"Evolving Standards for Just Compensation"

presented by

Michael D. Leroy, Esq.

Neal & Leroy
Chicago

prepared by

Michael D. Leroy, Esq.

and

Trevor Kent

Preface: The constitutional dialectic as related to just compensation is based upon two potentially competing concepts, being: (1) just compensation should be based only upon the market value of the interest taken, and (2) just compensation requires indemnification of an owner in order to make the owner whole.

I. MARKET VALUE OF INTEREST TAKEN

A. Focus on the property acquired and its market value, not the owner's particular circumstances.

B. "Just compensation is the value of the interest taken. This is not the value to the owner for his particular purposes, or to the condemnor for some special use, but a so-called 'market value.'" *Petty Motor*, 327 U.S. 372, 377 (1946).

1. "In the absence of a statutory mandate the sovereign must pay only for what it takes, not for opportunities which the owner may lose." *People's Gas Light & Coke Co. v. Buckles*, 24 Ill. 2d 520, 535 (1962).

2. Since an eminent domain proceeding is an in rem action and therefore focuses on the property itself, the compensation to be paid depends on the value of the property to be taken. *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893).

3. "The constitution requires only that the owner obtain the fair market value of his property; it does not guarantee him a return on his investment." *Housing Authority of City of East St. Louis v. Kosydor*, 17 Ill.2d 602, 606 (1959).

4. The fair market standard excludes several aspects of "value," such as replacement value, particular value to the specific owner, sentimental value, or ongoing business value.

- Two reasons for these restrictions:

  a. Fair market rule provides a neutral/objective method of determining just compensation and thus achieves a balance between the rights of the public and the rights of the individual.

  b. Fair market rule focuses on the property itself – what is being condemned – rather than on the person who owns the property or the public body acquiring it.

5. Cases where non-real estate related attributes of the property are not compensable.

   a. **Business Value**

      i. Since the market value standard attempts to achieve an objective/neutral method of valuing property, the courts have rejected any valuations that consider the amount of business conducted on the site or the profits from that business.

      ii. Reason for this position:

         - An owner may be able to do double the amount of business than any other person, but such considerations are purely speculative and cannot form the basis for fixing the price of the property. *Jacksonville & Southeastern Ry. v. Walsh*, 106 Ill. 253, 256 (1883).

      iii. Parties cannot introduce evidence of the "going" value of the property based on the conduct of business, the value of products produced, or the costs of production." *City of Chicago v. Farwell*, 286 Ill. 415 (1918).

      iv. "Where the property sought to be taken is not designed for or applied to a special use, the evidence should be confined to its market value; and all evidence of the volume of business that may be done in or upon the property or the profits that may arise therefrom should be excluded." *Forest Preserve District v. Hahn*, 341 Ill. 599, 602-603 (1930).

v. This rule works both ways: the owner cannot show increased value as a result of his or her financial status or successful business, and the condemnor cannot show decreased value as a result of the owner's financial problems or unprofitable business. *Department of Public Works & Buildings v. Lambert*, 411 Ill. 183 (1952).

vi. The emphasis on market value precludes evidence of value based on an owner's ability to obtain financing commitments for a particular project or the owner's outlay of capital for future planning. *City of Chicago v. Provus*, 415 Ill. 618 (1953).

vii. In *Chicago v. Martin*, 26 Ill.2d 274, 276 (1962), the court said that in *Provus* the expenditures were for financing, appraisal and architect's expense which had "value particular to the owner" and could not be considered as increasing the fair market value of the property.

b. **Relocation Expenses**

i. If condemnor does not acquire the owner's equipment or stock-in-trade, the cost of moving these items and other personal property is not compensable. *Housing Authority of City of East St. Louis v. Kosydor*, 17 Ill.2d 602 (1959).

ii. The Eminent Domain Act of 2007 (735 ILCS 30/10-5-62) now requires every public body to pay relocation expenses. Relocation expenses fill an indemnification gap.

