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13TH ANNUAL CONDEMNATION APPRAISAL SYMPOSIUM

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Reasonably Probable Highest & Best Use: Cost to Cure Issues

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Reasonably Probable Highest & Best Use: Cost to Cure Issues

Attorney Smitha Chintamaneni and Art Sullivan MAI, SR/WA
13th Annual Condemnation Appraisal Symposium
May 25, 2016

Milwaukee | Madison
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Statutory Authority on Highest and Best Use

- U.S. Constitution
  - Fifth Amendment: Prohibits taking of private property for public use without just compensation
  - Fourteenth Amendment: State cannot deprive any person "of property" without due process of law
- Wisconsin
  - Wis. Stat. § 32.09 "Just Compensation"
    - Provides framework of determining compensation due to landowners
    - Sub (2) – "In determining just compensation the property sought to be condemned shall be considered on the basis of its most advantageous use but only such use as actually affects the present market value."

Almota Farmers Elev. & Warehouse Company v. United States, 409 U.S. 470 (1973)

- Court addressed "highest and best use"
- The dispute centered around the government's attempt to acquire the lessee's remaining interest in a land lease, (upon which grain elevators were constructed) surrounding a railroad track.
  - Almota: the lease value and tenant improvements is based on what a willing buyer would have paid on the open market
  - U.S.: lease value and tenant improvements limited to remainder value of lease at taking; no consideration for potential lease renewal
- Court accepted Almota's position that just compensation is what a private buyer would have paid on the open market
  - "Just compensation means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken."
  - Held Gov't "must pay just compensation for those interests probably within the scope of a project from the time the Government was committed to it" and at the time of taking "there was an expectancy [by Almota] that the improvements would be used beyond the lease term."

Almota cont'd

- Factors considered:
  - Almota's unbroken succession of leases from 1919 onwards of the property
  - Lessor, the railroad company, had its own interest in continuing to lease property to Almota for grain elevators so grain shipments would occur over railroad's lines
  - Court determined that, in a free market, Almota would not have sold its leasehold for just the remainder of a term such that it would have salvaged the grain elevators after that lease expired.
  - Court's rationale is that Almota would have only sold its leasehold interest to a buyer to use over the grain elevator's "useful" lives- e.g. decades.

Almota – Appraisal Application

1. Speaks to H/B Use analysis and reasonableness of cost to cure by focusing on practical market participation and reaction, not just specific terms of property law, such as a remaining length of lease.

> "The constitutional requirement of just compensation on taking of private property for public use derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law."

> "By failing to value the improvements in place over their useful life – taking into account the possibility that the lease might be renewed as well as the possibility that it might not – the Court of Appeals in this case failed to recognize what a willing buyer would have paid for the improvements. If there had been no condemnation, Almota would have continued to use the improvements during a renewed lease term, or if it sold the improvements to the fee owner or to a new lessee at the end of the lease term, it would have been compensated for the buyer's ability to use the improvements in place over their useful life,"

> "Lessors do desire after all, to keep their properties leased, and an existing tenant usually has the inside track to a renewal for all kinds of reasons – avoidance of costly alterations, saving of brokerage commissions, perhaps even ordinary decency on the part of landlords."

Highest and Best Use- Appraisal Applications

- H/B Use at core of every appraisal assignment
- Guides comparable selection, market area, type of analysis
- Primary source of litigation, combined with cost to cure issues, in eminent domain

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Before the Taking - 2 access points

7

After the Taking - one access point

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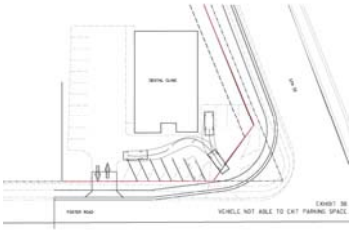
Is there a cure or change of H/B use?



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Highest and Best Use

1. Legal Permissibility
2. Physical Possibility
3. Financial Feasibility
4. Maximum Productivity

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Bembinster v. State of Wisconsin, 57 Wis. 2d 277 (1973)

- Seminal Wisconsin case on "highest and best use" and legal permissibility issues
- Dispute centered around State's taking of 32 acres of property previously leased by Bembinster to Aero for auto salvage.
- Bembinster argued that the cost of Aero to remove its salvage yard at the end of the lease were just compensation damages.
- The court held that since Aero, as lessee, would have had an obligation to return the property to the landowners on the condition it received it, the costs of moving were not damages.
- Notably, there were four widely differing appraisals (two from the landowner and two from the state). What would cause such wide discrepancies? And how would you reconcile them? The court also said that opinion testimony from zoning board and sanitary district saying they would have granted applications for zoning changes was insufficient. Again, what factual evidence would help for "reasonable probability"?
- Access: the probability of town laying a new road to provide access to the north parcel, which would have required a zoning change

Bembinster cont'd

- Lower court refused to allow
  - Testimony by chairman of town's zoning board and a member of the town board that had a zoning application been made, it "probably would have been granted."
  - Testimony by member of sanitary district was also excluded on the grounds that such a zoning application could not be proved by opinion testimony.
  - Court held that the type of evidence to show "reasonable probability of change" includes
    - Granting of other variances which show a continuing trend towards rezoning;
    - An actual amendment of an ordinance subsequent to the taking;
    - Or an ordinance rezoning neighboring property.

Legal Permissibility

- Zoning
- Restrictions
- Easements
- Environmental Regulations
- Comprehensive Plans

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Comprehensive Plans

- Chapter 66.1001 Comprehensive Planning
- Requires every political subdivision – county, city, village, town, regional planning commission to develop a comprehensive plan
- Unlike the opinions of town board members or staff, these plans reflect a well thought and purposefully planned development direction for the community, which landowners can anticipate to remain the same despite changing boards.

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Comprehensive Plans

- Procedures for Adopting the plan
  - Public participation
  - Plan commission adopts a resolution by majority vote
  - Takes effect when municipality enacts an ordinance or regional planning adopts a resolution

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Comprehensive Plans

- Procedures for Adopting the plan
  - Municipality or regional planning cannot enact the ordinance or resolution until at least one public hearing is held

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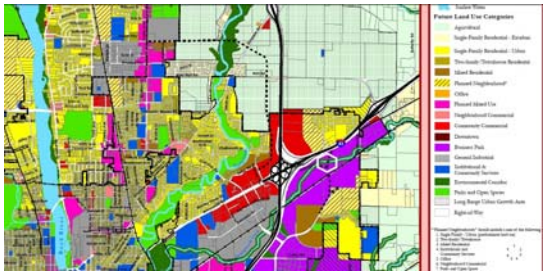
Comprehensive Plan



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Most Advantageous Use - Legal

- Is the current use (as vacant or improved) conforming or non-conforming to the property's planned use or most advantageous use? Is a buyer more likely to consider this property for its current use or planned use?

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Current Street View

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Business Park

20

Spiegelberg v. State of Wisconsin, 291 Wis. 2d 601 (2006)

- Court addressed the "physical possibilities" of "highest and best use".
- DOT partially acquired portions of multiple contiguous tax parcels owned by same landowner. In motions in limine, DOT sought to exclude landowner's appraisals which valued each parcel separately. DOT valued all five parcels together for a FMV taking of $18,900 while Spiegelberg's FMV was $84,200.
- The Supreme Court allowed separate valuations for just compensation purposes because such valuation was the "most advantageous".
  - Wis. Stat. § 32.09(6) does not specify whether contiguous, commonly-owned tax parcels should be appraised separately or collectively, the landowner is entitled to rely on separate appraisals to obtain "highest and best use".
  - Court gave great consideration to Spiegelberg's argument that each tax parcel had separate legal descriptions, could have been sold freely from each other, and could be distinctly developed according to their zoning.
  - Court, citing Pinkowski, stated FMV is "the amount for which the property could be sold in the market on a sale by an owner willing, but not compelled, to sell, and to a purchaser willing and able, but not obligated, to buy."

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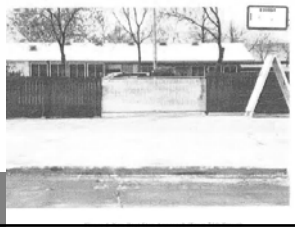
- 2009 Kenosh
  - DOT's re to enter from its "least a ıd dumpsters.



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Brat Stop cont'd

- Court ruled in favor of landowner for "curb appeal" damages on the grounds that
  - Owner's testimony that most customers were first-time customers and "their visual senses" largely control their decisions about where to dine.
  - McDonald's across the street has an advantage of luring first-time customers who did not have a "taste-memory" of Brat Stop and were put off by the "dumpy appearance".
- "The evidence in this case clearly and convincingly demonstrates that new access to the Brat Stop is a completely unreasonable replacement of that which existed before" and Brat Stop did not have any "reasonable business alternative."
- Court awarded $1,324,900 in damages to the landowners.

Spiegelberg/Brat Stop Conclusions

1. "Fair market value" relates to the price a willing buyer would pay to a willing seller.
2. The requirement to consider the "whole property" does not require that an individual assessment always treat contiguous, commonly owned tax parcels separately or as a single unit, but requires that no portion of the property be left out of an assessment.
3. The requirement of 32.09 (2) that a property's "most advantageous use but only such use as actually affects the present market value" be considered as a part of a valuation is linked to the determination of the "fair market value" required by 32.09(6).
4. How to apply the language of 32.09 (6) to arrive at just compensation depends upon considerations related to each property's individual characteristics.

Spiegelberg property

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Physical Attributes

- Size
- Shape
- Street frontage
- Utilities
- Site conditions

26

Most Advantageous Use - Physical

- Looking at each property's unique features
- Considering how market participants value individual components (i.e. separate parcels, landscaping, entry points), not only when the property is looked at as one whole unit, but also when individual components are singularly removed

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Most Advantageous Use - Physical

- How do we maintain a reasonableness (*basic equitable principle of fairness - Almota*) when estimating the loss of one component from the whole, in order to keep the owner in the *same position monetarily as he would have occupied if his property had not been taken (Almota*)

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Brat Stop Cost to Cure

- Court held that Brat Stop was forced to make decisions much like MGM Grand faced in order to maintain customers, which in turn links to property market value.
- Court agreed that the evidence supported an estimate of $896,000 for revision to building to restore the Brat Stop to a comparable "pre-taking" condition.

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What is a reasonable severance for landscaping loss?

30

Landscaping Severance

$4,100

Landscape Severance - Vacant Lot		
Lot Value		$56,500
Contributory Percentage of Landscaping	X	8%
Percentage of Landscaping Acquired	X	90%
Total	=	$4,068

31

Landscaping Severance

$15,000

Landscape Severance - Improved Residence		
Lot Value		$56,500
Average Residence		$150,000
Subtotal Improvements		$206,500
Contributory Percentage of Landscaping	X	8%
Percentage of Landscaping Acquired	X	90%
Total	=	$14,832

32

Landscaping Severance

$22,500

Landscape Severance - Functional Replacement	
Landscape area – 225' x 45' 3 rows, staggered spacing	45 trees
8'-10' Spruce Trees	$500
Functional Replacement Value	$22,500

33

What is a reasonable severance

$4,100 $15,000 $22,500

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Clarmar v. Redevelopment Authority of City of Milwaukee

- 1986 Wisconsin Supreme Court decision on financial feasibility and maximum productivity for "highest and best use" purposes
- Clarmar owned a truck terminal, land, and adjacent buildings. Redev. Authority instituted condemnation proceedings after it had already acquired an adjacent parcel through condemnation.
- Clarmar argued "highest and best use" was the value of the terminal as integrated with adjacent parcel (minus cost of acquisition):
  - The terminal doors faced east and were 58 feet from the adjacent parcel. Clarmar argued long trucks would need a greater turning space to park perpendicularly, requiring crossing onto the adjacent parcel to turn. Clarmar argued a prospective purchaser would purchase both parcels to get full use of the truck terminal.
  - **Doctrine of assemblage:** where the highest and best use of separate parcels involves their integrated use with the lands of another, such prospective use may be properly considered in fixing the value of the property if the joinder of the parcels is reasonably practicable." Nichols on Eminent Domain, 12.3142 (1), (3rd ed. 1978).

Clarmar cont'd

- Test for assemblage is "reasonably likely"
- Court stated that assemblage possible here because
  - The "most advantageous use" of property was for a terminal for long and short trucks;
  - Full use could only be achieved through combination of Clarmar's parcel with a portion of the adjacent land;
  - The combination of the terminal with the adjacent portion was "reasonably probable";
  - The court determined that the prospective use of the land was not speculative;
  - Finally, the fact that the adjacent parcel was previously condemned by the Redevelopment Authority had no bearing on the combination of the two parcels.
- Contrasting Speigelberg (which focused on viewing contiguous parcels separately), Clarmar focuses on the physical possibility of combining two parcels.

Most Advantageous Use
Financial Feasibility and Maximum Productivity

- To thoroughly examine financial feasibility and conclude a maximum productivity, we would need to engage in an analysis focusing on the financial return of a particular use to the land and or building. While there may be numerous uses that could be financially feasible (positive financial return), there is but one maximally productive use, which generally speaking, addresses the "ideal improvement" for that site.
- Within eminent domain, our scope of work is typically not that in depth and tends to produce a financially feasible and maximally productive conclusion that are more general than to determine an ideal improvement for the site.

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Clarmar – Maximum Productivity

- **Doctrine of assemblage:** where the highest and best use of separate parcels involves their integrated use with the lands of another, such prospective use may be properly considered in fixing the value of the property if the joinder of the parcels is reasonably practicable." Nichols on Eminent Domain, 12.3142 (1), (3rd ed. 1978).
- The Appraisal Institute would say that assemblage is not a highest and best use. It is a motivating factor for a buyer to acquire a parcel in order to use it with an existing property.
- The Supreme Court concludes, where most advantageous use of condemned parcel involves prospective, integrated use (assembled use), court may consider prospective, integrated use in determining fair market value.

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Costs to Cure- Ken-Crete Products co. v. State Highway Commission

- 1964 Supreme Court decision considered admission of evidence by landowner regarding installation of an overhead conveyer to transport sand and gravel to manufacturing plant 240 feet away over a portion of condemned land.
  - Ken-Crete owned 3.5 acres, State took .44 acres of this land which lay between the south end of the building and highway.
  - State argued an overhead conveyer system was a capital improvement, barred under Sec. 32.09(6).
  - Court disagreed and allowed condemnee to introduce the advisability and cost of installing an overhead conveyer into evidence (Ken-Crete had no other manner) to transport its sand and gravel to the plant.
    - Highest and best use was a concrete block manufacturing plant.
    - The overhead conveyer system was "an element to be considered in arriving at the value of the remainder of the property after taking."
- WI- JI 8103 allows a jury to consider cost to cure damages if they are less than severance damages (reduction of FMV due to the partial taking) and the costs to cure are "reasonable to partially or completely restore the remaining property to its condition or status **immediately** before the partial taking."

Ken Crete Site Kenosha

40

Cost-to-Cure Practical Considerations

- If property (or access) is taken away such that the landowner will have to take steps to return his property to its "before taking" condition, how would one go about valuing that? This could arise in access cases where one driveway is taken and the landowner would have to put in another entrance elsewhere. At what point would the cost to cure become impractical and what are the limits of costs to cure? How does an appraisal conduct a cost-to-cure analysis vs. severance damages? Do best practices require both analysis be done?

Before the Taking - 2 access points

42

After the Taking - one access point

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Saukville Dental Clinic

- Cost to cure
  - Started with a parking lot study to determine alternatives for after taking parking layout
  - Reviewed practicality of continued use of building as dental clinic vs alternative uses such as an office.

44

Saukville Dental Clinic

- Alternative 1
- Based on parking reduction, initially addressed limited utility to the building.

Building and Fixture Depreciation	
Item	Value
Building Square Footage – 350sf x $180/sf	$63,000
Dental Fixtures- Hygiene	$5,775
Dental Fixtures – Operatory	$6,470
Total	$75,250

45

Saukville Dental Clinic

- Renovation to entrances to facilitate relocation of the patient parking

Summary of Reduced Building Utility	
Item	Value
Building and Fixture Depreciation	$75,250
Renovation to entrance	$37,200
Construction Plans	$8,150
Total Severance Alternative 1	$120,600

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Saukville Dental Clinic

- Alternative 2
- Renovate building for general office use

Summary of Reduced Building Utility	
Item	Value
Building Renovation	$325,000
Loss to dental fixtures	$43,200
Total Severance Alternative 2	$368,200

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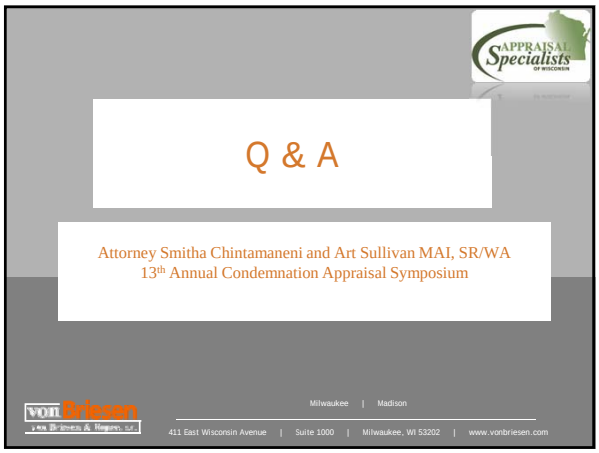
Saukville Dental Clinic

- Justification of Cost to Cure

Remaining Value Contribution of Improvements			
Alternative 1		Alternative 2	
Before Taking	$594,000	Before Taking	$594,000
Damages	($120,600)	Damages	($368,200)
Remaining Bldg Contribution	$473,400	Remaining Bldg Contribution	$225,800

- Value of a building purchased for office use, needing renovation - $73/sf x 3,300sf = $241,000

48


Q & A
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93 S.Ct. 791
Supreme Court of the United States

ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY, Petitioner,
v.
UNITED STATES.

No. 71—951.
|
Argued Oct. 18, 1972.
|
Decided Jan. 16, 1973.

Eminent domain proceeding was instituted by the Government to acquire lessee's property interest in land being taken for river improvement and navigation project. The United States District Court for the Eastern District of Washington, Charles L. Powell, Chief Judge, awarded compensation, and the Government appealed. The Court of Appeals for the Ninth Circuit, 450 F.2d 125, reversed and remanded, and certiorari was granted. The Supreme Court, Mr. Justice Stewart, held that on condemnation of leasehold, just compensation was to be measured by what a willing buyer would have paid for improvements, which were placed on property by lessee, which had useful life exceeding remainder of lease term and which were subject to removal by lessee, taking into account possibility that the lease might be renewed as well as that it might not; just compensation due lessee, which had no right of renewal, was not limited to loss of use and occupancy of buildings over remaining term of lease, notwithstanding that the Government had also contracted to purchase the underlying fee and had no need for improvements.

Judgment of Court of Appeals reversed and judgment of District Court reinstated.

Mr. Justice Powell concurred and filed opinion in which Mr. Justice Douglas joined.

Mr. Justice Rehnquist dissented and filed opinion in which The Chief Justice and Mr. Justice White and Mr. Justice Blackmun joined.

