"Valuation Issues in Eminent Domain Litigation: What You Need to Know"

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I. Introduction

In going all the way to the United States Supreme Court, *Kelo v. City of New London*[1] brought eminent domain issues into the national spotlight. Because eminent domain cases present a conflict between the rights of property owners and the right of a sovereign government to seize property for public use, courts are required to strike a delicate balance. This constantly shifting balance between public and private rights means that this area of the law is constantly changing and evolving. In Ohio, as in many other jurisdictions, the last fifteen years have seen some significant developments in eminent domain law. This article examines some recent decisions from the last fifteen years of eminent domain cases in Ohio, and considers their effect on appropriation proceedings in the State, particularly in the areas of evidentiary, substantive, and procedural issues.

This article will first examine *City of Hilliard v. First Industrial* [2] and *City of Green v. Genovese*[3], two very recent Ohio eminent domain cases that raise many of the issues that will be addressed throughout this article. *First Industrial* reached the Ohio Court of Appeals on two separate occasions, the first following the original trial[4], and the second following a damages-only trial on remand.[5] *First Industrial* provides an excellent look at the interaction of a number of different eminent domain issues, and provides a perspective as to how these issues are dealt with by Ohio courts on appeal. *Genovese* provides insight to a number of the more specific takings issues to be discussed later, including partial takings.

The rest of the article will be dedicated to analyzing various cases, each in the context of different areas of eminent domain law. For the sake of organization, these cases are broken down into three general categories. Each case will be categorized as presenting evidentiary issues, substantive issues, or procedural issues, and some may have some relevance to each category.

A. *City of Hilliard v. First Industrial*

Although some court decisions can be classified as strictly evidentiary, substantive or procedural, other cases involve the interaction of all three types of issues. One very recent case that involves all three of these areas of eminent domain law is *City of Hilliard v. First Industrial*.[6] In *First Industrial II*, the Court of Appeals of Ohio heard a claim for damage to the residue of the landowner's property resulting from the

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[1] 125 U.S. 2655 (2005).
[2] *City of Hilliard v. First Indus., L.P.* (*First Industrial I*), 158 Ohio App.3d 792, 2004-Ohio-5836, 822 N.E.2d 441 (10th Dist.); *City of Hilliard v. First Indus., L.P.* (*First Industrial II*), 165 Ohio App.3d 335, 2005-Ohio-6469, 846 N.E.2d 559 (10th Dist.).
[3] 2008 Ohio 1911 (Ohio Ct. App. 2008).
[4] *First Industrial I.*
[5] *First Industrial II*
[6] *First Industrial I*; *First Industrial II*.

City of Hilliard's appropriation of a portion of the land. At the original trial the jury awarded $520,000 compensation for the appropriated land, as well as $300,000 for damages to the residue after the appropriation.[7]

The city appealed the original jury verdict, and the case was heard by the Court of Appeals of Ohio in *First Industrial I*.[8] On appeal, the Court in *First industrial I* affirmed the compensation for the taking itself, but reversed the jury's determination of damages to the residue. Regarding the damage to the residue, the Court stated that "it is well established by clear and venerable case law that an opinion as to the damages to the residue must be expressed in terms of the difference between the pre- and post-appropriation fair market value of the residue."[9] Furthermore, the Court of Appeals of Ohio had previously affirmed this principle in *Wray v. Stvartak*.[10] The Court also noted that the determination of pre and post-appropriation fair market values should consider every element that can fairly enter into the question of value and an ordinary prudent businessperson would consider before forming judgment and making a purchase.[11] The Court in *First Industrial I* further noted that "[a]mong the elements that may be important are loss of ingress and egress and any other losses reasonably attributable to the taking."[12]

The owner's position in *First Industrial I* was that the cost to reconstruct an internal road may be considered as part of the damages to the residue. The interference created by the circuity was not a mere inconvenience shared by the public in general, but a damage specific to the owner. Following the general rule applied in most jurisdictions, the court required a review of the costs without the cure of the internal road. The court concluded: "[a]s we have found that there was no proper evidence of the difference between the fair market value of the residue after the taking and the fair market value of the residue before the taking, the cost-of-cure alternative could not be analyzed."[13] For this reason, the Court in *First Industrial I* remanded the case for a damages-only hearing regarding the residue of the property, finding that the original jury had found the existence of a diminution in value using an improper method of calculating damages.[14]

On remand, the trial court again entered judgment for First Industrial for damage to the residue of the property. This time, however, the trial court found these damages to be $510,000, representing a

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[7] *First Industrial I* at ¶ 3.
[8] *First Industrial I*
[9] *Id*. at ¶ 9 (citing *Ry Co. v. Gardner*, 45 Ohio St. 309, 322, 13 N.E. 69 (1887) ("[I]t is improper for a witness to state his opinion on the amount of damages arising from an appropriation of property without giving an opinion as to the value of the property before and after the appropriation" *First Industrial I* at ¶ 9.)).
[10] 121 Ohio App.3d 462,476,700 N.E.2d 347 (6th Dist. 1997).("[I]n giving an opinion as to the damages to the residue, an expert is required to state the before and after fair market values of the property." *First Industrial I* at ¶ 9).
[11] *First Industrial I*, (citing *City of Norwood v. Forest Converting Co*., 16 Ohio App.3d 411, 415,476 N.E.2d 695 (1st Dist. 1984)).
[12] *Id*. (citing *In re Appropriation for Hwy. Purposes of Lands of Lunsford*, 15 Ohio App.2d 131, 134-135; 239 N.E.2d 110 (3d Dist. 1968).
[13] *Id*. at ¶ 13.
[14] *Id.* at ¶ 14-15.

significant increase over the original award.[15] The trial court judgment was based on a few key findings. First, the trial court found that the general benefits created by the construction of a public roadway, even if generally beneficial to First Industrial, cannot be used to offset the damages to the residue of First Industrial's property caused by the appropriation for that roadway.[16] Second, the trial court found that the damage to the residue of First Industrial's property, based on the before and after approach of valuation, was $510,000.[17] Third, the cost to cure the damage to the residue was calculated to be $537,500.[18] Finally, First Industrial was found to be entitled to the value of the damages to the residue totaling $510,000 because the cost to cure exceeded the total damage to the residue.[19] The City of Hilliard appealed on multiple grounds, each of which the Court handled individually.

In the City's first assignment of error, the Court addressed the claim that the trial court's decision was contrary to law on four separate grounds. The plaintiff contended that the trial court had: 1) "failed to offset damages to the residue by the special benefits received by First industrial…", 2) applied best cost-to-cure standard rather than reasonable cost-to-cure standard, 3) improperly restricted best use testimony, and 4) "…improperly considered loss of ingress and egress to the property."[20]

The Court of Appeals first considered the claim that the damages to the residue of the property should have been offset by the special benefits bestowed upon First Industrial as a result of the appropriation. The Court began by looking to *City of Norwood v. Forest Converting Co.* for the principle that:

> In an appropriation case, a landowner is entitled to compensation for the property actually taken, as well as damages for injury to the property that remains after the taking, i.e., the residue. Compensation and damages are two separate and distinct remedies. Compensation means the sum of money that will compensate the owner for the land actually taken, which is reflected in the fair market value of the land taken without deduction for benefits that may accrue to the remaining lands of the owner.[21]

The Court contrasted this with damage, which "means an allowance made for any injury that may result to the remaining lands by reason of the construction of the proposed improvement, after making all permissible allowances for special benefits, and the like, resulting thereto."[22] The Court continued on to state that R.C. 163.14 requires the jury to assess the damages due "without deductions for general

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[15] *First Industrial II*, 165 Ohio App.3d 335, 2005-Ohio-6469, 846 N.E.2d 559, at ¶ 1.
[16] *Id at ¶ 4*.
[17] *Id.* (based on pre-appropriation value of$10,515,000 and post-appropriation value of $10,005,000).
[18] *Id.* (based on an estimated cost of construction of $300,000 and the required use of 2.5 acres of land valued at ($95,000 per acre).
[19] *First Industrial II*
[20] *Id*. at ¶ 6.
[21] *Id.* at ¶ 8 (citing *City of Norwood v. Forest Converting Co.*, 16 Ohio App.3d 411, 415, 476 N.E.2d 695 (1st Dist. 1984); referencing Article I, Section 19, Ohio Constitution ("[W]here private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.").
[22] *Id.* (citing *Norwood*, 16 Ohio App.3d at 415, 476 N.E.2d 695; *In re Appropriation of Easement for Hwy. Purposes*, 93 Ohio App. 179, 183, 112 N.E.2d 411 (6th Dist. 1952)).

benefits to the owner's property."[23] The Court noted that "[g]eneral benefits are those that accrue to the community or the vicinity at large as a result of the appropriation,"[24] while "[s]pecial benefits are those that accrue directly and solely to the landowner's property."[25] By negative implication of R.C. 163.14, and based on growing case law, the Court stated that "special benefits" may be considered to the extent that they have a positive impact on the residue's post appropriation value.[26] As damages to the residue are to be determined by comparing pre- and post-appropriation property values,[27] the Court noted that when determining these values, "every element should be considered that can fairly enter into the question of value and that an ordinary prudent businessperson would consider before forming judgment in making the purchase."[28] While the plaintiff's experts had testified that special benefits to First Industrial's residue had accrued as a result of the appropriation, the Court noted that "[n]either R.C. 163.14 nor case law *requires* the fact-finder to include the accrual of special benefits when assessing the damage to the residue; rather, the law dictates that the fact-finder *may* consider special benefits when making its determination."[29] For this reason the Court concluded that:

> Since the court allowed plaintiff to introduce testimony on special benefits and the court, as the trier of fact, considered but did not include special benefits in its assessment, the court did not err as a matter of law, especially in view of the trial court's not finding the plaintiff's testimony persuasive."[30]

The Court next examined the claim that the trial court erred as a matter of law by determining the best cost to cure rather than a reasonable cost to cure. The Court first noted that "[t]he amount of cost-to-cure damages to the residue is significant because it may limit the amount of damages assessed if the cost to restore the residue to its pre-appropriation fair market value is less than the difference between the pre- and post-appropriation fair market values.''[31] The Court next stated the rule that "[t]he cost to cure, however, cannot be utilized to increase the damages to the residue, but only to reduce them."[32]

With these general principles in mind, the Court examined the testimony of each party's experts. The source of the dispute was the total cost to cure, in light of the loss of an ingress/egress access point, and in light of the new roads that would have to be built as a result of the loss of the appropriated land. The defendant's experts determined that there would be a total cost to cure of $537,500, which included the cost of constructing new access roads and the value of the property that would be lost to those roads.[33]

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[23] *Id.*at ¶ 9.
[24] *Id. at 6-7 (citing Richley v. Bowling, 34 Ohio App.2d 200, 202;, 299 N.E.2d 288 (3d Dist. 1972); referencing Norwood, 16 Ohio App.3d at 415, 476 N.E.2d 695).*
[25] *Id.* (citing *Little Miami R.R. Co. v. Collet*t, 6 Ohio St. 182, 186 (1856).
[26] *Id.* (citing Bowling at 202; Norwood at 415).
[27] See cases cited *supra* note 6.
[28] *First Industrial II*, 165 Ohio App.3d 335, 2005-Ohio-6469, 846 N.E.2d 559, ¶ 10 (citing *Hurst v. Starr*, 79 Ohio App.3d 757, 763, 607 N.E.2d 1155 (10th Dist. 1992); *see also In re Appropriation for Hwy. Purposes of Land of Winkelman*, 13 Ohio App.2d 125, 138, 234 N.E.2d 514 (3d Dist. 1968).
[29] *Id. at ¶ 1310 (see citing Norwood at 415; Bowling at 202, supra.).*
[30] *Id.*
[31] *Id. at ¶ 14 (citing Wray v. Stvartak, 121 Ohio App.3d 462, 478, 700 N.E.2d 347 (6th Dist. 1997)).*
[32] *Id*. (citing *Stvartak* at 478).
[33] *Id*. at ¶¶ 15-16 ($300,000 construction costs+ (2.5 acres of land used X $95,000 per acre value).

