HIGHEST AND BEST USE IN LAND VALUATION CASES

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INTRODUCTION

It is axiomatic that "you can't get the value right if you get the highest and best use wrong."[1] There may be no more fundamental concept in the valuation of property under the Fifth Amendment's just compensation clause than that fair market value is determined in light of a property's highest and best use.[2] It is well-established that market value and highest and best use are connected—the market value of a property is the value of the property at its highest and best use.[3]

This article will explore highest and best use, its analytical definitions, both legal and appraisal, and the evidentiary application to assist in preparing the expert witness for trial.

APPRAISAL AND LEGAL DEFINITIONS

Appraisal Definitions

The Uniform Standards of Professional Appraisal Practice (USPAP) Rule 1-3 provides:

> When necessary for credible assignment results in development a market value opinion, an appraiser must … (b) develop an opinion of the highest and best use of the real estate. Comment: An appraiser must analyze the relevant legal physical and economic factors to the extent necessary to support the appraiser's highest and best use conclusion(s).[4]

The Appraisal of Real Estate defines highest and best use as "[t]he reasonable probable use of property that results in the highest value."[5]

The Dictionary of Real Estate Appraisal has a similar definition:

> The reasonably probable and legal use of property that results in the highest value. The four criteria that the highest and best use must meet are legal permissibility, physical possibility, financial feasibility, and maximum productivity.[6]

A thorough analysis of highest and best use issues provides a firm foundation for the appraiser's opinions and helps the appraiser identify the most likely purchaser for the property in the open market.[7] Highest and best use is that reasonable and probable use that supports the highest present value, as defined, as of the effective date of the appraisal.[8]

The four criteria to determine highest and best use are:

- Legal permissibility: Is the proposed use legal under existing zoning or other applicable rules, regulations, and bylaws as of the date of value? If not, is there a reasonable probability of securing legal entitlements (e.g., permits, zoning variances)?
- Physical possibility: Can the land physically (size, shape, frontage, access, wetlands) support, sustain, promote, and accommodate the proposed use?
- Financial feasibility: Can the land be developed to the use proposed in a financially sound manner? Is the cost associated with achieving the proposed future use (e.g., demolition, site preparation, environmental remediation) reasonably related to the return generated in terms of value (and profit)?
- Maximum profitability: Will the proposed use produce the highest economic land value and generate both a return of and a return on the capital invested?[9]

The tests of physical possibility and legal permissibility must be applied before the tests of financial feasibility and maximum profitability as "[t]here is little to be learned from analyzing the financial feasibility of an illegal, or physically impossible, use."[10]

These four tests have the following three essential components: (i) a property's physical, legal, and locational attributes; (ii) the economic demand for the potential alternative uses of the property; (iii) estimates of the financial rewards for each alternative use.[11]

Legal Definitions

Legal definitions should be, and are, aligned with appraisal standards. The US Supreme Court has stated the rule as follows: An owner of lands sought to be condemned is entitled to their "market value fairly determined."[12] That value may reflect not only the use to which the property is presently devoted but also that use to which it may be readily converted.[13]

According to the prevailing holdings in the states, highest and best use is that use of the property, among all those reasonably probable uses, that impacts the reckonings of the willing buyer and seller when arriving at the most probable selling price for a property in a free and open market. Highest and best use is that alternative from among all reasonable alternatives that will bring the highest value return to the owner, taking into consideration site capacity, infrastructure, neighborhood conditions, zoning trends, and data dealing with costs and values. Highest and best use is not restricted to the existing use of the property by the owner at the time of the taking (date of valuation), nor necessarily only those uses allowed as a matter of law (e.g., by zoning). In determining market value, a factfinder may consider all uses to which the property is reasonably adaptable and for which it is (or in all reasonable probability will become) available within the foreseeable future. The probability of a property's use for all purposes, present and prospective, for which it is either presently adapted and/or to which it might in reason be applied, must be considered. It is the legal, possible, and probable employment that will give the greatest present value to land or realty while preserving its utility. With discounts for

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likelihood of being realized and for futurity, the values of potential uses of land taken are elements that should be considered in fixing just compensation.[14]

Each state has its own legal definition of highest and best use and while there are variations, they all reflect a common approach. A few examples:

- **Alabama**: Highest and best use is the highest use to which the property could reasonably have been put.[15]
- **Arizona**: Market value must be determined only by uses for which the land is adaptable and available.[16] An exception to the general rule exists when land sought to be condemned is not presently available for a particular use, but the evidence tends to show a reasonable probability of a change in the near future.[17] There must be evidence of reasonable probability as distinguished from possibility and speculation in order for the exception to apply.
- **California**: "The property taken is valued based on the highest and best use for which it is geographically and economically adaptable"[18] (i.e., the highest and most profitable use to which the property might be put in the reasonably near future, to the extent that the probability of such a prospective use affects the market value).[19]
- **Georgia**: In the estimation of value of land taken for public uses, it is not restricted to its agricultural or productive qualities, but inquiry may be made as to all other legitimate purposes to which the property could be appropriated. The test in such cases is whether the land could be used for other purposes, not whether the land would be used for other purposes.[20] In this regard, "[t]he jury [should be] allowed to inquire as to all legitimate purposes, capabilities and uses to which the property might be adapted, provided that such use [is] reasonable and probable and not remote or speculative."[21]
- **Illinois**: Highest and best use is the present use to which property is actually put or any capacity for future uses which may be anticipated with reasonable certainty.[22] Vacant or improved land should be valued at the reasonably probable and legal use of the land that is physically possible, appropriately supported, financially feasible, and that results in the highest value. The four criteria the highest and best use must meet are legal permissibility, physical possibility, financial feasibility, and maximum productivity.[23]
- **Indiana**: Highest and best use is the legal use of land or buildings which will bring the greatest economic return over time.[24]
- **Louisiana**: That use of property most favorably employed to which property is adaptable and may reasonably be put in the not-too-distant future as determined as of the time of taking.[25] The highest and best use of property involved in an expropriation suit is that to which it is best adaptable in the not-too-distant future and which is not speculative or remote.[26]
- **Massachusetts**: Because the determination of fair market value is based on what a reasonable buyer would believe the property to be worth, the highest and best use of the property is not limited to the present use of the property but also includes potential uses of land that a reasonable buyer would consider significant in deciding how much to pay.[27] With discounts for the likelihood of being realized and for futurity, the property may be valued for any potential use that maximizes its value in the marketplace.[28]
- **Mississippi**: When assessing damages, the lower court is not limited to just the property's highest and best use for the moment but may consider the value of the property with reference to any use for which the property is reasonably adaptable.[29] Property may have several available uses and purposes and consideration must be given to the fair market value of each use and purpose.[30]
- **New Hampshire**: Highest and best use are the actual or potential uses that would produce a property's maximum economic value.[31]
- **New Jersey**: Highest and best use is that use which is both legally permitted and physically possible, which will provide the highest net

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return to the owner.[32] It is broadly defined as the use that at the time of the appraisal is the most profitable, likely use or the available use and program of future utilization that produces the highest present land value provided that use has as a prerequisite a probability of achievement.[33]

- **New Mexico**: Determination of highest and best should be made with regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.[34]
- **New York**: In the determination of highest and best use, the appraiser "must take into consideration all restrictions including current zoning, and all encumbrances on the land, as well as the lease term."[35] A determination of highest and best use of property must be based on evidence of a use which reasonably could or would be made of the property in the near future.[36]
- **Ohio**: Highest and best use is the most valuable and best use to which the property could reasonably, practically, and lawfully be adapted.[37]
- **Texas**: Highest and best use is the reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible and that results in the highest value.[38]
- **Virginia**: Evidence of the reasonable probability of rezoning is to be allowed when known facts make such a determination possible.[39]
- **Wisconsin**: Highest and best use is the present or prospective use for which the property is adapted and to which it reasonably might be applied.[40]

Vacant and Improved Land

Appraisal theory and practice recognize that the determination of highest and best use may be influenced by the nature, age, and usefulness of any existing improvements on the land. Not all improvements add value to the land. The highest and best use of a property must be determined as if vacant and improved.[41] The difference in value between existing use as improved and value for a future use will then become apparent.[42] And the existence of an improvement does not necessarily limit the highest and best use of the land to that improvement. The improvements may be so dilapidated and obsolete (e.g., physically, functionally, or economically) or underutilize the capacity of the land (e.g., allowable density) so as to be a burden on the land which would then have to be removed in order to maximize the property's value.