West Headnotes (7)

[1] Eminent Domain
Limited estates or interests in property
148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k147 Limited estates or interests in property
(Formerly 149k147)

On condemnation of leasehold, just compensation was to be measured by what a willing buyer would have paid for improvements, which were placed on property by lessee, which had useful life exceeding remainder of lease term and which were subject to removal by lessee, taking into account possibility that the lease might be renewed as well as that it might not; just compensation due lessee, which had no right of renewal, was not limited to loss of use and occupancy of buildings over remaining term of lease, notwithstanding that the Government had also contracted to purchase the underlying fee and had no need for improvements. U.S.C.A.Const. Amend. 5.

63 Cases that cite this headnote

[2] Eminent Domain
Necessity of just or full compensation or indemnity
148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k122 Necessity of just or full compensation or indemnity

"Just compensation," within meaning of constitutional provision that private property shall not be taken for public use without just compensation, means the full monetary equivalent of the property taken; the owner is to be put in the same position monetarily as he would have occupied if his property had not been taken. U.S.C.A.Const. Amend. 5.

45 Cases that cite this headnote

[3] Eminent Domain

Value of land

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k129 Taking Entire Tract or Piece of Property
148k131 Value of land

To determine the full monetary equivalent of private property taken for public use, the court early established the concept of "market value": the owner is entitled to the fair market value of his property at time of taking; this value is normally to be ascertained from what a willing buyer would pay in cash to a willing seller. U.S.C.A.Const. Amend. 5.

82 Cases that cite this headnote

[4] Eminent Domain

Limited estates or interests in property

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k147 Limited estates or interests in property

On taking of a leasehold interest, the Government should not be allowed to escape paying what a willing buyer would pay for the same property. U.S.C.A.Const. Amend. 5.

26 Cases that cite this headnote

[5] Eminent Domain

Time with reference to which compensation to be made

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k124 Time with reference to which compensation to be made

On taking of private property for public use, the Government must pay just compensation for those interests probably within the scope of the project from the time the Government was committed to it; it may not take advantage of any depreciation in the property taken that is attributable to the project itself. U.S.C.A.Const. Amend. 5.

12 Cases that cite this headnote

[6] Eminent Domain

Necessity of just or full compensation or indemnity

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k122 Necessity of just or full compensation or indemnity

Constitutional requirement of just compensation on taking of private property for public use derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law. U.S.C.A.Const. Amend. 5.

9 Cases that cite this headnote

[7] Eminent Domain

Limited estates or interests in property

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k147 Limited estates or interests in property

On taking of leasehold interest for navigation project, the lessee should not have been placed in a better position than if it had sold its leasehold to a private buyer; however, its position should not have been any worse. U.S.C.A.Const. Amend. 5.

29 Cases that cite this headnote

****792** Syllabus [*]

***470** Before and during the last of several successive leases, petitioner made substantial and permanent improvements that had a useful life in excess of the remaining lease term. With 7 1/2 years to run on the then-current lease term, the United States contracted to acquire the underlying fee and began condemnation proceedings for the leasehold. The Court of Appeals reversed the District Court's ruling that just compensation required that the improvements be valued in place over their useful life, without limitation to the remainder of the lease term. Held: In a condemnation proceeding, the concept of 'just compensation' is measured by what a willing buyer would have paid for the improvements, taking into

account the possibility that the lease might be renewed as well as that it might not. Pp. 794—797.

****793** 450 F.2d 125, reversed and District Court judgment reinstated.

Attorneys and Law Firms

Lawrence Earl Hickman, Colfax, Wash., for the petitioner.

Kent Frizzell, Washington, D.C., for respondent.

Opinion

Mr. Justice STEWART delivered the opinion of the Court.

Since 1919 the petitioner, Almota Farmers Elevator & Warehouse Co., has conducted grain elevator operations on land adjacent to the tracks of the Oregon ***471** - Washington Railroad and Navigation Company in the State of Washington. It has occupied the land under a series of successive leases from the railroad. In 1967, the Government instituted this eminent domain proceeding to acquire the petitioner's property interest by condemnation. At that time there were extensive buildings and other improvements that had been erected on the land by the petitioner, and the thencurrent lease had 7 1/2 years to run.

In the District Court the Government contended that just compensation for the leasehold interest, including the structures, should be 'the fair market value of the legal rights possessed by the defendant by virtue of the lease as of the date of taking,' and that no consideration should be given to any additional value based on the expectation that the lease might be renewed. The petitioner urged that, rather than this technical 'legal rights theory,' just compensation should be measured by what a willing buyer would pay in an open market for the petitioner's leasehold.

As a practical matter, the controversy centered upon the valuation to be placed upon the structures and their appurtenances. The parties stipulated that the Government had no need for these improvements and that the petitioner had a right to remove them. But that stipulation afforded the petitioner only what scant salvage value the buildings might bring. The Government offered compensation for the loss of the use and occupancy of the buildings only over the remaining term of the lease. The petitioner contended that this limitation upon compensation for the use of the structures would fail to award what a willing buyer would have paid for the lease with the improvements, since such a buyer would expect to have the lease renewed and to continue to use the improvements in place. The value of the buildings, machinery, and equipment in place would be substantially greater than their salvage value at the end ***472** of the lease term, and a purchaser in an open market would pay for the anticipated use of the buildings and for the savings he would realize from not having to construct new improvements himself. In sum, the dispute concerned whether Almota would have to be satisfied with its right to remove the structures with their consequent salvage value or whether it was entitled to an award reflecting the value of the improvements in place beyond the lease term.

In a pretrial ruling, the District Court accepted the petitioner's theory and held that Almota was to be compensated for the full market value of its leasehold 'and building improvements thereon as of the date of taking . . ., the total value of said leasehold and improvements . . . to be what the interests of said company therein could have been then sold for upon the open market considering all elements and possibilities whatsoever found to then affect the market value of those interests including, but not exclusive of, the possibilities of renewal of the lease and of the landlord requiring the removal of the improvements in the event of there being no lease renewal.' The court accordingly ruled that the petitioner was entitled to the full fair market value of the use of the land and of the buildings in place as they stood at the time of the taking, without limitation of such use to the remainder of the term of the existing lease.

****794** On appeal, the Court of Appeals for the Ninth Circuit reversed, 450 F.2d 125; it accepted the Government's theory that a tenant's expectancy in a lease renewal was not a compensable legal interest and could not be included in the valuation of structures that the tenant had built on the property. It rejected any award for the use of improvements beyond the lease term as 'compensation for expectations disappointed by the exercise of the sovereign power of eminent domain, expectations ***473** not based upon any legally protected right, but based only . . . upon 'a speculation on a chance.' 450 F.2d, at 129. The court explicitly refused to follow an en banc decision of the Court of Appeals for the Second Circuit, relied upon by the District Court, which had held that for condemnation purposes improvements made by a lessee are to be assessed at their value in place over their useful life without regard to the term of the lease. United States v. Certain Property, Borough of Manhattan, etc., 388 F.2d 596, 601.

[1] In view of this conflict in the circuits, we granted certiorari, 405 U.S. 1039, 92 S.Ct. 1312, 31 L.Ed.2d 579, to decide an important question of eminent domain law: 'Whether, upon condemnation of a leasehold, a lessee with no right of renewal is entitled to receive as compensation the market value of its improvements without regard to the remaining term of its lease, because of the expectancy that the lease would have been renewed.'[1] We find that the view of the Court of Appeals for the Second Circuit is in accord with established principles of just-compensation law under the Fifth Amendment, and therefore reverse the judgment before us and reinstate the judgment of the District Court.

[2] **[3]** The Fifth Amendment provides that private property shall not be taken for public use without 'just compensation.' 'And 'just compensation' means the full monetary equivalent of the property taken. The owner is ***474** to be put in the same position monetarily as he would have occupied if his property had not been taken.' United States v. Reynolds, 397 U.S. 14, 16, 90 S.Ct. 803, 805, 25 L.Ed.2d 12 (footnotes omitted). See also United States v. Miller, 317 U.S. 369, 373, 63 S.Ct. 276, 279, 87 L.Ed. 336. To determine such monetary equivalence, the Court early established the concept of 'market value': the owner is entitled to the fair market value of his property at the time of the taking. New York v. Sage, 239 U.S. 57, 61, 36 S.Ct. 25, 26, 60 L.Ed. 143. See also United States v. Reynolds, supra, 397 U.S., at 16, 90 S.Ct., at 805;United States v. Miller, supra, 317 U.S., at 374, 63 S.Ct., at 280. And this value is normally to be ascertained from 'what a willing buyer would pay in cash to a willing seller.' Ibid. See United States v. Virginia Electric & Power Co., 365 U.S. 624, 633, 81 S.Ct. 784, 790, 5 L.Ed.2d 838.

By failing to value the improvements in place over their useful life—taking into account the possibility that the lease might be renewed as well as the possibility that it might not—the Court of Appeals in this case failed to recognize what a willing buyer would have paid for the improvements. If there had been no condemnation, Almota would have continued to use the improvements during a renewed lease term, or if it sold the improvements to the fee owner or to a new lessee at the end of the lease term, it would have been compensated ****795** for the buyer's ability to use the improvements in place over their useful life. As Judge Friendly wrote for the Court of Appeals for the Second Circuit:

'Lessors do desire, after all, to keep their properties leased, and an existing tenant usually has the inside track to a renewal for all kinds of reasons—avoidance of costly alterations, saving of brokerage commissions, perhaps even ordinary decency on the part of landlords. Thus, even when the lease has expired, the condemnation will often force the tenant to remove or abandon the fixtures long before he would otherwise have had to, as well as deprive him ***475** of the opportunity to deal with the landlord or a new tenant—the only two people for whom the fixtures would have a value unaffected by the heavy costs of disassembly and reassembly. The condemnor is not entitled to the benefit of assumptions, contrary to common experience, that the fixtures would be removed at the expiration of the stated term.' United States v. Certain Property, Borough of Manhattan, 388 F.2d, at 601—602 (footnote omitted).

It seems particularly likely in this case that Almota could have sold the leasehold at a price that would have reflected the continued ability of the buyer to use the improvements over their useful life. Almota had an unbroken succession of leases since 1919, and it was in the interest of the railroad, as fee owner, to continue leasing the property, with its grain elevator facilities, in order to promote grain shipments over its lines. In a free market, Almota would hardly have sold the leasehold to a purchaser who paid only for the use of the facilities over the remainder of the lease term, with Almota retaining the right thereafter to remove the facilities—in effect, the right of salvage. 'Because these fixtures diminish in value upon removal, a measure of damages less than their fair market value for use in place would constitute a substantial taking without just compensation. '(I)t is intolerable that the state, after condemning a factory or warehouse, should surrender to the owner a stock of secondhand machinery and in so doing discharge the full measure of its duty.' United States v. 1,132.50 Acres of Land, Etc., Upper Allegheny Sand & Gravel Co., 2 Cir., 441 F.2d 356, 358.[2]

***476** **[4]** United States v. Petty Motor Co., 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729, upon which the Government primarily relies, does not lead to a contrary result. The Court did indicate that the measure of damages for the condemnation of a leasehold is to be measured in terms of the value of its use and occupancy for the remainder of the lease term, and the Court refused to elevate an expectation of renewal into a compensable legal interest. But the Court was not dealing there with the fair market value of improvements. Unlike Petty Motor, there is no question here of creating a legally cognizable value where none existed, or of compensating a mere ****796** incorporeal expectation.[3] The petitioner here has constructed the improvements and seeks only their fair market value. Petty Motor should not be

***477** read to allow the Government to escape paying what a willing buyer would pay for the same property.

[5] The Government argues that it would be unreasonable to compensate Almota for the value of the improvements measured over their useful life, since the Government could purchase the fee and wait until the expiration of the lease term to take possession of the land.[4] Once it has purchased the fee, the argument goes, there is no further expectancy that the improvements will be used during their useful life since the Government will assuredly require their removal at the end of the term. But the taking for the dam was one act requiring proceedings against owners of two interests.[5] At the time of that 'taking' Almota had an expectancy of continued occupancy of its grain elevator facilities. The Government must pay just compensation for those interests 'probably within the scope of the project from the time the ***478** Government was committed to it.' United States v. Miller, 317 U.S., at 377, 63 S.Ct., at 281. Cf. United States v. Reynolds, 397 U.S., at 16—18, 90 S.Ct., at 805—806. It may not take advantage of any depreciation in the property taken that is attributable to the project itself. Id., at 16, 90 S.Ct., at 805;United States v. Virginia Electric & Power Co., 365 U.S., at 635—636, 81 S.Ct., at 791—792. At the time of the taking in this case, there was an expectancy that the improvements would be used beyond the lease term. But the Government has sought to pay compensation on the theory that at that time there was no possibility that the lease would be renewed and the improvements used beyond the lease term. It has asked that the improvements be valued as though there were no possibility of continued use.[6] That is not how the market would ****797** have valued such improvements; it is not what a private buyer would have paid Almota.

[6] **[7]** 'The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, United States v. Commodities Trading Corp., 339 U.S. 121, 124, 70 S.Ct. 547, 549, 94 L.Ed. 707 (1950), as it does from technical concepts of property law.' United States v. Fuller, 409 U.S., at 490, 9*o* S.Ct., at 803. It is, of course, true that Almota should be in no better position than if it had sold its leasehold to a private buyer. But its position should surely be no worse.

The judgment before us is reversed and the judgment of the District Court reinstated.

Reversed and District Court judgment reinstated.

***479** Mr. Justice POWELL, with whom Mr. Justice DOUGLAS joins, concurring.

I join the opinion of the Court, but add a few words to indicate what I find implicit in its rejection of the Government's claim to act as if it were Almota's landlord.

It is clear, first of all, that the market value of improvements placed on a leasehold interest will vary depending in major part upon the probable future conduct of the landlord. In this case, based on the experience of nearly half a century and the evident self-interest of the landlord railroad, this conduct could be predicted with considerable confidence. There was every expectation that the improvements would continue to have significant value beyond the term of the present lease. In a transaction between a willing buyer and a willing seller, there can be no doubt that this value would have been accorded appropriate weight.

On different facts, the market value of Almota's interest might have been significantly lower. If, for example, the railroad had relocated its tracks before the Government entered the picture, the leasehold improvements would have been nearly valueless in the market. A risk which Almota took in erecting those improvements, the risk that the railroad would relocate its tracks, would have proved a poor one. The risk would have been substantially the same if, independently of the present navigation project, the Government had purchased the railroad with the intention of operating it, and thereafter had decided to relocate it or to discontinue operation. Under those circumstances, the Government could properly have acted as an ordinary landlord, and its lessees could have been expected to bear the risk that it would put its land to a new use.

Here, however, the Government held no interest in the land until its navigation project required the acquisition of both the fee and the leasehold interests. If, at that ***480** point, the Government had condemned both interests in a single proceeding, or in separate proceedings, Almota would have been entitled to compensation for the value of the improvements beyond the present lease term. Almota bore the risk that the railroad would change its plans, but should not be forced to bear the risk that the Government would condemn the fee and change its use. Where multiple properties or property interests are condemned for a particular public project, the Government must pay pre-existing market value for each. Neither the Government nor the condemnee may take advantage of 'an alteration in market value attributable to the project itself.' United States v. Reynolds, 397 U.S. 14,

16, 90 S.Ct. 803, 805, 25 L.Ed.2d 12 (1970); cf. United States v. Virginia Electric & Power Co., 365 U.S. 624, 635—636, 81 S.Ct. 784, 791—792, 5 L.Ed.2d 838 (1961); United States v. Miller, 317 U.S. 369, 377, 63 S.Ct. 276, 281, 87 L.Ed. 336. (1943).

The result should not be different merely because the Government arranged to acquire the fee interest by negotiation rather than by condemnation. Apart from cases where, as in ****798** United States v. Rands, 389 U.S. 121, 88 S.Ct. 265, 19 L.Ed.2d 329 (1967), the Government has a property interest antedating but within the bounds of its present project, it would be unjust to allow the Government to use 'salami tactics' to reduce the amount of one property owner's compensation by first acquiring an adjoining piece of property or another interest in the same property from another property owner. While United States v. Petty Motor Co., 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946), arguably establishes an exception to this principle, I subscribe to the Court's narrow construction of that case.

Mr. Justice REHNQUIST, with whom THE CHIEF JUSTICE, Mr. Justice WHITE, and Mr. Justice BLACKMUN join, dissenting.

Petitioner is entitled to compensation for so much of its private 'property' as was taken for public use. ***481** The parties concede that petitioner's property interest here taken was the unexpired portion of a 20-year lease on land owned by the Oregon-Washington Railroad & Navigation Co. near Colfax, Washington. The Court recognizes the limited nature of petitioner's interest in the real property taken, but concludes that it was entitled to have its leasehold and improvements valued in such a way as to include the probability that petitioner's 20-year lease would have been renewed by the railroad at its expiration.

There is a plausibility about the Court's resounding endorsement of the concept of 'fair market value' as the touchstone for valuation, but the result reached by the Court seems to me to be quite at odds with our prior cases. Even in its sharply limited reading of United States v. Petty Motor Co., 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946), the Court concedes that the petitioner's expectation of having its lease renewed upon expiration is not itself an interest in property for which it may be compensated. But the Court permits the same practical result to be reached by saying that, at least in the case of improvements, the fair market value may be computed in terms of a willing buyer's expectation that the lease would be renewed.

In United States v. Petty Motor Co., supra, the Government acquired by condemnation the use of a structure occupied by tenants inpossession under leases for various unexpired terms. The Court held that the measure of damages for condemnation of a leasehold is the value of the tenant's use of the leasehold for the remainder of the agreed term, less the agreed rent. The Court considered the argument, essentially the same raised by petitioner here, that a history of past renewal of the leases to existing tenants creates a compensable expectancy, but held that the right to compensation should be measured solely on the basis of the remainder ***482** of the tenant's term under the lease itself. Id., at 380, 66 S.Ct., at 600. In so deciding, the Court stated: 'The fact that some tenants had occupied their leaseholds by mutual consent for long periods of years does not add to their rights. Emery v. Boston Terminal Co., 178 Mass. 172, 185, 59 N.E. 763 (per Holmes, C.J.):

"It appeared that the owners had been in the habit of renewing the petitioners' lease from time to time . . .. Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of the petitioners' holding, they could not be taken into account in determining what the respondent should pay. They added nothing to the tenants' legal rights, and legal rights are all that must be paid for. Even if such intentions added to the saleable value of the lease, the addition would represent a speculation on a chance, not a legal right." Id., at 380 n. 9, 66 S.Ct., at 601.

The holding in Petty was consistent with a long line of cases to the effect that the Fifth Amendment does not require, on a taking of a property interest, compensation for mere expectancies of ****799** profit, or for the frustration of licenses or contractual rights that pertain to the land, but that are not specifically taken and that are not vested property interests. Omnia Commercial Co. v. United States, 261 U.S. 502, 510, 43 S.Ct. 437, 438, 67 L.Ed. 773 (1923); Sinclair Pipe Line Co. v. United States, 152 Ct.Cl. 723, 728,287 F.2d 175, 178 (1961); Chicago, M., St. P. & P.R. Co. v. Chicago, R.I. & P.R. Co., 138 F.2d 268, 270—271 (C.A.8 1943), cert. denied, 320 U.S. 804, 64 S.Ct. 437, 88 L.Ed. 486 (1944).

