlined the rules of bilateral offer and purchase. An offer must be a bona fide offer by a person with the ability to sign a document purporting to be an offer for the property:

In order to establish market value by an offer one must at least show that there has been a bona fide offer made for the property. If this were not the rule, offers might be secured in an amount far in excess of the real value of the property in question. To admit such testimony might open the door to perjury.

The policy barring offers by persons without the present ability to fulfill a purchase agreement is premised upon the need to avoid fraud on the court that could easily occur if property owners were allowed to present claims that properties were prospectively for sale in a certain amount in order to obtain a higher award of just compensation. A different result applies when there is a legitimate bilateral purchase agreement. Bona fide transactions may be considered by the jury in determining fair market value.¹⁶ However, options by the condemning authority to purchase properties are not admissible as evidence of value.¹⁷

Admissibility of Settlements

Evidence regarding compromises or partial settlements between interested parties as to condemnation proceedings generally are considered to be in contemplation of litigation and therefore not arms-length transactions between willing parties. As such, partial settlements are prohibited from being presented as evidence of value at trial.¹⁸

HIGHEST AND BEST USE: DEFINITIONS AND FACTORS

In making a determination of fair market value, the fact finder is not limited to placing a value on the land and its existing utilization, but can also consider other legal potential uses of the property. This is commonly referred to as highest and best use.¹⁹

Any evidence relating to the question of the highest and best use of property is material and therefore admissible regarding value, and the jury may consider every legitimate use of the property.

Michigan Standard jury Instruction 90.09 sets forth a definition of highest and best use:

By "highest and best use" we mean the most profitable and advantageous use the owner may make of the property, even if the property is presently used for a different purpose or is vacant, so long as there is a market demand for such use

The AIA defines highest and best use as:

That reasonable and probable use that supports the highest present value, as of the effective date of the appraisal.

Once more, the distinction between the definitions set forth by the Michigan Standard jury Instruction and the AIA is clear. The SJI of applying highest and best use is again intended to protect an owner from the harsh remedy of eminent domain.

The notion that the property should not be limited in value to its existing use a that consideration should be given to a I possible uses to which it may be adapted, with compensation based upon the most advantageous use, arises out of the case of Chicago, Detroit & CGTJR Co v Simons, 200 Mich 76; 166 NW 960 (1918). In Simons, the court applied the "indemnification" standard of what the owner has lost and concluded that the property should be treated at the most profitable use so that the owner is fully compensated.

While the SJI recognizes that the owner should be compensated for the most profitable and advantageous use, this is limited to a use that has a "reasonable basis, but cannot rest upon mere speculation."²⁰

Any evidence relating to the question of the highest and best use of property is material and therefore admissible regarding value, and the jury may consider every legitimate use of the property.²¹

Before the enactment of the current Michigan Rules of Evidence, evidence of asking prices or offerings was inadmissible. However, as stated earlier, the rule of Comm of Conservation v Hane, supra, of excluding sales prices, may have been modified by MIZE 705.

Specially Adapted Property

Land that is used for a special purpose must have that use considered as an element of value. This is commonly referred to as "special adaptability."

The historical reliance for considering special adaptability as a measure of value in eminent domain cases is found in 18 Am Jur, Eminent Domain, Section 247, p. 885.

In re Grand Haven Hwy v Dake, 357 Mich 20, 28; 47 NW2d 748 (1951), sets forth the standard in Michigan:

The adaptability of the land, sought to be taken in eminent domain, for a special purpose or use may be considered as an element of value This is not taking the "value in use" to the owner as contra-distinguished from the market value. What is done is merely to take into consideration the purposes for which the property is suitable as a means of ascertaining what reasonable purchasers would in all probability be willing to give for it, which in a general sense, may be said to be the market value.

The language cited in Dake has been adopted in Standard Jury Instruction 90.07.

All Uses to Which Property May Reasonably Be Adapted

Standard Jury Instruction 90.09 states that a determination of fair market value requires

consideration of "any and all uses to which the property may be adapted." These types of cases usually fall into three categories:

* Potential to Expand. Included in the highest and best use of property is the potential to expand on that property. Payments for a diminution in this potential is properly considered in the determination of just compensation.²²

* Assemblage. A difficult problem in ascertaining the highest and best use of property occurs when there is a claim that assemblage may be possible. Frequently, the highest and best use of property involves assemblage with other parcels. The Michigan Supreme Court has set forth the standard in *Consumers Power v Allegan State Bank*, 338 Mich 568, 577; 202 NW2d 299 (1972):

[U]pon remand the commissioners should be instructed make a factual determination of the possibility of assemblage within a reasonable time at a reasonable price. If such assemblage is found to be practical without exercising eminent domain, the increment in value due to the particular use should be apportioned among the parcels comprising the entire tract.

City of Allegan v Vonaseh, 261 Mich 16; 245 NW 557 (1932), provides another example of assemblage. There, the property in question was to be one of many parcels to be assembled for a proposed electrical facility. The court held that if the highest and best use of the property would occur in such an assemblage, then that was to be the measure of value in determining compensation.

* Subdivision Approach. One of the most frequently disputed issues in condemnation proceedings is whether property may be subdivided in some way to show the profitability of the land in its highest and best use.