c. **Attorneys' Fees**

i. Attorney's fees and costs in eminent domain proceedings are only recoverable if provided for by statute." *County of Will v. Cleveland*, 372 Ill. 111 (1939).

ii. The just compensation required to be given to a property owner does not include compensation for attorneys' fees. *Department of Conservation v. Jones*, 63 Ill. App. 3d 402 (1978).

d. **Replacement Costs**

i. Market value does not include the cost of replacing improvements that have been acquired.

ii. A witness may not use replacement cost, either to determine the value of a building as part of an opinion of the value of the subject property (*Forest Preserve District v. Chilvers*, 344 Ill. 573 (1931)), or to determine the money that the owner needs in order to purchase similar property after the subject property has been acquired. *City of Chicago v. Cunnea*, 329 Ill. 288 (1928).

II. INDEMNIFICATION OF OWNER

A. Focus on the individual; the right to compensation is an individual right.

B. The goal is to make the owner whole; the value of the owner's property is not based on what the condemnor acquires.

C. Cases where the court puts the owner in the same position he was in before the taking.

1. "The owner's right [to just compensation] has been considered a basic civil right."

2. "Property does not have rights. People have rights." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

3. "That rights in property are basic civil rights has long been recognized." *Id.*

4. "Some opinions hold that the owner is entitled to remove improvements from the land and recover the cost of the removal. If he prefers to leave the improvements on the land he can generally recover for them unless there is a statute to the contrary." *Department of Public Works & Buildings v. McBride*, 338 Ill. 347, 350 (1930) (citing American and English Encyclopedia of Law (vol. 10, p. 1158).

5. "Just compensation means the payment of such sum of money as will make the owner whole, so that on receipt of the compensation he will not be poorer by reason of his property being taken." *City of Chicago v. Cunnea*, 329 Ill. 288, 294-295 (1928).

6. "When property is taken under the power of eminent domain the owner is entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily as it would have occupied if its property had not been taken." *FPC v. Natural Gas Pipeling Co.*, 315 U.S. 575, 603.

III. SPECIAL USE PROPERTY

A. Illinois Eminent Domain Act – Value (735 ILCS 30/10-5-60)

"**Except as to property designated as possessing a special use**, the fair cash market value of property in a proceeding in eminent domain shall be the amount of money that a purchaser, willing, but not obligated, to buy the property, would pay to an owner willing, but not obliged, to sell in a voluntary sale."

B. Special Use Property In General

1. Special Use Property Defined

a. Special use property is property that does not have a ready market value, meaning it is not the type of property that is readily bought and sold. *Em Domain Ill. §5.06 (3rd Ed).*

b. Special use of property has been defined as a situation where the land is not available for use for general and ordinary purposes. *Lake Shore & M.S.R. Co. v. Chicago & W.I.R. Co.*, 100 Ill. 21 (1881).

2. Special Use Approved

a. The Supreme Court of Illinois has permitted value other than market value to be applied in railroad cases (*Mauvaisterre Drain. Dist. v. Wabash Ry. Co.*, 299 Ill. 299 (1921), although by way of illustration it has also referred to properties used for churches and schools as being properties to which the market value rule would not be applicable. *Em Domain Ill. §5.06 (3rd Ed).*

b. In a 1967 case the appellate court for the first district upheld the ruling of the trial court that where school property was taken by the County of Cook, the special use formula for value was to be applied. *County of Cook v. Chicago*, 84 Ill. App.2d 301 (1967).