The plaintiff's expert testified that the total cost to cure the taking would be only $55,464 because two short stub roads could be used to access the property.[34] In response, the defendant's expert stated his belief that "[the] plaintiff's alternative proposal would be 'feasible,' but it would not restore the residue to its pre-appropriation value."[35]

The trial court adopted First Industrial's proposal as the proper cost to cure the appropriation, relying on the testimony of the defendant's experts. The plaintiff argued that the cost to cure "should operate to mitigate damages, not to finance improvements to the residue."[36] Finding this claim unpersuasive, the Court noted that both sides presented expert opinions as to what they believed it would cost to cure the appropriation, and the trial court simply found First Industrial's witnesses more credible and their proposal more reasonable.[37] In concluding the issue, the Court held that "[a]lthough First Industrial's proposal is considerably more expensive than plaintiff's, the trier of fact weighs the credibility of the witnesses and makes the determination. Because the evidence supports the trial court's conclusion that First Industrial's proposal was reasonable, the court did not err as a matter of law."[38]

Plaintiff's third claim was that the trial court erred in restricting the plaintiff's experts "from considering better zoning uses in determining the post-appropriation value of the residue."[39] The court agreed that:

> The rule of valuation in a land appropriation proceeding is not what the property is worth for any particular use but what it is worth generally for any and all uses for which it might be suitable, including the most valuable uses to which it can reasonably and practically be adapted.[40]

For this reason, the Court noted that "an expert need not confine his valuation testimony to the use permitted under existing zoning regulations."[41] Furthermore, the Court acknowledged that "the expert may testify as to a highest and best use that is not permitted under existing zoning regulations even without evidence of a probable change in zoning within the foreseeable future."[42]

The City's expert had testified that the residue had actually increased in value as a result of the improved access to the site and potential commercial uses that were previously unavailable. The plaintiff contends that this testimony was "competent, credible and admissible and thus the court should not have excluded it from consideration."[43] The Court noted that the "plaintiff once again is

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[34] *Id*. ¶ 17(The two proposed roads would simply run directly from the new ingress/egress access points to the internal roads, and were contended to "fully restore the usefulness of the residue at a reduced cost." *Id.*).
[35] *Id*.
[36] *Id*. at ¶ 19
[37] *Id.*
[38] *Id*.
[39] *Id*. at 14.
[40] *Id*. (citing Sowers v. Schaeffer, 155 Ohio St. 454, 99 N.E.2d 313 paragraph three of the syllabus (1951).
[41] *Id. (quoting Wray v. Stvartak, 121 Ohio App.3d 462, 477, 700 N.E.2d 347 (6th Dist. 1997) (quoting Wray v. Mussig, 11th Dist. Lake No. 95-L-172, 1996 Ohio App. LEX1S 4113 (Sept. 20, 1996))) (internal quotation marks omitted).*
[42] *Id*. (quoting *Stvartak* at 477 (quoting *Mussig*)).
[43] *Id*. at ¶ 21.

asking this court to substitute its judgment for that of the trial court regarding the witnesses' credibility."[44] The Court stated that the defendant's witness "was not required to appraise the land upon the basis of an alternate commercial use, since he believed it was not feasible for the area in question."[45] According to the Court, this is an extension of the principle that "[a]lthough an expert may testify to the best use of the land irrespective of the current zoning restrictions, the expert may not increase the fair market value over and above that which an informed willing purchaser would presently pay."[46] Ultimately, on that issue the Court held that "[t]he trial court's choice not to include [plaintiff's witness'] highest-and-best-use valuation is an issue of credibility, not a matter of law. The court did not err when it found [defendant's witness] more credible than [plaintiff's witness]."[47]

The last issue included in the plaintiff's first assignment of error was a claim that it was an error of law for the defendant's experts to include loss of ingress/egress in calculating their post-appropriation fair market value. The Court stated that "[p]laintiff correctly asserts that circuity of travel to and from real property is not compensable,"[48] but it also noted that "circuitry of travel created within the owner's property is compensable."[49] As noted in the previous appeal of the case, the point of ingress and egress to and from First Industrial's loading dock was taken away and not replaced.[50] The plaintiff alleged that the defendant's expert had improperly included the change of ingress/egress as an element of damages to the residue.[51] The Court dismissed this claim, finding that the opinion of the expert was based on a diminution in value to a building on the premises that was the result of the loss of ingress/egress.[52] Because that was a proper basis for the valuation, the Court held it to not be error, and dismissed the plaintiff's first assignment of error.[53]

The City's second assignment of error by the plaintiff was a claim that the verdict was against the great weight of the evidence. The claim was that the trial court: 1) ignored better use expert testimony; 2) failed to determine pre-taking fair market value of the building; and 3) the $300,000 estimate lacked foundation and was based on hearsay.[54]

The Court first looked to the standard of review to be applied to claims of this nature. The Court stated the rule that '"[j]udgments supported by some competent, credible evidence going to all essential

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[44] *Id.* at ¶ 22.
[45] *Id.* at ¶ 23..
[46] *Id*. (citing Masheterv. Kebe, 49 Ohio St.2d 148, 153, 359 N.E.2d 74 (1976).
[47] *Id*. (The court also held that a limitation on the plaintiff's ability to cross-examine anoher defense expert was a harmless error as that witness' opinion did not serve as the basis for the court's valuation of the issue.).
[48] *Id.* at ¶ 26 (citing *First Industrial I*, 158 Ohio App.3d 792, 2004-Ohio-5836, 822 N.E.2d 441, ¶ 8 (10th Dist.) (citing *State ex rel. Merritt v. Linzell*, 163 Ohio St. 97, 102, 126 N.E.2d 53 (1955))).
[49] *Id.* (citing *First Industrial I* at ¶ 8 (citing *State ex rel. OTR v. City of Columbus*, 76 Ohio St.3d 203, 210, 667 N.E.2d 8 (1996))).
[50] *Id.* (citing *First Industrial I* at ¶ 8).
[51] *Id.* at ¶ 27.
[52] *Id.*
[53] *Id.* at ¶¶ 27-28.
[54] *Id*. at ¶ 29

elements of the case' are not against the manifest weight of the evidence."[55] The Court continued on to note that "[a] judgment is not against the manifest weight of the evidence merely because inconsistent evidence was presented."[56] Finally, the state acknowledged that "[i]f the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment."[57]

Applying this deferential standard of review, the Court quickly dispatched with the bases for the plaintiff's second assignment of error. First the Court addressed the claim that the testimony of plaintiff's expert witness should have been considered regarding the best use for the property. The claim was that the witness was no less credible than that of the defendant. The Court refused to second guess the trial court's determination of credibility, and instead found that "[s]ince [defendant's expert's] testimony was sufficient, competent credible evidence of damages to the residue, plaintiff's first issue is not well taken."[58]

The plaintiff had also claimed that the decision was against the manifest weight of the evidence because First Industrial's building was not appraised prior to the taking. The Court noted, however, that the court's $5.1 million pre-appropriation value was in fact the same value that the plaintiffs own witness had assigned to the building during his testimony.[59] The Court found that it was not error for the trial court to accept the plaintiff's own testimony as to the value of the building.[60]

Finally, the Court addressed the plaintiff's claim that one of the witnesses that had provided expert testimony at trial had not been properly qualified as an expert witness under Evidence Rule 702 (A), and that the opinion relied on the hearsay of others. [61] The Court determined that because neither of these issues was preserved by objection at trial, the Court need only determine whether or not the trial court had committed plain error.[62] In reviewing the plaintiff's claim, the Court noted that:

> In civil cases, the "plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself."[63]

Because the Court found no plain error, and because the testimony in question did not affect the fairness or integrity of the judicial process, the Court denied the third basis for the second assignment of

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[55] *Id.* at ¶ 30 *(citing quoting Young v. Univ. of Akron,* 10th Dist. Franklin No. 04AP-318, 2004-Ohio-6720, ¶ 25 *(citing C.E. Morris Co. v. Foley Constr. Co.,* 54 Ohio St.2d 279, 376 N.E.2d 578, paragraph one of the syllabus (Ohio 1978))).
[56] *Id*. (citing *State v. Raver*, 10th Dist. Franklin No. 02AP-604, 2003-Ohio-958, ¶ 21).
[57] *Id*. (quoting *Estate of Barbieri v. Evans*, 127 Ohio App.3d 207, 211, 711 N.E.2d 1101 (9th Dist. 1998).
[58] *Id.* at ¶ 32.
[59] *Id.* at ¶ 34.
[60] *Id*. at ¶ 35.
[61] Id. at ¶ 36.
[62] *Id.* at ¶ 37.
[63] *Id.* at ¶ 38 (citing *Goldfuss v. Davidson*, 79 Ohio St.3d 116; 679 N.E.2d 1099 (1997)).

error.[64] Having found that the trial court's judgment was not against the manifest weight of the evidence, the plaintiff's second assignment of error was overruled.[65]

The City's third assignment of error was a claim that the Court erred in not allowing certain witnesses to testify in person after they had given video depositions for trial. The plaintiff claimed that not being able to re-cross-examine one of the witnesses substantially prejudiced its case.[66] The Court responded that "[e]videntiary rulings lie within the broad discretion of the trial court."[67] Furthermore, the Court noted that Evid.R. 103(A)(2) addresses erroneous exclusion of evidence, stating that:

> Error may not be predicated on a ruling which ... excludes evidence unless a substantial right of the party is affected, and ... the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Offer of proof is not necessary if evidence is excluded during cross-examination.[68]

The Court further noted that "[i]f the party claiming error is unable to establish that the trial court's ruling affects a substantial right, the error is deemed harmless; if the party is unable to proffer the substance of the excluded evidence, the error is deemed waived."[69] Under this standard the Court determined that the plaintiff's desire to ask additional questions about "some things [the witness] testified to on [his video deposition]" did not disclose the substance of the excluded evidence, making it an inappropriate assignment of error under Evid.R. 103(A)(2).[70] Although the Court noted that there is an exception to the proffer requirement contained in Evid.R. 103(A)(2) for cross-examination, the witnesses in question would not have been called in for cross-examination, and would thus not fall within that exception.[71] For that reason, the Court rejected the third assignment of error.[72]

The only assignment of error that the Court found to be meritorious was the claim that First Industrial was improperly awarded ten percent interest when the applicable interest rate is only four percent. According to R.C. 163.17, the appropriating agency is required to "pay interest on the appropriated land from the date of the taking to the date of the actual payment of the award."[73] The statute also states that the interest is to be paid at the rate forth in R.C. 1343.03.[74] During the time at which interest was accruing on the appropriated land, however, the statutory interest rate changed from ten percent per annum to the federal short-term rate plus three percent (stipulated to be four percent per annum).[75] The change became effective on June 2, 2004, and the Court held that the first rate should apply from the date of the appropriation until the date of the statutory change, and then the second rate will apply

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[64] *Id.*
[65] *Id.* at ¶ 39.
[66] *Id.* at ¶ 40.
[67] *Id*. at ¶ 41(citing *Krischbaum v. Dillon*, 58 Ohio St.3d 58, 66, 567 N.E.2d 1291 (1991).
[68] *Id*. at ¶ 41 (citing Evid.R. 103(A)(2)).
[69] *Id*. (citing *Campbell v. Johnson*, 87 Ohio App.3d 543, 551, 622 N.E.2d 717 (2d Dist. 1993)).
[70] *Id*. at ¶ 42.
[71] *Id*. at ¶ 43.
[72] *Id*. at ¶ 44.
[73] *Id. Id*. at ¶ 46 (citing R.C. 163.17).
[74] *Id.*
[75] *Id.*

from that date until the actual payment of the appropriation award is made.[76] According to the Court, "[t]o do otherwise would make R.C. 1343.03(A) retroactive. Since R.C. 1343.03(A) was not expressly made retroactive, it would operate prospectively only. See R.C. 1.48"[77]

The issues presented in the *First Industrial* cases are illustrative of the complex nature of eminent domain proceedings. Such cases present a variety of evidentiary, substantive and procedural issues, any one of which can dramatically alter the outcome of the matter. Each of these three categories will be considered individually below in the context of other recent Ohio decisions.

