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Untried Use and Valuation of Condemned Land in New York

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NOTES

UNTRIED USE AND VALUATION OF CONDEMNED LAND IN NEW YORK

Private property shall not be taken for public use without just compensation.[1]

If a condemnor is successful in a New York condemnation proceeding, the court will appoint three commissioners to ascertain the compensation to be awarded to the condemnee.[2] The determination of what constitutes "just compensation" is basically a judicial question, not within the realm of legislative action.[3] Case law throughout the country indicates that the market value of the land at the time of appropriation is the proper measure of compensation.[4] The determination of a condemnation award where all of the condemnee's property has been acquired has been judged "relatively simple" under the market value method of valuation.[5] However, rather than clarifying the meaning of "just compensation," this method merely equates "just compensation" to the relatively vague concept of "market value," which itself requires clarification. In an effort to distinguish those elements which should be considered in determining the market value of land, the courts of New York have applied several general rules.

Elements of Market Value

Implied within the "market value" method of valuation is the theory that a compensation award should be an estimate of the

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[1] N.Y. CONST. art. I, § 7(a). A similar provision is found in the federal constitution. U.S. CONST. amend. V.

[2] N.Y. CONDEM. LAW § 13.

[3] Monongahela Nav. Co. v. United States, 148 U.S. 312, 327 (1893). However, the legislature can make provisions concerning compensation if such are not detrimental to the rights of the owner to a minimum award. 4 NICHOLS, EMINENT DOMAIN § 12.1[3] (rev. 3d ed. 1962) [hereinafter cited as 4 NICHOLS]. Within the area of untried uses, it has been stated that "a statutory rule defining the elements of just compensation in terms of available use . . . would not be feasible." N.Y. CITY LAW DEP'T, REPORT ON LAW AND PROCEDURE IN CONDEMNATION 158 (1951).

[4] See cases cited in 4 NICHOLS § 12.2 n.1. In exceptional cases, however, in which the application of this measure would be unjust, it is not employed. JAHR, EMINENT DOMAIN 102-03 (1953) [hereinafter cited as JAHR].

[5] LEVEY & MANHEIMER, CONDEMNATION IN NEW YORK 75 (1937).

highest purchase price which the land would bring on the open market,[6] and not an appraisal of the subjective value of the land to either the condemnor or the condemnee.[7] The award should reflect the value to a potential purchaser; "it centers attention on some sort of sale price. . . ." [8] However, since the purchase price would vary in relation to the necessity to sell on the part of the owner and the buyer's capacity and desire to acquire land, a further definition of "market value" is required.

The rule in New York is that the award to the condemnee should represent "the amount which one desiring but not compelled to purchase will pay under ordinary conditions to a seller who desires but is not compelled to sell." [9] Although the terminology of this "willing buyer—willing seller" standard is designed to eliminate the consideration of forced-sale prices, it is not definitive of the factors which would influence such a "willing buyer" or "willing seller." [10] This rule does not compensate for certain special situations.[11] Although hardships may result in these circumstances, the courts have nonetheless applied the same standard.

It has been determined that any fact which the theoretical "willing seller" might bring to the attention of the "willing buyer" in order to influence his decision to purchase, or to affect the price which he is willing to pay, must be considered in the valuation process.[12] This is based on the concept [13] that

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[6] Roberts v. City of New York, 295 U.S. 264, 284 (1935); Matter of City of Rochester [Smith St. Bridge], 234 App. Div. 583, 586, 255 N.Y. Supp. 801, 807 (4th Dep't 1932).

[7] 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN §§ 13, 14 (2d ed. 1953); see United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 80-81 (1913); Cookinham v. Village of Richfield Springs, 140 Misc. 760, 761, 251 N.Y. Supp. 520, 523 (Sup. Ct. 1931); Matter of Town of Frankfort, 193 Misc. 617, 620, 84 N.Y.S.2d 78, 81 (Herkimer County Ct. 1948).

[8] 1 ORGEL, *op. cit. supra* note 7, § 15 at 76.

[9] Matter of Bd. of Water Supply, 277 N.Y. 452, 457, 14 N.E.2d 789, 791 (1938); Heiman v. Bishop, 272 N.Y. 83, 86, 4 N.E.2d 944, 945 (1936). *Accord,* Matter of City of Rochester [Smith St. Bridge], *supra* note 6, at 586, 255 N.Y. Supp. at 807; School Dist. v. Wicks, 227 N.Y.S.2d 768, 771 (Sup. Ct. 1962). See JAHR 97-100; 4 NICHOLS § 12.2[1].

[10] See generally 1 ORGEL, *op. cit. supra* note 7, § 20.

[11] An insolvent owner may be willing to sell the land at a forced-sale price in order to obtain capital immediately, rather than receive a greater payment at the completion of condemnation proceedings. *Id.* § 22. An owner may be capable of finding an individual purchaser who is in such urgent need of acquiring the land that he is willing to pay an unusually high price for the opportunity. *Id.* § 23.