In *Hwy Comm'r v Snell*, 8 Mich App 299, 310; 154 NW2d 631 (1968), the court approved of the subdivision and stated:

It is proper to inquire what the tract would be worth, having in view the purposes for which it is best adapted, but it is the tract and not the lots into which it might be divided that is to be valued.

In all cases where a claim of highest and best use is different from the existing use, it is a question for the fact finder to determine if such a use could be accomplished.

Incompatible Uses

It is error to consider the value of two incompatible uses together on the same land when determining damages.²³

The notion of incompatible use is that if the highest and best use of the land is a use that detracts from the existing use, the value created by the existing use may not create an incremental value to be added to the highest and best use. "It is not a combination of all mutually exclusive uses, but, rather the highest and best use which is the standard to be applied."²⁴

Possibility of Rezoning

In *State Hwy Commr v Eilender*, 362 Mich 697; 109 NW2d 877 (1961), the court determined that the finder of fact may determine the possibility of rezoning in considering the fair market

value for just compensation purposes. This position has been unsuccessfully challenged on numerous occasions.

The practitioner in eminent domain cases must go beyond a mere appraisal in determining the measure of damages when a client's property is taken for public use.

Michigan courts have held that if there is a reasonable possibility of rezoning that would affect the price a willing buyer would have paid for the property before the taking, then this element should be considered in the determination of just compensation.

The standard of reasonable possibility was affirmed in *Michigan State Hwy Comm'r v Haelnle*, 69 Mich App 336; 224 NW2d 470 (1976), when the court reversed a decision in which a jury instruction was given applying a "real probability" standard for rezoning purposes. The standard of reasonable possibility of rezoning has been adopted in Standard Jury Instruction 90.16.

CONCLUSION

The practitioner in eminent domain cases must go beyond a mere appraisal in determining the measure of damages when a client's property is taken for public use. All factors in determining fair market value, including highest and best use, and any special adaptability of the property, should be fully investigated before making a determination of what constitutes just compensation for the property owner's loss.

Making sure that your client is as fully compensated as the law allows can minimize the interruption and inconvenience occasioned by a taking, thereby allowing the property owner to return to normalcy in as short a time as possible.

Footnotes

1. MCLA 213.51, et seq.; MSA 8.265, et seq., which provides standards for the acquisition of property.
2. *Detroit v Hamtramck Community Federal Credit Union*, 146 Mich App 155; 379 NW2d 405(1986).
3. *In re Acquisition of Land for Central industrial Park Union*, 127 Mich App 255; 338 NW2d 204(1983).
4. *American Institute of Real Estate Appraisers, Society of Real Estate Appraisers, Real Estate Appraisal Terminology* revised ed., Ballinger Publishing Co., Cambridge, Mass., 1981, p. 70.
5. SJ12d 90.06, 90.09.
6. *Id.*, p. 143.
7. *In re Jeffries Homes Housing Project*, 306 Mich 638; 11 NW2d 272 (1943).
8. *Wassenick v City & Co. of Denver* 67 Col 456; 186 P 533 (1919); *Pennsylvania Co for Ins on Lives & Granting Annuities v Philadelphia*, 268 Pa 559; 112 A 76 (1920).

9. In re Jeffries Homes Housing Project, *supra*.
10. Michigan State Hwy Comm v Abood; 83 Mich App 612, 618; 269 NW2d 247 (1978), citing In re Petition of Dillman, 263 Mich 542, 549-50; 248 NW 894 (1933).
11. State Hwy Comm v McGuire, 29 Mich App 32; 185 NW2d 187 (1980).
12. See In re Jeffries Homes Housing Project, *supra*.
13. Grand Rapids v Ellis, 375 Mich 406; 135 NW2d 675 (1965).
14. State Highway Comm'r v Hessell, 5 Mich App 559; 147 NW2d 464 (1967).
15. In re Jeffries Homes Housing Project, *supra*, State Hwy Comm'r v Copper R Co, 105 Mich App 140; 306 NW2d 384 (1981).
16. Detroit v Fidelity Realty, 213 Mich 448; 182 NW 140 (1924).
17. In re Parkside Housing Project, City of Detroit v Vandebroeker 290 Mich 582; 287 NW 571 (1939)
18. State Hwy Comm'r v Cooper R Co, *supra*.
19. See In re Condemnation of Lands in Battle Creek, 341 Mich 412; 67 NW2d 49 (1954); In re Widening of Fulton Street, 248 Mich 13; 226 NW 690 (1929); Ecorse v Toledo, CS&D R Co, 213 Mich 445; 182 NW 138 (1921).
20. In re Dillman, 255 Mich 152, 155; 237 NW 552(1931)
21. St. Clair Shores v Conley, 350 Mich 458; 86 NW2d 271 (1958).
22. Michigan State Hwy Comm v Great Lakes Express Co, 50 Mich App 170; 213 NW2d 230 (1973).
23. Bd of County Rd Comm'r v GLS Leas Co, *supra*.
24. In re Widening of Bagley Ave., 248 Mich 1, 5; 67 NW2d 49 (1954).