- "We disagree with the petitioner that a school and playground facility for the children is not a unique and extraordinary use of property so as not to be placed apart from the normal or ordinary use of property." *County of Cook v. Chicago*, 84 Ill. App.2d 301, 307 (1967).

c. In *Sanitary Dist. of Chicago v. Pittsburgh, Ft. W.&C. Ry. Co.*, 216 Ill. 575 (1905), which involved the taking of a portion of the passenger and freight station grounds of a railroad, the court held that such property had no market value as it was devoted to a special and particular use and that it was proper for the railroad to show the value of the property for such special use.

d. As other examples of where a test other than market value might be applied, the courts have mentioned churches, colleges, cemeteries (*Department of Transportation v. Bouy*, 69 Ill. App.3d 29 (1979), club houses and railroad terminals.

- Since no other possible "special" uses have been suggested in these opinions, the "special use" exception to the market value rule may be confined to these categories of property.

3. Special Use Denied

a. Illinois cases have recognized the exception to the general rule that market value is the measure of compensation but have denied its application to the following situations:

i. vacant land (*Forest Preserve Dist. v. Lehmann*, 388 Ill. 416 (1945)),

ii. Kankakee River frontage (*Illinois Light & Power Co. v. Bedard*, 343 Ill. 618 (1931)),

iii. restaurant and picnic grove (*Forest Preserve Dist. v. Hahn*, 341 Ill. 599 (1930)),

iv. meat packing plant (*Kankakee Park Dist. v. Heidenreich*, 328 Ill. 198 (1927)),

v. amusement park and picnic grove (*River Park Dist. v. Brand*, 327 Ill. 294 (1927)),

vi. soap factory (*Chicago v. Farwell*, 286 Ill. 415 (1919)),

vii. saloon (*West Chicago Park Com'rs v. Boal*, 232 Ill. 248 (1908)),

viii. property zoned by Zionist church (*Dowie v. Chicago, W.&N.S. Ry. Co.*, 214 Ill. 49 (1905)). (Righeimer page 92-93).

b. In *Chicago v. Merton Realty*, 99 Ill. App.3d 101 (1981), a commercial building converted into the West Madison Street (Chicago) Mission was held not to be a special use.

c. In *People ex rel. Director of Finance v. Y.W.C.A. of Springfield*, 74 Ill.2d 561 (1979), the Illinois Supreme Court reemphasized the limited nature of the special use category. The Court refused to grant special use status to the Springfield Y.W.C.A., which had a gymnasium, an indoor swimming pool, locker rooms, a chapel, meeting rooms, and three kitchens.

d. In other jurisdictions it has been held that the following are not special use properties: airport terminal property (*United States v. 11 Acres of Land*, 54 F. Supp 89 (1944)), girl scouts camp (*Newton Girl Scouts Council v. Massachusetts Turnpike Authority*, 335 Mass. 189 (1956)), private bathing beach (*In re Public Beach, Borough of Queens, City of New York*, 269 N.Y. 64 (1935)).

C. Special Purpose Property

1. Special purpose buildings are designed for a particular or special use, whereas "special use" buildings are not so designed originally, but at the time in question are being put to a "special use." *City of Chicago v. George F. Harding Collection*, 70 Ill. App.2d 254, 257 (1st Dist. 1965).

2. In *Department of Public Works & Buildings ex rel. People v. Brockmeier*, 128 Ill. App.2d 395 (5th Dist. 1970), the court held that a sod farm was "special purpose" property and allowed it to be valued based upon income from the land alone, not upon fair cash market value.

   - Landowners' appraisal witness testified he was unable to find any comparable property in the area, and because he found no comparables, he had used the income approach in determining fair cash market value. *Id.* at 398.

3. Due to its unusual nature, special purpose property must be valued, if condemned, by other means such as income potential (*Coeur d'Alene Garbage Services v. City of Coeur d'Alene*, 759 P.2d 879 (Idaho 1988)), reproduction cost (*United States v. Certain Property Located in Manhattan*, 306 F.2d 439 (2d Cir. 1962)), or replacement cost (*Department of Transp. v. Livingston*, 413 S.E.2d 249 (Ga. Ct. App. 1991)).