[12] See Matter of City of New York [Blackwell's Island Bridge], 198 N.Y. 84, 88, 91 N.E. 278, 279 (1910); Matter of City of Rochester [Smith St. Bridge], *supra* note 6, at 586, 255 N.Y. Supp. at 806; Heintz v. State, 32 Misc. 2d 1025, 1030, 226 N.Y.S.2d 540, 545 (Ct. Cl. 1962).

[13] Matter of City of New York [School of Industrial Arts], 2 Misc. 2d 403, 407, 154 N.Y.S.2d 402, 407 (Sup. Ct. 1956).

the law of supply and demand will furnish a more correct index of value and that "market value," the standard in condemnation, is determined not so much by cost as by the relative desirability, abundance and utility of the particular property in the community.

It is clear that there is a possibility that certain land may possess a latent utility which, although providing a degree of attraction to a potential purchaser, was never exploited by the present owner. This situation could exist because the owner was unwilling or unable to put the land to that specific use, or because he intended to so utilize the land in the future but was prevented from executing his plan when the land was condemned. It is likewise possible that an owner might intend to use his land in the future for a purpose which, although it would provide him personal satisfaction or value, would not enhance the "relative desirability" of the property on the open market. It is the purpose of this note to consider the problem of land valuation with specific reference to the effect of future but untried uses [14] upon the market value of land.

1. *Untried Uses*

In estimating land value on the open market, *i.e.*, in predicting a selling price agreeable to a "willing buyer" and a "willing seller,"

it must be assumed that the property would be valued for its most profitable use and where a particular piece of property is enhanced by a present recognition of its adaptability and suitability for a particular use, such elements must be considered.[15]

Attention must be given, therefore, to "every element of usefulness and advantage in the property," including location and availability for "any useful purpose whatever." [16]

Since it is market value, and not the value to the owner, which is to be determined, there is no requirement that value

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[14] A distinction must be made between the terms "future" and "untried." Future use may refer to the continuation of a present use into the future. Thus, a condemnee might request that evidence of present income and predicted future income from the land be allowed, since it would affect the market value of the land if purchased for the same use. This area is beyond the scope of the present discussion.

[15] Andrews v. State, 19 Misc. 2d 217, 220, 188 N.Y.S.2d 854, 858 (Ct. Cl. 1959), *aff'd mem.*, 11 App. Div. 2d 599, 200 N.Y.S.2d 451 (3d Dep't 1960), *aff'd mem.*, 9 N.Y.2d 606, 176 N.E.2d 42, 217 N.Y.S.2d 9, *cert. denied*, 368 U.S. 929 (1961).

[16] Matter of City of New York [Water Front on E. River], 213 App. Div. 187, 190, 210 N.Y. Supp. 387, 390 (1st Dep't 1925).

be based on a use to which the owner has previously or presently devoted the land.[17] Thus, it has been stated that

> an owner might allow a parcel of vacant property to remain undeveloped indefinitely. . . . Land, which may have been accumulating nothing but arrears of taxes, thereupon [upon condemnation] suddenly develops enormously valuable "potentialities." [18]

A condemnee may be permitted to recover compensation based upon the "potentialities" of his property because

> property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it. . . . Its capability of being made thus available gives it a market value which can be readily estimated.[19]

The potential use, in relation to which the condemnee's land is to be valuated, has been termed the "most advantageous use";[20] it has more accurately been referred to as the "best available use." [21] Problems arising from the vagueness of such general terminology can be resolved only by determining the elements which constitute "availability."

The Supreme Court of the United States has stated that

> 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 . . . to the full extent that the prospect of demand for such use affects the market value while the property is privately held.[22]

It seems clear from this statement that "availability" consists of (1) the need for such land for a certain use, and (2) the recognizable influence of the land's potential to enhance its value

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[17] Olson v. United States, 292 U.S. 246, 255 (1934); Matter of City of New York [Clearview Expressway], 9 N.Y.2d 439, 445, 174 N.E.2d 522, 525, 214 N.Y.S.2d 438, 442 (1961); Matter of City of New York [Water Front on E. River], *supra* note 16; Walker v. State, 33 Misc. 2d 668, 671, 227 N.Y.S.2d 58, 61 (Ct. Cl. 1961); JAHR 111-14; 4 NICHOLS § 12.3142.

[18] N.Y. CITY LAW DEP'T, *op. cit. supra* note 3, at vi.

[19] 4 NICHOLS § 12.314, at 161.