B. *City of Green v. Genovese*

In the *City of Green v James* Genovese, et al., the appellate panel reversed a jury award to the owners.[78] At the trial level, the owners were prohibited from the presentation of evidence of their marina's piers' being in danger by an "increased susceptibility to ice flow damage after a partial taking reduced the fair market value of their property".[79]

This writer finds this case interesting because there are so few cases in which trial court judges are reversed for their evidentiary findings, and therefore provides an instructive experience in comparison to the reading of the normal mundane affirmances which one normally expects when there is testimony supporting an eminent domain proceeding.

The Genoveses owned a marina and operated a mobile home park on the partially-acquired property.[80] Although there was a strip of land owned by the State between the property and the water, the Genoveses had a license to use the State lands for the marina's piers and boat ramp."[81] Two one-acre parcels which were not being utilized were contemplated for future commercial development.[82]

Due to the construction of new bridges and widening a road, the Genoveses' engineer explained that the layout of the property had to be reconfigured.[83] Prior to the project, the piers had never been damaged due to moving ice.[84] This was because the piers did not protrude far enough into the lake and were protected from the movement by the bridges' embankments that existed prior to the taking.[85] After the taking, the new bridge provided more space and an increased amount of ice flow under the bridge created havoc with the piers' protection from ice movement.[86]

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[76] *Id*. at ¶ 47 (citing *Tony Zumbo & Son Constr. Co v. Ohio Dept. of Transp.*, 22 Ohio App.3d 141, 148-49, 490 N.E.2d 621 (10th Dist. 1984); *Cleveland Hts. Fire Fighter Assn. v. City of Cleveland Hts.*, 8th Dist. Cuyahoga No. 47727, 1984 WL 13999 (July 12, 1984)).
[77] *Id. (quoting Sheets v. Sheets, 4th Dist. Gallia No. 94CAI7, 1994 Ohio App. LEXIS 6102 (Dec. 30, 1994)).*
[78] *City of Green v. Genovese*, 10th Dist. Summit No. 23472, 2008-Ohio-1911.
[79] *Id*. at ¶ 1.
[80] *Id.* at ¶ 2.
[81] *Id.*
[82] *Id.*
[83] *Id. at* ¶¶ 4-5.
[84] *Id. at* ¶ 5.
[85] *Id.*
[86] *Id.*

The engineer explained how there would be a "probable" likelihood that the owners would suffer damage from the moving ice in future years.[87]

The engineer then stated it would be best if the piers were taken out of the lake each fall and returned in the spring, creating a large yearly expense.[88]

The Genoveses' expert considered the new requirement of removing and returning the piers each year in order to property protect them from ice damage to be an "uncurable permanent damage to the residue."[89]

The city successfully moved to exclude evidence about the potential ice flow damage to the piers. Given that this was a project in which the county and the city each had involvement, as one would expect, the city claimed that this was a county problem and not a city problem.[90] The City also noted that the Genoveses had not as yet removed the piers during the past two winters.[91] The Genoveses claimed that the road and bridge project had been submitted by the city and county together for federal-funding purposes and therefore should be considered a "joint project."[92]

The trial court excluded the Genoveses' evidence because it found the county's construction of the bridge created the ice flow problem and therefore is non-compensable.[93] Additionally, the Genoveses only had a "license" to operate their marina on the state property and, therefore, there was no compensable taking.[94] Finally, the trial court maintained that the damage from the moving ice was too speculative.[95]

Genovese offers an interesting discussion of the just compensation and "taking of private property" process. It goes through the standards for compensation, what just compensation and fair-market value are, highest and best use and damages to the residue. In drafting this Opinion, the Court gave thought to making the owner whole not as a penalty to the government, but because the money was owed due to the taking.

Generally, once evidence is found admissible and let in, a jury verdict will be upheld. However, when there are exclusions of otherwise admissible testimony, a different rule will apply. The *Genovese* court noted that evidentiary issues are for the trial court to determine. "If a trial court's order is based on a misconstruction of law, however, 'an abuse-of-discretion standard is not appropriate; in determining questions of law, an appellate court may properly substitute its judgment for that of the trial court'".[96]

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[87] *Id*. at ¶ 6.
[88] *Id.*
[89] *Id.* at ¶ 7.
[90] *Id.* at ¶ 8.
[91] *Id.*
[92] *Id*.
[93] *Id.* at ¶ 9.
[94] *Id.*
[95] *Id.* at 6.
[96] *Id*. at 4 (citing Swartzentruber v Orrville Grace Brethren Church, 163 Ohio App 3d 96, 2005-Ohio-4264 at ¶6.).

As so often occurs, when there is a motion in limine, the court is effectively construing the law. If the law is misconstrued and the motion in limine is granted, the likelihood of reversal is far greater.

The Genoveses proffered a resolution by the city indicating that they were working with the county on the bridge project. In fact, many of the costs were being shared and the federal application for funding was effectively joint.[97]

The court therefore concluded that the Genoveses could obtain a recovery from the City for any decrease in the market value of their property due to the county's construction of the new bridge.[98] The court concluded the recovery was allowed, but limited the award by what the county could have done without any taking of the Genoveses' property. The court stated,

> The piers' protection from ice movement by the bridges' embankments is an element that the trial court should have allowed the jury to consider in determining the before market value of the Genoveses' marina and in calculating the damage to the residue of their property. See *In re Appropriation for Hwy. Purposes of Lands of Arnold*, 23 Ohio App. 2d 56, 70, 261 N.E.2d 142 (3d Dist. 1970) (explaining that landowner's privilege of accessing the state highway via the vacated county road was "an element entering fairly and directly into the question of market value . . . of Arnold's property as of the time of the take . . . .") The jury, however, should also be allowed to consider the county's right, before the project, to have constructed a new bridge without taking any of the Genoveses' property. *See City of Columbus .v Farm Bureau Coop. Assn*., 27 Ohio App. 2d 197, 202 , 273 N.E.2d 888 (10th Dist. 1971); *Arnold*, 23 Ohio App.2d at 70-72, 261 N.E.2d 142.[99]

The court indicated that the license issue is irrelevant because the Genoveses are "entitled to recover for anything that affects the fair market value of their property."[100] The notion that the damage to the piers would occur was considered to be a "factor" that "an ordinary prudent business man would consider" before deciding whether to purchase the marina."[101]

With regard to the question of whether the ice damage could or would be speculative, the court reversed the trial court again maintaining this is a consideration included in the thoughts of a buyer in the marketplace. "The relevant question was not whether ice flow damage to the piers will happen, but whether a buyer would offer less for the marina"[102] because of the potential of ice flow damage to them. The Genoveses' appraiser stated that the marina's new configuration was disadvantageous because of the piers' increased exposure to moving ice. The appraiser noted that the physical layout of

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[97] *Id*. at 2.
[98] *Id.* at ¶ 21.
[99] *Id.*
[100] *Id.* at ¶ 22.
[101] *Id*. (quoting *Sowers v. Schaeffer*, 155 Ohio St. 454, 459, 99 N.E.2d 313 (1951) (quoting 29 C.J.S. Eminent Domain § 136 (1941)).
[102] *Id*. at 6 (Citing Sowers v Schaeffer, 155 Ohio St. 454, 459 (2951) (quoting 29 C.J.S. Eminent Domain § 136 (1941)).

a marina and harbor is "very important to the desirability of a particular location" and that excessive ice damage can put a marina out of business."[103]

As with the potential to re-zoning cases in Ohio, the Supreme Court is looking at basic economic/marketplace potentials and considerations. If something has an effect on the value, it will likely be accepted in the evidentiary presentation.

II. Evidentiary Issues

Due to the complex nature of eminent domain proceedings, they are largely driven by expert testimony and, as with much litigation, they can be greatly affected by evidentiary rulings. Some recent Ohio decisions have clarified the position of the Ohio courts regarding evidentiary issues such as expert testimony, owner testimony and highest and best use.

A. Expert Testimony

In the unpublished decision *Proctor v. CNL Income Fund IX Ltd.,*, the Court of Appeals for the Sixth District, Wood County heard a challenge to the exclusion of expert evidence in a trial for the appropriation of land.[104] The Court determined that a witness may testify as an expert only if the following three requirements are fulfilled:

> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
>
> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information.[105]

In *Proctor v. CNL*, evidence regarding the tenant's rental payment amount was excluded.[106] Although the lease in question expressly set out the rents for the property, the Court found justification for the trial court's exclusion of the evidence.[107] Specifically, the Court noted that: the tenant had already filed bankruptcy, and the owner establishing an account reserve for the doubtful rents; the rent had been negotiated to a lower level because of a new competitor nearby; finally, part of the rent was premised upon percentages, and the operation went out of business.[108] No doubt, the owner/landlord claimed that the tenant went out of business because of the partial taking. However, the court seemed to apply what is commonly called the Daubert standard in holding that ample evidence introduced regarding the

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[103] *Id.* at ¶ 23
[104] *Proctor v. CNL Income Fund IX, Ltd.*, 6th Dist. Wood No. WD-04-027, 2005-Ohio-1223.
[105] *Id*. at ¶¶ 19-21 (quoting Evid.R. 702).
[106] *Id.* at ¶ 25.
[107] *Id.* at ¶ 33.
[108] *Id.*

rental amount pursuant to a 15-year-old lease was so far over the market that it would be prejudicial testimony, and thus inadmissible.

In *Proctor v.King*, an owner provided a new listed expert and appraisal months after the closure of discovery.[109] The appellate panel affirmed the trial court denial of a motion to reopen discovery and excluded a belated expert real estate filing. The rejection of the expert appraisal, one which affects the process as a summary disposition, was granted by a trial court because of the failure to follow the basic procedure available.

B. Owner Testimony

In *Proctor v. Vance*, the Court of Common Pleas of Ohio (Clermont County) affirmed the earlier cases allowing owner testimony.[110] In Vance, the Plaintiff sought to limit owner testimony premised upon the lack of knowledge of the property.

