

9.11 CONDEMNATION — HIGHEST AND BEST USE (Approved 4/02)

A. Generally (Approved 4/96)

The fair market value of property is not necessarily limited to what an owner actually uses it for. The use to which an owner may realistically and legally put the property is one of the first things to consider in arriving at its value. Property that has been used for a modest one-family house would probably be worth more if it were used for some profit-making enterprise such as an apartment house, office building or factory. In arriving at the property's fair market value, you should consider the “highest and best” use to which the property can be put. In other words, to determine fair market value you should consider the use which would prompt a buyer to pay as much as the owner might reasonably expect to receive from selling the property.¹

You must decide what the “highest and best” use of the property is.² But you must be realistic. In considering whether a “use” advanced by either party is the property's highest and best, you must determine if the property is suitable for that use, and whether anybody would want it for that use.

¹*State by Com'r of Transp. v. Caoili*, 135 N.J. 252, 260 (1994); *See generally American Institute of Real Estate Appraisers, The Appraisal of Real Estate*, 275 (10th ed. 1992).

²*State v. Nalbone Trucking Co.*, 128 N.J. Super. 370, 378 (App. Div. 1974), *certif. den.* 65 N.J. 575.

[OPTIONAL If deemed appropriate, give an example using the specific facts of your case, *i.e.* “A piece of land might have more value if used for an office building, but to have that higher value there would have to be a demand for an office building on the property. If the property is farm land, far removed from any city, it may be less likely that anyone would want to build an office there. In that case, use as an office complex could not be considered as that property's highest or best use.”]

Similarly, zoning, planning, and building laws and regulations limit the way property may be used. If, for example, the zoning laws permit only one-family houses, then an industrial or commercial use could not be considered as the highest or best use of the property even though there might be wide-spread demand for such other uses.

B. Effect of Anticipated Variance or Zone Change
(Approved 4/96; revised 4/02)

Now suppose there were indications that the law regulating the property's use might change so as to permit a use, or limit a use, in the future which would make the property more valuable or less valuable. Parties negotiating a price for the property's sale on the date of taking would not simply ignore the probability of change; neither should you.

[Here insert the parties' contentions on the variance or zoning changes.]

It is for you to determine what effect, if any, those indications of a *[zoning, planning, etc.]* change would have on the property's market value on the date of

taking. You may find that the change in use is so remote as to have *no* effect on the property's value.

You may find that the change appeared uncertain, yet would have had *some* effect on the property's value; or you may find that the change to be very likely, in which case the potential change would have a *very substantial* effect on the value.

In any case, your finding as to the value of the subject property should reflect the potential change in [*zoning, planning, etc.*] to the same extent that reasonable buyers and sellers would give such potential change in determining its value.³

C. Effect of Potential Assemblage of Lots (Approved 4/02)

In determining “highest and best” use of the property you must take all the surrounding circumstances into account. Now suppose there were indications that there was reasonable probability that the property may be assembled with neighboring properties to form a larger piece of property.⁴ Suppose further that the assemblage of a larger piece of property would permit a use in the future which would make the

³*State by Com'r of Transp. v. Caoili*, 135 N.J. 252, 264 (1994). Before such evidence can be considered by a jury, the trial court must first serve a “gate-keeping” function and determine that such a zoning change is probable; that is, supported by “cogent evidence indicating beyond a mere possibility that a change of use is likely . . .”

⁴The court does have a gate-keeping function which requires a threshold determination that the proofs justifying sending the issue of assemblage to the jury have been entered into evidence. “If the judge determines that an assemblage including the defendant’s property was reasonably probable at a near-future time from the date of taking, then . . . the jury must be instructed to consider in its determination of fair market value the premium a willing buyer would pay for the assemblage . . .” *County of Monmouth v. Hilton*, 334 N.J.Super. 582, 594 (App. Div. 2000), *certif. den.* 167 N.J. 633 (2001).

property more valuable. Parties negotiating a price for the property's sale on the date of taking would not simply ignore the probability of assemblage and neither should you.

[Here insert the parties' contentions on the probability of an assemblage of properties.]

It is for you to decide what effect, if any, those indications of a probability of future assemblage would have on the market value of the property on the date of taking.⁵ You may find that the probability of an assemblage is so remote as to have *no* effect on the property's value. You may find that the probability of an assemblage appeared uncertain, yet would have had *some* effect on the property's value. Or you may find the probability of an assemblage to be very likely, in which case the potential change would have a *very substantial* effect on the value.

In any case, your finding as to the value of the subject property should reflect the probability of an assemblage to the same extent that reasonable buyers and sellers would give such potential change in determining its value.

⁵See, *County of Monmouth v. Hilton*, 334 N.J. Super. 582, 594, (App. Div. 2000), *certif. den.* 167 N.J. 633 (2001).