Improvements that would otherwise be physically sound or productive for a particular use might be undercut by identifiable trends in the market for land in the immediate vicinity, rendering the property's improvements obsolete. For example, high-rise apartment buildings may be the development of choice in the neighborhood of traditional low-rise residential. Or a building may produce good income, but only by using a portion of the total land parcel or by failing to take maximum advantage of allowable density pursuant to local zoning parameters. Or a site may have a higher value if suitable for improvements, but demolition costs or environmental remediation may be so costly as to make the potential use financially unfeasible to achieve.[43]

Vacant land may have an alternative highest and best use as improved. The concept of highest and best use of real estate as improved pertains to the use that should be made of an improved property in light of the existing improvements and the ideal improvement described at the conclusion of the analysis of highest and best use as though vacant.[44] The determination of highest and best use requires the appraiser to determine whether the improvement contributes to the fair market value of a subject property or is a burden on the land that must (or hypothetically would have to) be removed in order to maximize the property's value. Regardless of an appraiser's ultimate determination, however, appraisal analysis of the highest and best use of property as both vacant and as improved should be as specific as the market suggests through market analysis. The specificity of the ideal improvement can test the reasonableness of the highest and best use conclusion and affects the comparable

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properties that might be analyzed in the application of the approaches to value.[45]

Interim Use

Highest and best use does not equal highest and best interim or transitional use. Interim use is the "[t]he use contemplated by the market participant that the subject real estate can be put to while waiting for certain subsequent factors to occur."[46] The most common example in an urban setting of an interim use is a parking lot [47]which may generate substantial income but is less valuable than its present value for future use as an office building on the same site. A rural example would be the temporary use of land for agricultural purposes with the expectation for future development as a residential subdivision.

While valuation is based on the present value of the future potential use (e.g., present value of future benefits) and not the interim use, in some instances the two are not mutually exclusive but rather complimentary, in which case interim use can contribute to the overall highest and best use of the property.[48] However, care should be taken to avoid appraisals predicated upon lengthy interim use periods. "To estimate an interim use period longer than five years can be considered speculation and conjecture."[49]

EVIDENCE OF HIGHEST AND BEST USE

Once the working definition of highest and best use has been established, the first step is to start with an expansive list of potential use alternatives which is then winnowed down to those uses which satisfy the four-prong test of highest and best use and are susceptible of proof. All illegal, illogical, and otherwise financially and physically unfeasible alternatives should be eliminated from consideration. Uses that are possible but are so remote and speculative that they are unlikely to influence the market should be identified, tested for market demand, and rejected if none appears reasonable. Consideration cannot be given to uses which are purely speculative and unavailable.[50]

All uses, at least initially, may be considered. It has been argued that uses which do not produce a monetary return, as well as those uses that have as their sole attribute some incalculable benefit to the community in general, must be excluded from the appraiser's consideration (e.g., amenity contribution to a community from a planned project, such as the public space in a park-like area).[51] Rarely has an appraiser merely disregarded passive recreational or conservational use as potentially highest and best because neither produces income. For example, conservation use may provide an adequate basis for highest and best use, or a combination of a for-profit use and a passive recreational use may also be appropriate. As discussed further below, the best approach is to consider all uses and then decide what can be proved by market or other evidence of value.

Physically Possible

Evidence of the physical characteristics are most commonly proved by instrument (e.g., deed, plan, or plat) showing the property's land area, dimensions, and configuration. Documentary evidence as to characteristics or overcoming physical obstacles (e.g., unsuitable soils, ledge, wetlands) is supplemented by expert opinion by engineers or surveyors.

Legal Permissibility

Legal permissibility can be proved by expert opinion, a document, order, or decision. In nearly all jurisdictions, however, legal definitions tend to be a variation on the basic theme that market demand and market trends will present the most compelling evidence of highest and best use. A landowner must show that a market in fact existed on the date of taking or would be reasonably likely to exist in the near future for a proposed highest and best use, regardless of whether the property was being put to that use at the time of the taking (date of valuation).[52] The existing use of property, in any case, is its presumed highest and best use; however, this presumption can be rebutted by showing a reasonable probability that the land was adaptable or would likely be needed in the near future for another use, as dictated by market demand or current market trends.[53] "[T]he mere physical adaptability of the property is

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insufficient to discharge the burden of proving the existence of the market."[54]

Existing Use

There may be no better example of the divergence between theoretical and evidentiary highest and best use than when the existing use of a property is arguably its highest and best use. For the condemnee, trial strategy may be influenced by wishful consideration of a theory of highest and best use which may have some allure, possibly driven by an owner's opinion of value, but is difficult to prove in the market. Millions of dollars in an eminent domain case may be predicated on a theory of a higher and best use that looks good on paper but has limited foundation in the market. For the condemnor, the prospect of capping damages by valuing the existing improvement as highest and best may ignore demonstrable market trends. Before rejecting or embracing the existing use as highest and best, the eminent domain lawyer must determine what evidence is available to prove each.

If it is determined that the property is being put to its highest and best use as of the date of taking (i.e., date of value), then fair market value should be proved by valuing the property for that use. Evidence that the existing use is its highest and best is readily available and often most persuasive.[55] Photographs of the property as it existed and was being used at the time of valuation may be more persuasive to a jury than artistic renderings of future use even if such future use is conceivable. In those jurisdictions where the finder of fact may or is required to take a view, the use of the property actually seen on the view may also be the most persuasive. If the improvements have been demolished as of the date of the view, then the surrounding area may be indicative of existing uses (e.g., a residential proposed future use in a manufacturing/industrial area). It is often easier to prove highest and best use when the condemned property used for a single-family residence is to be valued as a single-family residence, the land being subdivided is valued as a subdivision, an office building is valued as an office building, or a warehouse is valued as a warehouse. Neither the appraiser nor the finder of fact is asked to project or hypothesize a future use for the property or to visualize some future development alternative that could have been built had the property not been taken. Predicate witnesses are generally not required for proof of value for the existing use, unless a modification to the existing use is proposed (e.g., an increase in density). It has been held that there is a presumption that the existing use is highest and best which a landowner can rebut only "by showing a reasonable probability that when the taking occurred, the property was adaptable and needed or would likely be needed in the near future for another use."[56]

In virtually every jurisdiction, the owner is permitted to testify as to the market value of his or her property. Although market value is typically established through expert testimony, expert testimony is not required.[57] However, the decision whether a property owner should testify is generally a matter of persuasion rather than an evidentiary prerequisite. Unless the owner is in the real estate business or has bought the property for investment purposes, owners tend to be more persuasive when they describe how the property was being used rather that what they thought the property could be.[58] An owner's description of the property, how it was used, and its benefits and amenities serve as a valuable foundation for appraisal opinion. Evidence that the owner has invested in developing the property for a particular use is generally more persuasive than a mere plan for future action.[59]