4. The typical approach to valuation of private property in condemnation is fair market value, where the property condemned is a type seldom exchanged, or lacking in comparable sales data. These "limited market" properties are usually improved real estate, constructed and used for a special purpose. *Idaho-Western Ry. Co. v. Columbia Conference of Evangelical Lutheran Augustana Synod*, 119 P. 60 (Idaho 1911).

D. Standards of Just Compensation Used to Determine Value of Special Use and Special Purpose Property

1. Introduction

   a. In certain instances, where the type of property being condemned does not have a ready market value, the Illinois courts have said that evidence of value other than that of market value may be introduced. *Em Domain Ill. §5.06 (3rd Ed).*

   b. If the property is devoted to a special use (i.e. race horse training track, ice pond for cutting ice for sale, hot bed system of flower gardening, or sod farm), and for that reason has a special value, the owner is entitled to receive what it is worth for the purpose to which it is devoted.

2. Substitute Facility Approach

   a. Publicly owned property (i.e. roads, schools, parks, courthouses, fire stations, etc.), when condemned, are often subject to the replacement cost or "substitution cost" measure. (*United States v.43.635 Acres of Land in Greene County, Md.*, 183 F. Supp 168 (D.C. Mo. 1960)).

   b. Replacement costs are a full substitution for the governmental property taken, including payment of all attendant costs caused by the need to replace. (*Meriden v. Highway Comm'n*, 169 Conn. 655 (Conn. 1975)).

c. In *County of Cook v. Chicago*, 84 Ill App. 2d 301, 307 (1967), where school property was taken by the County of Cook, the court, in applying the special use formula for value, said "There is no dispute that the defendant is required to replace the use of the condemned portion of its property by acquiring another site for the same special use. Just compensation requires the full and equivalent value of the condemned property as it is used entirely for school and playground purposes."

- In the County of Cook case, the appellate court held that the trial court had properly ruled that the cost of acquiring substitute facilities was the measure of compensation to the school board.

d. This replacement or substitution value is usually only applicable if the condemned public property is held in a governmental, as opposed to proprietary, capacity and needs to be replaced. If not, then more typical fair market value approaches are used. *United States v. 3727.91 Acres of Land*, 563 F.2d 357 (8th Cir. 1977).

e. When a market exists for the condemned property, the market value rule must be followed even if the condemned property was owned by a public body, in this case a sanitary landfill owned by the city of Duncanville, Texas, which had the obligation to provide substitute facilities. *United States v. 50 Acres of Land*, 469 U.S. 24 (1984). The Supreme Court rejected the city's request to have its landfill valued in relation to the cost of acquiring a substitute facility by ruling that the same principles of just compensation presumptively apply to both private and public condemnees under the Fifth Amendment.

3. Replacement Cost Approach

a. The property owner is a private person or organization, not a public or government entity. Under this approach, unlike the substitute facility approach, the condemnor is not required to actually replace the condemned property. Instead, an appraisal approach is used; the issue is the replacement value of the condemned property.

b. If the property can be considered a special use and if the replacement theory of valuation is used, the condemnor must be willing to pay for replacement of the entire building. The condemnor cannot base its valuation on a proposed replacement

building that has substantially less square footage than the building being acquired. *City of Chicago v. George F. Harding Collection*, 70 Ill. App.2d 254 (1st Dist. 1965).

i. Overview of *Harding*: The city instituted condemnation proceedings to take the museum's land and buildings for a public use. The city submitted evidence of the value of replacing the main building with a building considerably smaller in size than the original condemned building. Although the trial court properly determined that the fair market value of the land should be paid to the museum, the city failed to abide by the trial court's guideline that the buildings should be compensable on the basis of replacement value less depreciation. *Id.*

ii. Simply on the basis of this outline of the City's evidence – the "replacing" of more with less -- it seems to us that the City has failed to meet its burden of introducing competent evidence to prove the value of all of the property to be taken. And without such proof, the "just compensation" requirement of the constitution cannot be satisfied. *Id.* at 266.

iii. The replacement theory of valuation must recognize the value of unused parts of the premises on some basis. *Id* at 265.

