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NOTES

ADMISSIBILITY OF ASSESSED VALUE IN CONDEMNATION PROCEEDINGS

When private property is taken for public use, the property owner is constitutionally entitled to "just compensation."¹ The determination of the justness of compensation is a judicial question,² subject to legislative regulation only if such regulation provides at least a constitutionally required minimum award.³ American case law uniformly indicates that market value of the land at the time of appropriation is the proper measure of compensation.⁴ Of the varied evidence which is presented to the court to assist in the determination of market value, no item has given courts greater difficulty or resulted in a wider spectrum of authority than evidence of real estate tax assessment. The purpose of this comment is to survey divergent views and evaluate their rationales in order to postulate a logical and practicable doctrine governing the admissibility of evidence of tax assessment in condemnation cases.

The Spectrum of Authority

The weight of authority holds that assessed value is not competent direct evidence of value for purposes other than taxation.⁵ Some jurisdictions allow its admission only as some evidence of value, insufficient in itself to support a finding of market value; in others it is admissible for the limited purpose of impeaching the credibility of the condemnee's testimony. (These rules are discussed *infra*.) This reluctance to give the assessment full weight is explained as the result of judicial recognition that property is rarely assessed at market value. In many states, it has been held that assessments are inadmissible because of their notorious unreliability in spite of constitutional or statutory requirements that all property be assessed at market value or some

¹ *E.g.*, U.S. CONST. amend. V; N.Y. CONST. art. I, §7(a).

² *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 327 (1893).

³ 4 NICHOLS, EMINENT DOMAIN §12.1 [3], at 33 (rev. 3d ed. 1962).

⁴ *Id.* at §12.2. In cases where the application of this measure would be unjust, it is not employed. JAHR, EMINENT DOMAIN 102-03 (1953).

⁵ Annot., 39 A.L.R.2d 209, 214 (1955).

equivalent thereof.⁶ In ignoring these requirements that assessments must be at market value, an important reason put forth by the courts is that assessed value is used solely for the purpose of taxation and is not a fair criterion of market value in condemnation proceedings.⁷ The assessor is said to be concerned with relative and not absolute values, seeking only to distribute tax burdens reasonably. In such jurisdictions, testimony as to the accuracy of the assessed valuation or the ratio of assessed value to market value does not make the evidence admissible.⁸

Another frequently advanced rationale for the exclusion of evidence of tax assessment when only the assessment rolls are offered in evidence is that they represent only an *ex parte* opinion, not subject to cross-examination.⁹ This position ignores the doctrine that public records are entitled to that confidence which requires no cross-examination.¹⁰ In addition, it seems inconsistent with the generally accepted doctrine that assessors, as sworn public officers, are presumed to have done their duty of placing a fair market value on all realty.¹¹ Finally, where the assessor is an opinion witness at trial, this position is untenable.

When the condemnor cannot be identified with the assessor, evidence of assessed valuation has been held inadmissible as *res inter alios acta*, *i.e.*, binding only as between the assessor and the assessed.¹² This rule has been applied most strictly in Oklahoma where it has been held that the evidence is not admissible except between the assessor and the assessed for tax purposes.¹³ More generally, however, the rule is not applied when both the assessor and the condemnor are agents or representative bodies of state or local government.¹⁴

⁶ *E.g.*, *St. Louis, I. M. & So. Ry. v. Magness*, 93 Ark. 46, 123 S.W. 786 (1909); *San Jose & A. R.R. v. Mayne*, 83 Cal. 566, 23 Pac. 522 (1890); *Ft. Collins Dev. Ry. v. France*, 41 Colo. 512, 92 Pac. 953 (1907); *In re Northlake Ave.*, 96 Wash. 344, 165 Pac. 113 (1917). In the majority of states, there are requirements, either constitutional or statutory, that real property be assessed at "market," "actual," "cash," or "full" value. Note, *Tax Assessments of Real Property: A Proposal for Legislative Reform*, 68 YALE L.J. 335, 386 (1958) (appendix).