[20] Olson v. United States, *supra* note 17; Sparkhill Realty Corp. v. State, 254 App. Div. 78, 82, 4 N.Y.S.2d 679, 682 (3d Dep't), *aff'd mem.*, 279 N.Y. 656, 18 N.E.2d 301 (1938); Board of Supervisors v. Sherlo Realty, Inc., 32 Misc. 2d 579, 585, 224 N.Y.S.2d 244, 252 (Sup. Ct. 1961), *aff'd mem.*, 19 App. Div. 2d 590, 240 N.Y.S.2d 950 (4th Dep't 1963).

[21] Banner Milling Co. v. State, 240 N.Y. 533, 148 N.E. 668 (1925); Humbert v. State, 278 App. Div. 1041, 107 N.Y.S.2d 507, 508 (4th Dep't 1951), *aff'd mem.*, 303 N.Y. 929, 105 N.E.2d 504 (1952); Walker v. State, *supra* note 17.

[22] Olson v. United States, *supra* note 17.

on the open market. The first element may be termed "marketability"; the latter may be called "adaptability." There seems to be some confusion in the case law of New York as to the relative importance of these two elements when considered with a third factor, *i.e.*, the condemnee's intention, or lack of intention, to use or sell the land for the purpose claimed as the "best available use."

2. *Marketability*

As has been indicated, land may be valued in relation to a future untried use since the object of valuation proceedings is to determine the market value of the land. It is obvious that there will be no market value for a potential use unless there is a market for that use. In other words, whether or not a future use will be considered in determining market value is dependent upon "whether or not purchasers can be found who would pay more for it [the land] because of the adaptability to the use. . . ." [23] A market is deemed to exist only when such purchasers are found "in substantial numbers." [24] It is well established in New York law that marketability, which is influenced by the possibility of a future use, is the *sine qua non*, without which untried uses will not be considered in the valuation process.[25]

It is important to note that the *effect* of the future use is the controlling factor. Land is not to be valued as if it were being employed for the use claimed; rather, it is to be valued in relation to the enhancement of market value resulting from the possibility of the potential buyer converting the land to a future use. If the best possible use of certain land is for the construction of an apartment house, the market price is not that of apartment house real estate, but is the price a purchaser would pay in order to have the opportunity to build the apartment house himself. Of course, such a purchaser would also consider the investment required before such potential use could be realized. For this reason, the market price of land adaptable to a future use would necessarily be less than that of land which was already being used for that purpose.

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[23] New York Cent. R.R. v. Maloney, 234 N.Y. 208, 218, 137 N.E. 305, 309 (1922). *Accord*, Board of Supervisors v. Sherlo Realty, Inc., *supra* note 20, at 586, 224 N.Y.S.2d at 253; Dillenbeck v. State, 193 Misc. 542, 547, 83 N.Y.S.2d 308, 314 (Ct. Cl. 1948), *aff'd mem.*, 275 App. Div. 871, 88 N.Y.S.2d 389 (3d Dep't 1949).

[24] Matter of Bd. of Water Supply, *supra* note 9, at 459, 14 N.E.2d at 792.

[25] Fowler v. State, 234 App. Div. 166, 168, 254 N.Y. Supp. 446, 448 (3d Dep't 1931), *aff'd mem.*, 259 N.Y. 594, 182 N.E. 195 (1932); Matter of Simmons, 130 App. Div. 350, 352, 114 N.Y. Supp. 571, 573 (3d Dep't), *aff'd mem.*, 195 N.Y. 573, 88 N.E. 1132 (1909); *In re* Daly, 18 App. Div. 194, 197, 45 N.Y. Supp. 785, 789 (2d Dep't 1897). See also cases cited note 23 *supra*.

3. *Adaptability — A Question for Experts*

If it can be shown that certain property is marketable for a future use, it must be determined (1) whether the land is more valuable by reason of its potentiality, and (2) to what extent the value is enhanced. For example, if a condemnee claims that his property may be best utilized for residential development, he

> must show more than the fact that it is possible to split up a tract into building lots. He must show that the tract is in or near a town and that a possible purchaser of the property would take into consideration the availability of the land for such building lots.[26]

The proof of these elements, and the estimation of the extent to which they would enhance market value, is largely a matter of expert testimony and evidence.[27]

The practice of determining awards on the basis of the opinions of experts has been justified by the belief that "genuine and accurate verdicts reflecting actual market value will result." [28] However, this method has also been assailed, on the ground that "availability and practicability are, essentially, not matters of definition, nor matters of fact, but matters of opinion [in which] . . . actual skill, judgment and experience play a smaller role . . . than in any other form of expert testimony." [29] The criticism of expert testimony has sometimes been vehement:

> Many experts unwarrantably assume a superior attitude and endeavor to leave the impression that wisdom will die with them. The triers of the fact should not be condemned in failing to be convinced by their egotism and their pretensions.[30]
>
> Greater travesty of justice could hardly be imagined, for the result depends altogether on the integrity and intelligence of professional witnesses, who can testify as they please on hearsay with complete irresponsibility.[31]

Although these arguments appear valid, the court must somehow determine whether the use claimed is too remote or speculative

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[26] LEVEY & MANHEIMER, *op. cit. supra* note 5, at 93-94.

