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## EMINENT DOMAIN-EFFECT OF ZONING ORDINANCES ON MEASURE OF DAMAGES

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EMINENT DOMAIN—EFFECT OF ZONING ORDINANCES ON MEASURE OF DAMAGES—In a proceeding to condemn land located in an area subject to zoning restrictions, defendant contended that in fixing value the adaptability for all possible uses should be considered whether or not such uses were forbidden by zoning ordinances. The trial court instructed the jury that it should consider only the uses to which the property was suitable and available. On appeal, *held*, affirmed. *Long Beach City High School District v. Stewart*, (Cal. 1947) 185 P. (2d) 585.

Ordinarily when an entire parcel of land is taken under the power of eminent domain, the market value of the property is the measure of compensation.<sup>1</sup> In determining market value the inquiry is not limited to the use being made at the time of suit, but rather extends to all uses to which the land is reasonably adapted having regard to the existing wants of the area and such as may reasonably be expected in the near future.<sup>2</sup> Only uses which are reasonably probable can be considered.<sup>3</sup> Speculative values cannot be taken into account.<sup>4</sup> Therefore it seems that no evidence should be heard on value for uses prohibited by a zoning ordinance unless there is a reasonable possibility that the ordinance will be repealed or amended. The practical operation of the rule set out in the principal case is shown by *In re Gibson*,<sup>5</sup> in which the court concluded that because the area involved was rapidly changing into a business district evidence of the value of land for commercial purposes could be considered even though a city by-law had placed the land in a residential area. The dissenting justices in the principal case apparently would have the jury determine the effect of restricted uses on market value. The difficulty with this approach is that it allows the

<sup>1</sup> *Roberts v. City of New York*, 295 U.S. 264, 55 S.Ct. 689 (1935); *City of Chicago v. Cunnea*, 329 Ill. 288, 160 N.E. 559 (1928); *City of St. Louis v. Rossi*, 333 Mo. 1092, 64 S.W. (2d) 600 (1933). Fair market value is commonly defined as the price which would be agreed upon at a voluntary sale between an owner willing to sell and a purchaser willing to buy. *Maher v. Commonwealth*, 291 Mass. 343, 197 N.E. 78 (1935). In general see 29 C.J.S., Eminent Domain, § 136; 64 A.L.R. 1513 (1929).

<sup>2</sup> *Boom Co. v. Patterson*, 98 U.S. 403 (1878); *Ala. Power Co. v. Herzfeld*, 216 Ala. 671, 114 S. 49 (1927); *State v. Hamer*, 211 Ind. 570, 199 N.E. 589 (1936). In general see 18 AM. JUR., Eminent Domain, § 244.

See *Chicago R. Co. v. Catholic Bishop*, 119 Ill. 525, 10 N.E. 372 (1887). See also *Ill. Central R. Co. v. Chicago*, 141 Ill. 509, 30 N.E. 1036 (1892), which involved a special assessment proceeding, and the court held that when land is restricted by statute to a particular use, and cannot be applied to any other use, the measure of the benefit which an improvement will confer on the land is its increased value for the special use to which it may be restricted by statute.

<sup>3</sup> *Olson v. United States*, 292 U.S. 246, 54 S.Ct. 704 (1934); *Forest Preserve of Cook County v. Sauer*, 350 Ill. 116, 182 N.E. 813 (1932); *Pruner v. State Highway Commr.*, 173 Va. 307, 4 S.E. (2d) 393 (1939); *Brack v. Baltimore*, 125 Md. 378, 93 A. 994 (1915). Also see 106 A.L.R. 955 (1937).

<sup>4</sup> *Glover v. State Highway Comm. of Kansas*, 147 Kan. 279, 77 P. (2d) 189 (1938); *In re Smith St. Bridge in City of Rochester*, 234 App. Div. 583, 255 N.Y.S. 801 (1932); *Muscoda Bridge Co. v. Grant County*, 200 Wis. 185, 227 N.W. 863 (1929); *Greenspan v. Norfolk County*, 264 Mass. 9, 161 N.E. 894 (1928).

<sup>5</sup> 28 Ont. L. Rep. 20 at 27, 11 Dom. L.R. 529 (1913).

jury to decide which uses are speculative and which are not. The trial judge is much more competent to handle this task. Under the majority view it is always possible for the owner to present facts pointing to the possibility of repeal or modification of zoning ordinances. If the trial judge decides as a preliminary question of fact that the evidence indicates such a probability, then evidence of value for restricted uses can be presented for consideration of the jury.

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