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Eminent Domain - Reasonable Probability of Rezoning

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tional policy of free alienability. The attorney would simply advise his clients that they can agree that no stock can be transferred without offering it for a dollar to the other stockholders, explaining that this constitutes no 'forfeiture' or no 'prohibition' because there is a ready escape, i.e., in the event that the other stockholders do not elect to purchase at a dollar, the selling stockholder is free to sell. Such a result it is submitted, would represent a solid victory of form over substance, legal niceties over logic and common sense.²⁴

Apparently form has triumphed over substance in the Supreme Court of Pennsylvania. This decision now makes it possible for first option agreements to provide in effect that if the corporation or other stockholders do not desire to have a gift made to them, the shareholder wishing to dispose of his stock is free to sell it on the open market.

EMINENT DOMAIN—Reasonable Probability of Rezoning—Valuation testimony may be premised upon a reasonable probability of rezoning—Evidence supporting the probability must not be remote or speculative.

Snyder v. Commonwealth, 412 Pa. 15, 192 A.2d 650 (1963).

Under the power of eminent domain, an unimproved parcel of land owned by George Snyder and Edward Boone was condemned by the Commonwealth of Pennsylvania for highway purposes. This property contained 1 ⁷/₁₀ acres and was zoned residential at the time of the taking.

Being dissatisfied with the Commonwealth's offer of compensation, the plaintiffs petitioned for appointment of a board of viewers to hear testimony and make an award of damages for the taking. The board of viewers awarded plaintiffs \$12,745.37. Both sides appealed to the Court of Common Pleas where the jury returned a verdict of \$40,000.00 plus \$7400.00 for delay in payment.

The Commonwealth appealed from the jury award, arguing that the condemnee should not have been permitted to introduce evidence of market value which was based on the theory that the property had a reasonable probability of being rezoned at the time of the taking. The main thrust of this argument being that there was not suf-

24. BRIEF FOR APPELLANTS, p. 19.

ficient evidence offered to indicate any likelihood of rezoning with respect to this property.¹

Without discussing the evidence that was offered on this question, the Supreme Court of Pennsylvania held that the reasonable probability of rezoning was a question of fact and that there was sufficient evidence to support the probability in this case.²

However, the dissent of Justice Cohen, concurred in by Chief Justice Bell and Justice Eagen, was in complete agreement with the Commonwealth's position that the evidence on the likelihood of a change in zoning was insufficient. Justice Cohen, in commenting on the lack of facts to support the probability of rezoning, stated that, ". . . in order for evidence of a possible zoning change to be admissible, the prospect of repeal or amendment of the zoning ordinance must be reasonably probable and not speculative or remote."³

At trial, plaintiffs contended that, had the land not been condemned, there was a reasonable probability that it would have been rezoned to a higher use classification. The plaintiffs' valuation witness was permitted to give an opinion that there was a trend in favor of institutional and commercial use of those properties along Route 22 in Churchill Borough where the plaintiffs' property was located. His opinion of market value of the Snyder tract was based on the theory that this land had a reasonable probability of being rezoned at the time of the taking.

The following evidence was submitted by the plaintiffs to support the probability; Churchill Borough had willingly made a change of zoning from residential to institutional to accommodate a large research laboratory. The research property and the plaintiffs' property were 1/8 of a mile apart, both fronting on Route 22. There was a limited amount of usable undeveloped land along Route 22 in the Churchill Borough area. Many commercial establishments were erected along this highway in the municipalities to the east and west of Churchill Borough.

The Commonwealth offered evidence indicating that there was no probability of a zoning change for the Snyder property. All of Churchill Borough had been zoned residential for at least ten years, and, except for the laboratory property and a water authority property, there had been no zoning changes. In 1957, the proper authorities of Churchill Borough had refused to rezone the property adjoin-

1. Brief for Appellant, p. 12, *Snyder v. Commonwealth*, 412 Pa. 15, 192 A.2d 650 (1963).

2. *Snyder v. Commonwealth*, 412 Pa. 15, 20, 192 A.2d 650, 652 (1963).

3. *Id.* at 24, 192 A.2d at 654.

ing that of the plaintiffs. There were no commercial enterprises anywhere in Churchill Borough and the residential growth in Churchill Borough had been substantial for six or eight years prior to the condemnation.