The existing use of raw land has market value even though it is not currently being used for any particular purpose. The most common example is the highest and best use of raw land held for future development. But not all land valuation assignments should simply assume that the highest and best use of raw land is its development potential. Raw land may have value without projecting a specific hypothetical future development. There is a demonstrable market for assemblage purposes, for land banking purposes, for buffer and for an abutter's purposes. One court went so far as to opine that highest and best use may simply be land use "speculation," that

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is, holding the property for some future use so long as the value is the present value for that future use.[60]

Future Use

If the property is being used for some purpose that fails to take maximum advantage of the property's physical attributes (e.g., its size, shape, location, etc.), its legal advantages (e.g., zoning), or its marketability (e.g., demand), and there is evidence that the market would react favorably to some other use, the property may be valued for any potential use to which the property might reasonably be adapted.[61] Fair market value may be based on proof that the highest and best use is a use for which the property is adaptable and needed or likely to be needed in the reasonably near future.[62] The market value of property includes its value for any purpose to which it may be put. If, by reason of its surroundings, its natural advantages, its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which make up this adaptation may be taken into consideration.[63] So long as the potential use is shown to be more than merely some yet-to-be-conceptualized, undefined plan for the future, property may be valued for that probable future use.[64] When the highest and best use is other than its existing use, the burden of proof falls on the party who claims the different use.[65]

Often the fair market value of land taken is estimated based on a legally permissible future use. Legally permissible higher and better future uses for an underutilized property take advantage of land use rules and regulations in place to enhance value. A demonstrable market exists for land available as a matter of right for a higher and better use. For example, many industrial zones also allow office use, many existing improvements fail to take advantage of allowable density, and many large residential estates may be subdivided as a matter of right. It is common to value both unimproved and underimproved property as consistent with prevailing zoning as a matter of right. Even an offer to purchase intending to dedicate the land to another use has been admitted as evidence of potential future use.[66]

Merely possible uses that are unduly speculative or conjectural, uses that are so remote from the reality of the marketplace that they would not figure materially in the reckonings of the willing buyer and seller, are not highest and best uses and are excluded from the calculation of market value.[67] In determining value, a jury may consider existing zoning and possible or probable future zoning changes which are sufficiently likely to have appreciable influence upon present market value.[68] It is within the trial judge's discretion whether the evidence presented demonstrates that the market would have considered the potential use as so likely to eventuate and so imminent to occur that the property's fair market value may be determined by considering how that potential use impacted value. Witnesses are not permitted to enter the realm of speculation and swell damages beyond market by fantastic visions as to future exigencies.[69] An appraiser is also not permitted to explore unreasonably the details of particular plans of development that are still essentially speculative. For example, many jurisdictions exclude the subdivision method of valuation unless it can be shown that there was a plan in progress.[70]

The value of yet-to-be-developed land or of improved property with a different historical or existing use may be influenced by its potential for a future more valuable use.[71] The property is not to be valued assuming that it had been dedicated to the future use, but value is to be arrived at taking into consideration the full extent that the prospect of demand for such use affects market value.[72]

If highest and best use is some use other than the existing use, then fair market value is the value impacted by the reasonable probability of being able to achieve the potential, future use. The value of a future, potential use is the present value impacted by the property's suitability for future use.[73] With discounts for the likelihood of being realized and for futurity, the property may be valued for a potential use that maximizes its value in the marketplace.[74] Fair market value may then reflect what an astute buyer would pay for the probability factor (not the value of the property rezoned).[75] This may be shown either by enhancing the present value by the

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reasonable probability of achieving the future use or discounting the indicated future value because the subject only has a reasonable probability of achieving the highest and best use. These are both appraisal issues of judgment and are susceptible of proof by market data.[76]

Proof of value for a future use, as well as the likelihood of achieving a higher and better future use, may be proved by market data. Cases exist in virtually every jurisdiction in support of this proposition.

Overcoming Legal Prohibitions and Development Handicaps

Potential future highest and best use may also be shown to be a legally prohibited use at the time of the taking (date of value). Illegality of use may be based upon the existing law, in relation to the rights of other persons, or those of the public.[77] If highest and best use is some use not legally permitted as of the date of value, it must be demonstrated that there is a reasonable probability that the legal prohibition or restriction will be varied, modified, or removed in the reasonably near future so as to have an influence on market perception that the proposed future use is likely to eventuate. If the property is to be valued for a potential, yet prohibited use, the burden falls on the proponent to demonstrate that there is a reasonable probability that an illegal use may be permitted at some future, commercially reasonable time so as to figure materially in the reckonings of the hypothetical buyer and seller.[78] Of course, if the experts agree and both base their opinions on the reasonable probability of a rezoning, then evidence of that value is admissible.[79]

The effect upon the value of the property of a probability of achieving the higher and better use or of the market's perception of the probability of achieving a higher and better use may be taken into consideration by the appraiser. It may be shown by expert testimony, by the testimony of actual parties to a sale or by market data that the highest and best use is to hold certain property for future development based upon evidence that there is a probability of rezoning to permit a more valuable or intense use sometime in the foreseeable future. Developers and investors may purchase undeveloped tracts in anticipation of zoning changes that yield greater profitability because of increased densities or changes in use classification. Frequently, they hold real estate for future development with expectations of such zoning changes.

Zoning and Regulatory Constraints

Highest and best use may be a more intense or different use than that permitted by the zoning in effect as of the date of value. Zoning is a limit on the use of land adopted to promote the most appropriate use of real estate throughout the municipality, often at the expense of the most profitable use.[80] Land value for the highest and best use must reflect governmental and private regulations imposed upon the property and existing as of the date of value.[81] Examples of governmental restrictions on the use of land include zoning restrictions, subdivisions rules and regulations, board of health regulations, and building restrictions specifying set-back, height, ground coverage, fire, and building codes. Private restrictions include easements, rights-of-way, subdivision deed restrictions, covenants, servitudes, and conditions.[82]

An opinion of value which simply ignores the existing regulations (including zoning) or merely assumes a change in zoning without proof that a zoning change or a variance was reasonably probable may be excluded in many jurisdictions as a matter of law.[83] Conversely, an opinion that merely assumes the applicability of a regulatory restriction is subject to evidence that the land is not subject to the regulation at all. Neither the landowner nor the taking authority should assume that a particular land use regulation applies to the subject property or that a variance may be granted.

Market value may be shown to reflect a highest and best use that might be achieved only if there is a reasonable probability that zoning restrictions in place at the time of the taking may soon be lifted or of a reasonable probability that a special permit or license may soon be granted.[84] Though a higher

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and better use may not be legally permissible as of the date of value, market value may be established by demonstrating that there exists a reasonable probability of overcoming development handicaps or unfavorable zoning.[85] Fair market value may then reflect what an astute buyer would pay for the property as influenced by the probability factor, not the value of the property rezoned.[86]

The reasonable probability of a zoning change is a question of fact. In the face of an existing restriction, the burden is on the proponent to prove that either the restriction applies or that it does not.[87] As a threshold matter, the proponent of the evidence must "come forward with reliable evidence that the feasibility, suitability, and practicability of its proposal make it reasonably probable that development handicaps like zoning will be overcome and the requisite approvals will be secured."[88] The trial court must be satisfied that evidence of a prospective zoning change is sufficient to warrant a determination that such a change is reasonably probable. If that preliminary finding is made, then the jury is to decide whether the change is likely to occur and, if so, whether the change has any impact on value. The question then becomes whether a buyer and seller would reasonably believe that regulatory constraints could be overcome and, if so, whether this prospect would have an impact on the value of property "regardless of the degree of probability."[89] In determining value, the property must be evaluated with the restrictions of the existing zoning in mind and consideration given to the impact upon market value of the likelihood of a change in zoning.[90]