The *Vance* court maintained that:

> Evid.R. 701 permits a lay witness to testify in the form of an opinion if the opinion is "rationally based on the perception of the witness" and is "helpful to a clear understanding of his testimony or the determination of a fact in issue."[111] Under the owner-opinion rule, an owner of real property, by virtue of his ownership and without qualification as an expert, is competent to testify to his property's fair market value.[112] The rule is based on the presumption that "'the owner of real estate***possess[es] sufficient acquaintance with it to estimate the value of the property, and his estimate is therefore received although his knowledge on the subject is not such as would qualify him to testify if he were not the owner.'"[113] Thus, the rule is an exception that allows for the admission of opinion evidence that might otherwise be incompetent. [114]

What is exceptional about the *Vance* case is the extension to a husband who deeded the property to his wife for tax purposes. Despite the disconnect, the court maintained that the "benefit of the rule should not be denied to a person whose interest is tantamount to that of an owner by virtue of having purchased, or dealt with, the property as if he were the individual owner [,who] may testify as to its value."[115]

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[109] *Proctor v. King*, 5th Dist. Licking No, 2007CA00133, 2008-Ohio-5413.
[110] *Proctor v. Vance*, 139 Ohio Misc.2d 93, 2006-Ohio-4677, 860 N.E.2d 1099 (C.P.).
[111] *Id.* at ¶ 3 (citing *City of Cincinnati v. Banks*, 143 Ohio App.3d 272, 291, 757 N.E.2d 1205 (1st Dist. 2001)).
[112] *Id.* (citing *Banks; Tokles & Son, Inc. v Midwestern Indemn. Co*., 65 Ohio St.3d 621, 605 N.E.2d 936, paragraph two of the syllabus (1992); *Smith v. Padgett*, 32 Ohio St.3d 344, 347, 513 N.E.2d 737 (1987)).
[113] *Id.* (alteration in original) (omission in original) (quoting *Smith v. Padgett* at 347) (citing *Tokles & Son* at paragraph two of the syllabus).
[114] *Id.*
[115] *Id.* at ¶ 5 (alteration in original) (quoting *Tokles & Son* at 627) (internal quotation marks omitted).

Citing *Ohio Turnpike Comm. v. Ellis*,[116] the comments to the Ohio Judicial Conference Jury Instructions clearly state that an owner is entitled to express an opinion on the value of the subject property.[117] As stated above, *Cincinnati v. Banks* confirmed the general rule that an owner of real property, by virtue of their ownership, is qualified to testify about the value of the owner's property.[118] In *Banks*, the owner was permitted to testify as to an opinion of value far higher than the opposition expert witness.[119] The City had objected to the testimony at trial, and the appropriateness of the owner's opinion on value was raised as one of the issues on appeal.[120] That court denied the City's argument to find testimony including the owner's use of non-comparable properties to establish her opinion on the value inadmissible.[121] That court made it clear the jury was free to weigh the appropriateness of owner valuation testimony, rather than have the court as a gatekeeper for such testimony.[122]

The Fifth District differed on the use of non-comparable properties in the owner-opinion rule. While upholding the owner-opinion rule in part, the *Proctor v. Bader* court forbade owner testimony as to the value per acre of other tracts and how those tracts compared to the property being valued.[123] While the court looked to *Cincinnati v. Banks* for the owner-opinion rule, it declined to follow *Banks* in permitting owner testimony regarding a non-comparable property. Instead, the appellate panel concluded that permitting testimony of any non-comparable property inappropriately "expand[s] the parameters of the 'owner opinion rule'".[124]

The Eleventh District recently examined the issue in *City of Kent v. Atkinson*.[125] Going along with the *Bader* ruling, the *Atkinson* court held that, "a lay witness is not permitted to testify about the sales prices of other properties and the degree to which those properties are comparable to the subject property."[126] At the trial level of that case, the magistrate did not permit the inclusion of owner valuations based on comparable properties, because the owner was not seen as expert in property appraisal.[127] The appellate court declined to overturn the ruling as there was no abuse of discretion.[128] At the forefront of the issue at large is whether owner testimony should be seen as lay testimony or if the owner-opinion rule allows it to be submitted unqualified with other relevant expert testimony.

Quoting *Proctor, v. Dennis*,[129] the *Atkinson* court maintained that:

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[116] 164 Ohio St. 377, 131 N.E.2d 397 (1955).
[117] *Ohio Jury Instructions*, CV Section 609.01, comments (Jul. 2013).
[118] *City of Cincinnati v. Banks*, 143 Ohio App.3d 272, 291, 757 N.E.2d 1205 (1st Dist. 2001).
[119] *Id.* at 279.
[120] *Id.* at 291.
[121] *Id.* at 292.
[122] *Id.*
[123] *Proctor v. Bader*, 5th Dist. Fairfield No. 03 CA 51, 2004-Ohio-4435.
[124] *Id. at* ¶ 33.
[125] 11th Dist. Portage No. 2010-P-0084, 2011-Ohio-6204.
[126] *Id.* at ¶ 81.
[127] *Id.*at ¶ 6 (indicating that the trial court required Atkinson to present expert testimony to admit evidence of comparables).
[128] *Id.* at paragraph 81.
[129] Court of Appeals, Fifth District, Fairfield County; 2006-Ohio-4442, at ¶30 (2006).

> At trial court before permitting evidence of the 'comparable sale' price, should require the party offering such evidence to show that:
>
> (a) The sale was between a willing seller and a willing buyer, neither of whom is required to buy or sell;
>
> (b) It was an 'arm's length' transaction;
>
> (c) It is sufficiently similar in construction, size, location, date of sale, age, condition, and use so as to make it comparable to the property being appropriated.[130]

Clearly, *Bader* and *Atkinson* lack the authority to overturn the *Banks* ruling. As the Ohio Supreme Court has yet to review the issue of whether the owner-opinion rule gives owners the right to present evidence to a jury comparing the value of their property to others, the Courts of Appeals of Ohio appear to be in a 2-1 split, between three appellate courts that have examined the issue. The majority is *Bader* and *Atkinson*, in the fifth and eleventh districts, respectfully, holding that owner valuation may not include comparable properties. The minority is Banks in the first district, holding that the weight of such valuations is a matter for the finder of fact. This analysis begs the question, "If the owner valuation is not to be treated as expert testimony, what effect does the long-standing owner opinion rule really have?" Condemning agencies might argue that the *Banks* holding would allow the submission of valuations of any property to a jury as comparable to the subject property. However, if the owner cannot present such values, then the Jury Instruction and the owner-opinion rule are ineffectual. There is a danger that such a rule as *Bader* and *Atkinson* suggest might leave an owner without the ability to present a valuation based on a proper reference point to a jury.

C. Highest and Best Use

In *Proctor v. Wolber*, the appellate panel rejected the Ohio Department of Transportation's (ODOT) position that the evidence of alternate property uses may only be submitted where there is a present intent to make use of the land in the fashion proposed.[131] The Court stated:

> We find, however, that property owners need not take steps to develop their property prior to appropriation or have a present intent to utilize the property for the use, so long as the necessary adaptability and demand have been established by competent evidence, which shows more than mere speculation or prediction.[132]

Interestingly, the court allowed evidence of the potential or loss thereof to subdivide the residue after the taking.[133] Applying a broad standard of admissibility, the court held that eminent domain

[130] Id. at paragraph 82.
[131] *Proctor v. Wolber*, 3d Dist. Hancock No. 5-01-38, 2011-Ohio-2593, ¶ 2.
[132] *Id.*
[133] *Id*. at ¶ 15.

proceedings are not limited exclusively to comparable sales.[134] Relying upon *Masheter v. Hoffman*,[135] the court stated that:

> "[E]very element that can fairly enter into the question of value, and which an ordinary prudent business man would consider before forming judgment in making the purchase, should be considered." Furthermore, entirely different valuation methods may be necessary where demand for the identified use has only recently developed, the property is extremely unique, or comparable sales or other market data are otherwise unavailable or produce an incomplete or inaccurate valuation.[136]

A trial court has the discretion to allow the admission of competent evidence. However, where the probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury; it will be excluded under Evid.R. 403(A).[137] In *Wolber*, the court noted that there had been significant changes in the marketplace, with agricultural land being converted to residential use in the area.[138] *Wolber* produced plat maps showing the changes in the community, and the Court noted that this was something that an "ordinary prudent business person would consider before forming judgment in purchasing the parcel."[139] As such, it was admissible to demonstrate demand for the residential developments in the area.[140]

In addition, the Court noted that the sum total of subdivision sales on an individualized basis is not admissible as such. Instead, the Court stated that those values could be relevant to prove the value at which someone would purchase the properly, knowing that it could be subdivided into the exact same number of lots. To this end, the Court held that:

> In essence, where the adaptability and demand for a particular use have been established by competent evidence, the property must be valued at a price that a buyer intending to develop the land for the identified use would pay for the entirely of the appropriated property in its current state of completion. Therefore, although the value of the parcel is not simply the aggregate value of the individual lots, the level of development and price that the individual lots could be sold are legitimate considerations in ascertaining the present market value of the entire parcel. Moreover, one is not required to value tl1e entirety of a parcel as though amenable only to a singular, unified use, when portions thereof can be developed toward a higher use, thereby enhancing the value of the property.[141]

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[134] *Id.* at ¶ 22.
[135] 34 Ohio St.2d 213, 298 N.E.2d 142 (1973).
[136] *Wolber* at ¶ 22 (quoting *Hoffman* at 221)
[137] *Id*. at ¶ 26
[138] *Id.* at ¶ 27.
[139] *Id.* at ¶¶ 27-28.
[140] *Id.* at ¶ 27
[141] *Id*. at ¶ 39 (citing *In re Appropriation for Hwy. Purposes of Lands of Lunsford*, 15 Ohio App.2d 131, 136-37, 239 N.E.2d 110 (3d Dist. 1968)).

D. Admission of Evidence in an Instructive Case

Dealing with the admission of evidence, in *City of Cincinnati v. Banks*, the condemnor sought a motion in limine excluding testimony of the owner witnesses.[142] The Court began by noting the authority of Evid.R. 611(A), which permits the Court to control the presentation of evidence at trial, and the Court noted that there is no specific rule or statute providing for a "motion in limine."[143] The Court continued on to state that there is no requirement that the Court rule on such a motion, and that "error in the ultimate admission of the challenged evidence must be preserved by objection when the matter is broached at trial. In the absence of a timely objection, any error in the admission of the evidence is waived unless it rises to the level of plain error"[144] Further, the court noted that:

> "[I]n general, the test for reliability is whether the "testimony is based on reliable scientific, technical, or other specialized information."[145]

The court then continued on to state that:

> But testimony that "reports the result of a procedure, test, or experiment * * * is reliable only if "the procedure, test or experiment (1) is based on a theory that is either "objectively verifiable" or "validly derived from widely accepted knowledge, facts or principles," (2) is "design[ed to] * * *reliably implement the theory," and (3) "was conducted in a way that will yield an accurate result." Evid.R. 702(C)(1) through 702(C)(3). An expert must base his opinion, in whole or in major part, on "facts or data * * * perceived by him or admitted in evidence" at trial, and he must disclose "the underlying facts or data" before rendering his opinion. Evid.R. 703 and 705; see, also, *State v. Solomon* (1991), 59 Ohio St.3d 124, 570 NE2d 1118, syllabus (in which the Ohio Supreme Court relaxed the foundational requirement of Evid.R. 703). The decision to admit expert opinion testimony is discretionary with the trial court and will not be disturbed on appeal unless the court abuses its discretion. See *Wightman v. Consolidated Rail Corp*. (1999), 86 Ohio St.3d 431, 437, 715 NE2d 546, 552.[146]

Based on this deferential standard, the Court held that because the case required expert testimony, and because the experts' evidence was based on experience and not experimentation, that it was not an abuse of discretion for the trial court to admit it.[147]

III. Procedural Issues

Because eminent domain proceedings involve a conflict between a sovereign government and private citizens, many statutory procedures have been enacted to legitimize the process and to protect citizens

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[142] *City of Cincinnati v. Banks*, 143 Ohio App.3d 272, 280, 757 N.E.2d 1205 (1st Dist. 2001).
[143] *Id.* at 281.
[144] *Id.*
[145] *Id*.
[146] *Id*. at 281-282 citing Evid.R. 702(C)).
[147] *Id.* at 282.

from overreaching on the part of the government. Indeed, failure to follow the proper procedural requirements can have dramatic effects on the outcome of an eminent domain case. Some of the procedural issues that Ohio courts have recently dealt with include the standard of review to be applied to lower court decisions, the proper manner of preserving testimony at trial, the requirement that the parties negotiate before appropriations are pursued, and manner for challenging the necessity of an appropriation.