While the inquiry as to what property interest is taken by the condemnor and the inquiry as to how that property interest shall be valued are not identical ones, they ***483** cannot be divorced without seriously undermining a number of rules dealing with the law of eminent domain that this Court has evolved in a series of decisions through the

years. The landowner, after all, is interested, not in the legal terminology used to describe the property taken from him by the condemnor, but in the amount of money he is to be paid for that property. It will cause him little remorse to learn that his hope for a renewal of a lease for a term of years is not a property interest for which the Government must pay, if in the same breath he is told that the lesser legal interest which he owns may be valued to include the hoped-for renewal.

The notion of 'fair market value' is not a universal formula for determining just compensation under the Fifth Amendment. In United States v. Miller, 317 U.S. 369, 374, 63 S.Ct. 276, 280, 87 L.Ed. 336 (1943), the Court said of market value:

> 'Respondents correctly say that value is to be ascertained as of the date of taking. But they insist that no element which goes to make up value as at that moment is to be discarded or eliminated. We think the proposition is too broadly stated.'

It is quite apparent that the property on which the owner operates a prosperous retail establishment would command more in an open market sale than the fair value of so much of the enterprise as was 'private property' within the meaning of the Fifth Amendment. Yet Mitchell v. United States, 267 U.S. 341, 45 S.Ct. 293, 69 L.Ed. 644 (1925), stands squarely for the proposition that the value added to the property taken by the existence of a going business is no part of the just compensation for which the Government must pay for taking the property:

'No recovery therefor can be had now as for a taking of the business. There is no finding as a fact that the government took the business, or that what it did was intended as a taking. If the ***484** business was destroyed, the destruction was an unintended incident of the taking of land.' Id., at 345, 45 S.Ct., at 294.

More recently, in United States ex rel. TVA v. Powelson, 319 U.S. 266, 283, 63 S.Ct. 1047, 1056, 87 L.Ed. 1390 (1943), the Court generalized further:

'That which is not 'private property within the meaning of the Fifth Amendment likewise may be a thing of value which is destroyed or impaired by the taking of lands by the United States. But like the business destroyed but not 'taken' in the Mitchell case it need not be reflected in the award due the landowner unless Congress so provides.'

In either Mitchell or Powelson, the result would in all probability have been different had the Court applied the reasoning that it applies in this case. Here, too, the improvements on the property are not desired by the Government for the project in question, but the taking of petitioner's leasehold interest prevents its continuing to have their use for the indefinite future as it had anticipated. The Court says that although its 'property' interest would have expired in 7 1/2 years, the market value of that interest may be computed on the basis of expectancies that do not rise to the level of a property interest under the Fifth Amendment.

****800** If permissible mothods of valuation are to be thus totally set free from the property interest that they purport to value, it is difficult to see why the same standards should not be applied to a going business. Although the Government does not take the going business, and although the business is not itself a 'property' interest within the Fifth Amendment, since purchasers on the open market would have paid an added increment of value for the property because a business was located on it, it may well be that such increment of value is ***485** properly included in a condemnation award under the Court's holding today. And it will assuredly make no difference to the property owner to learn that destruction of a going business is not compensable, if he be assured that the property concededly taken upon which the business was located may be valued in such a way as to include the amount a purchaser would have paid for the business.

The extent to which the Court's decision in this case will unsettle condemnation law is obscured by the fact that the parties, motivated no doubt by condemnation lawyers' well-known propensity to enter into factual stipulations that present abstract questions of valuation theory for decision, have stipulated as to amounts to be awarded depending on which party prevails. But the underlying difficulty with petitioner's theory was lucidly demonstrated by the late Judge Madden in his opinion for the Court of Appeals in this case, referring to the similar holding of the Court of Appeals for the Tenth Circuit in Scully v. United States, 409 F.2d 1061 (1969):

'If the law were to go into the business of awarding compensation for an expectancy which never materialized, because the sovereign 'took' the subject of the expectancy, should, in Scully, supra, e.g., the one year lessees be compensated for the loss of a five year occupancy, a 50 year occupancy, a perpetual occupancy? In our instant case, was the stipulation based upon some actuarial computation such as the prospective life of the buildings and machinery, or the

life of the railroad, or upon free-ranging guesswork? ' United States v. 22.95 Acres of Land, 450 F.2d 125, 129 (C.A.9 1971).

The Court's conclusion gains no support from its citation of the recognized principle that the Government ***486** may not take advantage of any depreciation in the property taken that is attributable to the project itself, United States v. Reynolds, 397 U.S. 14, 90 S.Ct. 803, 25 L.Ed.2d 12 (1970); United States v. Miller, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336 (1943). The value of petitioner's property taken could not be diminished by the fact that the river improvement and navigation for which the Government took its property might have had a depressing effect on pre-existing market value. But the Government makes no such contention here. While, under existing principles of constitutional eminent domain law, the value of petitioner's property was not subject to diminution resulting from the effect on market value of the improvement that the Government proposed to construct, it was subject to the hazard of nonrenewal of petitioner's leasehold interest. The fact that the Government has condemned the underlying fee for the same project, and has therefore made the risk of non-renewal a certainty, undoubtedly diminishes the market value of petitioner's leasehold interest. But the diminution results, not from any depressing effect of the improvement that the Government will construct after having taken the leasehold, but from a materialization of the risk of transfer of ownership of the underlying fee to which its value was always subject.

In at least partially cutting loose the notion of 'just compensation' from the notion of 'private property' that has developed under the Fifth Amendment, the Court departs from the settled doctrine of numerous prior cases that have quite rigorously adhered to the principle that destruction of value by itself ****801** affords no occasion for compensation. United States v. Fuller, 409 U.S. 488, 93 S.Ct. 801, 35 L.Ed.2d 16;United States v. Rands, 389 U.S. 121, 88 S.Ct. 265, 19 L.Ed.2d 329 (1967). '(D)amage alone gives courts no power to require compensation where there is not an actual taking of property.' United States v. Willow River Power Co., 324 U.S. 499, 510, 65 S.Ct. 761, 767,89 S.Ct. 1101 (1945). '(T)he existence of value alone ***487** does not generate interests protected by the Constitution against diminution by the government . . ..' Reichelderfer v. Quinn, 287 U.S. 315, 319, 53 S.Ct. 177, 178, 77 L.Ed. 331 (1932). While the Court purports to follow this well-established principle by requiring the compensation paid to be determined on the basis of private property actually taken, its endorsement of valuation computed in part on an expectancy that is no part of the property taken represents a departure from this settled doctrine. I therefore dissent.

All Citations

409 U.S. 470, 93 S.Ct. 791, 35 L.Ed.2d 1

Footnotes

* The syllabus constitutes no part of the opinion of the Court, but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 This was the statement of the question presented by the Government in opposing the grant of the petition for certiorari. As the petitioner phrased the question, the Court was asked to decide: 'In awarding just compensation to a tenant in the condemnation of a leasehold interest in real property, including tenant owned building improvements and fixtures situated thereon, may an element of great inherent value in the improvements be excluded merely because it does not, by itself, rise to the status of a legal property right.' (Emphasis added.)

2 The compensation to which Almota is entitled is hardly 'totally set free from (its) property interest,' as the dissent suggests. Post, at 800. The improvements are assuredly 'private property' that the Government has 'taken' and for which it acknowledges it must pay compensation. The only dispute in this case is over how those improvements are to be valued, not over whether Almota is to receive additional compensation for business losses. Almota may well be unable to operate a grain elevator business elsewhere; it may well lose the profits and other values of a going business, but it seeks compensation for none of that. Mitchell v. United States, 267 U.S. 341, 45 S.Ct. 293, 69 L.Ed. 644, did hold that the Government was not obliged to pay for business losses caused by condemnation. But it assuredly did not hold that the Government could fail to provide fair compensation for business improvements that are taken—dismiss them as worth no more than scrap value—simply because it did not intend to use them. Indeed, in Mitchell the Government paid compensation both for the land, including its 'adaptability for use in a particular business,' id., at 344, 45 S.Ct., at 294, and for the improvements thereon.

3 Hence, this is not a case where the petitioner is seeking compensation for lost opportunities, see United States ex rel. TVA v. Powelson, 319 U.S. 266, 281—282, 63 S.Ct. 1047, 1055—1056, 87 L.Ed. 1390,Omnia Commercial Co. v. United States, 261 U.S. 502, 43 S.Ct. 437, 67 L.Ed. 773. The petitioner seeks only the fair value of the property taken by the Government.

Nor is this a case where compensation is to be paid for 'the value added to fee lands by their potential use in connection with (Government) permit lands,' United States v. Fuller, 409 U.S. 488, at 494, 93 S.Ct. 801, at 805, 35 L.Ed.2d 16, for neither action by the Government nor location adjacent to public property contributed any element of value to Almota's leasehold interest.

4 It was established at oral argument that while the Government had contracted to acquire the railroad's interest, it had not acquired the fee at the time of the taking of the leasehold, nor did it have possession at the time of the trial or appeal.

5 'It frequently happens in the case of a lease for a long term of years that the tenant erects buildings or puts fixtures into the buildings for his own use. Even if the buildings or fixtures are attached to the real estate and would pass with a conveyance of the land, as between landlord and tenant they remain personal property. In the absence of a special agreement to the contrary, such buildings or fixtures may be removed by the tenant at any time during the continuation of the lease, provided such removal may be made without injury to the freehold. This rule, however, exists entirely for the protection of the tenant, and cannot be invoked by the condemnor. If the buildings or fixtures are attached to the real estate, they must be treated as real estate in determining the total award. But in apportioning the award, they are treated as personal property and credited to the tenant,' 4 P. Nichols, Eminent Domain s 13.121(2) (3d rev. ed. 1971) (footnotes omitted).

6 Similarly, the dissent today would value the petitioner's interest after the Government has condemned the underlying fee, and thus after the value of the petitioner's interest has been diminished because the risk of nonrenewal of the lease has materialized. But there was only one 'taking,' and at the time of that 'taking' there was not only a risk that the lease would not be renewed, but a possibility that it would be and that the improvements would be used over their useful life.

57 Wis.2d 277
Supreme Court of Wisconsin.

Florence BEMBINSTER, Appellant,
v.
STATE of Wisconsin, DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS, Respondent.

No. 307.
|
Feb. 8, 1973.

Condemnation proceeding. The Circuit Court, Marathon County, Ronald D. Keberle, J., entered judgment, and landowner appealed. The Supreme Court, Hallows, C.J., held that where evidence adduced did not prove corporate tenant was the alter ego or agent of owner of property and there was no reason for disregarding the corporate entity, cost of removal of automobiles and trucks of tenant, operating an automobile salvage business on the property, was not properly chargeable to owner of property and it was error to permit argument from evidence of claim by tenant for realignment of the personalty that value of land before taking should be reduced by amount of the claim and, where jury determined a value considerably less than that attributed to the land by the condemnation commissioners, admission of the realignment claim was prejudicial.

Judgment reversed and new trial granted.

West Headnotes (8)

[1] Eminent Domain
Conduct of proceedings in general

Eminent Domain
Harmless error

Landlord and Tenant
Personal Property on Premises at Termination of Tenancy

148 Eminent Domain
148III Proceedings to Take Property and Assess Compensation
148k213 Assessment by Jury
148k219 Conduct of proceedings in general
148 Eminent Domain
148III Proceedings to Take Property and Assess Compensation
148k250 Appeal
148k262 Review
148k262(5) Harmless error
233 Landlord and Tenant
233V Enjoyment and Use of Premises
233V(I) Personal Property on Premises at Termination of Tenancy
233k1200 In general
(Formerly 233k161(1))

Where evidence adduced did not prove corporate tenant was the alter ego or agent of owner of property and there was no reason for disregarding the corporate entity, cost of removal of automobiles and trucks of tenant, operating an automobile salvage business on the property, was not properly chargeable to owner of property and it was error to permit argument from evidence of claim by tenant for realignment of the personalty that value of land before taking should be reduced by amount of the claim and, where jury determined a value considerably less than that attributed to the land by the condemnation commissioners, admission of the realignment claim was prejudicial. W.S.A. 32.19, 32.19(2).

1 Cases that cite this headnote

[2] Landlord and Tenant
Condition of Premises at Termination of Tenancy

233 Landlord and Tenant
233V Enjoyment and Use of Premises
233V(H) Condition of Premises at Termination of Tenancy
233k1180 In general
(Formerly 233k160(1))

Whether or not a tenant of land taken in condemnation proceeding qualifies under statute pertaining to claim for realignment of the personalty, in the absence of a contract to the contrary, a tenant generally is required to return property upon termination of tenancy in the same

condition as he received it, ordinary wear and tear excepted. W.S.A. 32.19, 32.19(2).

Cases that cite this headnote

[3] Eminent Domain

Taking Entire Tract or Piece of Property

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k129 Taking Entire Tract or Piece of Property
148k130 In general

Just compensation in condemnation proceedings is measured by what a willing buyer would pay for the land, taking into account the probability of an access road or of a change in zoning or of other factors affecting value of property.

1 Cases that cite this headnote

[4] Eminent Domain

Value of Property

Eminent Domain

Questions for jury

148 Eminent Domain
148III Proceedings to Take Property and Assess Compensation
148k199 Evidence as to Compensation
148k202 Value of Property
148k202(1) In general
148 Eminent Domain
148III Proceedings to Take Property and Assess Compensation
148k213 Assessment by Jury
148k221 Questions for jury

Probability of town's exercising its discretion to construct access road to property is for jury to evaluate in determining value in condemnation proceeding and evidence that owner would be required to pay for benefits of such a road went not to admissibility but to weight of the evidence.

1 Cases that cite this headnote

[5] Eminent Domain

Value for special purposes

148 Eminent Domain
148III Proceedings to Take Property and Assess Compensation
148k199 Evidence as to Compensation
148k202 Value of Property
148k202(4) Value for special purposes

Zoning changes and sanitary facilities are elements of value and are factors to be admitted in evidence concerning value in condemnation proceeding when the evidence is in proper form.

Cases that cite this headnote

[6] Eminent Domain

Value for special use

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k129 Taking Entire Tract or Piece of Property
148k134 Value for special use

Market value in an eminent domain proceeding is to be based not necessarily on the use to which the property was being put by its owner at time of taking but rather on basis of the highest and best use, present or prospective, for which it is adapted and to which it might in reason be applied.

7 Cases that cite this headnote

[7] Eminent Domain

Value for special purposes

148 Eminent Domain
148III Proceedings to Take Property and Assess Compensation
148k199 Evidence as to Compensation
148k202 Value of Property
148k202(4) Value for special purposes

In condemnation proceeding, where a zoning ordinance prohibits the most advantageous use of the property, landowner may show there is a reasonable probability of rezoning so as to allow for the highest use.

9 Cases that cite this headnote

[8] Evidence

Subjects of opinion evidence in general

157 Evidence
157XII Opinion Evidence
157XII(A) Conclusions and Opinions of Witnesses in General

157k474.5 Subjects of opinion evidence in general

(Formerly 157k4741/2, 157k474)

Trial court in condemnation proceeding did not err in refusing to admit opinion testimony of chairman of town zoning board and of a member of the town board to effect that, had an application for zoning change been made, it probably would have been granted and in excluding similar testimony of a member of sanitary district to effect that, had application been made, property probably would have been added to district.

1 Cases that cite this headnote

***278** ****898** This appeal raises the question of admissibility of evidence relating to value of land in a condemnation proceeding. The jurisdictional offer was $135,000. The Marathon County Condemnation Commissioners awarded $219,000, and on appeal to the circuit court the jury awarded $181,130. The owner of the land Mrs. Florence Bembinster appeals.

Attorneys and Law Firms

***279** Genrich, Terwilliger, Wakeen, Piehler & Conway, Wausau, W. Thomas Terwilliger, Wausau, of counsel, for appellant.

Crooks, Low & Earl, Wausau, for respondent.

Opinion

HALLOWS, Chief Justice.

Mrs. Bembinster owned approximately 46.92 acres of land in Marathon county west of the city of Wausau. The land was situated south of Highway 29 and west of Highway 51 bypass. Part of this land was needed by the state for an interchange at the junction of Highways 29 and 51. The land was divided by the Chicago & North Western Railway right of way, which ran approximately east and west. Approximately 39.18 acres lay north of the tracks and 7.74 to the south. After the taking by the respondent State of Wisconsin in December 23, 1968, there was left 8.85 acres north of the tracks and two parcels consisting of 1.7 and 5.27 acres south of the railroad tracks. The land had been zoned for interchange manufacturing.

In 1962 Florence Bembinster leased the land to Aero Auto Parts, Inc. (Aero) for three years at an annual rental of $5,200. The lease contained options to renew for two successive three-year periods. The first option was exercised; the second was not because of the pendency of the taking. On the day of the taking the land was occupied by Aero, which was a Wisconsin corporation operating an automobile salvage business thereon. The corporation had stored approximately 2,000 junk trucks and autos on the premises. The president of the corporation was George Bembinster; the secretary-treasurer and chief executive officer was Edward Bembinster, the husband of the appellant, who was a stockholder. Aero filed with the state of Wisconsin (highway commission) a claim for realignment of the personalty in the sum of ***280** $55,669 pursuant to sec. 32.19(2), Stats. 1967.[1] This claim was based on the ****899** ground Aero was a tenant under a three-year lease and was required to move its stock of autos and trucks off the premises as a result of the taking.

During the trial this claim was admitted in evidence and the state was allowed to argue to the jury that the value of the property before the taking should be reduced by the amount of the claim. This argument was based upon the further argument that Aero, Mrs. Bembinster and her husband were all one and the same entity and therefore the cost of removing the property was properly chargeable to Mrs. Bembinster. It is claimed it was prejudicial error to admit this evidence, and we agree.

[1] Much evidence was adduced concerning the lease, its options, the officers of the tenant corporation, and the alleged agency of the husband of Mrs. Bembinster, all to the point of sustaining a conclusion that Aero as a tenant was fictitious and the corporate veil should be pierced. In our view, the evidence adduced did not prove the tenant was the alter ego or the agent of Mrs. Bembinster. We find no reason for disregarding the corporate entity. There was neither fraud nor any strong equitable claim demanding such action. Milwaukee Toy Company v. Industrial Commission (1931), 203 Wis. 493, 234 N.W. 748; Minahan v. Timm (1933), 210 Wis. 689, 247 N.W. 321; R. B. General Trucking v. Auto Parts & Service (1958), 3 Wis.2d 91, 87 N.W.2d 863; Marlin Electric Co. v. Industrial Commission (1967), 33 Wis.2d 651, 148 N.W.2d 74. The evidence was no more unusual than in most situations ***281** involving recognized family corporations. See Button v. Hoffman (1884), 61 Wis. 20, 20 N.W. 667; Petersen v. Elholm (1906), 130 Wis. 1, 109 N.W. 76; Lipman v. Manger (1924), 185 Wis. 63, 200 N.W. 663; Oeland v. Woldenberg (1925), 185 Wis. 510, 201 N.W. 807.