[27] *In re* Mountain Lakes in Westchester, Inc., 219 N.Y.S.2d 140, 145 (Sup. Ct. 1961).

[28] Comment, *Hearsay Testimony in Condemnation Cases*, 6 ARIZ. L. REV. 112, 120 (1964).

[29] N.Y. CITY LAW DEP'T, REPORT ON LAW AND PROCEDURE IN CONDEMNATION 153 (1951). "[T]he judgment as to available use is more personal than judicial — matter of impression rather than judgment." *Id.* at 154.

[30] Board of Hudson River Regulating Dist. v. Cady, 131 Misc. 768, 769-70, 228 N.Y. Supp. 159, 161 (Sup. Ct. 1928).

[31] N.Y. CITY LAW DEP'T, *op. cit. supra* note 29, at iv. "[S]uch opinions are often in the highest degree haphazard and irresponsible, if not worse." *Id.* at iii.

to actually affect and enhance the value of the property on the open market. This judgment requires some method or basis of decision, and expert testimony seems to be the only practical and available means of determining adaptability. A manifestation of intention on the part of the condemnee to use or sell his land for the use claimed might provide evidence in support of the expert's opinion of adaptability—it would tend to show that the potential use would enhance the market price. However, it appears that the element of manifest intention is not requisite for the consideration of a future use in valuation proceedings.

4. *Adaptability Without Intention*

It has been demonstrated that adaptability is determined by the intrinsic potential of the land which would justify an enhancement of its value; it may be unrelated to the time or effort required to improve the land in order to realize such potential.[32] In New York, it has been held that if land is adaptable for a certain use, it is reversible error to exclude from the valuation proceedings evidence of such adaptability.[33] But it is more difficult to determine whether adaptability alone, without any manifestation of intent to utilize the land for the future use claimed, requires valuation on the basis of an untried use. Because a discussion of the degree of adaptability and manifest intention in the circumstances of each case is treated in the text of individual court decisions, it may appear unclear which is the controlling factor of the court's rationale. A consideration of several cases in the area will serve as the basis for deducing principles which will clarify the relative importance of adaptability and manifest intention.

In *Matter of City of New York* [*Clearview Expressway*],[34] the condemnee claimed that the best use to which his land could be put was the construction of apartment houses. The fact that the land was adaptable to this use was not contested. The question on appeal was not the possibility or desirability of such a project, but rather, the importance of the fact that the condemnee "didn't think enough of the availability of financing" [35] to undertake the construction himself. The court of appeals held that

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[32] Land has been valued in relation to its potential use as a site for commercial buildings although "the productivity of the property based upon use as a shopping center was some millions of dollars removed in terms of investment and not less than a year removed in terms of time . . . ." Levin v. State, 8 Misc. 2d 33, 166 N.Y.S.2d 438 (Ct. Cl. 1957).

[33] Matter of City of New York [Inwood Hill Park], 230 App. Div. 41, 243 N.Y. Supp. 63 (1st Dep't 1930), *aff'd mem.*, 256 N.Y. 556, 177 N.E. 138 (1931).

[34] 9 N.Y.2d 439, 174 N.E.2d 522, 214 N.Y.S.2d 438 (1961).

[35] *Id.* at 444, 174 N.E.2d at 525, 214 N.Y.S.2d at 442.

the fact that they did not put the property to the best use for which it was available because of a temporary stringency in the money market, or their own financial inability, should not deprive them of the fair potential value of the property. . . .[36]

It may be concluded from this decision that, under the specific circumstances of financial impossibility or difficulty, an untried use of land adaptable to that use will be considered in valuation even though the condemnee did not manifest an intention to take advantage of the adaptability himself.

The *Clearview* decision could be based on either of two principles: (1) the lack of manifest intention will not defeat a claim of best possible use *only if* the absence of intention results from financial inability; or, (2) the lack of manifest intention will *never* invalidate such a claim, on the theory that market value is not affected by the condemnee's plans, but rather by the potentialities in the land for which a prospective buyer would pay a certain price. The decision is unclear as to which of these the court applied. Thus, the case is direct authority only for the proposition that lack of intent under conditions of financial difficulty will not justify the rejection of the condemnee's claim. The broader question, *i.e.*, the materiality of intention in the presence of financial capability, was left unanswered by the *Clearview* decision.

It would appear that there are two reasonable solutions to this question. It could be reasoned that, since the condemnee never intended to take advantage of the land's potentialities, an award based upon future use would represent profits to the condemnee which he would never have realized, if it were not for the condemnation. On the other hand, it could be argued that condemnation deprives the owner of the opportunity to change his mind, and utilize the land for such purposes in the future, or sell it to one who would use it to full advantage. Later case law appears to clarify the New York viewpoint on this question.