> This may be done either by determining the subject property's value as rezoned, minus a discount factor to allow for the uncertainty that rezoning would actually take place, or by determining the property's value with its existing zoning, plus an incremental factor because of the probability of rezoning.[91]

Reasonable probability of overcoming zoning or other legal impediments may be demonstrated by introducing evidence that:

- On prior occasions the permit granting authority or board granted the permit, the special permit, the variance, or other relief;
- The zoning classification itself contemplated change;
- The surrounding land had changed sharply in character and use and the subject property is located in proximity to areas already developed in a manner compatible with the intended or potential use;
- Demand for the use evidenced by increased demand for property dedicated to the intended or potential use in the area and nearby parcels have been rezoned as a consequence of changes in use in the vicinity; identifiable trends indicate that a rezoning is reasonably probable;
- The report of a zoning advisory council recommended a change in zoning;
- A comprehensive development plan, public or private, has been approved and initiated change in the zoning and regulatory climate;
- Post-taking zoning amendment adoption of a previously considered change;
- The property was particularly well suited for a use prohibited by the zoning;
- The municipality or economic development agency encouraged industries to locate near the property on land regulated by the zoning restrictions which were later overcome or changed;
- The proposed zoning would not harm surrounding property, would be advantageous to the public and be a reasonable use;
- Acquisition of an off-site easement easing physical constraints and making higher and better uses likely to eventuate with zoning relief;
- The wetlands advisory board granted orders of conditions allowing filling, crossing of wetlands and/or building in the buffer or other permissions contemplated by proponent;
- An unrelated urban renewal or economic redevelopment plan increased the likelihood of

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development in the area or a feasibility study commissioned by the proponent of a certain use that took into account zoning, demographics, employment facilities and public utilities; or

- Local development office sought to attract certain industries for uses which required variances being granted or changes in existing regulations, or employment base is suitable for an expansion of a use where land is otherwise limited by zoning or other regulation.[92]

The reasonable probability of a zoning change may also be shown by predicate, opinion testimonial evidence. Evidence of potential zoning changes can come from an expert whose opinion is based upon an investigation of actual zoning changes by the zoning authority on similar properties in similar locations.[93] A qualified witness may give an opinion about what an owner might expect in the way of zoning action. The witness may not give an opinion that a zoning board will approve, but only whether there is a reasonable probability that the board would act favorably.

Change in Circumstances

Analogous is a wide range of reasonably probable change that may impact highest and best use and, therefore, its fair market value. If there is evidence (which may be an expert opinion) that the market would respond favorably, evidence may also be offered to demonstrate how a real estate professional would approach and overcome a myriad of development problems, not solely zoning. Evidence of the likelihood of land acquisition by a hypothetical willing buyer for better access, the possibility of adjusting wetlands problems on site, the likely relocation of a major road, and the favorable support for development by the municipality or the permit-granting authority may evidence reasonably probable change.

Market value may then reflect a premium based on a reasonable expectation of improving the development capacity of the land. The value of the premium would be a function of factors including the location of the land, the number of development obstacles to be solved or overcome, the time estimated to solve them, the cost of carrying the land while attempts are made to solve the problems, and the strength of evidence indicating that the problems will, indeed, be solved. Value is impacted by how much more would be paid for the property which enjoyed the reasonable probability of overcoming development handicaps, not the value of the land as if the development problems had, in fact, been solved or did not exist.

The Project Influence Doctrine

Value of property taken can neither be enhanced nor diminished by the project for which the taking is made. This is settled law in nearly every jurisdiction and is often referred to as the project influence doctrine, or the project-enhancement rule. A landowner is entitled to the fair market value of its property unaffected by any influence owing to the project, the impending taking, or knowledge that the taking may occur.[94] The critical consideration is "whether the [taken] lands were probably within the scope of the project from the time the government committed to it."[95]

In determining market value, the project-enhancement rule, as promulgated in Texas courts, provides that the factfinder may not consider any enhancements to the value of the landowner's property that result from the taking itself.[96] The doctrine or rule also has applicability to a determination of whether reasonably probable change influences highest and best use. The grant of a special permit to a city, town, or government agency (or the fact that the government developed a property to a use previously prohibited) is not necessarily highly probative of the probability that the permit or change would have been granted to a private petitioner or that the property could have been privately developed for the same use. Where the change in zoning results from the taking or from the public project for which the taking was made, the evidence that the hypothetical developer could have expected to receive the same zoning or other regulatory relief is likely to be excluded. Similarly, a post-taking zoning amendment that acts to the benefit of the taking authority

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may not indicate that a private developer could have obtained the zoning change. Care must be taken to distinguish between availability for public use, which constitutes availability even in private hands, and availability which is peculiar to the government. Evidence tending to blur that distinction may be excluded even though the change in question may have significant relevance to market value. [97]

If, however, a taking is made for precisely the same use as that proposed by the owner, the fact that the condemnor eventually dedicated the land to that particular use does not preclude the owner from advancing the use as highest and best. The condemnor's use of the property may be relevant to the subject's adaptability, suitability, and practicability of the proposed or intended use.[98]

Assemblage

The doctrine of assemblage applies when the highest and best use of separate parcels involves their integrated use with lands of another. If applicable, this doctrine allows a property owner to introduce evidence showing that the fair market value of the owner's real estate is enhanced by its probable assemblage with other parcels. The basis for the doctrine of assemblage can be found in *Olson v. United States*, where the court stated:

> [j]ust compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined... The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered. ...The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value.[99]

A distinct, but related, concept is unity of use where separate parcels may be valued as one whole even if not physically contiguous. The classic federal case is *Baetjer v. United States*, where the federal government condemned two tracts used to raise sugar cane by the same owner who also owned the sugar processing plant located on another island and not taken.[100] The court ruled that the owner was entitled to severance damages to the property not taken. "Contiguous tracts may be 'separate' ones if used separately [citation omitted] and tracts physically separated from one another may constitute a 'single' tract if put to an integrated unitary use … Integrated use, not physical contiguity, therefore, is the test."[101]

Generally, there are three factors to consider in determining whether parcels are separate and independent or a single tract: "physical contiguity, unity of ownership, and unity of use."[102] In evaluating unity of use, courts look to the following criteria: (i) intent of the owner; (ii) the adaptability of the property; (iii) the dependence between parcels; (iv) the highest and best use of the property; (v) zoning; (vi) the appearance of the land; (vii) the actual use of the land; and (viii) the possibility of tracts being combined in use in the reasonably near future.[103] The "question is a practical one" whether "land in various parcels, contiguous or close together, is to be treated as a unit."[104] "No doubt there are many cases in which the court is able to see, from the way in which they are divided and used, that different parcels of land, even if they adjoin one another, are to be regarded as distinct."[105]

In that connection the value may be determined in light of the special or higher use of the land when combined with other parcels; it need not be measured merely by the use to which the land is or can be put as a separate tract.[106] But in order for that special adaptability to be considered, there must be a reasonable probability of the lands in question being combined with other tracts for that purpose in the reasonably near future.[107] In absence of such a showing, the chance of their being united for that special use is regarded "as too remote and speculative to have any legitimate effect upon the valuation."[108]

Some courts have accepted assemblage (as distinguished from "plottage")[109] as an element of value only where there is unity of ownership over

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contiguous lots.[110] Other courts have refused to allow plottage or assemblage if the assemblage would require the use of property already owned by or in the process of being taken by the condemnor.[111] Regardless of a jurisdiction's requirement as to ownership of parcels, a condemnee must show that integration of the parcels is reasonably probable and not speculative.