[2] The question of whether the tenancy was one for three years, month to month, or at will is relevant only to the issue of whether a tenant qualifies for realignment benefits under sec. 32.19, Stats., which requires a three-year lease. Whether a tenant qualifies under this section or not, in the absence of a contract to the contrary, a tenant generally is required to return the property upon termination of the tenancy in the same condition as he received it, ordinary wear and tear excepted. 49 Am.jur.2d, Landlord and Tenant, pp. 913, 914, sec. 939. Consequently, it was the duty of Aero to restore the land by removing its autos and trucks. This cost of removal was not properly chargeable to Mrs. Bembinster, the owner. Whether the claim was valid under sec. 32.19 is not before us. But valid or not, the attorney for the state was erroneously allowed to argue from this evidence that the value of the land before taking, as testified to by the witnesses for Mrs. Bembinster, should be reduced by the amount of the claim.

The testimony relating to the value of the land disclosed widely varying opinions. Mr. Sternberg, a witness for Mrs. Bembinster, testified to a before value of $385,212 and an after value of $19,035. Mr. Chrouser, also a Bembinster witness, testified to a before value of $438,454 and an after value of $37,130. The state's witness Mr. Anderson testified to a before value of $212,500 and an after value of $49,500. Mr. Faust, another state witness, testified to a before value of $176,000 and an after value of $41,000. Mr. Faust's value results in a taking value exactly in the amount of the jurisdictional offer, which value both the commissioners and the jury ***282** rejected. What is puzzling to this court is how four appraisers, if they were impartial and competent in ascertaining value of land, could differ so widely in their judgments.

[3] **[4]** The state argues the jury probably followed the testimony of Mr. Anderson ****900** because it found a before value of $227,000 and an after value of $45,870, and consequently, the error was harmless. While the result is close, we cannot assume the jury therefore disregarded the argument and testimony concerning the claim of Aero. The fact is the jury determined a value considerably less than that attributed to the land by the commissioners. We think the admission of the realignment claim was prejudicial and Mrs. Bembinster is entitled to a reversal and a new trial.

Because two other questions raised are likely to again appear at the new trial, we will briefly discuss them. The first concerns the questioning of two witnesses as to the probability of the town's laying out a road to provide access to the parcel north of the railroad tracks. Admissibility and the weight to be given evidence should always be distinguished. Evidence should be admitted unless it has little or no probative value or serves only as a basis for speculation. While possibilities of factors affecting value may be speculative, probabilities are not. Just compensation in condemnation proceedings is measured by what a willing buyer would pay for the land taking into account the probability of an access road or of a change in zoning or of other factors affecting the value of property. See Almota Farmers Elevator & Warehouse Co. v. United States (Jan. 16, 1973), 409 U.S. 470, 93 S.Ct. 791, 35 L.Ed.2d 1. The probability of the town's exercising its discretion to construct[2] such a road is for the jury to evaluate in determining value. ***283** This is not speculation by the jury but an evaluation of what a willing buyer would do in making a judgment as to value. The evidence that Mrs. Bembinster would be required to pay for the benefits of such a road goes not to admissibility but to the weight of the evidence.

[5] Zoning changes and sanitary facilities are elements of value and are factors to be admitted in evidence concerning value when the evidence is in proper form. The question here is whether the form of proof submitted was acceptable to prove these factors. The court refused to admit opinion testimony of the chairman of the town zoning board and of a member of the town board to the effect that had an application for zoning change been made, it probably would have been granted. Likewise, the court excluded similar testimony of a member of the sanitary district, to the effect that had application been made, the property probably would have been added to the district.

[6] **[7]** It is well established that market value in an eminent-domain proceeding is to be based not necessarily on the use to which the property was being put by its owner at the time of taking but rather on the basis of the highest and best use, present or prospective, for which it is adapted and to which it might in reason be applied. 4 Nichols, Eminent Domain, p. 12—189, sec. 12.314; see also Utech v. Milwaukee (1960), 9 Wis.2d 352, 101 N.W.2d 57; Carazalla v. State (1955), 269 Wis. 593, 70 N.W.2d 208, vacated, 71 N.W.2d 276; Muscoda Bridge Co. v. Grant County (1929), 200 Wis. 185, 227 N.W. 863; Munkwitz v. The Chicago, Milwaukee & St. Paul R. Co. (1885), 64 Wis. 403, 25 N.W. 438. Where a zoning ordinance prohibits the most advantageous use of the property, the landowner may show there is a reasonable probability of rezoning so as to allow for the highest use.

***284** 'Where the enactment of the zoning restriction is not predicated upon the inherent evil of the proscribed use . . . and there is a possibility or probability that the zoning restriction may in the near future be repealed or amended so as to permit the use in question, such likelihood may be considered if the prospect of such repeal or amendment is sufficiently likely as to have an appreciable influence upon present market ****901** value.' 4 Nichols, Eminent Domain, p. 12—394, sec. 12.322(1).

The question of how a landowner may meet his burden of showing the probability of such rezoning is the question now facing this court.

[8] In Hietpas v. State (1964), 24 Wis.2d 650, 130 N.W.2d 248, we stated a reasonable probability that a zoning restriction may in the near future be repealed or amended so as to permit a greater use cannot be proved by an opinion based upon a possibility or an assumption. Nor can the probability of change in legislation be proved by the opinion of board members of legislators. The reason as generally stated is that the process involves prognostication of future legislative action, which may be speculation if not based upon facts justifying a probability. See 4 Nichols, Eminent Domain, p. 12—415, sec. 12.322(2); Cartwright v. Sharpe (1968), 40 Wis.2d 494, 162 N.W.2d 5; Northern Trust Co. v. Snyder (1902), 113 Wis. 516, 89 N.W. 460 (legislator's opinion on what the legislature would have done if faced with a particular fact situation not admissible); but see Dept. of Public Works & Bldgs. v. Rogers (1966), 78 Ill.App.2d 141, 233 N.E.2d 409 (opinion of city corporation counsel who handled all city zoning ordinance variances and drafted the ordinance involved was inadmissible to prove probability of zoning change). The type of evidence which has been admitted as material as tending to prove a reasonable probability of change includes ***285** the granting of many variances which showed a continuing trend that will render rezoning probable, the actual amendment of the ordinance subsequent to the taking, and an ordinance rezoning neighboring property. See 4 Nichols, Eminent Domain, pp. 12—414 to 12—419, sec. 12.322(2). Opinions based upon such facts are also admissible. There was no error in excluding the opinion testimony.

Judgment reversed, and a new trial granted.

All Citations

57 Wis.2d 277, 203 N.W.2d 897

Footnotes

1 '32.19 Additional items payable . . .
(2) Removal of personal property to another site. The cost of removal from the property taken to another site of personal property of land owners, or tenants under an existing unexpired written lease, the full term of which is at least 3 years. Such costs shall not exceed $150 for removals from each family residential unit or $2,000 from each farm or nonresidential site.'

2 See sec. 80.13(1), Stats.; Backhausen v. Mayer (1931), 204 Wis. 286, 289, 234 N.W. 904; Larsen v. Town Supervisors (1958), 5 Wis.2d 240, 92 N.W.2d 859.

291 Wis.2d 601
Supreme Court of Wisconsin.

Bernice SPIEGELBERG, Plaintiff–Respondent,
v.
STATE of Wisconsin and Department of Transportation, Defendants–Appellants.

No. 2004AP3384.
|
Argued April 4, 2006.
|
Decided June 27, 2006.

Synopsis

Background: In condemnation proceedings involving partial taking of multiple contiguous tax parcels having common ownership, the Department of Transportation (DOT) brought motion to exclude landowner's appraisal, which valued parcels separately, rather than as a single unit. The Circuit Court, Winnebago County, Robert A. Hawley, J., denied motion. Parties entered stipulation that if the circuit court was correct, the value set by landowner's appraisal correctly established the value of the taking. DOT appealed. The Court of Appeals certified question.

Holdings: The Supreme Court, Patience Drake Roggensack, J., held that:

[1] valuation of contiguous tax parcels separately or as a single unit is to be determined based on the highest and best use of the property at issue, and

[2] sale of separate tax parcels was the most advantageous use, and thus valuation of the land as separate tax parcels constituted the "fair market value."

Affirmed.

Ann Walsh Bradley, J., dissented and filed opinion, in which Shirley S. Abrahamson, C.J., joined.

West Headnotes (16)

[1] Appeal and Error
Review Dependent on Whether Questions Are of Law or of Fact

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(1) In general

Supreme Court interprets a statute whose meaning is in dispute without deference to the circuit court.

4 Cases that cite this headnote

[2] Appeal and Error
Review Dependent on Whether Questions Are of Law or of Fact

Appeal and Error
Review Dependent on Whether Questions Are of Law or of Fact

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(1) In general
30 Appeal and Error
30XVI Review
30XVI(L) Decisions of Intermediate Courts
30k1081 Questions Considered
30k1083 Review Dependent on Whether Questions Are of Law or of Fact
30k1083(1) In general

When the facts are not disputed, Supreme Court decides the remaining questions of law independent of earlier court decisions, yet benefiting from the analysis of the previous court's decision.

7 Cases that cite this headnote

[3] **Statutes**
Construction in View of Effects, Consequences, or Results

361 Statutes
361IV Operation and Effect
361k1402 Construction in View of Effects, Consequences, or Results
361k1403 In general
(Formerly 361k181(1))

Purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.

1 Cases that cite this headnote

[4] **Statutes**
Language and intent, will, purpose, or policy

Statutes
Context

361 Statutes
361III Construction
361III(A) In General
361k1078 Language
361k1080 Language and intent, will, purpose, or policy
(Formerly 361k188, 361k184)
361 Statutes
361III Construction
361III(E) Statute as a Whole; Relation of Parts to Whole and to One Another
361k1153 Context
(Formerly 361k208)

Context is important when determining the plain meaning of a statute, as is the purpose of the statute and its scope, if those qualities can be ascertained from the language of the statute itself.

Cases that cite this headnote

[5] **Statutes**
Plain, literal, or clear meaning; ambiguity

361 Statutes
361III Construction
361III(H) Legislative History
361k1242 Plain, literal, or clear meaning; ambiguity
(Formerly 361k217.4, 361k214)

If statutory language is ambiguous, courts may consult extrinsic sources such as legislative history.

Cases that cite this headnote

[6] **Statutes**
Undefined terms

361 Statutes
361III Construction
361III(D) Particular Elements of Language
361k1123 Undefined terms
(Formerly 361k188)

Non-technical words that are not defined in a statute are to be given their ordinary meanings.

2 Cases that cite this headnote

[7] **Statutes**
Dictionaries

361 Statutes
361III Construction
361III(F) Extrinsic Aids to Construction
361k1179 Treatises and Reference Works
361k1181 Dictionaries
(Formerly 361k188)

Courts may consult a dictionary to aid in statutory construction of undefined words.

2 Cases that cite this headnote

[8] **Eminent Domain**
Land constituting single tract

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k135 Taking Part of Tract or Property
148k137 Land constituting single tract

Requirement to consider the "whole property" in condemnation proceedings does not require that an individual assessment always treat contiguous, commonly owned tax parcels separately or as a single unit, but requires that no part of a property affected by a partial taking be omitted from the valuation used to establish just compensation. W.S.A. 32.09(6).

1 Cases that cite this headnote

[9] **Eminent Domain**
Value of land

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k129 Taking Entire Tract or Piece of Property
148k131 Value of land

Just compensation for governmental taking must take into account the fair market value. W.S.A. 32.09(6).

1 Cases that cite this headnote

[10] **Eminent Domain**
Value of land

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k129 Taking Entire Tract or Piece of Property
148k131 Value of land

In condemnation proceedings, "fair market value" relates to the price a willing buyer would pay to a willing seller. W.S.A. 32.09(6).

1 Cases that cite this headnote

[11] **Eminent Domain**
Value for special use

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k129 Taking Entire Tract or Piece of Property
148k134 Value for special use

Requirement that a property's "most advantageous use but only such use as actually affects the present market value" be considered as a part of a valuation is linked to the determination of the "fair market value" in condemnation proceedings. W.S.A. 32.09(2, 6).

1 Cases that cite this headnote

[12] **Eminent Domain**
Value of land

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k129 Taking Entire Tract or Piece of Property
148k131 Value of land

Determination of just compensation in condemnation proceedings depends upon considerations related to each property's individual characteristics. W.S.A. 32.09(6).

1 Cases that cite this headnote

[13] **Eminent Domain**
Value for special use

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k129 Taking Entire Tract or Piece of Property
148k134 Value for special use

In determining "fair market value" in condemnation proceedings involving partial taking of contiguous, commonly-owned tax parcels, when the property's "highest and best" use that affects its present market value is most appropriately appraised by considering the contiguous tax parcels separately, that is the appropriate appraisal method; conversely, when the "highest and best use" is more adequately represented through an appraisal of the property as a single unit, that approach is the one that is appropriate. W.S.A. 32.09(2, 6).

Cases that cite this headnote

[14] **Eminent Domain**
Value for special use

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k129 Taking Entire Tract or Piece of Property
148k134 Value for special use

Ascertainment of property's "fair market value" depends upon the common law definition of "highest and best use," which is synonymous with the "most advantageous use" set out in condemnation statute. W.S.A. 32.09(2, 6).

Cases that cite this headnote

[15] **Eminent Domain**
Statutory Provisions and Remedies

148 Eminent Domain
148III Proceedings to Take Property and Assess Compensation

148k167 Statutory Provisions and Remedies
148k167(1) In general
Rule of strict construction should be applied to the condemnor's power and to the exercise of this power because the exercise of the power of eminent domain is an extraordinary power, and the rule of strict construction is intended to benefit the owner whose property is taken against his or her will; conversely, statutory provisions in favor of the owner, such as those which regulate the compensation to be paid to him or her, are to be afforded liberal construction. W.S.A. 32.09.

Cases that cite this headnote

[16] Eminent Domain
Value for special use

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k129 Taking Entire Tract or Piece of Property
148k134 Value for special use
Sale of landowner's multiple contiguous tax parcels as separate tax parcels was a readily available prospective use and would have been more advantageous, or the highest and best use, as compared with the sale of the property as a single unit, and thus valuation of the land as separate tax parcels constituted the "fair market value" for purposes of condemnation proceedings, even though landowner had not yet used the land as separate tax parcels or for a venture other than farming. W.S.A. 32.09(2, 6).

Cases that cite this headnote

Attorneys and Law Firms

****642** For the defendants-appellants, the cause was argued by Robert M. Hunter, assistant attorney general, with whom on the briefs (in the court of appeals and supreme ****643** court) was Peggy A. Lautenschlager, attorney general.

For the plaintiff-respondent there was a brief by Dan Biersdorf, E. Kelly Keady, and Biersdorf & Associates, S.C., Milwaukee, and oral argument by Dan Biersdorf.

Opinion

¶ 1 PATIENCE DRAKE ROGGENSACK, J.

***605** This case comes to us on certification from the court of appeals. The certified question is whether, when a partial taking affects multiple contiguous tax parcels that have common ownership, the property is to be valued based on: (1) the fair market value of the combined acreage as a single property or (2) the sum of the fair market values of each individual tax parcel. We conclude that Wis. Stat. § 32.09(6) (2003–04),[1] which determines the method by which just compensation is to be determined for a partial taking, permits a flexible approach such that the individual characteristics of each property may be considered, according to each property's highest and best use, in order that the property owner receives just compensation for the taking. Because valuing the tax parcels separately produced a value consistent with the most advantageous use of this property, the circuit court correctly chose the ***606** method of appraisal employed by Bernice Spiegelberg's appraiser. Therefore, we affirm the judgment and order of the circuit court that awarded $84,200 to the property owner.

I. BACKGROUND[2]

¶ 2 Bernice Spiegelberg owns five contiguous tax parcels, consisting of approximately 150 acres of land. The Department of Transportation (DOT) condemned a portion of Spiegelberg's land. The taking consisted of a fee acquisition totaling 11.08 acres from three of the five parcels. With the exception of her residence, Spiegelberg leased all five tax parcels together for use as a farm.

¶ 3 The DOT determined the value of the partial taking by valuing the farm as a single entity, before and after the taking, and then subtracting the "after" value from the "before" value. The DOT's appraisal valued all the farm as a single entity worth $368,300 before the taking and $349,400 after the taking. Based on those calculations, its appraiser set the fair market value of the taking of Spiegelberg's property at $18,900.

¶ 4 Spiegelberg, on the other hand, obtained an appraisal for the partial taking based on the sum of the values of the five individual tax parcels both before and after the taking. Using a comparable sales method of valuation, Spiegelberg's

appraiser arrived at the following "before" fair market values: (a) Parcel 1: $152,700; (b) Parcel 2: $113,400; (c) Parcel 3: $89,000; (d) Parcels 4 and 5: $114,000; (e) improvements: $63,500. The sum of the fair market values of the parcels and improvements "before" was $532,700, and the sum of their fair market values ***607** "after" was $448,500. The appraised fair market value for all of the land taken was $84,200.

¶ 5 Before the circuit court, each party submitted jury instructions and special verdict forms consistent with its theory of valuation for the property that was taken. In August of 2004, the DOT brought a motion in limine seeking to exclude Spiegelberg's appraisal. The circuit court denied the DOT's motion. It also held that Spiegelberg's jury instructions and special ****644** verdict would be used at trial. Counsel then discussed how to proceed from those determinations with regard to proof of valuation. The parties entered into an oral stipulation on the record wherein they agreed that since the court had concluded that Spiegelberg's theory of valuation was correct, the DOT had no evidence to present of the fair market value of the property that was taken. The parties concluded that if the circuit court was correct, the value set by Spiegelberg's appraisal correctly established the value of the taking.

¶ 6 In November, a signed stipulation was submitted by both parties. In addition to the facts already related, it included the following recitation: (1) prior to the taking, the five tax parcels either had direct access to existing roads or could have been provided access through the property owned by Spiegelberg; (2) the taking caused damage to only three of the five tax parcels; (3) David Gagnow completed an appraisal for the DOT, which valued all five tax parcels, both before and after the taking, as one parcel; (4) Kurt Kielisch completed an appraisal for Spiegelberg based on the fair market value of each individual parcel, both before and after the taking and then calculated the sum of those values; (5) the circuit court's ruling resulted in the DOT not having evidence to present on the value of the taking; (6) based on the court's ruling "the damages in ***608** this case under the analysis before and after the taking [is] $84,200[,] consistent with the analysis presented by [Spiegelberg]"; (7) if upon appeal it is determined that the circuit court erred: (a) the damages under the before and after analysis will be "blank based" upon the appraisal submitted by the DOT; and (b) the case "will be remanded to [the] circuit court for a trial on the value of the part taken as a separate entity." [3]

¶ 7 The DOT appealed, and the court of appeals certified the question of what method of valuation should be used to accord just compensation to a condemnee whose affected property consists of contiguous individual tax parcels.