In *Albany Country Club v. State*,[37] the land in question was owned by a country club, but had never been used as part of its golf course or devoted to the benefit of its members. The condemnee claimed that this land on the perimeter of the property was available for commercial and residential development.

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[36] *Id.* at 445, 174 N.E.2d at 525, 214 N.Y.S.2d at 442.

[37] 37 Misc. 2d 134, 235 N.Y.S.2d 684 (Ct. Cl. 1962), *aff'd*, 19 App. Div. 2d 199, 241 N.Y.S.2d 604 (3d Dep't), *aff'd*, 13 N.Y.2d 1085, 196 N.E.2d 62, 246 N.Y.S.2d 407 (1963). Only part of the condemned property was claimed to be most profitably valued for untried uses. It is the decision in relation to this land which is pertinent to this discussion.

"Shortly before the appropriation the claimant initiated steps to determine the best use for the surplus land . . . but had actually done little else to utilize such property." [38] A previous case had held that contemplated improvement, if manifested for the first time only shortly before condemnation, without any attempt to start improvement, did not show an intention to use the land for a future purpose.[39] However, despite this authority to find the manifestation of intention invalid, the lower court in *Albany* valuated the property on the basis of the untried use. The appellate division approved the method of valuation, but considering the proximity of the land to two highways, the rising value of land in the area, and the comparative sales of similar land, it modified the judgment of the lower court by increasing the award to the condemnee.[40] The New York Court of Appeals affirmed,[41] impliedly confirming both the standard of valuation applied by the lower court and the modification by the appellate division.

Since the condemnee in *Albany* had not made plans, caused maps to be drawn, or contractually committed himself to the improvement of his land, but had only initiated steps to determine the best use, this case appears to indicate that if the land is adaptable for an untried use, that use will be considered even though the condemnee's intention is *minimal.* It is unclear, however, whether the court completely disregarded the last-minute show of intention on the part of the condemnee. Since condemnation plans usually can be anticipated, an owner of land may conceivably initiate steps to determine the best use of the land, even though he had no prior intent to do so. The decision in the *Albany* case may permit an increase in award based upon this meager evidence of intent. However, it remains uncertain whether even a minimal indication of intention is required.

In *Andrews v. State,*[42] the appropriated property consisted of land which had been improved by a house, horse barn, granary and shed. In the past, the property had been used as a tenant farm and a ferrying point. The court considered the land as

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[38] *Id.* at 136, 235 N.Y.S.2d at 687.

[39] *In re* Mountain Lakes in Westchester, Inc., *supra* note 27, at 146.

[40] Albany Country Club v. State, 19 App. Div. 2d 199, 241 N.Y.S.2d 604 (3d Dep't), *aff'd,* 13 N.Y.2d 1085, 196 N.E.2d 62, 246 N.Y.S.2d 407 (1963).

[41] Albany Country Club v. State, 13 N.Y.2d 1085, 196 N.E.2d 62, 246 N.Y.S.2d 407 (1963).

[42] Andrews v. State, 19 Misc. 2d 217, 188 N.Y.S.2d 854 (Ct. Cl. 1959), *aff'd mem.,* 11 App. Div. 2d 599, 200 N.Y.S.2d 451 (3d Dep't 1960), *aff'd mem.,* 9 N.Y.2d 606, 176 N.E.2d 42, 217 N.Y.S.2d 9, *cert. denied,* 368 U.S. 929 (1961).

adaptable "for industrial and commercial purposes, including uses arising from and connected with the development of hydro-electric power and the St. Lawrence Seaway," [43] although the claimant had never contemplated using the land for this purpose, and had never manifested any intention to sell the property to one who would so use it. The decision to consider this untried and unintended use was based on "evidence of a demand, desire and need for this type of use in the area and [testimony that] this property was suitable for and adaptable to such use." [44]

In this case, there was no express consideration of the condemnee's financial inability to realize the potential use of the land. It was obvious, however, that the property could have been sold for a greater price by reason of its adaptability. The court apparently valued the land in relation to its attractiveness to a potential purchaser, completely disregarding the lack of manifest intention on the part of the condemnee. The case appears to hold, therefore, that land will be valued with respect to a future use to which it is adaptable, even when there is *no manifest intention* on the part of the owner to take advantage of such potentiality. This seems to be a valid rule, considering the fact that market value depends on the thoughts, plans and intentions of the theoretical "willing buyer" and not the extent of development or improvement intended by the condemnee. Although it may be argued that the award provides windfall profits for the owner, it must be remembered that the owner theoretically could have obtained the same profit on the open market had he not been compelled to sell to the state.