Although it is the general rule that evidence of value premised upon a proscribed use is inadmissible,⁴ a well-recognized exception to this rule, never before considered by an appellate court of Pennsylvania, states that a reasonably probable change in the zoning restriction may be considered in arriving at fair market value, if the change would have an appreciable influence on that value; the exception further requires that such a possible zoning change must not be remote or speculative.⁵

Admittedly, the existence or non-existence of a reasonable probability of rezoning is a question of fact,⁶ but it is submitted that the evidence to support the probability must meet the usual evidentiary standards of the law in order to be admissible at all. As was stated by the California court:

If there is to be a showing of a reasonable probability of a change in the zoning of a property to be condemned, the evidence must at least be in accordance with the usual minimum evidentiary requirements, and that which is purely speculative, wholly guesswork and conjectural, is not admissible.⁷

The Maryland court also discussed the insufficiency of evidence, stating:

[I]t would, we think, have been entirely in order for the trial court to have instructed the jury as to the insufficiency of such evidence and to have stated that no element or enhancement of market value could be based upon the mere possibility that at some time in the future a reclassification might occur.⁸

Authorities on eminent domain, Nichols, *Eminent Domain* (3rd rev. ed. 1962) and Orgel, *Valuation Under Eminent Domain* (2d ed. 1963) do not indicate the minimum evidentiary requirements for the admissibility of valuation premised upon the reasonable probability

4. 4 NICHOLS, EMINENT DOMAIN § 12.322 (3rd rev. ed. 1962).

5. *Id.* at § 12.322 (1).

6. *Supra* note 2.

7. Redondo Beach School Dist. v. Flodine, 163 Cal. App. 2d 437, 448, 314 P.2d 581, 587 (1957).

8. State Roads Comm'n v. Warrimer, 211 Md. 480, 486, 128 A.2d 248, 251 (1957).

of rezoning. Nichols only states that the evidence to support the probability "must not be remote or speculative."⁹

Other jurisdictions, although admitting a variety of evidence on the question, do not refer specifically to what minimum standards this type of evidence must meet to be admissible. But they do give some indication of what the minimum evidentiary standards should be.

For example, in *Matter of Village of Garden City*¹⁰ the evidence indicated that, while the subject property was zoned residential, an adjoining property and properties across the street were zoned commercial. Also, for a three year period prior to the condemnation the Village of Garden City had under study a change in zoning of this parcel and others in the immediate area. The condemnee's property was not properly zoned and was not suitable for residential use, as this particular area was primarily developed commercially. A change of zoning of the subject property would not have been inconsistent with the general character of this vicinity or the village as a whole.

Supporting the reasonable probability theory in *Masten v. State*¹¹ was evidence of a number of commercial establishments existing in the neighborhood before the appropriation and a large number of variances from residential restrictions being granted before and after the condemnation. A comprehensive zoning revision, under study for approximately a year before the taking, was put into effect three years after the appropriation. The court recognized the probative value of the numerous variances granted, but noted that "isolated variances granted in the exercise of discretion . . . have little or no probative force. . . ."¹²

In *People v. Donovan*¹³ there was evidence that the condemnee's property was adjacent to a rapidly expanding governmental center and that several properties situated similarly and zoned residential had been sold for inflated prices for non-residential uses. At the date of the condemnation the city was considering rezoning the area, but had temporarily rejected any changes. There was expert testimony which indicated that properties lying between the subject property and the governmental center had a reasonable probability of being rezoned and that this possibility existed to a somewhat lesser

9. *Supra* note 5.

10. 9 Misc. 2d 693, 167 N.Y.S. 2d 166, *aff'd*, 4 App. Div. 2d 783, 165 N.Y.S.2d 1022, *appeal denied*, 3 N.Y.2d 708 (1956).

11. 11 App. Div. 2d 370, 206 N.Y.S.2d 672, *aff'd*, 9 N.Y. 796 (1960).

12. *Id.* at 372, 206 N.Y.S.2d at 674.

13. 57 Cal. 2d 346, 369 P.2d 1 (1962).

degree for the subject property. The court, in admitting valuation testimony premised on a probability of rezoning, stated that, "The reasonable probability of a zoning change may be shown by a variety of factors including neighborhood changes and general changes in land use."¹⁴ In view of the evidence that was offered on this question, it appears obvious that the court was referring to "neighborhood changes and general changes in land use" in the particular area in close proximity to the Donovan property and within the same municipality in which it was located.

These three cases¹⁵ indicate that the evidence relied upon must first and foremost refer to circumstances existing within the particular area where the property in question is located; further, that the evidence must concern the situation within the municipality which imposed the restrictions upon the property in question. This appears to be the very minimum common denominator of the evidence sufficient to support valuation testimony which is premised upon the reasonable probability of rezoning.

But, a large quantity of this type of evidence will not necessarily meet the burden of proof, unless it indicates some basis from which to draw a conclusion that the zoning change was reasonably probable.

In *City of Euclid v. Lakeshore Co.*¹⁶ the evidence showed that the property across the boulevard was zoned commercial and used commercially and that there was commercial zoning and use on the same side of the boulevard two blocks from the subject property. There had been a few adjustments to a different class of commercial zoning on the other side of the boulevard, but the neighborhood was experiencing a general residential growth. The court refused to admit market value testimony which was premised upon a probability of rezoning. The court placed considerable importance on the condemnor's argument that the zoning ordinance had been in effect for twenty-seven years and had, almost without change, maintained the residential character of this area throughout this period. The court felt that the past history of this zoning ordinance indicated that there was little possibility of any change in the future which would be inconsistent with the general character of this area.