4. Income or Business Approach

a. As to special use property, the law permits a resort to any evidence available to prove value, such as the amount of business done or the use made of the property, and the like. *City of Chicago v. Farwell*, 286 Ill. 415 (1918).

b. The Fifth District deemed a sod farm to be a “special purpose” property, which may be valued solely on an income approach. *Department of Public Works & Buildings ex rel. People v. Brockmeier*, 128 Ill. App.2d 395 (5th Dist. 1970).

c. Where property devoted to a public use, such as a water, sewerage, or power system, is taken by eminent domain, the value may be determined by considering the utility’s past earnings capitalized at a market rate. *Puget Sound Power & Light Co. v. P.U.D. No. 1*, 123 F.2d 286 (1941).

d. If the earnings are viewed as speculative, or improbable, the reproduction cost method plus "going concern" value is relied upon. *South Bay Irrigation Dist. v. California Am. Water Co.*, 61 Cal. App.3d 944 (1967).

IV. CONSIDERATION OF BUSINESS AND COMPENSATION FOR BUSINESS LOSSES

A. Business related evidence can be considered to determine the adaptability of the property to its highest and best use.

1. Evidence of the character and amount of business conducted on the land may be admitted as tending to show one of the uses for which the land is available. *St. Louis, etc., R. Co. v. Kirby*, 104 Ill. 345.

2. Evidence of lost profits may have a bearing on the value of the land taken or on the diminution in value of the remainder. *State v. Sungrowth VI, California Ltd.*, 713 S.W.2d 175 (Tex. Ct. App. 1986).

3. While not considered a criterion of the land's market value, in some circumstances profits are admissible as evidence to be considered in determining such market value (*State v. Halverson*, 86 Idaho 242, 247 (1963), unless the business is of such a nature that profits therefrom are attributable to the character of the entrepreneur rather than the character of the land (*Board of Pub. Bldgs. v. GMT Corp.*, 580 S.W.2d 519, 528-531 (Mo. Ct. App. 1979)).

4. Decreased sales of gasoline after the partial taking of a gas station were properly taken into consideration in fixing damages as an indication that the taking substantially impaired access to the remainder. *Department of Transportation v. Shell Oil Co.*, 156 Ill. App.3d 304 (1987).

B. There has been a recent trend in certain limited circumstances where case authorities in states other than Illinois have allowed compensation for business losses when a business property with unique physical characteristics is condemned and thus cannot relocate.

1. Compensation for loss of goodwill, rather than lost profits, was the appropriate measure of compensation for a franchised business destroyed on condemned property that could not relocate due to unavailability of franchises in the area. *State v. Cowan*, 103 P.3d 1, 8-9 (Nev. 2004).

2. The business owner/condemnee, pursuant to an exclusive license, operated a concession stand within the confines of a racetrack. Since the condemnee could not relocate to another racetrack, a condemnation of the racetrack destroyed the condemnee's business. The court stated

that the going concern value could be awarded if it was necessary to render full compensation, if it was not redundant of other damages awarded, and if the business was totally destroyed. Thus, the condemnee was granted an award for the going concern value of his business. *State Highway Comm'n v. L & L Concession Co.*, 31 Mich. App. 222, 237-238 (1971).

3. In Georgia, the fair market value of the property is the fair measure of compensation, and a claimed loss of a business will not be considered unless the condemned property has some unique or peculiar relationship to the condemnee and his business. *Metropolitan Atlanta Rapid Transit Auth. v. Ply-Marts, Inc.*, 144 Ga. App. 482, 483 (1978).

4. The Nevada Supreme Court has held that compensation for the loss of goodwill was appropriately awarded to a lessee that operated a franchised gas station and convenience store on the condemned property. The lessee was unable to relocate the business because oil companies were not extending new leases for gas station franchises in the Las Vegas area. The court held that under such circumstances, business goodwill damages could be awarded as an exception to the general rule. *State v. Cowan*, 103 P.3d 1, 8-9 (Nev. 2004).