In addition, further case law seems to support the result reached in *Andrews*. In *Hewitt v. State*,[45] the appellate division declared that there was "no question but that the land involved was in a residential zone and that its best and highest use at the time was as a potential real estate subdivision." [46] However, it was specifically noted that there had been no subdivision, no maps had been filed, no lots had been offered for sale—in short, the condemnee had not manifested an intention to use the land for the use claimed. Further, it had been stated in the lower court decision [47] that, at the time that the plans for a government project in the vicinity were announced, there was "no practical possibility of the claimants' ever developing

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[43] *Id.* at 226, 188 N.Y.S.2d at 863.
[44] *Ibid.*
[45] 18 App. Div. 2d 1128, 239 N.Y.S.2d 522 (4th Dep't 1963).
[46] *Id.* at 1128, 239 N.Y.S.2d at 523.
[47] Hewitt v. State, 33 Misc. 2d 868, 227 N.Y.S.2d 52 (Ct. Cl. 1961), *aff'd mem.*, 18 App. Div. 2d 1128, 239 N.Y.S.2d 522 (4th Dep't 1963).

their premises for residential purposes." [48] Regardless of the lack of manifest intention and the practical impossibility of the claimants' improving the land, the court allowed the consideration of the future use, on the theory that "all owners have the right to hold property in anticipation of a rising market price or for whatever personal reasons they may have." [49]

The lower court had determined the award by subtracting from the value of the hypothetical subdivision the cost of development. This, in essence, represented the price which a potential buyer would pay for the land if it had already been subdivided, but had not been improved. On appeal, the state argued that the land should be valuated without reference to the untried use. The appellate division modified the award, but also rejected the state's contention, holding:

> The correct rule to be applied under the existing conditions was to treat the premises not as raw acreage nor as part of a completed development but as a potential subdivision site giving the acreage an increment in value because of that potential use.[50]

In essence, the court held that an untried use may be considered even though there was no intention to so use on the part of the condemnee. As in the *Andrews* decision, this case considered the enhancement of market value resulting from a potential use of the land. Thus, it would appear that the value of property may be enhanced by the possibility of untried uses notwithstanding the absence of an intent to so utilize the land.[51]

5. *The Value of Intention*

Although it can be shown that manifest intention is not necessary before a future untried use will be considered, courts have included discussion of this element within their rationale. In the case of *In re Mountain Lakes in Westchester, Inc.*,[52]

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[48] *Id.* at 870, 227 N.Y.S.2d at 55.

[49] *Id.* at 870-71, 227 N.Y.S.2d at 55, citing Matter of City of New York [Inwood Hill Park], *supra* note 33. *Accord,* Heintz v. State, 32 Misc. 2d 1025, 1028, 226 N.Y.S.2d 540, 543 (Ct. Cl. 1962).

[50] Hewitt v. State, 18 App. Div. 2d 1128, 239 N.Y.S.2d 522, 523-24 (4th Dep't 1963) (memorandum decision).

[51] Lasko v. State, 14 App. Div. 2d 637, 218 N.Y.S.2d 135 (3d Dep't 1961); Hazard Lewis Farms v. State, 1 App. Div. 2d 923, 149 N.Y.S.2d 658 (3d Dep't 1956); Town of Pittsford v. Sweeney, 34 Misc. 2d 436, 228 N.Y.S.2d 518 (Sup. Ct. 1962); Murphy v. State, 41 Misc. 2d 906, 247 N.Y.S.2d 453 (Ct. Cl. 1964); Brubaker v. State, 27 Misc. 2d 458, 214 N.Y.S.2d 838 (Ct. Cl. 1961), *aff'd,* 17 App. Div. 2d 519, 236 N.Y.S.2d 395 (3d Dep't), *motion for leave to appeal denied,* 13 N.Y.2d 598, 194 N.E.2d 605, 244 N.Y.S.2d 1025 (1963).

[52] 219 N.Y.S.2d 140 (Sup. Ct. 1961).

for example, a claim based upon a future use of presently mountainous land for residential development was rejected. After concluding that the land was not adaptable to that use, the court supported its holding by determining that there was no bona fide intention to so use the land. Such a decision might lead to the negative inference that the presence of manifest intention would vitiate the non-adaptability of the property. However, it may also be argued that the consideration of the lack of intention was merely supportive of the court's rejection.

The latter viewpoint may be preferable in light of a prior decision disallowing a claim based on a future use although the condemnee's intention was unquestionably valid. In *Veeder v. State*,[53] the condemnee claimed that the best use to which his property could be devoted was a housing development. Although his sincerity in claiming that this was his purpose for purchasing the land could be presumed from the fact that he had successfully developed other lands in the area, the court rejected his claim stating that

> if the road were extended and if the sewers were built and if the utilities were extended and if the encroaching settlements . . . did not come closer to the claimants' land then, and only then, would the value as placed by the claimants' witnesses become a firm figure for the consideration of the court.[54]

The court, in essence, stated that bona fide intention to put the land to the use claimed would, alone, be insufficient to increase the award when the increment would be purely speculative.