II. DISCUSSION

A. Standard of Review

[1] **[2]** ¶ 8 We interpret a statute whose meaning is in dispute without deference to the circuit court. *State v. Rasmussen*, 195 Wis.2d 109, 113, 536 N.W.2d 106 (Ct.App.1995); *Racine Marina Assocs., Inc. v. City of Racine*, 175 Wis.2d 614, 618, 499 N.W.2d 715 (Ct.App.1993). This case also requires us to review the circuit court's application of a statute to stipulated facts. When the facts are not disputed, we decide the remaining question of law independent of earlier court decisions. ***609** *State v. Trentadue*, 180 Wis.2d 670, 673, 510 N.W.2d 727 (Ct.App.1993). However, we benefit from the analysis of the previous court's decision. *State v. Cole*, 2003 WI 59, ¶ 12, 262 Wis.2d 167, 663 N.W.2d 700.

B. Just Compensation.

¶ 9 When property is taken through the power of eminent domain, the legislature has directed that the property owner is to receive "just compensation" for the taking. Wis. Stat. § 32.09. Here, only a portion of Spiegelberg's property was taken so we begin by examining § 32.09(6), the partial taking subsection of § 32.09. Section 32.09(6) states, in relevant part:

> ****645** In the case of a partial taking of property other than an easement, the compensation to be paid by the condemnor shall be the greater of either the fair market value of the property taken as of the date of evaluation or the sum determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the following items of loss or damage to the property where shown to exist:
>
> (a) Loss of land including improvements and fixtures actually taken.
>
> ...

(e) Damages resulting from actual severance of land....

¶ 10 The issue before us, and the issue the parties' arguments center on, is how to interpret the statutory term, "fair market value of the whole property" ***610** found in Wis. Stat. § 32.09(6). Both parties' valuation methods subtracted the appraised fair market value of what remained after the taking from an appraised fair market value of the property before the taking. Further, the specific calculations used in each of the party's valuations are not in dispute. The debate lies in whether it is appropriate to appraise the " before" and "after" values with regard to the five individual tax parcels and then sum those differences as a part of the valuation of the taking, or whether all of the contiguous Spiegelberg property should be appraised as a single unit, both before and after the taking. The answer to this question turns on whether the "whole property" language of § 32.09(6) requires that contiguous parcels be valued together as a single unit, or whether they can be valued individually with a sum total then calculated for their collective appraised values.

1. The DOT's position

¶ 11 The DOT submits that the appraisal method chosen by the circuit court, which analyzed the summation of the values of various parcels of property, does not meet the requirements of Wis. Stat. § 36.09(6). The DOT argues that the whole of Spiegelberg's property functioned as a single economic entity, a farm comprising 150 acres of land, and consequently the property must be valued as a single entity to properly determine the "fair market value of the whole property."

¶ 12 The DOT contends that the "unit rule" requires that we adopt a single-unit valuation approach to contiguous, commonly-owned tax parcels, as its appraisal has done. It cites *Jonas v. State*, 19 Wis.2d 638, 121 N.W.2d 235 (1963), in support of this contention. ***611** However, our decision in *Jonas* actually turned on the "unity of use," a very different principle from the "unit rule."

¶ 13 In *Jonas*, a seven-acre parcel owned by one corporation and located on the east side of a street was condemned. *Id.* at 640, 121 N.W.2d 235. A second corporation owned a parcel of one and one-half acres on the west of that same street. *Id.* The corporations operated as one concern. *Id.* Jonas contended that there was a unity of use between the two parcels and that in order to fully compensate for the damages arising from the condemnation, both parcels had to be valued. *Id.* We concluded that it was possible that when "two or more distinct parcels ... are used as a unit, the parcels may be treated as one and the taking of part or all of one of them treated as a partial taking of the combined whole." *Id.* at 642, 121 N.W.2d 235.

****646** ¶ 14 The possible application of the unity of use rule in condemnation cases does not support the DOT's assertion that Spiegelberg's entire farm must be valued as a single parcel because all of it has been used as a farm. The unity of use rule permits a condemnee to receive compensation when a taking from one property must be considered in terms of its effect on another property, in order for those affected by the taking to be fully compensated. *See City of Milwaukee v. Roadster LLC*, 2003 WI App 131, ¶ 18, 265 Wis.2d 518, 666 N.W.2d 524 (concluding that a parking lot that was condemned was "occupied" by its owner who used it for access to a business on an adjacent lot; and therefore, the city "took" an essential portion of the business when it took the parking lot). The unity of use rule does not require that property that currently has a single use be valued only for that single use.

***612** ¶ 15 Other cases cited by the DOT do refer to the "unit rule," which differs from the unity of use rule. Unit rule cases address the separate interests that may be found in a condemned property. For example, a property may have a fee owner and one or more leaseholders. Those properties that are subject to multiple interests are given one value for the entirety of the condemned property and then that value is apportioned among those who have an interest in the property. *See, e.g., Van Asten v. DOT*, 214 Wis.2d 135, 140, 571 N.W.2d 420 (Ct.App.1997) (concluding that "the unit rule ... stems from the common law theory that anything that was attached to a freehold was annexed to and considered to be a part of it.... The unit rule requires that improved real estate be valued in respect to its gross value as a single entity as if there was only one owner."). This is a far cry from the DOT's position, which is if one person owns multiple parcels that are affected by a partial taking, all of the parcels must be valued as though they were one parcel. [4] There is only one interest in the property for which Spiegelberg seeks compensation, her fee simple interest.

2. Spiegelberg's position

¶ 16 Spiegelberg argues that the "whole property" may be the smallest distinct parcel of land that can be independently sold; and therefore, her assessment ***613** method comports with the statutory language. Furthermore, Spiegelberg cites

Wisconsin case law holding that statutes concerning just compensation for property taken in an eminent domain proceeding must be liberally construed in favor of the condemnee. *See* *Standard Theatres, Inc. v. DOT*, 118 Wis.2d 730, 743, 349 N.W.2d 661 (1984). Spiegelberg emphasizes that the DOT's presumption that the legal distinction of parcels should be ignored in favor of a rule that would treat contiguous parcels as one parcel is contrary to our holding in *Standard Theatres.* She contends that there is no reason not to value separate tax parcels separately; they have separate legal descriptions; they can be developed distinctly according to their zoning; and they can be bought and sold freely, without further subdivision or attachment to other land. Finally, Spiegelberg argues that we should recognize this "reality" of real estate, but contends that at a minimum, separate legal tax parcelsshould ****647** be valued separately if it is beneficial to the property owner to do so. This, Spiegelberg asserts, is in accord with our decision in *Standard Theatres,* as well as the legislative directive of Wis. Stat. § 32.09(6).

3. Wisconsin Stat. § 32.09(6)

[3] **[4]** **[5]** ¶ 17 In order to address the parties' arguments, we must interpret and apply the phrase, "fair market value of the whole property" found in Wis. Stat. § 32.09(6). When we interpret a statute, we rely on the criteria set out in *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, 271 Wis.2d 633, 681 N.W.2d 110. In *Kalal,* we explained that:

> [T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.

***614** *Id.*, ¶ 44. Context is also important when determining the plain meaning of a statute, as is the purpose of the statute and its scope, if those qualities can be ascertained from the language of the statute itself. *Id.*,¶ ¶ 46–48. These are all intrinsic sources for statutory interpretation. *Id.* However, if statutory language is ambiguous, we often consult extrinsic sources such as legislative history. *Id.* at ¶ 48.

¶ 18 The disagreement between the parties in their interpretations of the phrase, "fair market value of the whole property," centers on the words, "whole property." Those two words can be understood by reasonably well-informed individuals in two or more senses. For example, in some circumstances those words could be interpreted as the DOT suggests as requiring all the property affected by the taking to be valued as one unit. Or, "whole property" could be interpreted as the cumulative value that is derived by taking the sum of the individual effects of the taking on each parcel, as Spiegelberg suggests. Accordingly, we conclude that the statute is ambiguous. *Id.*, ¶ 47. [5]

[6] **[7]** **[8]** ¶ 19 The word "whole" is not defined in the statute. Non-technical words that are not defined in a statute are to be given their ordinary meanings. *Town of Lafayette v. City of Chippewa Falls*, 70 Wis.2d 610, 619, 235 N.W.2d 435 (1975). We may consult a dictionary to aid in statutory construction of undefined words. *Id.* We do so for "whole." A dictionary defines ***615** "whole" as: "a complete amount or sum: a number, aggregate, or totality lacking no part, member, or element." *Webster's New Collegiate Dictionary*, 1338 (1977). This definition suggests that the use of the word "whole" when taken in the context of Wis. Stat. § 32.09(6) means that no part of a property is to be left out in determining the property's fair market value. Stated otherwise, an appraisal that complies with the statute must address the complete property, in its totality. Accordingly, the word "whole" does not require that a valuation of contiguous tax parcels employ a particular method of appraisal, but rather that no part of a property affected by a partial taking be omitted from the valuation used to establish just compensation.

¶ 20 Neither the dictionary definition nor our understanding of it establishes which definition of "whole property" is correct because both the DOT's and Spiegelberg's interpretations come within the definition. However, there are other contextual ****648** directives within Wis. Stat. § 32.09 and our interpretation of the compensation that is due to a condemnee that assist us in: (1) choosing the correct appraisal method for Spiegelberg's property and (2) comparing the Spiegelberg appraisal and the DOT appraisal to those statutory directives.

[9] **[10]** ¶ 21 First, to assist in our construction of the statutory language, "fair market value of the whole property," we consider "fair market value," which has a well-established meaning. In *Pinczkowski v. Milwaukee County*, 2005 WI 161, 286 Wis.2d 339, 706 N.W.2d 642, we interpreted "fair market value" as:

> Fair market value is "the amount for which the property could be sold in the market on a sale by an owner ***616** willing, but not compelled, to sell, and to a purchaser willing and able, but not obliged, to buy."

Id., ¶ 18 (citations omitted). We note that Wis. Stat. § 32.09(6) requires that just compensation will take into account the fair

market value. Both appraisals said that they were based on this standard.

¶ 22 Second, we have consistently held that when compensating condemnees in eminent domain proceedings, the "highest and best use" of the property should be considered in the valuation. In *Bembinster v. DOT*, 57 Wis.2d 277, 203 N.W.2d 897 (1973), we explained:

> It is well established that market value in an eminent-domain proceeding is to be based not necessarily on the use to which the property was being put by its owner at the time of taking but rather on the basis of the highest and best use, present or prospective, for which it is adapted and to which it might in reason be applied.

Id. at 283, 203 N.W.2d 897 (citations omitted). The Spiegelberg appraisal (Kielisch Appraisal) was based on the highest and best use that included residential development, as is described more fully below. Kielisch Appraisal, p. 17. The DOT appraisal (Gagnow Appraisal) limited its inquiry of the property's highest and best use to farming. Gagnow Appraisal, pp. 11–12.

¶ 23 Third, Wis. Stat. § 32.09(6) provides two valuation choices: (1) "the fair market value of the property taken" or (2) "the sum determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation." We are required by § 32.09(6) to employ that valuation choice that will provide the "greater" compensation to the property owner. Although both the DOT appraisal and the Spiegelberg ***617** appraisal use the before and after method, the Spiegelberg appraiser also used a before and after method that best fit the unique characteristics of the land. Therefore, although the appraisal with the higher value may not always come within the statutory directive, here it fits the spirit, as well as the letter, of § 32.09(6) and it results in greater compensation to the property owner.

¶ 24 Fourth, the requirement of Wis. Stat. § 32.09(2) that the "most advantageous use" be considered and the concept of "highest and best use" also are helpful to our deciding whether the circuit court correctly selected the Spiegelberg appraisal. In *Clarmar Realty Co. v. Redevelopment Authority of Milwaukee*, 129 Wis.2d 81, 383 N.W.2d 890 (1986), we explained:

> [Section] 32.09, Stats., governs the determination of "just compensation" in eminent domain proceedings in this state. It requires that "[i]n determining just compensation the property sought to be condemned shall be considered on ****649** the basis of its most advantageous use but only such use as actually affects the present market value." ... *The term "most advantageous" use as it appears in this section is synonymous with "highest and best" use ....*

Id. at 90, 383 N.W.2d 890 (emphasis added).

[11] ¶ 25 In *Clarmar*, we also set out three conditions for the valuation of prospective uses:

> [O]ur standards have permitted admission of evidence of prospective land uses in condemnation cases under three conditions: (1) if the prospective use is the "most advantageous" use of a condemned parcel; (2) if the prospective use is "reasonably probable"; and (3) if the prospective use is not imaginary or speculative.

Id. at 91–92, 383 N.W.2d 890 (citing ***618** *Carazalla v. State*, 269 Wis. 593, 598, 70 N.W.2d 208 (1955)). When considering the "highest and best use," we note that it accounts for the effect of such proposed use on the present market value of the property.[6] Therefore, even if an owner chooses not to engage in the most profitable use, such use may nevertheless make the property more valuable to the owner in the event of a sale. This value, based on "highest and best use," is what is to be valued in condemnation. For example, in *Utech v. City of Milwaukee*, 9 Wis.2d 352, 101 N.W.2d 57 (1960), we held that the owner's choice of present use was not conclusive in determining the "most advantageous use" because the present use may be unrelated to the value of the real estate. *Id.* at 357, 101 N.W.2d 57.

¶ 26 Here, the Spiegelberg appraisal considered the property's use for residential large lot development, as well as its current use as a farm. Kielisch Appraisal, p. 18. The consideration of residential development and recreational use was reasonable as each parcel was readily saleable and the zoning permitted those uses. Therefore the proposed uses were not speculative.

[12] ¶ 27 Fifth, Wis. Stat. § 32.09(2), and our past interpretations of its requirements, assist in our analysis. As we mentioned above, § 32.09(2) directs that when determining just compensation, a court should consider the "most advantageous use but only such use as actually affects the present market value." The Spiegelberg appraisal followed this directive. It examined:

> ***619** the highest and best use of the subject property, including an analysis of its present and future utility. [And] [t]he specific location, extent and utility of the land and its Market Value in the real estate market considered as if vacant and available for use.

Kielisch Appraisal, p. 7. Even though all of the property, with the exception of the improvements, had been leased for farming, the Kielisch Appraisal examined the potential use of the parcels, before the taking, as "residential large lot development land for parcels 1–3 and as a recreational land use with a potential of having some residential improvements for parcels 4 and 5." Kielisch Appraisal, p. 18. After the taking, that potential was diminished, not just because of the acres taken, but also because of other factors. Kielisch Appraisal, p. 19–22. For example, the ****650** acres taken from parcel 3 left it "with a fraction of the lands not affected by the Shoreland or the Wetland overlay district zoning," thereby reducing the potential to build upon it. Kielisch Appraisal, p. 19.

¶ 28 The approach used in the Kielisch Appraisal is also consistent with our interpretation in *Van De Hey v. Calumet County*, 40 Wis.2d 390, 161 N.W.2d 923 (1968), of how to determine "the most advantageous use" set out in Wis. Stat. § 32.09(2). *Van De Hey* involved a partial taking under subsec. (6), wherein 5.53 acres were taken from a 186–acre farm. *Id.* at 392, 161 N.W.2d 923. The strip of land taken also had three driveways for public highway access, which the condemnation limited to one public highway access after the taking. *Id.*

¶ 29 During the course of the trial, the expert for Van De Hey testified about the before and after values of the farm, and in doing so, he took into account the sales of several parcels of land from one-half to five acres as residential lots in the vicinity of the Van De ***620** Hey property. *Id.* at 394, 161 N.W.2d 923. Objection was made that this was improper because "the value of a total piece of property could not be determined by taking the cumulative value of the lots into which the parcel could be divided." *Id.* We disagreed, and held that the valuation method was proper because Van De Hey's expert was able to establish "the potential residential use of that part of the farm which could be put to such residential use if the access had not been restricted." *Id.* In addition, this testimony was held appropriate under Wis. Stat. § 32.09(2). As we explained:

> The measure of compensation for a partial taking as set forth in sec. 32.09(6)(b), Stats., contemplates the damage to the property from the deprivation or restriction of access to the highway from abutting land, and sec. 32.09(2), Stats., provides the most advantageous use of the property which actually affects the present market value shall be used in determining just compensation. A foundation for this testimony was made by the evidence of the adaptability of the land to subdividing.

Id. at 395, 161 N.W.2d 923. The Spiegelberg appraisal is consistent with *Van De Hey;* the DOT appraisal is not.

¶ 30 We derive the following conclusions from our statutory analysis of the terms chosen by the legislature: (1) "fair market value" relates to the price a willing buyer would pay to a willing seller; (2) the requirement to consider the "whole property" does not require that an individual assessment always treat contiguous, commonly owned tax parcels separately or as a single unit, but requires that no portion of the property be left out of an assessment; (3) the requirement of Wis. Stat. § 32.09(2) that a property's "most advantageous use but only such use as actually affects ***621** the present market value" be considered as a part of a valuation is linked to the determination of the "fair market value" required by § 32.09(6); and (4) how to apply the language of § 32.09(6) to arrive at just compensation depends upon considerations related to each property's individual characteristics.

[13] **[14]** **[15]** ¶ 31 Because Wis. Stat. § 32.09(6) does not specify whether contiguous, commonly-owned tax parcels should be separately appraised or appraised as a collective unit, we conclude that when the property's "highest and best" use that affects its present market value is most appropriately appraised by considering the contiguous tax parcels separately, that is the appropriate appraisal method.

Conversely, when, according to the above-addressed rules, the "highest and best use" is more adequately represented through an appraisal of the property as a single unit, ****651** that approach is the one that is appropriate. Which method is required by § 32.09(6) will depend on the unique qualities of the specific property affected by the taking and its "fair market value." The ascertainment of the property's "fair market value" depends upon the common law definition of "highest and best use," which we have determined is synonymous with the "most advantageous use" set out in § 32.09(2). And finally, just compensation is to take into account the principle of *Standard Theatres:*

> [W]e note that this court has recognized that the rule of strict construction should be applied to the condemnor's power and to the exercise of this power. This is because the exercise of the power of eminent domain has been characterized as an "extraordinary power," and the rule of strict construction is intended to benefit the owner whose property is taken against his or her will. Conversely, *statutory provisions in favor of* ***622** *the owner, such as those which regulate the compensation to be paid to him or her, are to be afforded liberal construction.*

Standard Theatres, 118 Wis.2d at 742–43, 349 N.W.2d 661 (citations omitted; emphasis added).