Partial Takings

As a general rule, in the case of a partial taking, the landowner is entitled to compensation measured, not by the fair market value of the portion taken, but by the diminution in the fair market value of his land caused by the partial taking. When only part of a target track is taken, the "just compensation" that the owner is entitled to receive consists of: (i) the market value of the part taken; and (ii) the diminution in value of the remainder due to the taking and construction of the improvements for which the target track is taken. When a part of a tract of land is taken for public use, just compensation includes recovery for the part taken as well as recovery for the damage visited on the remainder.[112]

A property may have one highest and best use before the taking and a different highest and best use after. A taking of a portion of the land may impact the utility of the improvements on the remainder, rendering them obsolete. A taking of a portion of the land only with the right to demolish an existing building on a portion of the land that remains (e.g., temporary construction easement with a demolition easement to remove structures) may remove the blighting influences of an old structure and result in a betterment to the remainder for another higher and better use. A property may be large enough before the taking to support a development of sufficient density so as to absorb high site development costs, but after the taking be too small. In each case, what may have been one type of development before the taking, may have to be something different and less valuable after. [113]

If only part of the land is taken, an analysis of highest and best use is performed on the property before the taking, without any consideration for project influence. After the taking, the owner is entitled to be paid for the loss in value as a result of the taking and any project influence that renders the remainder less valuable. A second highest and best use analysis is then required after the taking as well.[114]

Special Purposes Properties

Highest and best use is not necessarily a conventional residential, commercial, or industrial use of the property. Highest and best use may be some special use which takes advantage of the unique or peculiar nature of the property, something unusual in how the property is situated, its adaptability for a particular use, or the unique nature of the property's improvements. These are so-called special purpose properties.

Whether a property is special purpose is determined by focusing on the nature and characteristics of the property and a demonstrable lack of market activity for reliable evidence of value for this type of property. It is not simply a question of lack of market that proves special purpose, nor is it that the property is simply unusual. Not every property which has a limited market or requires more than mere perfunctory application of conventional market-based valuation methodology is a special purpose property. A special purpose property is difficult to value because something unusual, special, or peculiar inherent to the property limits the class of potential buyers on the open market. A special purpose property has unique physical design, special construction materials, or a layout that particularly adapts its utility to the use for which it was built. The property is usually costly to modify to another, more conventional use, usually expressed in terms of economic impracticability.[115] It is not to be expected that properties adapted or developed for a specialized use have a very active market. Once developed, such properties are rarely abandoned or sold. Service-type properties like churches, convents, hospital, country clubs, school and college premises, campgrounds, and buildings of religious and charitable societies are typical of those properties regarded as special

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purpose. The burden of proving that the property taken is special purpose falls on the proponent.

Appraisers generally use three criteria to determine whether a property is special purpose: (i) physical design features peculiar to a specific use; (ii) no apparent market other than to an owner-user; and (iii) no feasible economic alternate use. The valuation calls for integrating the concepts of highest and best use, special purpose properties, contribution, and value in use. Uses and value in use should receive the same analytical effort as the measurement of value and description of the property. Even this approach may fail to fully value a special purpose property due to unrealized potential for another use.[116]

That the highest and best use is special purpose does not necessarily mean that an appraiser is free to use unconventional approaches to value.[117] When the trial judge makes a preliminary finding that the property is special purpose, the proponent of value is permitted much greater flexibility in the presentation of evidence of value, in particular its value for a special purpose, than would otherwise have been permitted had the property been dedicated to a more conventional use.

The following uses, regarded as special, have been recognized in various jurisdictions:

- Land Adapted to Park Use;[118]
- Fee of Street;[119]
- Beach Property;[120]
- Mill Site;[121]
- Paper Mill;[122]
- Gas and Gas Rights;[123]
- Sand and Gravel;[124]
- Utility Plant;[125]
- Racetrack;[126]
- Sports Arena/Stadium;[127]
- Special Weight-Bearing Construction;[128]
- Refrigeration Plant;[129]
- Car Wash;[130]
- Bowling Alley;[131]
- Armory;[132]
- Chicken Farm;[133]
- Church;[134]
- Fraternal Lodge;[135]
- Limited Purpose Industrial Plant;[136]
- Timber;[137]
- Medical Center.[138]

CONCLUSION

The concept of highest and best use is fundamental to the valuation of real estate. Differences in highest and best use also result in some of the more material disputes as to value in eminent domain cases. Understanding the appraisal and the evidentiary rules will enhance the likelihood of a more successful result.

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Notes

1. D. Lennhoff and R. Parli, Timing is Everything: The Role of Interim Use in the Highest and Best Use Conclusion, The Appraisal Journal vol. 88, no. 3 (Summer 2020) at 198. See also D. Lennhoff and R. Parli, A Higher and Better Definition, The Appraisal Journal, vol. 72, no. 1 (Winter 2004) at 45-49.
2. Olson v. United States, 292 U.S. 246, 255-256, (1934) (citing Boom Co. v. Patterson, 98 U.S. 403, 408 (1878); Clark's Ferry Bridge Co. v. Public Service Comm'n, 291 U.S. 227 (1934)). The inquiry is "what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses." Boom Co., 98 U.S. at 408.
3. Appraisal Inst., The Appraisal of Real Estate, 15th ed., 52 (2020), available at https://www.appraisalinstitute.org/insights-and-resources/resources/books/the-appraisal-of-real-estate-15th-edition-pdf. See also B. Diskin et al., Market Rent and Highest and Best Use: Joined at the Hip?, The Appraisal Journal, vol. 90, no. 2 (Spring 2022) at 123.
4. Appraisal Standards Board, Standards Rule 1-3 in USPAP (2024).
5. The Appraisal of Real Estate, supra note 3, ch. 17.

6 The Dictionary of Real Estate Appraisal, 7th ed., Appraisal Institute, 89-90. The Dictionary includes three others: (i) The use of an asset that maximizes its potential and that is possible, legally permissible, and financially feasible. The highest and best use may be for continuation of an asset's existing use or for some alternative use. This is determined by the use that a market participate would have in mind for the asset when formulating the price that it would be willing to bid (IVS); (ii) The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future (Uniform Appraisal Standards for Federal Land Acquisitions); and (iii) See definition for fair value determination.

7 7 B. Carter, Appraising Restaurants: Highest and Best Use Analysis, The Appraisal Journal, vol. 89, no. 4, 224 (Fall 2021) at 224.

8 American Inst. of Real Estate Appraiser and the Soc. of Real Estate Appraisers joint publication of Real Estate Appraisal Terminology, 126-127 Bryl N. Boyce, ed. (rev. ed. 1981).

9 Highest and best use is a use that is the most fitting, and most probable. For a use to be most fitting, the objectives of various groups have to be optimally reconciled. S. Sussna, The Concept of Highest and Best Use Under Takings Theory, The Urban Lawyer, vol. 21, no. 1 (Winter 1989), at 113-150.

10 J.D. Eaton, Real Estate Valuation in Litigation, 105 (2d ed. 1995).

11 The Application of Highest and Best Use Analysis, excerpted from The Appraisal of Real Estate, The Appraisal Journal, 317-334 (15th ed. Fall 2020); Highest and best use analysis is "more effectively organized into eight steps that echo and amplify the process of a marketability analysis": (i) Property productivity analysis of site attributes (size, location, legal); (ii) Delineate the market; (iii) Demand analysis (need for a specific land use); (iv) Supply analysis; (v) Residual demand analysis (demand outstrips supply supporting new construction); (vi) Subject capture analysis (competitive position of location, physical attributes, etc.); (vii) Financial analysis of alternative uses; and (viii) Conclusions drawn from timing and market participants (users and buyers). Id. at 249-250.