If intention cannot remedy a defect in adaptability, of what importance is it? It must be remembered that the determination of adaptability, based largely on expert testimony, is a judgment of the probability of the land's potentialities affecting market value. Some manifestation of intent may be utilized to strengthen and support the contention that the land is adaptable:

> A proposed use may seem "remote" and "fanciful" if it is still in the stage of mental consideration. This naturally suggests to certain claimants or their attorneys that the first thing to do is to give the plan a semblance of reality and proximity by putting it on paper and making some moves in the direction of putting it into effect.[55]

However, if the land is not initially adaptable, such support is immaterial. A manifestation of intent to take advantage of a future use cannot render non-adaptable land adaptable:

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[53] 2 Misc. 2d 696, 152 N.Y.S.2d 392 (Ct. Cl. 1956).
[54] *Id.* at 697, 152 N.Y.S.2d at 393.
[55] N.Y. CITY LAW DEP'T, *op. cit. supra* note 29, at 154-55.

An expenditure of $100 for architect's plans is not the same thing as raising capital for the laying of sewers, grading of streets and building of apartment houses.[56]

Therefore, if land is adaptable for a future untried use, it will be valued accordingly, even in the absence of any manifest intent on the part of the condemnee. Conversely, non-adaptable land will not be valuated in relation to a future use, although the condemnee's intention to realize such potential use is unquestioned. These principles must be considered valid when one considers that (1) a "willing buyer" who would purchase land adaptable to a future use would not be influenced by the seller's intention, and (2) a "willing buyer" would not purchase non-adaptable land for a future use merely because the condemnee planned to so use it himself.

Related Problems — Zoning and Future Income

There are certain areas related to the present discussion which present practical problems in valuation proceedings. If the adaptability of the land in question is dependent upon the fulfillment of a condition outside of the condemnee's control, may he claim that such adaptability should be considered? If a claim based on a future untried use is allowed, will the award be determined in relation to the profits which would be realized from that use? It is important, in a discussion of the valuation process, to outline the general rules applicable in cases involving zoning regulations and the principles regarding the consideration of predicted future income.

If zoning regulations prevent the use of land for certain purposes, it is obvious that they obviate the probability of (1) the property being marketable for such purpose, (2) the potential enhancement of the market value of the land due to such purposes, and (3) any manifest intention to exploit such uses. The implications of such a situation present many problems in condemnation proceedings.[57] Generally, in New York, the determinative criterion to be applied is the reasonable probability of a change in the zoning restrictions.[58] Thus, a future use prevented by zoning restrictions cannot be claimed where there is no reasonable likelihood

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[56] *Id.* at 158.

[57] See generally 4 NICHOLS § 12.322.

[58] *E.g.*, County of Westchester v. P. & M. Materials Corp., 38 Misc. 2d 734, 238 N.Y.S.2d 896 (Sup. Ct. 1963); Nelkin v. Town of Oyster Bay, 14 Misc. 2d 764, 181 N.Y.S.2d 833 (Sup. Ct. 1958); Matter of Village of Garden City, 9 Misc. 2d 693, 167 N.Y.S.2d 166 (Sup. Ct. 1956).

that the use may be permitted in the near future by reason of a change in zoning.[59] Conversely, where such reasonable probability of change can be shown, the claim will be allowed.[60] This reasoning is based upon the premise that such probability affects the market value, *i.e.,* that a purchaser may buy the land in reliance upon such future change, and would pay more for the land because of the probability of change.[61]

If a claim relating to a future untried use is allowed, a further question arises: is it proper to consider the projected or potential profits from that use? From the viewpoint of fundamental principles, *i.e.,* market value and "willing buyer—willing seller," it might appear obvious that such profits may be considered, inasmuch as they would influence the potential buyer and seller in their negotiations. But the case law in the state of New York is unclear in this regard.

There is authority for the viewpoint that prospective profits from an untried use are too uncertain and speculative to be considered.[62] Thus, in *Levitin v. State,*[63] the court disallowed a claim based upon the projected income of a motel to be built on the condemnee's land. The court decided that "a claim is improper where it is based entirely on hypothetical profits estimated from a nonexistent business." [64]

In *Mattydale Shopping Center, Inc. v. State,*[65] the appellate division held that it was error for the court of claims to consider the prospective profits to be derived from a future use. However, in reversing this decision and affirming the award of the court of claims, the court of appeals held that the original method of valuation was "in accordance with the weight of the evidence." [66] Although the rationale of the highest court is not clearly expressed in the decision, the case is authority for the proposition that future income may be considered in valuation proceedings.

It seems, therefore, that there is authority to support opposite viewpoints in regard to the consideration of future income. Per-

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[59] Heintz v. State, 32 Misc. 2d 1025, 226 N.Y.S.2d 540 (Ct. Cl. 1962).