C. Some state statutes allow for compensation of business expenses.

1. Florida was the first state to pass a statute allowing recovery for business losses. Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, 32 B.C. L. Rev. 283, 322 (1991) (citing *1933 Fla. Laws. Ch. 15927 (No. 70)*, amending §5089 of the Compiled General Laws of Florida, previously §3281 of the Revised General Statutes of Florida). *6 Conn Pub. Int. L.J. 269, 293*.

    a. Florida has deviated from the general rule by statutorily declaring that in limited circumstances, a business owner may be awarded damages for going concern value. *Fla. Stat. Ann. §73.071(3)(b).*

    b. If the following conditions are met, an award can be made for going concern value:

        i. the business must be more than 5 years old,

        ii. the taking must be for right-of-way purposes by one of the condemnors named in the statute, i.e., a county, district, or other public body,

iii. the business must have been located upon the land taken and adjoining lands for 5 years.

c. This Florida statute is strictly construed in favor of the state, and business damages will be awarded only when it is clearly consistent with the legislative intent. *Tampa Hillsborough County Expressway Auth. v. K.E. Morris Alignment Serv., Inc.*, 444 So.2d 926, 928-929 (Fla. 1983).

d. In computing a Florida business owner's damages under this statutory provision, wages for the services the owner was performing for the business must be deducted before calculating the business damages. *State of Florida Dept. of Transportation v. Manoli*, 645 So.2d 1093, 1094-1095 (Fla. Ct. App. 1994).

2. The Vermont legislature (*Vt. Stat. Ann. §212(2)*) has also provided for compensation when the taking of land causes damage to a business. The Vermont statute allows business damages when the following conditions are met:

a. An award for business loss is allowable only where the property owner's fixed and established business is harmed or destroyed when the land upon which it is situated is taken for highway purposes.

b. An award is allowed only to the extent that the business owner has suffered a loss to the business which has not necessarily been compensated for in the allowance made for the land.

i. Step 1 – Determine the highest and best use of the land and a value based on that use.

ii. Step 2 – Determine the value of the business as a whole by looking at the following factors:

1) the land's contribution to the business,

2) the personal property used in the business,

3) the going concern value of the business,

4) the increased value derived from the fact that the tangible assets are combined in a single functioning unit, and

5) where appropriate, goodwill.

a) Thus, the value of the business includes the land.

b) A business loss exists if the value of the business as a whole exceeds the value of the highest and best use of the land. *Mazza v. Agency of Transp.*, 168 Vt. 112, 117 (1998).

3. Under *NYC Administrative Code §5-423*, certain business owners in specified counties whose going concern is directly or indirectly decreased in value as a result of New York City's acquisition of land for additional water supply have a right to damages for such decrease in business value. *29 Westchester B. J. 111, 119.*

   a. Recovery was allowed under the New York City Administrative Code provision where claimants owned no real estate subject to the taking but were, rather, permissive users of water in connection with their businesses and suffered indirect losses when that water usage was impacted by the City's actions. *In re Huie*, 11 A.D.2d 837 (3d Dep't 1960). *29 Westchester B.J. 111, 119.*

   b. In another claim pursued under the New York City Code, the owner of a retail feed enterprise was awarded compensation for lost profits and customers following the City's appropriation of nearby lands for water supply purposes. *In re Huie*, 26 A.D.2d 746 (3d Dep’t 1966).

4. Today, California and Wyoming's statutes also compensate for business losses for loss of goodwill such as benefits of location and customers. *Oswald* at 329-34. California and Wyoming adopted §1016 of the Uniform Eminent Domain Code which provides for recovery of lost goodwill. *Id.* at 329. *6 Conn Pub. Int. L.J 269, 293*.