12 United States ex rel. TVA v. Powelson Assignee, 319 U.S. 266 (1943) (citing United States v. Miller, 317 U.S. 369, 374 (1943)).

13 Boom Co. 98 U.S. at 403; McCandless v. United States, 298 U.S. 342 (1936).

14 See, e.g., Douglas Environmental Associates, Inc. v. Dep't of Env't Protection, 706 N.E.2d 620, 623 (Mass. 1999) (quoting Skyline Homes, Inc. v. Commonwealth, 290 N.E.2d 160, 162 (Mass. 1972)); State v. Windham, 837 S.W.2d 73, 77 (Tex. 1992); Jersey City Redevelopment Authority v. Mack, 656 A.2d 35, 40 (N.J. Super. 1995) (emphasis added) (citing State v. Gorga, 138 A.2d 833 (N.J. 1958)); United States v. 320.0 Acres of Land, 605 F.2d 762, 811 (C.A. Fla 1979).

15 Weldon v. State, 495 So. 2d 1113, 1117 (Ala. Civ. App. 1985), (emphasis added); Historic Blakely Authority v. Williams, et al., 675 So.2d 350, 352 (Ala. 1995).

16 Town of Paradise Valley v. Young Financial Services, 868 P.2d 971, 974 (Ariz. Ct. App. 1994) (review denied 1994).

17 State v. McMinn, 355 P.2d 900, 903 (Ariz. 1960).

18 County of San Diego v. Rancho Vista Del Mar, Inc., 16 Cal. App.4th 1046, 1058 (Cal. Ct. App. 1993) (internal citation omitted).

19 City of Ripon v. Sweetin, et al., 100 Cal.App.4th 887, 898 (Cal. Ct. App. 2002).

20 Dept. of Transp. v. Katz, 312 SE2d 635, 169 Ga. App. 310, 315 (Ga. Ct. App. 1983).

21 Canada West, Ltd. v. City of Atlanta, 169 Ga. App. 907, 912, 315 S.E.2d 442 (Ga. Ct. App. 1984); DOT v. Kanavage 358 S.E. 2d 464 (Ga. Ct. App. 1987).

22 City of Quincy v. Diamond Const. Co., 762 N.E.2d 710, 714-15 (Ill. App. Ct. 2002) (citing City of Chicago v. Anthony, 554 N.E.2d 1381 (Ill. 1990)).

23 See Illinois Dept. of Transportation, Land Acquisition Policies and Procedures Manual, 3.6.1 Minimum Appraisal Requirements (2018).

24 City of Gary v. Belovich, 623 N.E.2d 1084, 1088, fn.3, (Ind. Ct. App. 1993) (citing Black's Law Dictionary 728 (6th ed. 1990)).

25 Natchitoches Parish Port Commission v Deblieux & Kelley, Inc., et al., 760 So.2d 393, 403 (La. Ct. App. 2000).

26 West Jefferson Levee Dist. v. Mayronne, 595 So.2d 672, 681 (La. Ct. App. 1992).

27 Bos. Edison Co. v. Mass. Water Res. Auth., 459 Mass. 724, 731 (2011); see also Rodman v. Commonwealth, 86 Mass. App. Ct. 500, 504 (Mass. App. Ct. 2014).

28 Skyline Homes, Inc. v. Commonwealth, 290 N.E.2d 160 (Mass. 1972).

29 Oughton v. Gaddis, et al., 683 So.2d. 390, 394 (Miss. 1996) (emphasis added) (citing Potters II v. State Highway Comm'n of Mississippi, 608 So. 2d 1227 (Miss. 1992)).

30 See Comm'n v. Brown, 168 So. 277, 279 (Miss. 1936).

31 Opinion of the Justices, 555 A.2d 1095 (N.H. 1989) (citing Steele v. Town of Allenstown, 471 A.2d 1179, 1181 (N.H. 1984)).

32 State v. Van Nortwick, 670 A.2d 548, 551 (N.J. Super. Ct. App. Div. 1995).

33 County of Monmouth v. Hilton, 760 A.2d 786, 789 (N.J. Super. Ct. App. Div. 2000) (quoting Ford Motor Co. v. Township of Edison, 604 A.2d 580, 585 (N.J. Super. Ct. App. Div. 1992)).

34 City of Albuquerque v. PCA-Albuquerque No. 19, et al., 858 P.2d 406, 409 (N.M. Ct. App. 1993), citing State ex rel. State Highway Comm'n v. Pelletier, 417 P.2d 46, 49-50 (N.M. 1966).

35 New York Overnight Partners v. Gordon, 88 N.Y.S. 2d 716 (N.Y. 1996).

36 See Matter of Town of Oyster Bay v. 55 Motor Ave., Co. LLC, 156 A.D.3d 704, 708-709 (N.Y. App. Div. 2020).

37 City of Columbus v. Triplett, 632 N.E.2d 550, 553 (Ohio Ct. App. 1993) (quoting Masheter v. Ohio Holding Co., 313 N.E.2d. 413, 415 (Ohio Ct. App. 1973)).

38 City of Sugar Land v. Home and Hearth Sugarland, L.P., 215 S.W.3d 503, 511 (Tex. App. 2007).

39 Helnick Family Farm LLC v. Commissioner of Highways, 297 Va. 777 (2019).

40 W.H. Pugh Coal Co. v. State, 460 N.W.2d 787, 791 (Wis. 1990), citing Bembinster v. State, 203 N.W.2d 897, 900 (Wis. Ct. App. 1973).

41 There is a difference between "unimproved" (and therefore vacant), and "unencumbered." An encumbrance pertains to title restrictions and partial interests. See Evans v. Faught, 231 Cal. App. 2d 698 (Cal. Ct. App. 1965); Plaza Hotel Associates v. Wellington Associates, Inc., 285 N.Y.S.2d 941 (N.Y. Sup Ct. 1967), aff'd, 239 N.E.2d 736 (N.Y. 1968), where "the appraisers erroneously valued the land at its highest and best use, as if it were vacant, without regard to the fact that the land was encumbered by a lease." See also G. DeWeese, Valuing the Leased Fee Interest Subject to a Ground Lease - How and Why the Details Matter, The Appraisal Journal, vol. 85, no. 1 (Winter 2017) at 18.

42 Improvements which do not contribute value to the land, and current improvements which may contribute to highest and best use but are outmoded or in need of repair, may be examples of external obsolescence. External obsolescence of the structure arises if, and only if, that building is wrong for the site. S. Longhofer, Land Values and External Obsolescence, The Appraisal Journal, vol. 89, no. 2 (Spring 2021) at 96.

43 G. DeWeese, Special Issues in Land Valuation, The Appraisal Journal, vol. 90, no. 1 (Winter 2022) at 64.

44 See The Appraisal of Real Estate, supra note 3, at 313.

45 Id.

46 The Dictionary of Real Estate Appraisal, 7th ed. supra note 6. An earlier edition (6th) of the Dictionary defined interim use differently: "The temporary use to which a site or improved property is put until a different use becomes maximally productive."

47 A parking lot may be the highest and best use of the property, and not an interim use. Care must be taken to differentiate between a leased fee interest and a fee simple interest, in valuation. See Diskin and Lennhoff They Paved Paradise: Appraising a Parking Lot, The Appraisal Journal, vol. 88, no. 2 (Spring 2020) at 126, 129-130.