The condemnee in the case of *In re Armory Site in Kansas City*¹⁷ offered evidence indicating that across the street from his residen-

14. *Id.* at 353, 369 P.2d at 4.

15. *Matter of Village of Garden City*, 9 Misc. 2d 693, 167 N.Y.S.2d 166, *aff'd*, 4 App. Div. 2d 783, 165 N.Y.S.2d 1022, *appeal denied*, 3 N.Y.2d 708 (1956); *Masten v. State*, 11 App. Div. 2d 370, 206 N.Y.S.2d 672, *aff'd*, 9 N.Y. 796 (1960); *People v. Donovan*, 57 Cal. 2d 346, 369 P.2d 1 (1962).

16. 102 Ohio App. 96, 133 N.E.2d 372 (1956).

17. 282 S.W.2d 464 (Mo., 1955).

tially zoned land and in the immediate neighborhood there were structures which were not consistent with residential zoning. The court in rejecting this evidence said, "Merely presenting evidence that nearby there exist buildings other than those permitted by the present zoning regulation is not sufficient to remove from the realm of speculation the possibility of a change in the zoning regulation. . . ."18

The evidence in the *Snyder* case did not approach the standards in the case of *City of Euclid v. Lakeshore Co.*¹⁹ and probably not even those of *In re Armory Site in Kansas City*²⁰ where the evidence was very meager; the court in both cases rejected the reasonable probability arguments. In the *Snyder* case two zoning changes over a period of ten years were the only evidence directly referable to Churchill Borough which might have indicated a possibility of rezoning; this evidence did not even refer to the particular area in which the *Snyder* property was located. As noted in *Masten v. State*,²¹ one or two zoning changes have very little probative value. The balance of the evidence presented on this question referred to other areas which were located in municipalities adjacent to or a few miles distant from Churchill Borough.

There were no indications that any type zoning change was wanted or needed by Churchill Borough,²² or that the present zoning was inconsistent with the natural development of this area,²³ or that the zoning in the *Snyder* case was arbitrary and not in good faith,²⁴ or inconsistent with the general character of Churchill Borough.²⁵

This is not to say that extrinsic evidence would have no value on the question of the reasonable probability of rezoning, but to suggest that the admissibility of market value based on a probability of rezoning must depend on evidence which concerns the particular municipality and area of interest. If there is no such evidence, any val-

18. *Id.* at 471.

19. *Supra* note 16.

20. *Supra* note 17.

21. *Supra* note 12.

22. "[I]f it appears reasonably probable to the trial judge that the wants and needs of the particular community may result, within a reasonable time, in the lifting of restrictions, he should admit testimony of present value based on prospective use of the property for purposes not then available." *City of Austin v. Cannizzo*, 267 S.W.2d 808, 815 (1954).

23. *Long Beach City High School Dist. v. Stewart*, 30 Cal. 2d 763, 770, 185 P.2d 585, 589 (1947).

24. *Ibid.*

25. *Masten v. State*, 11 App. Div. 2d 370, 371, 206 N.Y.S.2d 672, 673 (1960).

uation testimony premised on a reasonable probability of rezoning should be rejected.

The condemnee in an eminent domain proceeding has the right to just compensation, interpreted by the courts to mean fair market value. But fair market value does not include remote possibilities under the mistaken application of the rule of reasonable probability of rezoning. The rule requires evidence which refers to that area in the particular political subdivision in which the condemned property is located. The evidence introduced in *Snyder v. Commonwealth* does not appear to fit this standard.

TORTS—Illegitimacy—Illegitimate v. Father—To cause one to be born into the world as an illegitimate constitutes a tortious act—no remedy for injuries resulting from this act will be granted.

Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E. 2d 849 (1963).

The defendant is the father of the infant plaintiff. The plaintiff's mother was induced by the defendant to have sexual relations with him by a promise of marriage. Because the defendant was already married, this promise could not be kept.¹ As a result, the plaintiff is an illegitimate child. This suit was brought by the plaintiff to recover damages for his illegitimacy.² The suit was dismissed by the Circuit Court of Cook County, Illinois, for failure to state a cause of action. The Supreme Court of Illinois refused to take the case, and transferred it to the Appellate Court which affirmed the lower court's decision.³

1. The plaintiff's mother had no knowledge that the defendant was married at the time of the act of coition, and therefore, she was a victim of the defendant's fraud.

2. The plaintiff sought damages for the deprivation of his right to be a legitimate child, to have a normal home, to have a legal father, to inherit from his paternal ancestors and for being stigmatized as a bastard.

3. According to Illinois Law not all cases can be appealed directly to the Supreme Court of Illinois.

ILL. REV. STAT. 1961, ch. 110, § 75.

(1) Appeals shall be taken directly to the Supreme Court
(a) in all cases in which a franchise or freehold or the validity of a statute or a construction of the constitution is involved,
(b) in all cases relating to revenue, or in which the State is interested as a party or otherwise and (c) in cases in which the validity of a municipal ordinance or county zoning ordinances