[16] ¶ 32 In summary, it is undisputed that at the time of condemnation each of the tax parcels could have been sold as a separate individual property. Therefore, such sales were a readily available prospective use, in conformity with *Van De Hey* and *Carazalla.* Sale of the property as separate tax parcels would have been more advantageous, or the highest and best use, as compared with the sale of the property as a single unit. It also would have garnered a greater payment for Spiegelberg. That she had not yet used the land as separate tax parcels or for a venture other than farming is not dispositive, as we explained in *Utech.* It is undisputed that the before-and-after appraisal that separately considered each of the individual tax parcels favored Spiegelberg, in conformity with *Standard Theatres.* According to these factors, the circuit court correctly determined that the Spiegelberg appraisal complied with Wis. Stat. § 32.09(6) and the DOT appraisal did not. [7]

***623** III. CONCLUSION

¶ 33 We conclude that Wis. Stat. § 32.09(6), which determines the method by which just compensation is to be determined for a partial taking, permits a flexible approach such that the individual characteristics of each property may be considered, according to each property's highest and best use, in order that the property owner receives just compensation for the taking. Because valuing the tax parcels separately produced a value consistent with the most advantageous use of this property, the circuit court correctly chose the method of appraisal employed by Bernice Spiegelberg's appraiser. Therefore, we affirm the decision of the circuit court that awarded $84,200 to the ****652** property owner. [8]

The judgment and order of the circuit court is affirmed.

¶ 34 ANN WALSH BRADLEY, J. (*dissenting*).
I agree with the majority's flexible approach in determining which is the correct method of valuation. It depends on the facts which address the individual characteristics and unique qualities of the property. I likewise substantially agree with the legal standards the majority sets forth. However, I do not join the majority's ***624** application of those standards here because it is impossible to meaningfully apply them on the inadequate record before us.

¶ 35 We cannot determine on this record what is the most advantageous use of Spiegelberg's property. Without more, we cannot decide whether it is reasonably probable that the separate parcels will be used for residential or recreational use.

¶ 36 The problem in this case arises because on the morning of the first day of the jury trial, before any evidence was admitted, the circuit court chose the exclusive method of valuation. The circuit court took no evidence, and it made no determinations with respect to the applicable legal standards set forth by the majority.

¶ 37 Further proceedings are necessary to determine whether the individual characteristics and unique qualities of the property should preclude either Spiegelberg's valuation method or the DOT's. I would therefore reverse the circuit court and remand for those proceedings. Spiegelberg could

then seek to show that the use she proposes is the most advantageous and is reasonably probable, and the circuit court could apply the standards articulated today by the majority. Accordingly, I respectfully dissent.

I

¶ 38 I substantially agree with the legal standards set forth by the majority. It correctly determines that just compensation in this case is pegged to "fair market value of the whole property" pursuant to Wis. Stat. § 32.09(6) (2003–04).[1] Majority op., ¶ 21.

***625** ¶ 39 In addition, the majority correctly recognizes that the "most advantageous use" standard should apply:

> In determining just compensation the property sought to be condemned shall be considered on the basis of its most advantageous use but only such use as actually affects the *present* market value.

Section 32.09(2) (emphasis added); *see also* majority op., ¶ 24 & n. 6.

¶ 40 The majority also correctly acknowledges that the case of *Clarmar Realty Co. v. Redevelopment Authority*, 129 Wis.2d 81, 383 N.W.2d 890 (1986), provides the test for the types of potential uses that may be considered in determining what is the most advantageous use. *See* majority op., ¶¶ 24–25. Under *Clarmar*, the prospective use must be:

(1) the most advantageous use;

(2) reasonably probable; and

****653** (3) not imaginary or speculative.

Id., ¶ 25, 383 N.W.2d 890 (citing *Clarmar*, 129 Wis.2d at 91–92, 383 N.W.2d 890).

¶ 41 In addition, the majority correctly determines that the application of § 32.09(6) to arrive at just compensation depends upon the facts presented and each property's individual characteristics. *See* majority op., ¶ 30. Likewise, it correctly determines that whether contiguous, commonly-owned parcels should be valued as a unit or separately to arrive at just compensation will depend upon the unique qualities of the specific property affected by the taking. *Id.*, ¶ 31, 383 N.W.2d 890.

***626** II

¶ 42 Having set forth these standards, the majority nonetheless fails to meaningfully apply them. This is not surprising because the inadequate record before us makes that impossible.

¶ 43 In order to see how the majority went wrong, it is important to first understand precisely what did and did not occur in the circuit court proceedings.

¶ 44 The DOT filed a motion in limine seeking to prohibit Spiegelberg from introducing evidence or making arguments using a calculation of the property's value "based upon the existence of hypothetical subdivision of such property." Spiegelberg opposed the motion, asserting "there is nothing 'hypothetical' about the division of [the] property." The parties each submitted proposed jury instructions and special verdicts reflecting their respective theories of valuation.

¶ 45 On the first day scheduled for trial, the circuit court briefly heard argument from the parties with respect to the DOT's motion. With little explanation, the court tentatively denied the motion, stating that it would "give that a little more thought at this point."

¶ 46 The circuit court then conducted an in-chambers conference that was not recorded and that addressed the proposed jury instructions. When the court and parties were back on the record, the court recounted:

> Okay. And we had an in-chambers conference ... and my ruling still would be that as far as the jury instructions would be consistent with my prior ruling as far as denying the motion in limine and going essentially with [counsel for Spiegelberg]'s jury instructions ***627** as to the jury looking at separate tax parcels as far as the diminution of value for his clients individually. And I guess we are kind of contemplating here as to what's the next step, essentially whether it's an

> offer of proof from both sides and just how we want to proceed.

Spiegelberg's counsel explained that he and the DOT had agreed that under the court's ruling, only Spiegelberg had relevant evidence to offer on the question of damages. Counsel continued:

> [T]here was basically going to be a stipulation by us and that we understand the Court's ruling and that if that ruling is affirmed so that if these are to be looked at as if it is appropriate to look at as separate tax parcels, then the plaintiffs' number would control ... and if the court of appeals says no, they have to be treated as a whole all together, then it would be the [DOT]'s evidence.

¶ 47 At that point in the proceedings, the circuit court indicated its approval of the parties' stipulation and set forth its rationale for denying the DOT's motion in limine:

> Yes, that's an excellent concept there. Essentially, I just wanted to make part of the record *I see no distinguishing traits of a certified survey map versus a separate tax parcel.* That's part of my ****654** reason and rationale for that.[2] So I guess we have a transcript here. I don't know if we need to make anything more as a matter of record other than to have a stipulation and order then.

(Emphasis added.)

¶ 48 The circuit court did not rule on the most advantageous use of the property. It did not inquire into ***628** whether residential development or recreational use of Spiegelberg's property as separate parcels was reasonably probable. It did not examine the individual characteristics or unique qualities of the property. The court took no evidence with respect to these legal standards that the majority sets forth. It did not make any findings of fact. Rather, its determination came down to one thing: It saw "no distinguishing traits of a certified survey map versus a separate tax parcel."

¶ 49 Over two months later, the parties filed a brief stipulation. Only a few undisputed facts were presented. The recitals in the stipulation included that "the subject property is comprised of 150.36 (gross) acres of agricultural land held as five contiguous separate tax parcels by the plaintiff."[3]

¶ 50 The three-page, double-spaced stipulation primarily consisted of the parties' offers of proof and a recitation of the procedural history of the case. It incorporated the report of Spiegelberg's appraiser as ***629** her offer of proof, and stated that as a further offer of proof she "would establish that before the taking, the five tax parcels either had direct access to existing roads or could have been provided access by the plaintiff through property owned by plaintiff."

¶ 51 The stipulation also incorporated the report of the DOT's appraiser as its offer of proof, and stated that as a further offer of proof it "would establish that the subject property had not been transferred for five years prior to the taking, [and] had been used in its consolidated form, as a dairy farm, which at the time of the taking the plaintiff had leased, with the exception of the residence, for use as a farm."

¶ 52 The circuit court entered judgment on the stipulation, and the DOT appealed.

¶ 53 Having detailed what did and did not occur in the circuit court proceedings, I turn to the majority's analysis. The majority concludes that "the circuit court correctly determined that the Spiegelberg appraisal complied with Wis. Stat. § 32.09(6) and the DOT appraisal did not." Majority op., ¶ 32. Putting aside whether the circuit court can be said to have actually made any such determination, the majority's conclusion largely rests on two determinations, neither of which holds water on the inadequate record before us.

¶ 54 First, the majority determines that the Spiegelberg appraisal's "consideration ****655** of residential development and recreational use" was "reasonable" because each parcel was "readily saleable" and the zoning "permitted" those uses. *Id.*, ¶ 26, 383 N.W.2d 890. Therefore, reasons the majority, the proposed uses were "not speculative." *Id.* In making this determination, the majority first introduces the concept of "readily saleable" without defining it, thereby begging the question of whether ***630** this is the same standard as that required under *Clarmar:* "reasonably probable."

¶ 55 If the standards are the same, then the majority has apparently concluded that Spiegelberg's proposed uses are

"reasonably probable" as a matter of law.[4] Based on what facts?

¶ 56 Second, the majority determines that Spiegelberg's appraisal "followed [the] directive" that just compensation should be based on the most advantageous use. Majority op., ¶ 27. This is a curious determination for an appellate court to make on the record here because the parties' respective appraisals show that the most advantageous use remains in dispute.

¶ 57 Spiegelberg's appraisal report states that "[t]he land use [in the area] is changing from agricultural to residential. There are several newer residential developments starting in the area." In the report, her appraiser opines that "[t]he Highest and Best Use of the property lying to the south of [a highway cutting through the northernmost parcel] is for residential development...."

¶ 58 The DOT's appraisal report, in contrast, states that "[a]t this time the neighborhood is considered to be in the stable to slow growth life stage." The DOT's appraiser opines that whether vacant or as currently improved the highest and best use is for "agricultural and recreational use." It also states that "[a] portion of the subject is in a designated flood plain" ***631** and "[a] portion of the subject is in a designated wetland." In addition, the DOT's appraisal report notes that in order for the land to be used for residential purposes, "[p]rivate systems would be required; well for water and a mound, conventional or holding tank for sewerage."

¶ 59 The majority is apparently concluding, as a matter of law, that the most advantageous use of the property as affects *present* value is as separately-sold parcels for residential development or recreational use. This requires an unspoken finding by the majority that the report of Spiegelberg's appraiser is credible while the report of the DOT's appraiser is not. Even if this court could make such a finding, how can the majority make this finding on the record before us? What facts support it?

¶ 60 Moreover, the record leaves unclear the significance of some of the few undisputed facts. For example, the parties stipulated that Spiegelberg's property is divided into five tax parcels. Also, Spiegelberg conceded at oral argument that there has not been a platted subdivision of the property or a certified survey. The majority does not explain the significance or insignificance of these facts with respect to whether the prospective use of the land for residential development or recreational purposes is reasonably probable.

¶ 61 It appears the record is silent as to the significance or insignificance of these facts. At oral argument, counsel for the DOT attempted to provide some explanation. It does not support the majority's conclusion:

> ****656** There is no evidence in the record as far as I'm aware that would support a determination by the court—by this court or by the trial court—that the ***632** parcels needed no further permits. It's true that the properties could be sold—theoretically.... The tax key number as far as I'm aware really doesn't mean anything per se with regard to the property. It is a methodology, which is developed by—as far as I'm aware—by ... the assessor for purposes of identifying the property.

¶ 62 In their stipulation, the parties recognized the distinct possibility that the record might be inadequate for a reviewing court to reach the conclusion the majority does, that Spiegelberg's appraisal is admissible evidence as a matter of law and the DOT's is not. One of the few paragraphs in the stipulation representing the substance of the parties' agreement provides as follows:

> If, upon appeal it is determined insufficient facts exist to establish the correct jury instructions and special verdicts for the damage analysis before and after the taking, the matter will be remanded to the circuit court for further proceedings consistent with the ruling by the appellate court.

¶ 63 Indeed, Spiegelberg even concedes in her brief that the only information in the record as to the most advantageous use is contained in the appraisal reports. She also recognizes that a remand for further factual development is necessary if an inquiry into most advantageous use is required:

> Other than what the appraisers describe as the Highest and Best Use, *the record contains no information about what might be the most*

> *advantageous use for the subject property.* The only thing addressed at the hearing was the existing use. *The trial court was obviously not concerned about this issue since it reached its ruling without making any inquiry about the most advantageous use.* Spiegelberg also contends that the ruling by the trial court and the position which it supports in this ***633** case does not rely upon such a determination. *In the event this Court, though, believes that a ruling on this issue does require an inquiry into the most advantageous use for the subject property, then this case will need to be remanded to the trial court for testimony on that use.*

(Emphasis added.)

¶ 64 The final statement from this passage in Spiegelberg's brief is sage advice. The majority should have followed it.

¶ 65 At oral argument Spiegelberg reiterated this passage from her brief, in response to questioning about the lack of an evidentiary hearing, adequate record, or circuit court determination as to the issue of most advantageous use. Counsel for Spiegelberg said: "I understand that and it's partly because of what you're addressing right now why I put that passage in our papers *because I can certainly see the court having a question about that.*" (Emphasis added.) Similarly, when asked what rule should result from this case, counsel said:

> The rule would be one where this court would recognize the smallest legal division that's possible ... *provided that there was an inquiry into the highest and best use, and that that subdivision was consistent with that highest and best use.*

(Emphasis added.)

¶ 66 Unlike the majority, I recognize that the record is inadequate for this court to meaningfully apply the proper legal standards. We cannot determine with any confidence whether Spiegelberg's proposed use of the land as separate parcels is "reasonably ****657** probable" and not "speculative." *Clarmar*, 129 Wis.2d at 92, 383 N.W.2d 890. On this record we cannot determine whether the ***634** proposed use is the "most advantageous use but only such use as actually affects the *present* market value." Section 32.09(2) (emphasis added). The circuit court, not this court, should resolve the factual disputes raised by the parties' appraisal reports as to the most advantageous use. Additional proceedings are necessary to determine whether the individual characteristics and unique qualities of the property should preclude either Spiegelberg's valuation approach or the DOT's.

¶ 67 I would therefore reverse the circuit court and remand for further proceedings. At those proceedings, the circuit court could apply the proper legal standards after Spiegelberg has an opportunity to introduce evidence to support her theory that her proposed use of the property is the most advantageous use and is reasonably probable. "If an owner of land wishes to assert that the land being taken in eminent domain is not at the present time being used at its highest potential, *it is incumbent upon [the owner] to establish this fact.*" Julius L. Sackman, 4 *Nichols on Eminent Domain* § 12B.14, at 12B–139—12B–140 (3d ed.2005) (emphasis added).

¶ 68 Ultimately the majority's analysis is unsatisfying at best. On the inadequate record before us, the proper legal standards simply cannot be meaningfully applied. I therefore respectfully dissent.

¶ 69 I am authorized to state that Chief Justice SHIRLEY S. ABRAHAMSON joins this dissent.

All Citations

291 Wis.2d 601, 717 N.W.2d 641, 2006 WI 75

Footnotes

1 All further references to the Wisconsin Statutes are to the 2003–04 version unless otherwise noted.

2 The facts are taken from the stipulation of the parties.

3 The Kielisch Appraisal included a "part taken analysis" whereby the value of the taken land was also analyzed separately. That analysis resulted in a valuation for the taking of $62,200. Because this statutory choice of appraisal method under Wis. Stat. § 32.09(6) is less than the other statutory choice, a "before and after" valuation, it was not chosen.

4 The unit rule is also discussed in *Green Bay Broadcasting Co. v. Redevelopment Authority of Green Bay,* 116 Wis.2d 1, 11, 342 N.W.2d 27 (1983) (explaining that "[t]he unit rule is designed to protect the interests of the condemnor.... The condemnees ... are indeed constitutionally entitled to just compensation, but contracts between the owners of different interests in the land should not be permitted to result in a total sum which is in excess of the whole value of the undivided fee.").

5 Even though we may use legislative history as an assist in interpreting an ambiguous statute, *State ex rel. Kalal v. Circuit Court for Dane County,* 2004 WI 58, ¶ 48, 271 Wis.2d 633, 681 N.W.2d 110, it does not assist us here because the legislature provided no history for its insertion of "fair market" and "whole" in the 1961 amendments to Wis. Stat. § 32.09(6).

6 Wisconsin Stat. § 32.09(2), which requires consideration of the most advantageous use that is synonymous with highest and best use, provides:

> In determining just compensation the property sought to be condemned shall be considered on the basis of its most advantageous use but only such use as actually affects the present market value.

7 We appreciate the dissenting opinion's concern with the status of the relatively undeveloped record. Dissent, ¶¶ 42–67. For example, the dissent is concerned with the lack of a "platted subdivision of the property or a certified survey." *Id.* at ¶ 60. However, this concern is misplaced. The dispute in this case was not about whether Spiegelberg could create a subdivision with her property. But rather, whether valuing the five separate parcels individually or valuing them as a unit satisfied the valuation direction of Wis. Stat. § 32.09(6) that "the fair market value of the whole property" be considered. The State said the statute required valuing the five parcels as one unit and Spiegelberg said valuing each separate tax parcel and then summing those values satisfied the statute. We agreed with Spiegelberg.

8 Spiegelberg has moved to strike the portion of the State's reply brief that raises Spiegelberg's alleged failure to comply with Wis. Stat. § 32.05(5) because this issue was not raised prior to the filing of the State's reply brief. We held Spiegelberg's motion in abeyance and addressed the § 32.05(5) issue at oral argument with both Spiegelberg and the State. We do not rely on § 32.05(5) in our opinion. Accordingly, we deny Spiegelberg's motion to strike.

1 All references to the Wisconsin Statutes are to the 2003–04 version.

2 If the circuit court had some other reason or rationale, it is not clear from the record.

3 The other undisputed facts in the stipulation were as follows:

(A) "The five tax parcels are contiguous except for the two roads that cut through the parcels as shown in Exhibit A."

(B) "[T]he taking consisted of a total fee acquisition of 11.08 acres (9.21 acres of new right-of-way and 1.87 acres of an existing right-of-way) from three of the five separate legal parcels, as shown in Exhibits B and C."

(C) Exhibit A was a one-page aerial map of the property before the taking. Exhibit B was a one-page aerial map of the property after the taking. Exhibit C was three pages of DOT project plat maps.

The majority's use of the stipulation conflates undisputed facts with disputed facts. The first two of seven "facts" in ¶ 6 of the majority opinion actually come from Spiegelberg's offer of proof, which was competing with the DOT's offer of proof.

4 If the standards are not the same, then it remains unclear why the majority opinion has failed to apply the reasonably probable standard. Perhaps the answer is that the proper standard cannot be meaningfully applied on the inadequate record before us.

129 Wis.2d 81
Supreme Court of Wisconsin.

CLARMAR REALTY CO., INC.,
Plaintiff-Respondent-Petitioner,
v.
REDEVELOPMENT AUTHORITY OF the
CITY OF MILWAUKEE, Defendant-Appellant.

No. 84-1085.
|
Argued Oct. 28, 1985.
|
Opinion Filed April 2, 1986.

Owner of condemned parcel, being used as truck terminal, brought action for additional compensation. The Circuit Court, Milwaukee County, Thomas J. Doherty, J., held that the fair market value of truck terminal was the value of the terminal in an integrated use with adjacent parcel of land owned by another, less the cost of acquiring that parcel and the city appealed. The Court of Appeals, 125 Wis.2d 567, 371 N.W.2d 429, reversed and property owner appealed. The Supreme Court, William A. Bablitch, J., held that: (1) where most advantageous use of condemned parcel of land involves its prospective, integrated use with land of another, court may consider that prospective, integrated use in determining fair market value of condemned parcel, (2) unavailability of adjacent parcel for assemblage due to its prior condemnation by city cannot be dispositive of whether assemblage is reasonably probable; (3) finding that it was reasonably probable that a buyer would combine condemned property with portion of adjacent parcel was sufficiently supported by evidence; and (4) determination of value of condemned property in integration with adjacent parcel, after subtraction of cost of acquiring that parcel, was not clearly erroneous.