48 See, e.g., Arkansas State Highway Commission v. Hawkins, et al., 474 S.W.2d 673, 674 (Ark. 1972) (where highest and best use of agricultural land was for subdivision into residential home sites, expert testimony as to value of house and barn on property nevertheless admissible as agricultural improvements were necessary to landowner's farming operations until time of actual subdivision); but see Emeryville Redevelopment Agency v. Harcros Pigments, Inc., et al., 125 Cal. Rptr. 2d 12, 33-35 (Cal. Ct. App. 2002) (where interim use incompatible with highest and best use, landowner not entitled to interim use value).

49 Eaton, supra note 10, at 118.

50 City of Sugar Land v. Home Sugarland, 215 S. W. 3rd 503, 511 (Tex. App. 2007) (citing City of Austin v. Cannizzo, 153 Tex. 325, 267 S.W.2d 808, 814 (1954)).

51 The Appraisal of Real Estate, Appraisal Institute, supra note 3, at 276, n.1.

52 National Railroad Passenger Corp. v. Certain Temporary Easements Above the Railroad Right of Way in Providence, Rhode Island, et al., 357 F.3d 36, 39 (1st Cir. 2004).

53 Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623, 627 (Tex. 2002); McAshan v Delhi Gas Pipeline Corp., 739 S.W.2d 130, 131 (Tex. App. San Antonio 1987, no writ).

54 United States v. 1,291.83 Acres of Land, 411 F.2d 1081, 1085 (6th Cir. 1969), citing Hembree v. United States, 347 F.2d 109 (8th Cir. 1965). United States v. 2,175.86 Acres of Land, 687 F. Supp. 1079, 1089 (E.D. Tex 1988).

55 Indeed, California Code of Regulations, title 18, section 8, subdivision (e), which governs use of the income approach, specifies that `recently negotiated rents or royalties of . . . comparable properties should be used in estimating the future income if, in the opinion of the appraiser, they are reasonably indicative of the income the property will produce in its highest and best use under prudent management.'

56 Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623, 628 (Tex. 2002); see also Board of Commissioners of the Tensas Basin Levee District v. Crawford, 731 So.2d 508, 512-13 (La. Ct. App. 1999).

57 Nat. Gas Pipeline Co. of Am. v. Justiss, 397 S.W.3d 150, 155 (Tex. 2012) ("A property owner may testify to the value of his property"). Texas's Property Owner Rule provides "[a] property owner may testify to the value of his property, and his testimony "fulfills the same role that expert testimony does." Id. at 157.

58 See City of Hildale v. Cooke, et al., 28 P.3d 697, 705 (Utah 2001) (where landowner not qualified as expert, his testimony as to highest and best use of property as residential should have been excluded).

59 See Clark et al. v. Miss. Transp. Comm., 767 So.2d 173, 176-77 (Miss. 2000); see also CBI Partners Ltd. Partnership v. Town of Chatham, 671 N.E.2d 523, 527 (Mass. App. Ct. 1996) (citing Clifford v. Algonquin Gas Transmission Co., 604 N.E.2d 697, 701-02 (Mass. 1992) (as to admissibility of a plan for the future)). But see City of Hildale, 28 P.3d at 705 (where testimony as to highest and best use as residential not established by expert testimony, evidence regarding steps taken by landowners to develop subdivision should have been excluded).

60 Columbus, 632 N.E.2d at 553.

61 See Elliott et al. v. Henry County Water & Sewerage Authority, 517 S.E.2d 545, 547 (Ga. Ct. App. 1999) (further citation omitted).

62 Hlavinka v. HSC Pipeline P'ship, 605 S.W.3d 819, 837 (Tex. App. 2020).

63 State v. Carpenter, 126 Tex. 604, 612 (Tex. 1936).

64 See Southern Natural Gas Company v. Land, Cullman County, 2.0 acres, et al., 197 F.3d 1368, 1376 (11th Cir.1999).

65 See Board of County Supervisors of Prince William County, Va., 276 F.3d 1359, 1364 (Fed. Cir. 2002) (citing United States for Use of T.V.A. v. Powelson, 63 S. Ct. 1047, 1052 (1943)).

66 Town of Rayville v. Thomason, 404 So.2d 1290, 1293 (La. Ct. App. 1981).

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67 See U.S. v. 62.50 Acres of Land, 953 F. 2d 886 (5th Cir. 1992) in which the court rejected as speculative and unrealistic opinions of value resting on the owner's evidence that the highest and best use of the property was for a clam shell mine containing 121,051 cubic yards of shells.

68 McDaniel Enters., Inc. v. Gwinnett County, 162 Ga. App. 419, 291 S.E.2d 738 (1982).

69 See, e.g., City of Virginia Beach v. Oakes, et al., 561 S.E.2d 726, 730 (Va. 2002); Brush Hill Development Inc. v. Commonwealth, 155 N.E. 170, 172 (Mass. 1959).

70 See, e.g., State of N.J. ex rel. Comm'r of Transp. v. Town of Phillipsburg, 573 A.2d 953, 959 (N.J. Super 1990).

71 See, e.g., City of Stockton v. Brocchini Farms, Inc., 92 Cal. App.4th 193, 199 (Cal. Ct. App. 2001) (right to future exploitation of undeveloped natural resources has present and ascertainable value).

72 See Olson, 292 U.S. at 255.

73 See South Farms v. Burns, 644 A.2d 940, 944 (Conn. App. 1994).

74 This concept is expressed in nearly every jurisdiction in much the same language. Massachusetts caselaw is clear on this notion. Newton Girl Scout Council, Inc. v. Mass. Turnpike Authority, 138 N.E. 2d 769 (Mass. 1956).

75 Salem Country Club, Inc. v. Peabody Redevelopment Authority, 487 N.E. 2d 864, 866 (Mass. 1986).

76 See South Farms, 644 A. 2d at 940.

77 United States v. Chandler-Dunbar Water Power Co., et al., 229 U.S. 53, 57 (1913); Salem Country Club, Inc. v. Peabody Redevelopment Authority, 487 N.E. 2d 864, 866 (Mass. 1986).

78 The Sixth Circuit Court of Appeals has held that "[f] our elements must be proven by a landowner before a potential use can be said to have influenced the fair market value of condemned land: 1) the potential use must not require a substantial expenditure of capital; 2) the project must not be highly uncertain; 3) the property must be physically adaptable to the potential use; and 4) a market for the property must have existed, in fact, at the time of the taking or must have been reasonable likely to exist in the near future. US ex rel. Tennessee Valley Authority v. 72 Acres of Land, 425 F. Supp. 929, 937. (E.D. Tenn. 1976), citing US v. 1291.83 Acres of Land, 411, F.2d 1081, 1084-85 (6th Cir. 1969).

79 City of Chicago v. Eychaner, 2020 Ill. App 191053 (Ill. Ct. App. 2020).

80 See Sussna, supra note 9, at 117.

81 Edwin E. Weiss, MAI, The Effect of Zoning on Market Value, Seventh Institute on Eminent Domain, Southwestern Legal Foundation 13, 28 (1967).

82 See State v. St. Charles Airline Lands Inc., 871 So.2d 674 (La. Ct. App. 2004) (reasonable probability that permit would issue for wetlands construction).