A. Standard of Review

Proctor v. CNL Income Fund I, Ltd.X,[148] is instructive of the Ohio standard of review. In upholding a jury verdict despite recognition of evidentiary errors, the appellate panel noted that "[a] trial court has broad discretion in determining whether to admit or exclude evidence; and absent an abuse of discretion, an appellate court may not disturb such rulings."[149] An abuse is only premised upon being "unreasonable, arbitrary, or unconscionable"[150]

B. Nature and Form of Proceedings

An owner may challenge the necessity of a taking under R.C. 163.09 (B). Under this circumstance the appropriating agency has the burden to show the necessity of the take by a preponderance of the evidence except when:

> (a) A resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation creates a rebuttable presumption of the necessity for the appropriation if the agency is not appropriating the property because it is a blighted parcel or part of a blighted area or slum.
>
> (b) The presentation by a public utility or common carrier of evidence of the necessity for the appropriation creates a rebuttable presumption of the necessity for the appropriation.
>
> (c) Approval by a state or federal regulatory authority of an appropriation by a public utility or common carrier creates an irrebuttable presumption of the necessity for the appropriation.[151]

When necessity is established, there is a separate trial to determine proper valuation. In *Martin v. City of Columbus*, the Supreme Court of Ohio described the nature of the damages trial:

> An action brought by a municipality to condemn private property under the Constitution and laws of Ohio is a proceeding in rem.

[148] Court of Appeals, Sixth District, Wood County No. WD-04-027; 2005 Ohio 1223; 2005 Ohio App. LEXIS 1212, March, 2005.
[149] *Id.* at ¶ 14 (citing *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658, 780 N.E.2d 186, ¶ 75).
[150] *Id.* at ¶ 14 (citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980)).
[151] R.C. 163.09 (B)(1).

> In such proceeding, there are no formal pleadings or definite issues, which admit of affirmation upon one side and denial upon the other, and hence the doctrine of 'burden of proof' has no application.
>
> The jury acts merely as an appraising or assessing board, determining the fair market value of the property from all the evidence submitted.[152]

This "minority" position that the burden of proof is placed on neither party remained court doctrine in Ohio until 2007. That doctrine was codified in a 2007 revision of ORC 163.09 (F) which states, "If an answer is filed under section 163.08 of the Revised Code with respect to the value of property, the trier of fact shall determine that value based on the evidence presented, with neither party having the burden of proof with respect to that value."[153]

Taking a different approach than the traditional neutral burden of proof position, the Ohio Supreme Court distinguished *Martin* in *Tennessee Gas Transmission Co. v. Wolfe*.[154] That Court reasoned that, "special damage, such as that to underlying minerals, is a matter usually within the knowledge of the owner rather than the condemner, and there is no valid reason for excusing the owner from the burden of proving the special damage he claims."[155] The sixth circuit cited *Wolfe* in *Hogan v. United States*, holding that a property owner bore the burden of showing the diminution the value of mineral resources on his land.[156]

It is important to note that 163.09 (F) does not have any stated qualifications or exceptions and is written plainly. Also, both *Wolfe* and *Hogan* come before the 2007 revision of the statute. As such, it is a reasonable reading of the statute to mean that the codified "minority" position is unqualified and that there is no burden of proof in when it comes to the valuation of property for all takings.

C. Preservation of Testimony

In *Proctor v. Jamieson*, the court noted that when error is claimed by a party:

> [I]t is incumbent upon a party who has been restricted from presenting evidence, to seek the introduction of the evidence by proffer or otherwise in order to enable the court to make a final determination as to its admissibility and to preserve any objection on the record for purposes of appeal. In the present case, the appellants failed to create a record on appeal of this issue as they failed to proffer to the trial court the substance of the evidence they sought to admit. *Sutherland v. Nationwide Gen. Ins. Co.* (1994), 96 Ohio App.3d 793. Rather, we are left with the appellants' unfounded

[152] *Martin v. City of Columbus*, 101 Ohio St. 1, 127 N.E. 411, syllabus (1920)
[153] R.C. 163.09 (F)
[154] 159 Ohio St. 391, 112 N.E.2d 376 (1953)
[155] *Id*. at 394.
[156] *Hogan v. United States*, 407 F.3d 778, 784 (6th Cir. 2005).

> assertions in their brief that the evidence concerning the sale prices of the property across the street was important to their case.[157]

The Court considered the failure to proffer the restricted evidence to be a waiver of their objection to the exclusion of the evidence, and their assignment of error on appeal was overruled.[158]

D. Negotiation Process

In *Metro v. Capozzola*, the appellate court upheld the trial court's finding that the Southwest Ohio Regional Transit Authority's (SORTA's) failure to negotiate with the proposed owner was grounds for dismissal for failure to fulfill a jurisdictional requirement.[159] R.C. 163.04 states:

> Appropriations shall be made only after the agency is unable to agree, for any reason, with the owner, * * * or is unknown, or is not a resident of this state, or his residence is unknown to the agency and cannot with reasonable diligence be ascertained.[160]

Because, among other things, SORTA knowingly transmitted its offer letter to someone other than the owner of record, and because the offer referred to appraisals that were not included with the letter, the trial court had determined that SORTA had never negotiated with the owner of the property before commencing the appropriation.[161] Since under R.C. 163.04 negotiations are a condition precedent to the right of appropriation, the Court held that the petition should have been dismissed by the trial court.[162]

In *Waghray v. City of Westlake*, the trial court held that the owner whose property was taken by a local project was not a "displaced person" under Ohio's Relocation Assistance statute.[163] On appeal, the Court went on to hold that under the statutory framework, Westlake had not appropriated the interest pursuant to a "state highway project."[164] In order to do so, the Court stated, would be to engraft a meaning of the term "state" into the statute, which is something the Court cannot do.[165] According to the Court, therefore, the owner was not entitled to relocation expenses from the community.[166]

In *State Ex rel. Elsass v. Shelby County Board of Commissioners*, the county drain was modified in order to alleviate water problems. [167] After the work was performed, the owner claimed that damage had

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[157] *Proctor v. Jamieson*, 3d Dist. Shelby No. 17-2000-19, 2001-Ohio-2187, 2001 WL 335189, at *
[158] *Id*.
[159] *Metro v. Capozzola*, 1st Dist. Hamilton No. C-010270, 2001-Ohio-4010, 2001 WL 1887723, at *1.
[160] *Id*. (quoting R.C. 163.04).
[161] *Id.*
[162] *Id.* at *2.
[163] *Waghray v. City of Westlake*, 8th Dist. Cuyahoga No. 79311, 2002-Ohio-1563, 2002 WL 509557, at *1 (citing R.C. 163.51 *et seq.*).
[164] *Id.* at *2.
[165] *Id.*
[166] *Id.*at *4.
[167] *State ex rel. Elsass v. Shelby Cty. Bd. of Commrs.*, 92 Ohio St.3d 529, 751 NE2d 1032 (2001).

been done to his property as a result of the drainage modification.[168] The court applied a very harsh rule that all economic use must be taken to qualify as an inverse condemnation.[169] Yet it also recognized the distinction between trespassory takings by entry and regulatory takings.[170] The Court first noted that "[m]andamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged. . . . Appellants have the burden of proving entitlement to the requested extraordinary relief in mandamus."[171] The Court continued on to state that:

> In cases of either physical invasion of the land or the destruction of a fundamental attribute of ownership like the right of access, the landowner need not establish the deprivation of *all* economically viable uses of the land. . . . But in other cases, which generally involve a claimed regulatory taking, the landowner must prove that the taking deprived *all* economically viable uses of the land.[172]

The Court of Appeals had held that because the property owner had consented to the project, there was no physical invasion of the land.[173] The Court of Appeals had also found no deprivation of any fundamental attribute of the appellants' land.[174] The Ohio Supreme Court reversed the decision of the Court of Appeals, stating that where the property is physically invaded by the construction of surface and sub-surface drainage systems as well as a rock chute, compensation must be paid for the taking.[175] Because this is a case of a physical taking and not a regulatory one, the loss of <u>any</u> economically viable use, including uses into the future, must be paid for.[176]

E. Statutory Procedure to Challenge of Necessity

Ohio River Pipe Line, LLC v. Gutheil, is illustrative of the burdens placed upon the owner and of the requirement that the statutory procedure in a necessity challenge be specifically followed.[177] The burden of proof in such a challenge, being on the owner, requires sufficient facts to support denial of the appropriateness of the taking.[178] The Court noted that "[i]f the landowners' answers specifically denied ORPL's right to make the appropriations or the necessity of the appropriations, and set forth sufficient facts to support the denials, R.C. 163.08 and 163.09 mandated a hearing on those issues between five and fifteen days after the filing of the answers."[179] furthermore, the Court noted that "[t]he right to a necessity hearing may be enforced through a writ of mandamus."[180] The Court of

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[168] *Id.* at 531.
[169] *Id.* at 534.
[170] *Id.*
[171] *Id*. at 533-534 (citations omitted).
[172] *Id.* at 534 (emphasis in original).
[173] *Id.*
[174] *Id.*
[175] *Id. at 535*
[176] *Id*.
[177] *Ohio River Pipe Line, LLC v. Gutheil*, 144 Ohio App.3d 694, 761 N.E.2d 633 (4th Dist. 2001).
[178] *Id.* at 697.
[179] *Id*. at 698.
[180] *Id*.

Appeals reviewed the answers and found that the der1ials were sufficiently specific and factually supported to have required a necessity hearing.[181]

In *Ohio River Pipe Line*, the condemnor was deemed to have waived its right to an immediate necessity hearing because it proceeded to discovery rather than pursuing its right to the hearing, but that no prejudice had occurred because the necessity issues arose in the trial court.[182] The trial court held that the statutory authorization was inappropriately being used because the condemnor was attempting to obtain the easements for the transportation of petroleum derivatives or by-products rather than the unrefined petroleum or crude oil described in the statute.[183] The appellate panel concluded that had the statutory delegation included a distinction between "crude" and "natural", it could have.[184] Therefore, the intent of the utilization of the word "petroleum" included petroleum products.[185]

The trial court also found that there was no public necessity for the pipe line. In the absence of any proof of an abuse of discretion in determining the necessity for the pipe line, the appellate panel held that the resolution by the condemnor was prima facie evidence of public necessity.[186] This decision was instructive of the fact that broad powers are intended "for the condemnors". Unless the statutory language is extremely limited, the condemnor resolutions of necessity will be upheld. One could not condemn in an urban renewal project using the pipe line statute, but clearly the pipe line statute is intended to include all petroleum product, whatever its state.