Decision of Court of Appeals reversed and judgment of circuit court reinstated.

West Headnotes (6)

[1] Eminent Domain
Value for Special Use
148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k129 Taking Entire Tract or Piece of Property
148k134 Value for Special Use
"Assemblage" doctrine permits consideration of evidence of prospective use of condemned parcel that requires integration of condemned parcel with another parcel if integration of lands by prospective purchaser is reasonably probable for purposes of determining fair market value of condemned property.

16 Cases that cite this headnote

[2] Eminent Domain
Value for Special Use
148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k129 Taking Entire Tract or Piece of Property
148k134 Value for Special Use
Court may determine fair market value of condemned parcel of land in combination with land or lands of another in a prospective, integrated use if: (1) prospective, integrated use is "most advantageous" use of condemned land; (2) "most advantageous" use can be achieved only through combination with another parcel or parcels; (3) combination with another parcel or parcels is "reasonably probable"; and (4) the prospective, integrated use is not speculative or remote. W.S.A. 32.09; U.S.C.A. Const.Amends. 5, 14.

6 Cases that cite this headnote

[3] Eminent Domain
Value for Special Use
148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k129 Taking Entire Tract or Piece of Property
148k134 Value for Special Use
"Just compensation" of owner of condemned land must include compensation for highest and most profitable use for which property is adaptable, even if that use requires combination of land with another parcel. W.S.A. 32.09; U.S.C.A. Const.Amends. 5, 14.

1 Cases that cite this headnote

[4] Eminent Domain

Value for Special Use

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k129 Taking Entire Tract or Piece of Property
148k134 Value for Special Use

Where highest and most profitable use for which condemned property is adaptable requires combination of property with another parcel, unavailability of adjacent parcel for assemblage due to its prior condemnation by city cannot be dispositive of whether assemblage is "reasonably probable." W.S.A. 32.09; U.S.C.A. Const.Amends. 5, 14.

9 Cases that cite this headnote

[5] Eminent Domain

Weight and Sufficiency

148 Eminent Domain
148III Proceedings to Take Property and Assess Compensation
148k199 Evidence as to Compensation
148k205 Weight and Sufficiency

Finding that it was reasonably probable that prospective buyer of condemned property would combine it with portion of adjacent property was sufficiently supported by evidence in action to determine value of condemned property.

1 Cases that cite this headnote

[6] Eminent Domain

Nature and Extent of Taking or Damage

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k149 Amount Awarded in General
148k149(6) Nature and Extent of Taking or Damage

Determination that value of condemned truck terminal in integration with adjacent parcel, after subtraction of cost of acquiring that parcel, was $213,400 was not clearly erroneous in that cost of acquiring adjacent parcel included enhancement of value of adjacent parcel which would arise from integrated use.

2 Cases that cite this headnote

Attorneys and Law Firms

****891 *83** Stephen T. Jacobs, Milwaukee, argued, for plaintiff-respondent-petitioner; Anne Willis Reed, Jerome M. Janzer and Reinhart, Boerner, Van Deuren, Norris & Rieselbach, S.C., Milwaukee, on brief.

Charles R. Theis, Asst. City Atty., argued, for defendant-appellant; Grant F. Langley, City Atty., on brief.

Opinion

WILLIAM A. BABLITCH, Justice.

We review an unpublished decision of the court of appeals filed on April 9, 1985, 125 Wis.2d 567, 371 N.W.2d 429, reversing the judgment of the circuit court for Milwaukee county, Judge Thomas J. Doherty, presiding.

Clarmar Realty Co., Inc., (**Clarmar**) appeals, arguing that in a condemnation proceeding the fair market value of a truck terminal which it owns should be the value of the terminal in an integrated use with an adjacent parcel of land owned by another, less the cost of acquiring that parcel. The circuit court accepted this argument, ordering the Redevelopment Authority of ***84** the City of Milwaukee (Authority) to compensate **Clarmar** on this basis. The court of appeals reversed.

We hold that a court may determine the fair market value of a condemned parcel of land in combination with the land of another in a prospective, integrated use if: 1) the prospective use is the "most advantageous use" of the condemned land; 2) the "most advantageous use" of the land can be achieved only through combination with another parcel or parcels; 3) combination with another parcel or parcels is "reasonably probable; " and 4) the prospective, integrated use is not speculative or remote. Because we conclude the circuit court appropriately determined the fair market value of the condemned parcel of land in this case, we reverse the court of appeals and reinstate the judgment of the circuit court.

The issues for review are: 1) where the "most advantageous" use of a condemned parcel of land involves its prospective,

integrated use with the land of another, may a court consider that prospective, integrated use in determining the fair market value of the condemned parcel; and 2) if so, did the circuit court correctly determine the fair market value of the condemned parcel in this case?

On April 22, 1983, the Authority condemned **Clarmar's** truck terminal, land and supporting buildings. When the Authority and **Clarmar** disagreed on the amount of compensation due, the Authority submitted to **Clarmar** a jurisdictional offer to purchase in the amount of $164,600. **Clarmar** provisionally accepted that amount, but appealed to the circuit court for additional compensation.

****892** ***85** At trial the key issue was the fair market value of **Clarmar's** terminal on the date of its condemnation. On that date the terminal had 22 docking doors, 9 on the east and 13 on the north and west sides. The nine doors facing east were 58 feet from the line separating **Clarmar's** property from an adjacent parcel of land, which the Authority had condemned in 1981. All 22 doors were adapted to perpendicular docking by long and short trucks, but long trucks, which require more space to maneuver into a perpendicular position, could dock at the east doors only by first crossing onto the adjacent parcel to turn. According to testimony of **Clarmar's** president, the owner of the adjacent parcel had permitted trucks to use a 25 foot strip of his parcel as a turning area for a number of years.

Finding that the evidence supported **Clarmar's** claim that the value of its terminal was enhanced by the likelihood that a buyer would assemble its parcel with a strip of the adjacent parcel in order to obtain full use of the terminal, the circuit court awarded **Clarmar** $48,800. Its award represented the difference between the value of the terminal in full use ($228,800), less the cost of acquiring the other parcel ($15,400) and the Authority's jurisdictional offer ($164,600). It also awarded **Clarmar** interest, attorneys' fees and other litigation costs.

The Authority appealed. The court of appeals held that a court may, in an appropriate case, consider a prospective, integrated use of a condemned parcel with the land of another in determining the fair market value of the parcel, but concluded that this was not an appropriate case to do so. **Clarmar** appealed the decision and we granted its petition for review.

***86** *Issue 1: Where the "most advantageous" use of a condemned parcel of land involves its prospective, integrated use with the land of another, may a court consider that prospective, integrated use in determining the fair market value of the condemned parcel?*

Clarmar urges this court to adopt an approach to valuation known as the "doctrine of assemblage." As **Clarmar** construes this approach to valuation, it permits valuation of a parcel of land at condemnation according to a use of the land which requires integration with other parcels when two conditions are met: the integrated use is the "most advantageous" use of the property and the integration of the parcel with another parcel is "reasonably probable." According to **Clarmar**, this approach does not permit valuation for a speculative use, which it defines as a use which a reasonable buyer would not consider when determining fair market value.

The Authority concedes that evidence of assemblage may enhance the value of a parcel of land when the evidence shows a "reasonable probability" that a buyer would combine a condemned parcel with another parcel in an integrated use and therefore would be willing to pay a greater price for it. The Authority also concedes that its present ownership of the parcel adjacent to **Clarmar's** terminal does not preclude the assemblage approach to valuation. It argues, however, that in this case the court applied the assemblage approach incorrectly by setting the value of **Clarmar's** parcel as though it included part of the adjacent parcel and as though that added land were used for a truck turning area, rather than by merely determining how the probability of future combination of the parcels enhanced the fair market value of the land **Clarmar** ***87** owned. According to the Authority, the circuit court's approach impermissibly inflated the value of **Clarmar's** terminal.

This court must decide questions of law independently without deference to the decisions of the trial court or the court of appeals. *Ball v. District No. 4, Area Board*, 117 Wis.2d 529, 537, 345 N.W.2d 389 (1984). Accordingly, we review the decision of the court of appeals in order to determine whether a court may consider the combination of a condemned parcel with another parcel for a prospective, integrated use in order to determine the fair market value of the condemned parcel.

****893** Traditionally, the doctrine of assemblage has been defined as follows: "[w]here the highest and best use of separate parcels involves their integrated use with the lands of another, such prospective use may be properly considered in fixing the value of the property if the joinder of the parcels

is reasonably practicable." 4 Sackman, *Nichols on Eminent Domain* 12.3142(1), pp. 12-329 (3d ed. 1978).

The assemblage approach permits a property owner to introduce evidence in a condemnation proceeding that the fair market value of its land is enhanced by its probable assemblage with other parcels. Generally, in jurisdictions which allow consideration of assemblage, the courts admit such evidence if combination with other parcels for a more profitable use is reasonably likely, whether or not the owner of the condemned property holds the other parcels. *See* *United Gas Pipe Line Co. v. Becnel*, 417 So.2d 1198 (La.App.1982); ***88** *Cain v. City of Topeka*, 4 Kan.App.2d 192, 603 P.2d 1031 (1979); *State v. Long*, 344 So.2d 754 (Ala.1977); and *City of Indianapolis, Dept. of Met. Dev. v. Heeter*, 171 Ind.App. 119, 355 N.E.2d 429 (1976). Specifically, these courts admit such evidence if a prospective, integrated use is the "highest and best use" of the land, can be achieved only through combination with other parcels of land, and combination of the parcels is "reasonably probable". *United Gas Pipe Line Co.* at 1202; *Cain*, 603 P.2d at 1033; *Long* at 759; and *City of Indianapolis* 355 N.E.2d at 434. Furthermore, these courts will not consider evidence of a prospective, integrated use which is speculative or remote. *United Gas Pipe Line Co.* at 1203; *Cain* 603 P.2d at 1033; and *Long* at 760. For example, in *Long* the Alabama court reviewed a probate court's award of damages and compensation for the condemnation of 96 acres of land for highway use. The court approved the admission of testimony that the condemned land, which had an unspecified current use, formed a prime industrial site in combination with other parcels. *Id.* It stated that the fact that the adjacent property was held by another did not of itself make combined use of the parcels speculative. Without expressly adopting the doctrine of assemblage, it concluded that a "reasonable possibility" of combination with another parcel for a more profitable use was a circumstance which could affect the market value of the condemned land. *Id.* at 759.

There is support for allowing a court to consider evidence of assemblage in condemnation proceedings in federal constitutional law and in prior standards set by this court.

Under the fifth and fourteenth amendments to the United States Constitution, a state may not appropriate private property for a public use through the power of eminent domain unless it pays the owner of the property ***89** a "full and exact equivalent" for the property. *Olson v. United States*, 292 U.S. 246, 254-55, 54 S.Ct. 704, 708, 78 L.Ed. 1236 (1934). In *Olson* the Supreme Court addressed the question whether the "full and exact equivalent," or fair market value, of a condemned parcel of land could be enhanced by the possibility of its more profitable use in combination with other parcels. It wrote:

> "Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. 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, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held.... *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."* (Citations ****894** omitted.) (Emphasis added.) *Id.* at 255-56, 54 S.Ct. at 708-09.

Federal constitutional law also requires that the value of condemned property be set without reference to the effects of condemnation on market conditions. Interpreting the fifth amendment in *Almota Farmers Elevator & Whse. Co. v. U.S.*, 409 U.S. 470, 93 S.Ct. 791, 35 L.Ed.2d 1 (1973), the Supreme Court stated that the constitutional requirement for "just compensation" in a condemnation proceeding is met by payment of what a willing, private buyer would pay for the property. *Almota* at 474, 93 S.Ct. at 794. The ***90** Court also stated that the government may not condemn lands in such a manner that the position of the owner is worse than it was prior to the condemnation. *Id.* at 478, 93 S.Ct. at 796. In *Almota* it held that the federal government could not reduce the compensation due the owner of a condemned leasehold and its improvements on grounds that condemnation had ended the renewability of the lease and the utility of the improvements. *Id.*

In accord with federal requirements, sec. 32.09, Stats., governs the determination of "just compensation" in eminent domain proceedings in this state. It requires that "[i]n determining just compensation the property sought to be condemned shall be considered on the basis of its most advantageous use but only such use as actually affects the present market value." Section 32.09(2). The term "most advantageous" use as it appears in this section is synonymous

with "highest and best" use as it appears in statements of the assemblage approach in other jurisdictions.

This court has clarified the statutory requirement of compensation on the basis of the "most advantageous" use by stating:

> " 'Any use to which it is reasonable to infer from the evidence that the land may be put to in the near future, or within a reasonable time, may properly be considered; and compensation may be awarded upon the basis of its most advantageous use. But the future uses considered must be so reasonably probable as to affect the present market value. Imaginary or speculative uses or value must be disregarded.' " *Carazalla v. State*, 269 Wis. 593, 598, 70 N.W. 208 (1955).

In *Carazalla* we held that a court could admit testimony of expert witnesses who considered the potential ***91** commercial value of a farm in determining its fair market value at condemnation, even though the land was not in commercial use, if commercial use were "reasonably probable." *Id.* 269 Wis. at 598, 70 N.W. 208. At the same time, we emphasized our long-standing prohibition against determining the value of land based on "remote and future" events. *Id.* at 598-99, 70 N.W. 208.

Similarly, in a later condemnation case, we stated that the determination of market value may include consideration of prospective land uses which are "reasonably probable." *Bembinster v. State*, 57 Wis.2d 277, 283, 203 N.W.2d 897 (1973). In *Bembinster* we held that a court could admit evidence of the "reasonable probability" of rezoning which would end restrictions on the use of a parcel of land and thus permit a more profitable use. *Id.* at 283, 203 N.W.2d 897.

More recently, we stated that "(e)very element which affects value and which would influence a prudent purchaser should be considered" in the valuation of property at condemnation. *Herro v. Dept. of Natural Resources*, 67 Wis.2d 407, 420, 227 N.W.2d 456 (1975). In *Herro* we held that a court could admit evidence concerning the likelihood that privately-imposed restrictions on the use of a parcel of land could be removed. *Id.* We concluded that the possibility of removing restrictions presented a question of fact regarding how a willing purchaser would value the land. *Id.*

Our approach to valuation of condemned land since *Carazalla* closely parallels the standards for compensation enunciated by the Supreme Court in *Olson.* Like the federal standards, our standards have permitted admission of evidence of prospective land uses in condemnation cases under ****895** three conditions: 1) if the ***92** prospective use is the "most advantageous" use of a condemned parcel; 2) if the prospective use is "reasonably probable;" and 3) if the prospective use is not imaginary or speculative. *Carazalla*, 269 Wis. at 598, 70 N.W. 208.

[1] The assemblage doctrine permits consideration of evidence of a prospective use that requires integration of the condemned parcel with another parcel if integration of the lands is "reasonably probable." In essence, the doctrine expands our second condition to include prospective uses that require combination of lands, while it preserves the limitation that the prospective event affecting land value be "reasonably probable."

[2] We conclude that allowing a court to consider a prospective, integrated use with the land of another in determining the fair market value of a parcel is consistent with our standards for valuation of condemned land and adapts them to settings in which potential assemblage of lands, as a matter of fact, does affect the fair market value of the land. Accordingly, we hold that a court may determine the fair market value of a condemned parcel of land in combination with the land or lands of another in a prospective, integrated use if: 1) the prospective, integrated use is the "most advantageous" use of the condemned land; 2) the "most advantageous" use can be achieved only through combination with another parcel or parcels; 3) combination with another parcel or parcels is "reasonably probable;" and 4) the prospective, integrated use is not speculative or remote.

We note that some jurisdictions limit the consideration of assemblage to settings in which the owner of the condemned parcel also owns the land to be assembled. *See:* 8 A.L.R. 4th 1202 (1981). However, we conclude that the traditional application of assemblage, which ***93** does not contain this limitation, better serves the overriding purpose of determining "just compensation" for owners of condemned land, because it permits property owners to establish a legitimate element of the fair market value of the property, i.e., its value in conjunction with adjacent land to which the owners may or may not hold title.

The facts in this case raised a related issue which the court of appeals addressed, namely whether the Authority's present ownership of the adjacent land (brought about by its prior condemnation) prevented consideration of assemblage.

[3] **[4]** As a matter of federal constitutional law, "just compensation" of an owner of condemned land must include compensation for the "... highest and most profitable use for which the property is adaptable...," even if that use requires combination of the land with another parcel. *Olson* 292 U.S. at 255-56, 54 S.Ct. at 708, 709. Moreover, the United States Supreme Court has made clear that the government may not condemn land in such a manner that condemnation itself worsens the owner's position in the market. *Almota* 409 U.S. at 478, 93 S.Ct. at 796. It stated "... it would be unjust to allow the Government to use 'salami tactics' to reduce the amount of one property owner's compensation by first acquiring an adjoining piece of property...." *Almota* 409 U.S. at 480, 93 S.Ct. at 797. (Powell and Douglas, J. concurring). We agree with this reasoning. Consequently, we conclude, as the Authority concedes, that the unavailability of the adjacent parcel for assemblage due to its prior condemnation by the Authority cannot be dispositive of whether assemblage is "reasonably probable."

Issue 2: Did the circuit court correctly determine the fair market value of the condemned parcel in this case?

***94** We now review the circuit court's determination of the fair market value of the condemned parcel in view of its consideration of evidence of assemblage. Our review involves a mixed question of law and fact. When a court's legal conclusions are closely intertwined with its factual findings, an appellate court must separate the conclusions of law from the factual findings and apply the appropriate standard of ****896** review to each. Ordinarily an appellate court will uphold the circuit court's factual determinations unless they are clearly erroneous. Section 805.17(2), Stats.

In this case the circuit court correctly analyzed the legal issues before it. The record indicates that the circuit court determined, first, that the "most advantageous" use of **Clarmar's** property was as a terminal for both long and short trucks. Second, it determined that full use of the terminal could only be achieved through combination of **Clarmar's** parcel with a portion of the adjacent parcel, which the Authority did not directly dispute. Third, it determined that the combination of the terminal with a portion of the adjacent parcel for use as a turning area was "reasonably probable." It stated:

> "My view is that it is reasonably probable on the basis that it was in fact-that land was being used by ... [owners of the terminal] at one other time without, as I say, without any apparant (sic) violating of the function of that adjoining land.
>
> "The impression is, frankly, the land wasn't being used for any significant purpose by Mr. Eisenberg who was the owner at that time, and I do not consider it unrealistic to-an invalid assumption to conclude that, as a reasonable probability, the land ***95** could be purchased. And the question is for how much."