83 See, e.g., Douglas Environmental Assoc., Inc. v. Dep't of Env't Protection, 706 N.E.2d 620, 623 (Mass. 1999).

84 See Hall County v. Merritt, et al., 504 S.E.2d 754, 755 (Ga. Ct. App. 1998).

85 Dep't of Transp. v. VanEislander et al., 594 N.W.2d 841, 843-44 (Mich. 1999).

86 See Comm'r of Transp. v. Towpath Assoc., 767 A.2d 1169, 1177 (Conn. 2001).

87 See U.S. v. 320.0 Acres of Land, 605 F.2d 762 (5th Cir. 1979).

88 State v. Caoili, 639 A.2d 275, 283 (N.J. 1994).

89 See id. at 281.

90 City of Las Vegas v. Bustos, et al., 75 P.3d 351, 352 (Nev. 2003).

91 State of Missouri, ex rel. v. Modern Tractor, 839 S.W.2d 642, 650 (Mo. App. 1992).

92 Each of these examples of reasonably probable change have been advanced by proponents of future highest and best uses in Massachusetts. They are common throughout eminent domain jurisprudence in many other states.

93 See City of San Diego v. Rancho Penasquitos Partnership, 105 Cal.App.4th 1013, 1041-43 (Cal. Ct. App. 2003); Standish Management, Inc. v. Randolph Housing Authority, 26 Mass. App. Ct. 901 (Mass. Ct. App. 1988).

94 U.S. v. Miller, 317 U.S. 369 (1943); Cole v. Boston Edison Co., 338 Mass. 661, 666-667 (Mass. 1959).

95 Id. at 376-77.

96 City of Fort Worth v. Corbin, 504 S.W.2d at 828, 830 (Tex. 1974).

97 Colonial Acres, Inc. v. North Reading, 331 N.E.2d 549, 551 (Mass. App. 1975).

98 See Dep't of Transp. v. Southeast Timberlands, Inc., et al., 589 S.E.2d 575, 579-580 (Ga. Ct. App. 2004); see also Paradise Valley, 868 P.2d at 975.

99 292 U.S. at 255-256.

100 143 F. 2d 391, 395 (1st Cir. 1944) (cert. denied 323 U.S. 772).

101 Id.

102 Dept. of Transportation v. Jirik , 498 So. 2d 1253, 1255 (1986).

103 See Ocean Palm Golf Club P'ship v. City of Flagler Beach, 139 So. 3d 463, 472 (Fla. Dist. Ct. App. 2014); Lake Lincoln LLC v Mantee County, FLA, 355 So.3d 493 (Fla. 2023).

104 Valley Paper Co. v. Holyoke Housing Authority, 346 Mass. 561, 566 (1963); citing Lincoln v. Commonwealth, 164 Mass. 368 (1895; Holmes, J.).

105 Lincoln, 164 Mass. at 379.

106 McGovern v. New York, 229 U.S. 363 (1913).

107 Olson, 292 U.S. at 255.

108 McGovern, 229 U.S. at 372.

109 Assemblage: The combining of two or more parcels of real estate into one parcel. Plottage: An increment of value that results when two or more sites are combined to produce a larger site with greater utility and probably a different highest and best use. The Appraisal of Real Estate, supra note 3, at 173.

110 Oglethorpe Power Corporation v. Lewis, 452 S.E.2d 167, 168 (Ga. Ct. App. 1994) (before condemnee is entitled to present evidence of assemblage, he must show at least substantial unity of ownership and either contiguity or adaptability of the parcels for an integrated use).

111 See Greystone Heights Redevelopment Corp. v. Nicholas Invest. Co., 500 S.W.2d 292, 295-96 (Mo. App.1973).

112 Portland Natural Gas Transmission System and Maritimes & Northeast Pipeline, L.L.C. v. 19.2 Acres of Land, et al., 195 F.Supp.2d 314, 320 (D. Mass. 2002) (aff'd at 318 F.3d 279 (1st. Cir. 2003); Windham, 837 S.W.2d at 75-76; Meriden v. Highway Comm'r, 363 A.2d 1094 (1975).

113 Hero Int'l v. Commonwealth, 618 N.E. 2d. 1386 (Mass. 1993); Comm'r of Transp. v. 2073 N. Main-Waterbury, LLC, No. CV145016609S (Conn. Super. Ct. Jun. 15, 2016). See also D. Keating, Appraising Partial Interests (Appraisal Inst. 1998).

114 Cf. United States v. Certain Land Situated in the City of Detroit, et al., 188 F.Supp.2d 747, 754-56 (E.D. Mich. 2002).

115 The Dictionary of Real Estate Appraisal, supra note 6, at 109.

116 J. Finch and R. Casavant Highest and Best Use and the Special Purpose Property, The Appraisal Journal (Apr. 1996) 95; see also Eaton, supra note 10, at 227.

117 See, e.g., YMCA of Quincy v. Sandwich Water District, 454 N.E.2d 514, 517 (Mass. App. 1983) (review denied, 459 N.E.2d 824 (Mass. 1984)).

118 People v. City of Los Angeles, 33 Cal. Rptr. 797 (Cal. App. 1963).

119 State v. Atkins, 439 So.2d 128, 132 (Ala. 1983).

120 U.S. v. 100 Acres of Land, et al., 468 F.2d 1261 (9th Cir. 1972).

121 County of Greene, Tennessee v. Cooper, et al., 1990 WL 10586 (Tenn. Ct. App. 1990).

122 Valley Paper Co. v. Holyoke Housing Auth., 194 N.E.2d 700 (Mass. 1963).

123 Creason v. Unified Government of Wyandotte County, 33 P.3d 850 (Kan. 2001).

124 Brazos River Authority v. J.W. Gilliam, et al., 429 S.W.2d 949 (Tex.Civ.App. 1968).

125 Washington Suburban Sanitary Comm'n v. Utilities, Inc. of Maryland, 775 A.2d 1178 (Md. 2001).

126 Verzani v. State, Dept. of Roads, 195 N.W.2d 762 (Neb. 1972).

127 In re Polo Grounds Area Project, et al. v. W. Gordon Coogan, et al., 286 N.Y.S.2d 16 (N.Y. 1967).

128 Ziegler, et al. v. Dake Corp., 97 N.W.2d 748 (Mi. 1959); Correia v. New Bedford Redevelopment Auth., 5 Mass. App. Ct. 289, 292 (Mass. Ct. App. 1977).

129 Tigar v. Mystic River Bridge Auth., 109 N.E.2d 148 (Mass. 1952).

130 Del-Mar Redevelopment Corp. v Associated Garages, Inc., 726 S.W.2d 866 (Mo. Ct. App. 1987).

131 Harmony Lanes v. State, Dept. of Roads, 229 N.W.2d 203 (Neb. 1975).

132 Commonwealth of Mass. v. Mass. Turnpike Auth., 224 N.E.2d 186 (Mass. 1967)

133 Arkansas State Highway Comm'n v. W.D. Davis, et al., 455 S.W.2d 97 (Ark. 1970).

134 Religious of the Sacred Heart of Texas, et al. v. City of Houston, 836 S.W.2d 606, 617 (Tex. 1992).

135 Rochester Urban Renewal Agency v. Patchen Post, Inc., et al., 407 N.Y.S.2d 641 (N.Y. 1978).

136 Dinner Bell Meats, Inc. v. Cuyaghoga County Board of Revision, 12 Ohio St. 3d 270 (1984) (a tax case using the cost approach).

137 U,S. v. Navajo Nation, 537 U.S. 488, 505 (2003) Congress instructed the Secretary specifically to take into account: "(1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs, (2) the highest and best use of the land, including the advisability and practicality of devoting it to other uses for the benefit of the owner and his heirs, and (3) the present and future financial needs of the owner and his heirs."

138 In Re: Appeal of Prospect Crozer LLC, 283 A.3d 428 (Penn. 2022).

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