In another case affirming a City's acquisition, *City of Mentor v. Osborne* presented a case in which an owner claimed that there were no "concrete plans" for the project and therefore the necessity for acquisition was flawed.[187] The Probate Court assigned the case to a Magistrate, who held that the condemnor was entitled to appropriate the property.[188] This was confirmed by the probate court.[189]

The Court noted that what is required of the municipality by the statute is a petition for the appropriation in the proper court with a copy of a resolution of necessity.[190] Although the owner sought evidence in the record proffered by the appropriating agency that it had duly enacted the appropriate resolutions, the Court stated that "[n]othing in R.C. Chapter 163,... places such a burden on the appropriating agency."[191]

The *Osborne* panel relied upon substantial precedent holding that great deference is provided by the courts to the legislative body that "is familiar with local conditions and best knows community needs."[192]

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[181] *Id.*
[182] *Id.* at 698-699.
[183] *Id.*at 699.
[184] *Id.* at 701.
[185] *Id.*
[186] *Id. at 702*
[187] *City of Mentor v. Osborne*, 143 Ohio App.3d 439, 443, 758 N.E.2d 252 (11th Dist. 2001).
[188] *Id.*
[189] *Id.*
[190] *Id.* at 444
[191] *Id*.
[192] *Id*. at 445.

Further, the appellate standard of review is limited to determining whether or not the trial court committed an abuse of discretion.[193] According to the Court, "[a]n abuse of discretion connotes more than a mere error of Jaw or judgment; rather, it implies that the court's attitude was unreasonable, arbitrary, or unconscionable."[194] The court noted that the taking was not for "some contemplated but undetermined future use," which would not fulfill the necessity requirement, but that the City had plans for utilization of the land for a park and therefore the taking should be upheld.[195]

F. Interest on Compensation Award

In City of *Akron v. Kalavity*, the money to pay for the appropriation of the defendant's property was deposited in an interest-bearing account in October of 1997.[196] However, no interest was paid when the settlement deposit was finally paid over to the owner, and the trial court denied payment of interest.[197] On appeal, the appellate panel determined that the funds were deposited solely for the benefit of the landowners until such time as an order for distribution was made.[198] Therefore, the interest accrued should be awarded to the landowner on a pro-rata basis of the distribution.[199]

G. Date of Taking

In Proctor v. CNL Income Fund IX, the court noted that "the date of taking is the earlier of either the date of trial or the date of physical appropriation."[200] However, the court noted there is an exception to that general rule when the "activity of an appropriating authority has caused depreciation of the value in the property prior to the time it is actually taken. In such case, the property shall be valued immediately prior to its depreciation."[201] This leaves open the issue of whether the depreciation which has occurred should be considered as of the date of taking, which is a common issue in many jurisdictions. Frequently, what is called the Klopping Rule out of California is utilized and allows the present date of take with disregard to the damages or payment for those damages occurring to the date of taking.

IV. Substantive Issues

In addition to evidentiary issues and procedural issues, eminent domain law presents substantive issues that may vary from state to state. Ohio courts have addressed a number of these kinds of issues over the last ten years, including the issues of future lost profits, cost to cure a taking and the date of a taking, among others.

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[193] *Id.* at 446 (citing *Media One v. Manor Park Apartments, Ltd.*, 11th Dist. Lake Nos. 2000-L-045, 99-L-117, 2000-L-046, and 2000-L-116, 2000 WL 1566525 (Oct. 13, 2000)).
[194] *Id*. (citing Blakemore v. Blakemore, 5 Ohio St.3d 217, 219; 450 N.E.2d 1140 (1983)).
[195] *Id.* at 448-49.
[196] *City of Akron v. Kalavity*, 9th Dist. Summit No. 19678, 2000 WL 141048, at *1 (Feb. 2, 2000).
[197] *Id.*
[198] *Id.* at *3.
[199] *Id.*
[200] *Proctor v. CNL Income Fund IX, Ltd.*, 6th Dist. Wood No. WD-04-027, 2005-Ohio-1223, ¶ 36 (citing *Evans v. Hope*, 12 Ohio St.3d 119, 120, 465 N.E.2d 869 (1984)).
[201] *Id.* (citing *Becos v. Masheter*, 15 Ohio st.2d 15, 15, 238 N.E.2d 548 (1968)).

A. Ohio Jury Instructions – Compensation

Some type of standardized jury instructions have existed in almost every state for the last 30 years. However, in the last 15 years or less, the jury instructions, generally approved by a supreme court of the state through a special committee, have been utilized in order to clarify the law and provide certainty in cases. Clearly, if a jury instruction is utilized, it is much less likely to be reversed simply based upon stare decisis. Therefore we should closely review the jury instructions the Supreme Court has provided us.

As in other jurisdictions, after the introductory comments, the compensation process and underlying premises are described. This is codified in CV 609.05. Fair market value is the basic initial point for the process. In Ohio the definition to be provided to the jury states:

> 1. FAIR MARKET VALUE. You will award to the property owner(s) the amount of money you determine to be the fair market value of the property taken. Fair market value is the amount of money which could be obtained on the market at a voluntary sale of the property. It is the amount a purchaser who is willing, but not required to buy, would pay and that a seller who is willing, but not required to sell, would accept, when both are fully aware and informed of all the circumstances involving the value and use of the property. You should consider every element that a buyer would consider before making a purchase. You should take into consideration the location, surrounding area, quality and general condition of the premises, the improvements thereon and everything that adds to or detracts from the value of the property.[202]

Again, the highest and best use is the key to the process of determining fair market value. The instruction , "the property must be valued at its worth for the most valuable use which it may reasonably, lawfully and practically be used. This is called highest and best use." [203]

609.05 continues,

> 3. NO INCREASE OR DECREASE The value is not to be increased or decreased because of the necessity of (name the appropriating body) to take the property nor because these proceedings require the owners to part with their property, nor because of any benefits that may accrue to the owners because of the (refer to the nature of the project).
>
> 4. EASEMENT. If any of the property taken is subject to an existing easement for public purposes, such property has no substantial value and only nominal compensation may be awarded for it. "Nominal" means trifling or small, usually $10.00 or less. [204]

B. Ohio Jury Instructions – Potential Use and Zoning

Unless the "existing zoning" is read carefully with the "possible zoning change" one could be led to believe that a jury would or could simply look at the "existing zoning" standard and disregard the

[202] *Ohio Jury Instructions*, CV Section 609.05.
[203] *Id.*
[204] *Id.*

instructions with regard to "potential use" and "possible zoning change". Yet, existing zoning is legal under effectively all circumstances in which the valuation process will occur, and if an understanding of the existing zoning always can be utilized, juries would be ready to simplify the situation and look at the "potential use" and "possible zoning changes" instructions in such a way that every case would have a value based upon re-zoning.

The comment to the highest and best use instruction specifically cites CV 609.07 "for specific issues about potential use."[205] The special instructions and issues dealt with by CV 609.07 provide the basic instructions of the highest and best use standard provided in almost every jurisdiction. Ohio is arguably more directly related to the potentials in specific circumstances of the highest and best issues in other jurisdictions, but provides ample support that the valuation process is to be based upon the market.

Potential use is a basic and underlying consideration of the valuation process. Most frequently, disputes in eminent domain valuation proceedings involve what is the highest and best use of a property. The instruction is an attempt to cover those issues which frequently occur.

The instruction discusses undeveloped lots with the following proposed instruction. "1. UNDEVELOPED LOTS. Undeveloped lots in an existing subdivision are to be valued as one parcel, but individual lot value may be considered to arrive at the market value of the entire parcel."[206]

The instruction follows the well-known national approach that subdivision valuation is not allowed. This is because the valuation of individual lots as part of a subdivision analysis is perceived by the courts to be "speculative". This notion of speculation was one which existed in the 1920's and 1930's, when properties were quickly considered to have a value premised upon the gross proceeds plus expenses of development. Because of the Depression mentality and the fact that the lot valuation process is so dependent upon the market itself, almost every jurisdiction has taken a position that a "subdivision approach" was inadmissible. However, courts are beginning to recognize that the underlying land value has a relationship to the value of a piece of property. The instruction "UNDEVELOPED LOTS" is as liberal as any instruction provided in the country.

The instruction then moves to potential use issues. "POTENTIAL USE. Potential use of the (property taken) (residue) may be considered, but a potential use must be one legally permissible within the reasonably foreseeable future and not dependent upon contingencies."[207]

In the comment cite, both *Masheter v. Kebe* and *Wood* support the proposed instruction.[208] Another market based instruction simply is that; based upon what occurs in the marketplace. So long as one can reasonably foresee in the near future, so as to avoid the ups and downs and risks of the marketplace, a potential use which is legal should be within the consideration process.

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[205] *Id.* at comment 2.
[206] *Ohio Jury Instructions*, CV Section 609.07.
[207] *Id.*
[208] *Id.* at comment 2 (citing *Masheter v. Kebe*, 49 Ohio St.2d 148, 359 N.E.2d 74 (1976); *Masheter v. Wood*, 36 Ohio St.2d 175, 305 N.E.2d 785 (1973)).

The instruction divides zoning issues into existing and possible changes. "3. EXISTING ZONING. Zoning may be a significant factor in determining potential use. Compensation must be based upon the market value for the highest and best use lawful under existing zoning regulations."[209]

Read alone, the instruction would lead one to believe that a jury may only consider the existing zoning of the property. However, when read with the "Possible Zoning Change" which follows, this provides a tilt towards a probability of a potential "higher and better use". Please note that most state jurisdictions, including federal case law, provide an instruction expecting a probability of re-zoning, frequently in the immediately foreseeable future rather than the "reasonably foreseeable future".

Ohio's instruction handles potential re-zoning as follows:

> "4. POSSIBLE ZONING CHANGE. Holding property for future development in anticipation of a zoning change allowing a more valuable use of the property, is a permitted use. If an informed and willing purchaser would be presently agreeable to pay more than the amount justified under existing zoning, hoping for a zoning change, that is the fair market value of the property. The jury may consider factors in evidence indicating a likelihood of a zoning change as those factors may reflect upon the fair market value of the property."[210]

Again citing *Masheter v. Kebe* and *Wood*, the standard is premised upon a market based consideration of whether the possibility of a zoning change should be given consideration in a valuation.[211] This instruction, when read with the instruction related to existing zoning, provides for consideration in the market, with the recognition that the zoning that exists does offer the relevant factor unless there is shown to be a clear potential for some other zoning.

As a final aside, most jurisdictions use the standard of "probability of re-zoning", with a few utilizing the "possibility". The terms themselves are indicative of whether the standard is balanced. The notion of "potential" is the most reasonable balancing between the "possibility" and "probability" standards available.