Fourth, the court determined that the prospective use of the land was not speculative. Finally, the court did not consider that the prior condemnation of the adjacent parcel ended the probability of this combination. From these determinations, we conclude that the circuit court correctly considered the evidence of assemblage.

We turn now to the circuit court's factual determinations that assemblage was "reasonably probable" and that the value of **Clarmar's** terminal was $213,400. We emphasize that **Clarmar** and the Authority agreed that the "most advantageous" use of **Clarmar's** property was as a truck terminal. There was therefore no need for a factual finding on the "most advantageous" use of the property. In addition, because the Authority did not directly dispute that full use of the terminal could only be achieved by combining the parcels, there was no need for a finding on whether its "most advantageous" use could only be achieved through combination. Therefore, the questions before the court were whether it was "reasonably probable" that a buyer would try to assemble the parcels in order to have a turning area for long trucks and whether this use was speculative or remote.

Clarmar's president testified that the need for a turning area on the east side had been accommodated for some years by an informal, uncompensated arrangement between **Clarmar** and the previous owner of the adjacent land. According to his testimony, three quarters of the trucks using the terminal were local haul trucks less than 35 feet long and the remaining trucks were long trucks. He also testified that, although ***96** **Clarmar** had not used the east doors between 1978 and 1981, due to a general downturn in the trucking business, by 1983 business in the industry had improved to a point where **Clarmar** could use all of its doors.

Land appraisers presented by **Clarmar** and the Authority and a city tax assessor agreed that the accepted method for ascertaining the value of a truck terminal is the "income method." Using the income method, an appraiser assigns a value to each docking door and then multiplies that value

by the number of doors. Accordingly, the total valuations offered by the expert witnesses varied in terms of their per door valuations. **Clarmar's** expert initially set the value per door at $10,800, the Authority's expert at $10,000, and the city assessor at $10,400.

Clarmar's appraiser testified that he believed that a buyer of the terminal would consider the possibility of purchasing a strip of the adjacent parcel for a turning area. In setting a price for the property, he testified that a buyer would reduce the value of the terminal by the cost of buying that additional parcel. He further testified ****897** that a buyer would probably have to pay as much as twice the normal market value of the adjacent strip because its owner would extract a premium based on the buyer's special need for the parcel. Adjusting his per door value to $10,400, **Clarmar's** appraiser valued the condemned property at $213,400, by multiplying 22 doors times $10,400 and then subtracting the cost of the adjacent strip of land, which he estimated at $15,400.

The Authority's expert, on the other hand, testified that the east doors of the terminal were not useable. According to this witness, the east doors had not ***97** been fully used since 1981. He stated that he had considered only use by long trucks in determining whether the doors were useable, although he also testified that short trucks could use the doors. After adding $1,000 per door to the value of the 13 useable doors to give some value to the partial useability of the east doors, he valued the property at $143,000.

A city tax assessor testified that his 1982 assessment of **Clarmar's** property set its fair market value at $227,700. The assessor stated that he had made no adjustment for any restrictions on use of the east doors.

There was no testimony in this case that a buyer would prefer to achieve full use of the east doors, and thus full use of the terminal, by scheduling all long trucks to dock at the other doors. **Clarmar's** president testified that such scheduling was difficult and the Authority did not refute that evidence. There was no testimony that a buyer would prefer to adjust the price downward to reflect the 25 percent loss of docking capacity of the east doors if no turning area were available to long trucks. Further, there was no testimony that an owner of the adjacent land other than the Authority would reject an offer of twice its value, while there was testimony by **Clarmar's** president that a prior owner had had no other use for that part of the parcel and had not objected to **Clarmar's** use of the adjacent strip.

[5] **[6]** Based on this evidence, the circuit court concluded that it was "reasonably probable" that a buyer would combine **Clarmar's** land with a portion of the adjacent parcel. It further concluded that a combined use of these parcels, which would permit continuation of **Clarmar's** present use of its terminal, was not speculative or remote. Finally, it determined that the value ***98** of **Clarmar's** land in integration with the adjacent parcel, after subtraction of the cost of acquiring that parcel, was $213,400.

Arguing on appeal that the approach of the circuit court impermissibly inflated the value of **Clarmar's** land, the Authority analogizes the facts in this case to a hypothetical setting. In the Authority's hypothetical example, an owner of a parcel worth $10,000, which is adjacent to another parcel worth $10,000, claims $20,000 as the market value of its parcel. The owner bases it valuation on grounds that in an integrated use the parcels have a fair market value of $30,000; since its cost of acquiring the adjacent land is $10,000, it claims the balance as the value of its land. Clearly the approach in the Authority's analogy would overcompensate the owner of the first parcel by $5,000. However, that analogy disregards the correction for such a false increase in value made by the circuit court in this case. Here the court determined that the cost of acquiring a portion of the adjacent parcel was $15,400, a figure which doubled its fair market value to reflect the premium a seller could require in these circumstances. By including that premium in its calculations to represent the enhancement of the value of the second parcel, which also arises from the integrated use, the circuit court corrected for the artificial inflation of the value of the first parcel which occurs in the Authority's analogy.

Findings of fact made by a circuit court will be affirmed unless they are clearly erroneous. *See*, D. Walther, P. Grove, M. Heffernan, *Appellate Practice and Procedure in Wisconsin*, sec. 3.5a (1986). We conclude ***99** from this record that the findings of the court are not clearly erroneous.

****898** For these reasons, we hold that the circuit court properly considered assemblage in valuing **Clarmar's** terminal under sec. 32.09, Stats., and that it correctly determined the fair market value of the condemned parcel in this case. Accordingly, we reverse the decision of the court of appeals and reinstate the judgment of the circuit court.

Decision of the court of appeals is reversed and the judgment of the circuit court is reinstated.

All Citations

129 Wis.2d 81, 383 N.W.2d 890

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24 Wis.2d 355
Supreme Court of Wisconsin.

KEN-CRETE PRODUCTS CO.,
a Wis. corporation, Respondent.
v.
STATE HIGHWAY COMMISSION
of Wisconsin et al., Appellants.

June 30, 1964.

Condemnation proceeding wherein the condemnor appealed from a judgment of the Circuit Court, Kenosha County, M. Eugene Baker, J. The Supreme Court, Currie, C. J., held, inter alia, that where highway committee condemned portion of premises used by manufacturer of concrete blocks for storing sand and gravel, condemnee was entitled to introduce evidence as to advisability and cost of installing overhead conveyor to transport sand and gravel from point where it was stored after condemnation on leased land, approximately 240 feet away, as element to be considered in arriving at value of remainder, and condemnors' evidence of less expensive way to transport such went only to weight of testimony relating to conveyor and not to its admissibility.

Affirmed.

West Headnotes (5)

[1] Eminent Domain
Taking Part of Tract or Property
148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k135 Taking Part of Tract or Property
148k136 In General
Statute providing that in case of partial taking, compensation shall be determined by deducting from fair value of whole property before date of evaluation fair value of remainder immediately after evaluation, and giving effect, without allowance, to offset for general benefits, and without restriction because of enumeration, but without duplication, to stated items, Legislature intended that every element which affected fair market value should be considered. W.S.A. 32.09(6).

10 Cases that cite this headnote

[2] Eminent Domain
Depreciation of Value
148 Eminent Domain
148III Proceedings to Take Property and Assess Compensation
148k199 Evidence as to Compensation
148k203 Damages
148k203(2) Depreciation of Value
In proceeding wherein condemnors condemned portion of premises used by manufacturer of concrete blocks for storing sand and gravel, condemnee was entitled to introduce evidence as to advisability and cost of installing overhead conveyor to transport sand and gravel from point where it was stored after condemnation on leased land approximately 240 feet away, as element to be considered in arriving at value of remainder, and condemnors' evidence of less expensive way to transport such went only to weight of testimony relating to conveyor and not to its admissibility.

6 Cases that cite this headnote

[3] Trial
Affidavits and Evidence of Jurors to Sustain or Impeach Verdict
388 Trial
388IX Verdict
388IX(A) General Verdict
388k344 Affidavits and Evidence of Jurors to Sustain or Impeach Verdict
Trial court properly refused to call two dissenters to verdict and foreman for purpose of finding whether jury used “average” or “quotient” method in arriving at verdict.

1 Cases that cite this headnote

[4] Trial
Manner of Arriving at Verdict
388 Trial
388VIII Custody, Conduct, and Deliberations of Jury

388k315 Manner of Arriving at Verdict
To invalidate verdict as improper quotient verdict, there had to be proof that jurors bound themselves in advance to quotient method of determining their answer.

Cases that cite this headnote

[5] **Trial**
Manner of Arriving at Verdict
388 Trial
388VIII Custody, Conduct, and Deliberations of Jury
388k315 Manner of Arriving at Verdict
Verdict is not rendered bad merely because it is arrived at by quotient method.

Cases that cite this headnote

****131** ***356** Condemnation proceeding instituted by the Kenosha County Highway Committee, acting in behalf of the State Highway Commission, to acquire .44 acres of land owned by **Ken**-**Crete** Products Company (hereafter '**Ken**-**Crete**'), for highway purposes. **Ken**-**Crete** appealed to the circuit court from the original award.

***357** **Ken**-**Crete** at all times material to the instant proceeding was engaged in the manufacture of concrete blocks. Before part of its property was acquired by condemnation **Ken**-**Crete** owned 3.5 acres of land on the north side of Highway 50 in Kenosha county. The .44 acres taken by condemnation, which lay between the south end of the building in which **Ken**-**Crete** manufactures concrete blocks and the highway, was used for the dual purpose of storing sand and gravel, referred to in the trade as 'aggregate', and for storing the manufactured blocks during their curing period.

The appeal from the award was tried to the court and a jury. The jury returned a special verdict whereby it was found that the fair market value of **Ken**-**Crete's** property as a whole before the taking on September 15, 1961, was $182,000 and that the value of the remaining property after the taking was $139,000.

Judgment was entered in behalf of **Ken**-**Crete** on July 18, 1963, for the $43,000 difference in values found by the jury less the amount of the original award, together with interest and costs. The condemnors have appealed.

Attorneys and Law Firms

Mittelstaed, Heide, Sheldon & Hartley, Kenosha, for appellants.

Wickhem, Consigny & Sedor, Janesville, John E. Malloy, Kenosha, for respondent.

Opinion

CURRIE, Chief Justice.

The two issues presented by this appeal are:

(1) Did the trial court err in receiving evidence as to the cost of installing an overhead conveyor which allegedly was necessary to maintain the same cost of production in **Ken**-**Crete's** plant as existed before condemnation?

***358** (2) Did the trial court err in refusing to take testimony as to whether the jury returned a quotient verdict?

Receipt of Evidence with Respect to Cost of Installing Overhead Conveyor

As a result of the taking of the .44 acres, **Ken**-**Crete** was deprived of the use of this land on which to store piles of sand and gravel used in the manufacture of its concrete blocks. After the taking, **Ken**-**Crete** leased some land to the west owned by a railroad company adjoining **Ken**-**Crete's** premises, and now its supply of sand and gravel is stored on this leased land. The aggregate is now brought by trucks and dumped there. The concrete block manufacturing plant is located close to the east boundary of **Ken**-**Crete's** property, and other buildings occupy the south portion of its remaining premises, so **Ken**-**Crete** had no available land abutting on the highway available for storing sand and gravel, which necessitated the leasing of the railroad premises for such purpose.

Before the taking, a 'loader' or elevator carried the sand and gravel up to the hopper where it would be loaded into the machines which manufactured the blocks. One employee operated both the loader and the automatic machinery used in manufacturing the blocks. After the taking, the sand and gravel had to be transported to the manufacturing plant, a

distance of approximately 240 feet from where it was stored on the leased land.

Three expert witnesses, Kerr, Williams and Wolf, all with long experience with ****132** concrete block manufacturing machines, were permitted to testify, over the objection of the condemnors, that the most economical way of transporting this sand and gravel from the stock piles on the leased land to the block manufacturing plant would be by installing an overhead conveyor system. The estimated cost of the overhead conveyor as testified to by the witness, Kerr, was ***359** $43,900. **Ken-Crete** called two experienced realtors, Bear and Pfennig, to testify to the value of its premises before and after the taking. Bear, in his testimony, stated, that he had consulted with Kerr, Williams and Wolf in familiarizing himself with the machinery involved and that in his judgment a well-informed buyer would consult with such experts before making a decision regarding the property. Pfennig's testimony made no reference to that of Kerr, Williams and Wolf.

The condemnors contend it was prejudicial error to admit the testimony of Kerr, Williams and Wolf with respect to the advisability of installing the overhead conveyor and the cost of such installation. Their principal argument in support of this contention is that such conveyor would constitute a capital improvement for which recovery may not be had under sec. 32.09(6), Stats. [1]

[1] Under sec. 32.09(6), Stats., the measure of damages in a condemnation proceeding where there is a severance is the difference between the fair market value of the whole property immediately before the taking and the fair market value of the remainder immediately thereafter. By use of the phrase 'and without restriction because of enumeration' found in sec. 32.09(6), Stats., it seems reasonable to conclude that the legislature intended that every element which affects fair market ***360** value should be considered. This is in accord with the great weight of authority. See 4 Nichols, Eminent Domain (3d ed. 1962), sec. 12.1, pp. 3 et seq., where the author states (at p. 4) that 'All elements of value which are inherent in the property merit consideration in the valuation process.' The author also states that evidence is admissible that the remainder area is no longer capable of use for a particular purpose or that its purpose or that its facility therefor has been impaired. See 4 Nichols, supra, sec. 14.243 and cases cited at note 4, p. 580. These principles were approved by this court in Carazalla v. State (1955), 269 Wis. 593, at pages 608(b)-608(c), 70 N.W.2d 208, 71 N.W.2d 276, at page 278 (on rehearing), where the court stated:
'* * * in case of a partial taking of land by eminent domain *any* damages to the remaining land, which results from the use to which the parcel taken is to be devoted, is a proper item to be included in determining the value of the owner's remaining land after the taking.' (Emphasis supplied.)

It is conceded that the highest and best use to which **Ken-Crete's** premises might be devoted at time of taking was a concrete block manufacturing plant.

[2] The testimony with respect to the advisability and cost of installing the overhead conveyor was not offered by **KenCrete** ****133** to establish a separate item of damages, but only as an element to be considered in arriving at the value of the remainder of its property after the taking. The underlying theory is that a prospective purchaser would pay $43,900 less for the premises after the taking than before, if he would have to expend that amount to provide a facility to enable the block manufacturing plant to continue to operate at the same capacity as before the taking. Under this theory, as borne out by the testimony of **Ken-Crete's** expert witnesses, the expenditure of this $43,900 would not cause the value ***361** of the remaining premises to exceed the value of the whole premises as they existed before the taking. The jury had the right to accept the testimony which substantiated this theory.

In an analogous situation involving agricultural property, which, because of a partial taking, would require additional fencing in order for the remaining property to be used thereafter in the same fashion, this court, in Nowaczyk v. Marathon County (1931), 205 Wis. 536, 238 N.W. 383, held that the cost of additional fencing was a proper element to be considered in determining the after value of the remaining property. In Nowaczyk, supra, the court made the following pertinent statements (205 Wis. at p. 541, 238 N.W. at p. 385):
"* * * the necessity of the fence must be considered in its tendency to minimize the value of the farm, rather than as an independent and separately itemized item of damages. The question is not what the particular fence desired by appellees at this time may cost; but rather the underlying inquiry is whether the farm as a whole, in view of the purposes for which it is adapted, will be minimized in value because extra fencing may be required and such fence might need to be repaired, maintained, and replaced.'

'This is doubtless a correct statement, and, being true we are unable to see why the estimated cost of construction, maintenance, and replacement may not be shown, as they must be considered in estimating the diminution in value caused by the extra fences.'[2]

Tested by the foregoing principles the court is constrained to hold that the anticipated cost of installing the conveyor system was an element that the jury could properly consider ***362** in determining the value of the remaining property after taking. Therefore, the trial court properly overruled the condemnors' objections to such testimony.

The condemnors point to other evidence which they contend disclosed a far less expensive way of getting the sand and gravel delivered into the block manufacturing plant than installing an overhead conveyor. This argument has to do with the weight to be accorded the testimony relating to the conveyor, not its admissibility.

Quotient Verdict.

The three expert witnesses who gave opinion testimony as to the value of **Ken-Crete's** premises before and after the taking were Bear, Pfennig and Borgman. The latter, an employee of the American Appraisal Company, was called by the condemnors.

The before value testified to by these three witnesses was:

Bear	$200,000
Pfennig	194,000
Borgman	152,200
Average:	$182,066.67

****134** The after value testified to by them was:

Bear	$150,000
Pfennig	133,000
Borgman	143,000
Average:	$142,283.33

The jury found the before value to be $182,000 or only $66.67 less than the average of the before value testified to by these three witnesses. However, the after value found by the jury was $139,000, which is $3,283.33 less than the average of the after values testified to by the three witnesses. This would strongly indicate that the jury arrived at its before value by taking such average and eliminating the odd dollars and cents. It is readily apparent, however, that ***363** the jury could not have adopted such method in determining the after value.

[3] **[4]** **[5]** There were two dissents to the verdict and after the verdict the condemnors requested the trial court to call the two dissenters and the foreman of the jury for the purpose of finding out whether or not the jury did use the 'average' or quotient' method in arriving at their verdict. The trial court refused to this relying on the rule that the testimony or affidavits of jurors will not be received to establish their own misconduct or to impeach their verdict. See Olson v. Williams (1955), 270 Wis. 57, 70, 70 N.W.2d 10; Dishmaker v. Heck (1915), 159 Wis. 572, 578, 150 N.W. 951; Wolfgram v. Schoepke (1904), 123 Wis. 19, 24, 100 N.W. 1054. The action of the trial court in this respect was clearly proper. In any event, in order to invalidate the instant verdict on the ground of it being an improper quotient verdict, there must be proof that the jurors bound themselves in advance to the quotient method of determining their answer to the before value. Schiro v. Oriental Realty Co. (1959), 7 Wis.2d 556, 564, 97 N.W.2d 385; Pierce v. Chicago & Milwaukee E. R. Co. (1909), 137 Wis. 550, 559-560, 119 N.W. 297; Anno. 52 A.L.R. 41, 44. A verdict is not rendered bad merely because it is arrived at by the quotient method. Schiro v. Oriental Realty Co., supra, 17 Wis.2d p. 564, 97 N.W.2d 385.

Judgment affirmed.

All Citations

24 Wis.2d 355, 129 N.W.2d 130

Footnotes

1 The pertinent provisions of this statute read:
'In the case of a partial taking, the compensation to be paid by the condemnor shall be determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the following items of loss or damage to the property where shown to exist.
'(e) Damages resulting from actual severance of land including damages, resulting from severance of improvements of fixtures and proximity damage to improvements remaining on condemnee's land.'

2 Under present sec. 32.09(6)(g), Stats., the cost of fencing 'reasonably necessary to separate land taken from remainder of condemnee's' except where this fencing is provided without cost to the condemnee is made an element of severance damages. This statutory provision was enacted long after the Nowaczyk Case was decided.

NOTES