V. DEVELOPMENT RIGHTS AS PART OF JUST COMPENSATION

A. Valuation of Property Taken in Progress of Development (ALI article by Tobin and Camp)

1. The Problem

   a. Where property is in the progress of development, an application of the traditional sales comparison approach will not necessarily compensate the owner fairly.

b. Courts have struggled to find a just means to allow a landowner who has begun developing his property to be fairly compensated for concrete steps taken toward development without allowing the landowner a windfall based on speculative future uses of the taken property. Particular confusion regarding vacant property the landowner intends to subdivide for residential development.

2. Judicial Application of the Development Approach

a. Even without physical improvements to the property, the developer may have invested great amounts of time and money into securing the requisite zoning, permits, utilities, access, platting, engineering or architectural plans. Courts agree that the developer must somehow be compensated for these expenditures, yet disagree as to the proper means of granting such compensation.

b. Development approach is designed to reflect, through a cash flow analysis, the current price that a developer would be justified in paying for the land, given the cost of developing it and the probable proceeds from the sale of the developed sites. *County of Ramsey v. Miller*, 316 N.W.2d 917, 920 (Minn. 1982).

- This approach considers what the developer had already planned to build, the steps taken by the developer in furtherance of his plan, and what another developer/buyer would be willing to pay today for the land in its current state.

c. Some courts have acknowledged the validity of the development approach. *Board of County Commissioners of Sedgewick County v. Kiser*, 825 P.2d 130, 137 (Ka. 1992). Yet, these same courts impose limitations and conditions on the introduction of valuation testimony based on the development approach to help ensure that the jury will not be unduly influenced by testimony regarding speculative, future development of the property.

d. Limits on Use of Evidence of Future Development

i. A landowner's compensation is limited to the value of the land as of the time the property was

taken. *City of Lafayette v. Beeler*, 381 N.E.2d 1287 (Ind. App. 1978).

ii. "It is not proper to speculate on what could be done to the land or what might be done to make it more valuable and then solicit evidence on what it might be worth at some unannounced future date." *Yoder v. Sarasota County*, 81 So.2d 219 (Fla. 1955).

iii. Although landowners may not introduce evidence of future value of the property as fully developed, courts have allowed them to present expert testimony as to additional investments made by the owners over and above the cost of the raw land. *Workman v. Agency of Transportation*, 657 A.2d 174 (Vt. 1994).

iv. Developers may introduce evidence of investments made in furtherance of development and may recover an upward adjustment/increment, but courts generally do not explain how that specific increment is to be determined. Therefore, the lawyers must rely on their appraisers to quantify what the preliminary legal and physical improvements to the property are presently worth.

e. Requisites to Admissibility of Development Approach

i. Lack of comparable sales, and

ii. Proposed development is not speculative (page 3)

1) There must be a reasonable possibility that the development will occur in the imminent future. *State of Oklahoma Department of Transportation v. Panell*, 853 P.2d 244 (Okl. 1993).

2) The proponent of the development approach must quantify all development costs that must be expended to complete the project. *United States v. 47.3096 Acres, etc., in Oxford Township, Erie County, State of Ohio*, 583 F2d 270 (6th Cir. 1978).

3) The more physical and legal improvements to the subject property, the more willing the courts are to allow the introduction of evidence regarding the future development of the property.

4) The courts' resistance to the development approach stems from the concern that the jury may determine compensation on the basis of a fully developed and completed project instead of on the value of the land as it actually existed on the date of the taking.

5) There is no bright line as to when courts in condemnation proceedings will allow the admission of the development approach.

B. Cases Addressing the Development Approach

1. Proper foundation was laid in condemnation proceeding for use of the "development approach," as condemnees had filed proposed plans for a residential subdivision on the subject land, one plan was designed in compliance with all existing zoning regulations and therefore was a "by right" zoning plan, and development of the land was within the realm of reasonable certainty. *Lehigh-Northampton Airport Authority v. Fuller*, 862 A.2d 159 (2004).