C. Future Lost Profits

In *City of Cincinnati v. Banks*, the court recognized that future lost profits are not to be considered as damages.[212] Relying on *Sowers v. Schaeffer*,[213] the court recognized that evidence it excludes for one purpose may be admissible for another.[214] Testimony of income from the rental of summer dwellings in *Sowers* was allowed in order to "show the kinds of businesses to which the premises [were] adaptable."[215] The appellate court noted that as the trial proceeded, the lottery income and profits

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[209] *Id.*
[210] *Id.*
[211] *Id.* at comment 3 (citing *Masheter v. Kebe*; *Wood*).
[212] *City of Cincinnati v. Banks*, 143 Ohio App.3d 272, 285, 757 N.E.2d 1205 (1st Dist. 2001).
[213] 155 Ohio St. 454, 458-59, 99 N.E.2d 313 (1951).
[214] *Banks* at 285-86.
[215] *Id*. at 458-459, 99 NE2d at 317.

were in fact relevant to the valuation of the premises.[216] Such profits, while not admissible under the business-losses rule of valuation, were relevant to prove that the highest and best use was not a parking lot, as had been claimed by the city's experts.[217]

In another evidentiary holding, the Court in *Banks* held that an exhibit showing other property taken by eminent domain in the area was intended to show the vast extent of governmental takings in the area rather than the prices.[218] While this is wholly inconsistent with the general rule that purchases made under compulsion are to be excluded, the Court noted that the exhibit was relevant in that it demonstrated why there was a lack of arms-length transactions in the area, supporting the decision of the defense' expert witness to apply non-traditional methods of valuating the property.[219] While the Court was concerned about the possible use of hearsay in preparing the exhibit, the Court also noted that the same information was elicited from one of the defense experts, making the admission of the exhibit harmless error.[220]

In direct contradiction to *Banks*, the *Court in Wray v. Stvartak* held that when an objection was properly taken to a determination of value based upon lost income for signs, such a consideration was deemed to be lost profits into the future.[221] In *Stvartak*, the Court of Appeals of the Sixth District in Lucas County found that the methodology of capitalizing future income was truly just payment for future profits.[222] Looking to *Sowers* for guidance, the Court noted that:

> As a rule, profits from commercial businesses on premises cannot be shown in an appropriation proceeding for the reason that such profits are too speculative, depending as they do upon the acumen and skill of the one who carries on the business, but, assuredly, it is proper to show the kinds of businesses to which the premises are adaptable.[223]

Because the rule against lost profits is intended to prevent speculative valuations, the Court rejected the capitalization model for valuing the signs, finding that while the signs may be relevant to the value of the property, such value must be determined according to recognized appraisal standards.[224]

D. Cost-to-Cure

In addition to deciding the issue of lost profits, in *Wray v. Stvartak* the Court of Appeals also held that a before-and-after valuation of the property is required.[225] However, given that the jury provided a

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[216] *Id.* at 288.
[217] *Id.*
[218] *Id.* at 289.
[219] *Id.* at 289.
[220] *Id*. at 289-290.
[221] *Id.* at 290
[222] *Id.*
[223] *Id.* at 472 (quoting *Sowers*, 155 Ohio St. 454, 459, 99 N.E.2d 313).
[224] *Id*. at 474-475.
[225] 121 Ohio App.3d 462 (1997).

before-and-after value, the failure by the witness is not grounds for reversal.[226] The *Stvartak* court then went on to note that:

> Where damage is caused to the residue ... [if], by the expenditure of money in an amount less than the difference between the before-and-after fair market value of the residue, the property owner could make improvements to such residue to restore the fair market value of the residue to that which it was before the improvement, then, evidence of such 'cost of cure' would be admissible and, if proved, would limit the amount of damages to be assessed. *Columbus v. Farm Bur. Co-op. Assoc., Inc*., (1971), 27 Ohio App.2d 197, 203, 56 0hio.2d 382, 385, 273 NE2d 888, 892. The court in *Farm Bureau* went on to state that "the 'cost of cure' cannot be utilized to increase damages to the residue, but may be utilized to reduce such damages."[227]

Because there was credible evidence that the taking had resulted in flooding on the residue, there was a just reason for examining the cost to cure the taking.[228] Because all of the figures in evidence for the cost-to-cure were below the damages figures, it was not an abuse of discretion for the Court to permit such evidence.[229]

In *Proctor v. Jamieson*, the appellate panel confirmed the well-known cost-to-cure rule that if the cost to cure is less than the difference between the before-and-after fair market value, the cost to cure must be assessed.[230] The court then noted that in this situation the condemnee's expert testified he had no way to estimate the value of the property after the take, and his testimony regarding the cost-to-cure was properly excluded by the trial court.[231]

E. Access

In *Proctor v. Thieken*, the ODOT acquired approximately 80 feet of a gas station location, and also installed curbing and limited access.[232] The Court's jury instruction stated:

> If you determine that the concrete curbing is a substantial or unreasonable interference with the right of access of Mr. Thieken and [Clark Oil], you will determine what the damages to the residue are. In order to establish a taking, an owner or tenant must demonstrate a substantial or unreasonable interference with a right of access. If you conclude that, after construction, the owner or tenant will have reasonable and substantial access to State Route 7, you will not compensate the owner or tenant for the damages to the residue.[233]

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[226] *Id.*
[227] *Stvartak*, 121 Ohio App.3d 462, 478, 700 N.E.2d 347 (citation as in original).
[228] *Id.* at 479.
[229] *Id.*
[230] *Proctor v. Jamieson*, 3d Dist. Shelby No. 17-2000-19, 2001-Ohio-2187, 2001 WL 335189, at *2.
[231] *Id.*
[232] *State ex rel. Thieken v. Proctor* (*Thieken I*), 4th Dist. Lawrence No. 03CA33, 2004-Ohio-7281.
[233] *Id*. at ¶ 8 (alteration in original).

ODOT challenged the jury verdict, claiming that the question is one of whether a taking of access is a legal question to be determined by the court.[234]

The court then noted that the jurisdiction of the Common Pleas Court was limited to the determination of just compensation and damages.[235] A mandamus action is required to compel public authorities to institute appropriation proceedings where the owner contends that an involuntary taking of private property is involved[236], the access damages caused by ODOT and created by the reconstruction in the right-of-way already owned by ODOT required a separate action. The net effect of this is to derive a result whereby owners simply cannot be paid for the construction which is part of the project that diminishes the value of their property unless it is in and of itself a separate take.[237] The court concluded that the property owner may recover for damage to the residue, but the recovery is limited to damage resulting from the appropriation itself. The appellate panel concluded that the trial court had no jurisdiction to provide an instruction for compensation for diminution costs within the prior existing right-of-way, and any such damage would have to be determined in an inverse condemnation proceeding at the hand of Franklin County.[238]

Recently, in *City of Dublin v. Pewamo Ltd.*, the Ohio Court of Appeals for Franklin County found that not all takings of roads create situations where owners will be compensated for the effect of the loss of road access on the remaining parcel.[239] In *Pewamo*, the highway frontage of a larger plat was rezoned from agricultural to commercial office use and was appropriated. The result was that the remainder of the Pewamo property, still farmland, had one access point to the highway instead of three after the taking.[240] The access road that was taken was semicircular in nature, once allowing for a passage through the property as well as internal travel necessary for farming.[241] Unlike the *Hilliard*[242] court, the appellate court rejected a circuity-of-travel jury instruction because even though the access point to the highway was cut off, there was still internal access allowing the defendants to maintain the property as a farm.[243] Unlike *Thieken*,[244] there was no structure on the property that required access.[245]

F. Effect of a Partial Taking

Partial taking rules vary from jurisdiction to jurisdiction. In cases like the famous *Batcher* case, where a sugar cane processing plant was on a separate island from where the sugar cane was grown, the taking

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[234] *Id.* at ¶ 9.
[235] *Id.* at 22.
[236] *Id.* (most recently decided in *State ex rel. Preschool Dev. v. City of Springboro*, 99 Ohio St.3d 347, 2003-Ohio-3999, 792 NE2d 721, ¶¶ 11-12).
[237] *Id.* at ¶ 25.
[238] *Id.* at ¶¶ 28-29
[239] *City of Dublin v. Pewamo, Ltd.*, 194 Ohio App.3d 57, 2011-Ohio-1758, 954 N.E.2d 1125 (10th Dist.).
[240] *Id.* at ¶¶ 2, 4.
[241] *Id.*
[242] *First Industrial I*, 158 Ohio App.3d 792, 2004-Ohio-5836, 822 N.E.2d 441 (10th Dist.).
[243] *Pewamo*, 194 Ohio App.3d 57, 2011-Ohio-1758, 954 N.E.2d 1125, ¶ 37.
[244] *State ex rel. Thieken v. Proctor* (*Thieken II*), 180 Ohio App.3d 154, 2008-Ohio-6960, 904 N.E.2d 619 (10th Dist.).
[245] *Id.* at 67.

of one island was considered to be effectively a partial taking because the taking caused harm to the remaining property.

In *Village of Scott v. Keysor*, the question is raised as to how to treat stone ballast located on a piece of property that is being appropriated. [246] The issue was whether the ballast was personal property, and therefore not compensable, or a compensable fixture of the property.[247] Relying upon *Masheter v. Boehm*,[248] in which the Ohio Supreme Court had noted that the determination of a fixture in an appropriation case must be made in light of the particular facts of the case, the *Keysor* court went on to note that *Boehm* also recognized that:

> [W]here the appropriating authority has announced its intention to take only the real property, "it will not be required to pay for other annexed property which it does not want and for which it has no need *unless fundamental notions of fairness require it to do so*." (Emphasis added.) The court has concluded that where no substantial dispute of material fact exists concerning the identity of the property, the determination of the extent of the taking is a question of law to be decided by the court before submitting the question of valuation to the jury.[249]

The court noted that the stone ballast was a fixture and its value could be considered as part of the land's value, but the ballast could not be valued separately.[250]

In *Village of Octa v. Octa Retail, LLC.*, the Layette County Court of Appeals determined that an appraisal was admissible when it did not consider and utilize the appropriate method of a partial taking analysis. [251] When an appraiser based his evaluation exclusively on the land taken, the required pre-appropriation and post-appropriation appraisal had not been provided, requiring reversal.[252]

G. Partial Taking - Denominator of Residue

In *Lucas County Board of Commissioners v. Mockensturm*, Carl Moekensturm was a trustee who owned the parcel in question in the Trust's name. [253] Mr. Moekensturm also owned adjacent parcels in a partnership with a second party on a 50%-50% basis.[254] The Lucas County Board had taken a strip of property in which eleven parking spaces were eliminated in front of appellant's "convenience" shopping center.[255] The appellant claimed that the taking had diminished the value of the remainder parcel, and the Road Commission countered that construction on the land co-owned by the appellant trustee and

[246] *Village of Scott v. Keysor*, 132 Ohio App.3d 456, 725 NE2d 347 (3d Dist. 1999).
[247] *Id.*at 458-59.
[248] 37 Ohio St.2d 68; 307 N.E.2d 533 (Ohio 1974).
[249] *Keysor* at 459 (quoting and citing *Boehm* at 77).
[250] *Id.* at 461.
[251] *Village of Octa v Octa Retail, LLC.*, 12th Dist. Fayette No. CA2007-04-015, 2008-Ohio-4505 ¶ 34.
[252] *Id.*
[253] *Bd. of Lucas Cty. Commrs. V. Mockensturm*, 119 Ohio App.3d 223, 695 NE2d 15 (6th Dist. 1997).
[254] *Id.* at 225.
[255] *Id.* at 226.

his son-in-law could be utilized to cure the problem of off-road parking.[256] The owner sought to exclude evidence of his partial ownership in the additional two lots. Over the owner's objections, the trial court allowed a cost-to-cure computation to be submitted to the jury, and the jury's responses to interrogatories indicated that a cost-to-cure amount had been adopted.[257]