⁷ *City of Chicago v. Harrison-Halsted Bldg. Corp.*, 11 Ill. 2d 431, 143 N.E.2d 40 (1957).

⁸ *Kansas City & G. Ry. v. Haake*, 331 Mo. 429, 53 S.W.2d 891 (1932). Cf. *American State Bank v. Butts*, 111 Wash. 612, 191 Pac. 754 (1920).

⁹ *Girard Trust Co. v. City of Philadelphia*, 248 Pa. 179, 93 Atl. 947 (1915); *Bergen County Sewer Auth. v. Borough of Little Ferry*, 15 N.J. Super. 43, 83 A.2d 4 (1951).

¹⁰ *Ripley v. Spaulding*, 116 Vt. 531, 80 A.2d 375 (1951).

¹¹ *People ex rel. Wallington Apartments, Inc. v. Miller*, 288 N.Y. 31, 41 N.E.2d 445 (1942).

¹² *Suffolk & C. Ry. v. West End Land & Improvement Co.*, 137 N.C. 330, 49 S.E. 350 (1904).

¹³ *Phillips Petroleum Co. v. Malone*, 179 Okla. 449, 66 P.2d 5 (1937).

¹⁴ *Coffee County v. Marsh*, 209 Ala. 566, 96 So. 891 (1923).

Some jurisdictions, which emphasize that tax assessments are unreliable because the property owner has not participated in the valuation, admit such evidence where the owner values his own property for the assessment or affirmatively assents to the assessment. In effect, the owner's assent is treated as a declaration against interest, admissible as an exception to the hearsay rule.¹⁵ The evidence is thus used against the owner when he seeks to establish a higher value for condemnation than he has previously assented to for taxation. Such evidence has been admitted to contradict the owner's testimony as to value or to impeach his credibility upon cross-examination,¹⁶ to serve as independent evidence of value for the consideration of the finder of fact,¹⁷ or to effect a complete estoppel against the owner-complainant.¹⁸

There is some conflict of authority as to what degree of owner participation is required in order to render the assessment admissible. It has been held that the mere fact that the owner permits the proper official to assess and thereafter pays the taxes, without objection or resort to appellate procedure, is not sufficient to constitute an admission against interest.¹⁹ Some affirmative act on the part of the owner, such as signing the assessment rolls or submitting a tax return stating the value of the property, is generally required.²⁰ While there is some authority to the contrary, the owner's participation in the assessment need not be in the form of a sworn statement to be sufficient for admissibility in these jurisdictions.²¹

It would seem that if the owner is bound by an assessed valuation because of prior ratification or other affirmative acts, the condemnor should be similarly bound because of its participation in the assessment. However, while there are exceptions,²² most

¹⁵ *Bowie Lumber Co. v. United States*, 155 F.2d 225 (5th Cir. 1946); *Rountree Farm Co. v. Morgan County*, 249 Ala. 472, 31 So. 2d 346 (1947); *Nedrow v. Michigan-Wisconsin Pipe Line Co.*, 245 Iowa 763, 61 N.W.2d 687 (1953); *Commonwealth v. Gilbert*, 253 S.W.2d 264 (Ky. 1952).

¹⁶ *In re United States Comm'n*, 54 App. D.C. 129, 295 Fed. 950 (D.C. Cir.), cert. denied, 265 U.S. 598 (1924); *Dean v. County Bd. of Educ.*, 210 Ala. 256, 97 So. 741 (1923); *Welton v. Iowa State Highway Comm'n*, 211 Iowa 625, 233 N.W. 876 (1930).

¹⁷ *United States v. First Nat'l Bank*, 250 Fed. 299 (M.D. Ala. 1918); *Commonwealth v. Lanter*, 364 S.W.2d 652 (Ky. 1963); *Mayor & City Council v. Himmel*, 135 Md. 65, 107 Atl. 522 (1919).

¹⁸ *Commonwealth v. Lanter*, *supra* note 17.