   - The condemnees laid the proper foundation for use of the development approach by showing that the land was ripe for development, that their expectation of securing all of the necessary zoning and other required permits was reasonable, and that the development of the property was within the reasonably foreseeable future. *Id.* at 166.

2. If sale of lots for subdivision purposes is reasonably prospective and if owner-developer is actually in the process of developing and selling land as subdivision lots, he is entitled to recover the individual retail value of each lot (less development costs), not the value of the property as if sold as a lump tract to another developer. *State Department of Highways v. Terrace Land Co., Inc.*, 298 So.2d 859 (1974).

   - Awarding a raw acreage rather than a retail lot value may be appropriate when, at time of taking, subdivision value of

land is only potential rather than being actually developed for purposes of resale by owner himself. *Id.*

3. Residual land or economic analysis approach is a proper approach in determining market value of a tract of land whose highest and best use is for subdivision and sale of lots. *Drakes Bay Land Co. v. United States*, 459 F.2d 504 (1972).

   - This was an inverse condemnation case and the landowner was entitled to recover reasonable costs by way of attorney, appraisal and engineering fees incurred in prosecution of case. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, §304(c), 42 U.S.C. §4654(c). *Id.*

4. Connecticut law permitted lost profits to be included in a condemnation award to condemnee, a condominium developer who was required to abandon its partially completed project after the government took away his access to the highway. Such award was not too speculative in view of the progress of the project as of the date of taking. *Laurel, Inc. v. Commissioner of Transportation*, 180 Conn. 11 (Conn. 1980).

   a. "It would be naive and unrealistic to assume that a willing buyer would not pay some portion of the anticipated profit on the partially completed project in view of the effort and expense Laurel [the condemnee] had already incurred." *Id.* at 42.

   b. "The court determined Laurel's share of the anticipated profit as follows. First, it determined the fair market value of the project when completed. From this it subtracted the cost of the project to the date of the taking and the costs necessary for the project's completion to arrive at the anticipated profit. Laurel's share of the anticipated profit was assumed proportional to the percentage of the total cost which Laurel had incurred." *Id.* at 20.

5. Evidence of condemnee's expenditures to prepare land for construction (i.e. architect, engineering, attorney and finance fees) was admissible to show enhancement of value. *Hawaii v. Chang*, 50 Haw. 195 (1967).

6. Where property owners were experienced shopping center developers who were without actual or constructive notice that a

highway would be routed through their proposed shopping center and developers proceeded in the usual way to begin plans for improving the property, fair market value of the property taken should reflect something more than raw value of the land. *Rosen v. State of New York*, 59 Misc.2d 905 (1969).

- Owner of condemned property is not limited in compensation to use which he actually made of his property but he is entitled to receive its market value based on its most advantageous use as evidenced by clearly to be expected future earnings. *Id.*

7. Use of land residual method, rather than comparable sales method, to determine the value of land in city condemnation proceedings, was justified where there were insufficient comparable sales, and costs and income of landowner's proposed waste transfer station could be estimated. *City of Englewood v. Denver Waste Transfer*, LLC., 55 P.3d 191 (2002).

    a. Although landowner's proposed waste transfer station had not yet been built, the land residual value method did not impermissibly consider a speculative or prospective value because the property had a permit for use as a waste transfer station and did not require rezoning, experts testified that the highest and best use of the property was for industrial purposes, and testimony indicated that a prospective purchaser would pay more for land that had already been approved for use as a waste transfer station. *Id.*

    b. Valuation of landowner's property, which took into account value of landowner's proposed waste transfer station, did not impermissibly include compensation for business value and lost opportunity because landowner was not seeking to be compensated for lost profits, and commission used landowner's estimated profits as a factor in calculating the amount a willing purchaser would pay for the property as approved for use as a waste transfer station. *Id.*