Appellant relied on the oft-cited rule in other states that a "'cost of cure' theory of damages may not be used to mitigate consequential damages where the cure must be accomplished by going outside the tract in controversy."[258]

The appellate panel reversed the trial court's admission of the information on the ownership of the adjacent property, concluding that their lack of common ownership with the parcels taken indicated that they were not part of the taken tract.[259]

H. Potential to Rezone

In *Ohio Turnpike Commission v. Likowski*, the Court dealt with the issue of whether a rezoning of a property after the date of taking, even though the zoning petition was pending as of the date of taking, was properly excluded by the trial court.[260] The issue was one of whether: "[i]f, in the opinion of an expert appraisal witness, an informed, willing purchaser would be presently agreeable to pay more than an amount justified under existing zoning, such evidence is admissible because it reflects upon the fair market value of the property."[261] The Court noted, however, that "the test to determine the proper compensation award is to be applied 'at the time of the taking.'"[262] Furthermore, the Court of Appeals stated that "[s]pecifically, it is clear that 'the fair market value of property subject to appropriation is to be computed and assessed as of the time of the taking.[263] Finally, in overruling the owner's first assignment of error, the appellate court held that:

> The trial court correctly ruled that the probability of a zoning change could be considered in the determination of the value of the property taken because, as of the date of the take, that was the status of the land in question. It would have been improper to consider an actual change in zoning because to do so would be to value the land based upon an event occurring after the date of the take and based upon a status the land did not have as of the date of the take. See, generally, *United States v. The Meadow Brook Club* (C.A. 2, 1958), 259 F.2d 41, 45 (holding that while a prospective demand for a use that would affect the value of the property should enter into the

[256] *Id.*
[257] *Id.*
[258] *Id.* at 227 (citations omitted).
[259] *Id.* at 227-28.
[260] Ohio Turnpike Comm. v Likowski, 9th Dist. Summit No. 21097, 2002-Ohio-7322.
[261] *Id*. at 1 (citing Masheter v. Kebe, 49 Ohio St.2d 148; 359 N.E.2d 74 (Ohio 1976)).
[262] *Id.* at 1(citing Kebe, 49 Ohio St.2d at 151).
[263] *Id*. at 1 (citing In re Appropriation for Highway Purposes, 90 Ohio App. 471, 477; 107 N.E.2d 387 (Ohio Ct. App. 1951).

> calculation of value, it would be improper to value the property as if it were actually being used for the different use).[264]

In *Board of County Commissioners of Clark County v Seminole Avenue Realty*,[265] the court affirmed a trial court evidentiary determination. The County attempted to bar any consideration of a highest and best use that was not permitted by the current residential zoning, 'prohibit any consideration of [the appraiser's] damage to residue calculations because [of] an impermissible calculation of lost profits" and to exclude the appraiser's report because it "did not specifically state the fair market value before and after the appropriation."[266]

The court rejected the claim that the highest and best use other than residential use was unavailable.[267] This is premised upon well-known precedent cited below, and the jury instruction.

The court reviewed the historical compensation method in a partial taking. The Court noted that:

> If the taking is only partial, the owner may be entitled to "damages." Damages are the injury resulting from the taking to the "residue" of the property still held by the owner, less any special benefits accruing to the residue from improvements. Damage to the residue is measured by the difference between the pre- and post-appropriation fair market value of the residue.[268]

In this case, appraiser Schenck determined the amount of lost nursing home facility available because of the partial taking.[269] Mr. Schenck then prepared an analysis which included the net present value of the lost income which would be derived.[270] This is probably a backwards way of doing it. Mr. Schenck would have been far better off determining how valuable the premises would be on a per square foot of rentable space basis before versus after. This type of analysis is frequently excluded because it is considered too "speculative" or simply a "lost profit" and thereby non-compensable.[271]

In citing Cincinnati v Banks,[272] the court succinctly outlined the inability to appropriately utilize the testimony. Rather than providing my personal description, below are the paragraphs released by the appellate panel.

> The board, on the other hand, argues that the trial court correctly limited Schenck's testimony and appraisal report because both were impermissibly based upon lost future

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[264] *Id*. at ¶ 11.
[265] *Bd. of Cty. Commrs. of Clark Cty. v Seminole Ave. Realty*, 179 Ohio App.3d 37, 2008-Ohio-5462, 900 N.E.2d 672 (2d Dist.).
[266] *Id.*at ¶ 4.
[267] *Id.*at ¶ 5.
[268] *Id*. at ¶ 14 (citing *City of Norwood v. Forest Converting Co*., 16 Ohio App.3d 411, 415, 476 N.E.2d 695 (1st Dist. 1984), *First Industrial I*, 158 Ohio App.3d 792, 2004-Ohio-5836, 822 N.E.2d 441, ¶ 5 (10th Dist.)).
[269] *Id*. at ¶ 18.
[270] *Id.*
[271] *Id*. at ¶ 22 (holding that the trial court's exclusion of appraiser's valuation testimony was not an abuse of discretion).
[272] 143 Ohio App.3d 272, 757 N.E.2d 1205 (1st Dist. 2001

> profits from the proposed assisted living facility on the subject property. This is known as the "business losses" rule. *Cincinnati v. Banks* (2001), 143 Ohio App.3d 272, 285, 757 N.E.2d 1205. The business-losses rule is a judicial construct that holds that the owner of appropriated property may not be compensated for the loss of future profits from any commercial enterprise on the property. *Id*., citing *Preston v Stover Leslie Flying Serv.,* Inc. (1963), 174 Ohio St. 441, 190 N.E.2d 446, paragraph five of the syllabus. "The theory underlying the application of the rule by Ohio courts to deny compensation for lost future profits is that commercial profits 'depen[d] * * * upon the acumen and skill of the one who carries on the business.' *Sowers v Schaeffer*, 155 Ohio St. at 459, 44 O.O. at 421, 99 N.E.2d at 317." *Id.* Evidence of profits derived from a proposed business conducted on the subject property is too speculative, uncertain, and remote to be considered as a basis for computing or ascertaining the market of the appropriated property. *Preston*, 174 Ohio St. 441, 190 N.E.2d 446, paragraph five of the syllabus. The business-losses rule provides the trial court in an appropriations proceeding a basis upon which to exclude evidence of lost profits because such profits "are not relevant to a determination of the issue of just compensation or that the admission of such evidence might confuse the jury and lead to an improper award." *Cincinnati v. Banks*, 143 Ohio App.3d at 285, 757 N.E.2d 1205. "As such, loss of future profits or the income potential of [a subject property] are inappropriate means by which to measure a property's fair market value." *Wray v. Stvartak* (1997), 121 Ohio App.3d 462, 472, 700 N.E.2d 347.[273]

The methodology used by Schenck was simply construed to be inadmissible given that there was never even an application for an assisted living facility.[274] The court noted that "portions of Schenck's appraisal report, as well as his own testimony that analyze and calculate the damage to the residue are based on speculation of future profits from a hypothetical assisted living facility. Speculation, based on supposed future profits from a hypothetical business, cannot be the basis upon which the damage to the residue can be properly and reliably calculated."[275]

I. Contract Provisions and Eminent Domain

In the second appeal of *Rite Aid of Ohio, Inc. v. Monroe/Laskey Ltd. Partnership, LLC.*, the tenant claimed that the eminent domain taking created a breach of a lease.[276] The argument was that there was "an unjust enrichment" because the family continued to see rental payments despite the loss of a portion of the real property.[277] The tenant was unsuccessful in its litigation, receiving a summary judgment dismissing its claim.[278] One should note that each of these drug store leases was different. In the lease

[273] *Seminole Ave. Realty*, 179 Ohio App.3d 37, 2008-Ohio-5462, 900 N.E.2d 672, ¶ 21 (2d Dist.) (alteration in original) (omission in original).
[274] *Id.* at ¶ 22.
[275] *Id*.
[276] *Rite Aid of Ohio, Inc. v. Monroe/Laskey Ltd. P'ship, LLC.*, 6th Dist. Lucas No. L-09-1179, 2010-Ohio-691.
[277] *Id.* at ¶ 10.
[278] *Id.* at ¶ 18.

which is the subject of this appeal, the relevant clause provided for reduced rent where the tenant has a right to terminate the lease due to eminent domain but elects to remain.[279]

J. Assemblage

Assemblage, also known as plottage, is the practice of increasing a parcel's value by recognizing its potential use combined with an adjacent parcel. In the unreported case from the Eighth District, Cuyahoga county, *Weir v. Kebe,* the Court refused to include evidence that the highest and best use of a property was a future co-development with an adjoining parcel.[280] According to that court, "an appropriation proceeding a property owner may not enhance the value of his property by proof of contingent and prospective uses of the property relative to the adjoining property of other persons."[281]

This had been the sole position of Ohio on assemblage until *Orange Village v. Tri-Star Development Co*[282]. In that case, the defendant witness testimony that a property's use as a road was not $150,000, but $650,000 because its value as a road was increased considering its import to the adjoining property which was scheduled to be developed into commercial property and was already rezoned for commercial use.[283] The necessity and valuation of the road is highlighted by the fact that the future commercial parcel lacked ingress and egress.[284] The Court referenced *Weir v. Kebe*, but held that as long as the proposed assemblage is not speculative, it may be admitted as evidence on valuation.[285] The proposed assemblage must be "reasonably sufficient to affect the market value."[286]

The court of Appeals for the Second District reinforced the *Orange Village* ruling in *Bd. of Trustees of Sinclair Community College v. Farra*.[287] Sinclair Community College brought motions for a new trial and in the alternative for remittitur on the basis that the jury award was higher than either party's appraisal.[288] Even though, the defense expert had a lower valuation than the jury award, he testified that the premium for assemblage could be as much as one hundred percent of the value of the land itself, which caused Farra to ask for a damage award above the appraisal of his expert witness.[289] The appellate panel affirmed the trial court denial of the motions for new trial and remittitur because jury award was within the range of testimony presented at trial, considering the defense expert's opinion on the possible upper limit of the assemblage.[290]

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[279] *Id.* at ¶ 14.
[280] *Weir v. Kebe*, 8th Dist. Cuyahoga Nos. 43722 and 43723, 192 WL 5306, at *4 (Apr. 15, 1982).
[281] *Id.*
[282] *Orange Village v. Tri-Star Dev. Co.*, 8th Dist. Cuyahoga No. 77358, 2001 WL 259190 (Mar. 15, 2001).
[283] *Id.* at *1.
[284] *Id.* at *2.
[285] *Id*. at *3.
[286] *Id.* (citing *Olson v. United States*, 292 US 246, 256-57, 54 S. Ct. 704, 709 (1934)).
[287] 2d Dist. Montgomery No. 22886, 2010-Ohio-568.
[288] *Id.* at ¶ 8.
[289] *Id.* at ¶ 54.
[290] *Id*. at ¶ 71.

IV. Conclusion

While many of the basic principles of eminent domain law have been in existence for a long time, the intricacies of the practice continue to evolve. Even in just the last ten years many changes have occurred in the manner in which Ohio handles appropriation cases. Only by carefully monitoring the developments in evidentiary, procedural and substantive law within the jurisdiction may a lawyer in an eminent domain case be able to properly strike the proper balance between the rights of an individual to their private property and the right of a sovereign government to appropriate property for public use.