[60] Masten v. State, 11 App. Div. 2d 370, 206 N.Y.S.2d 672 (3d Dep't 1960), *aff'd mem.,* 9 N.Y.2d 796, 175 N.E.2d 166, 215 N.Y.S.2d 508 (1961).

[61] Valley Stream Lawns, Inc. v. State, 9 App. Div. 2d 149, 152, 192 N.Y.S.2d 805, 807 (3d Dep't 1959).

[62] See New York Cent. R.R. v. Maloney, 234 N.Y. 208, 137 N.E. 305 (1922); Niagara, Lockport & Ont. Power Co. v. Horton, 231 App. Div. 402, 247 N.Y. Supp. 761 (4th Dep't 1931).

[63] 12 App. Div. 2d 6, 207 N.Y.S.2d 798 (3d Dep't 1960).

[64] *Id.* at 8, 207 N.Y.S.2d at 800.

[65] 279 App. Div. 704, 108 N.Y.S.2d 832 (4th Dep't 1951).

[66] Mattydale Shopping Center, Inc. v. State, 303 N.Y. 974, 976, 106 N.E.2d 59, 60 (1952).

haps a necessary clarification is to be found in a recent decision of the court of appeals:

> [W]here the dealings in the property had been crystallized in binding agreement and were on the road to fulfillment, the prospective purchaser in determining the price to pay would have given careful consideration to the first, albeit subordinate question of prospective rentals. . . .[67]

It appears from this holding that the determination to consider or to reject a claim based upon projected profits rests upon the degree of probability of realizing such profits and the possibility of ascertaining them. The inference here is that, although the land is adaptable to a future use, potential profits from that use will not be considered unless the use is close to being realized, *i.e.*, the improvements necessary before the future use can be employed are "on the road to fulfillment."

Conclusion

The New York decisions in condemnation cases involving a future untried use rest upon the application of the fundamental principles of land valuation. In each fact situation, therefore, it is necessary to view the valuation problems from the viewpoint of a theoretical purchaser on the open market. All elements which would influence the price that such a purchaser would be willing to pay must be considered by the commissioners attempting to estimate the market value of the land; likewise, those factors which would determine the price acceptable to a theoretical seller (not to the individual condemnee involved in the proceedings) must be considered. Since the potential buyer would be influenced by the adaptability of the property to future uses, and because the potential seller would expect to receive a greater price on the open market by reason of its adaptability, this element must be considered in valuation. But a purchaser of adaptable land would not be interested in whether or not the owner had intended to devote his land to its adaptable use. He certainly would not be willing to pay a greater price merely because of the owner's intention. All he would really be concerned with would be the land's adaptability and his own plans for development. Therefore, the valuation award should reflect the influence of an adaptable use, regardless of the condemnee's intention to take advantage of that use himself.

If this theoretical purchaser wished to purchase the land for a future use, but that purpose was prevented by zoning regu-

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[67] Levin v. State, 13 N.Y.2d 87, 92, 192 N.E.2d 155, 157, 242 N.Y.S.2d 193, 196 (1963).

lations, his attitude in regard to purchase price would be determined by the probability of the restriction being changed in the reasonably near future. He would not pay more because of a potential use if it appeared that he would never be able to take advantage of that use. Therefore, the future use should not be considered in valuation, unless the potential purchaser could foresee a change in the zoning laws. In such a case, future use should be considered since the "willing buyer" might well determine his purchase price in relation to the probability of such change.

The purchaser on the open market would be influenced by the profits he could expect to make by reason of his buying the land. But he would also consider the money he would have to invest before he could realize such profits. He would not pay a greater price for the land by reason of its adaptability if actualizing the future use would require sufficient investment to offset the value of the adaptability. Therefore, potential income should influence the determination of market value to the extent that it is not offset by the investment required to adapt the property.

"Just compensation," therefore, is an award which results in neither undue hardship nor unwarranted benefit for either party to the condemnation proceedings. If we admit the existence of personal or sentimental attachments to certain land which cannot be bargained for, if we realize that land condemned for a state highway may be valuated as farmland, the condemnation process may seem unfair. However, the "common good" basis of the eminent domain theory sometimes requires individual sacrifices. As an abstract concept, "just compensation" may correctly be considered the goal, rather than the product, of our case law.

MVAIC Six Years Later — A Practical Appraisal

The mounting toll of highway accident victims suffering death or bodily injury has presented many problems of varying complexity and scope. Among them, the difficulties in the area of providing such persons with indemnification against the wrongful acts of uninsured and financially irresponsible motorists remain particularly distressing and acute. The New York Legislature's first step toward a solution to the problem was recognition of the helpless predicament of innocent auto accident victims whose common-law remedy proved to be a Pyrrhic victory against the judgment-proof or uninsured motorist, and nonexistent against the unknown hit-and-run driver. Concern for the plight of such claim-