¹⁹ *Savannah, A. & M. Ry. v. Buford*, 106 Ala. 303, 17 So. 395 (1895); *Kansas City & G. Ry. v. Haake*, *supra* note 8.

²⁰ *West Kentucky Coal Co. v. Commonwealth*, 368 S.W.2d 738 (Ky. 1963); *Mayor & City Council v. Himmel*, *supra* note 17.

²¹ *Ibid.* But see *Meridian Mut. Fire Ins. Co. v. Sapkaris*, 82 Ind. App. 272, 145 N.E. 784 (1924) (insurance).

²² *E.g.*, *Louisiana Highway Comm'n v. Giaccone*, 19 La. App. 446, 140 So. 286 (1932) (dicta); *In re Site for Memorial Hall*, 316 Mich. 215, 25 N.W.2d 174 (1946).

cases hold that assessed value is not an admission against interest on the part of the condemnor.²³ It is felt that the state or local government cannot become bound in its capacity as condemnor by the acts of an official representing the government in its capacity as tax collector.

However, evidence of the assessed value has been admitted for the limited purpose of impeaching or discrediting witnesses of the owner or condemnor. The evidence has frequently been permitted for use against expert witnesses, especially those of the condemnor. Indeed, in some jurisdictions which prohibit the admission of assessed value as evidence-in-chief, questions pertaining to assessment may be asked upon cross-examination if contradiction or inconsistency in testimony might thereby be shown.²⁴ In contrast, other cases have held that evidence of assessed valuation cannot be used to impeach an expert's opinion of market value, since assessed valuation bears no relation to market value.²⁵

Statutes in some states authorize the admission of assessed value in condemnation proceedings.²⁶ Generally such statutes provide that it may be considered by the trier of fact as an element in the determination of just compensation. The Louisiana Constitution goes as far as to provide that lands used or destroyed for levees or levee drainage purposes may not be compensated for at a price exceeding the assessed value for the preceding year.²⁷

In jurisdictions which admit evidence of assessed value, whatever weight it is given, admission frequently depends upon how recent the valuation is.²⁸ In many states, assessments are not reviewed periodically so that the original assessment may remain on the property for many years. Where this is the case, new buildings are more likely to be assessed at the actual value. Where there has been material change in property values, the rule excluding assessed value remote in time seems proper.

²³ *Supra* note 9. See also *United States v. Certain Parcels of Land*, 261 F.2d 287 (4th Cir. 1958).

²⁴ *United States v. 243.22 Acres of Land*, 48 F. Supp. 177 (E.D.N.Y. 1942) (assessor as witness); *City of Los Angeles v. Deacon*, 119 Cal. App. 491, 7 P.2d 378 (1932) (expert witness).

²⁵ *United States v. Delano Park Homes, Inc.*, 146 F.2d 473 (2d Cir. 1944) (expert witness); *Johnson & Wimsatt, Inc. v. Reichelderfer*, 60 App. D.C. 186, 50 F.2d 336 (D.C. Cir. 1931) (assessor as witness).

²⁶ ARK. STAT. ANN. § 76-521 (1947); MASS. GEN. LAWS ch. 79, § 35 (1932). See *Arkansas State Highway Comm'n v. Snowden*, 233 Ark. 565, 345 S.W.2d 917 (1961); *Haven v. Town of Brimfield*, 345 Mass. 529, 188 N.E.2d 574 (1963).

²⁷ LA. CONST. art. 16, § 6. See *Board of Comm'rs v. Franklin*, 219 La. 859, 54 So. 2d 125, *appeal dismissed*, 342 U.S. 844 (1951).

²⁸ *Miller v. Windsor Water Co.*, 148 Pa. 429, 23 Atl. 1132 (1892); *In re Site for Memorial Hall*, *supra* note 22. *But see Minneapolis-St. Paul Sanitary Dist. v. Fitzpatrick*, 201 Minn. 442, 277 N.W. 394 (1937).

New York

In New York there is authority for the admissibility of assessed value as some evidence of market value in condemnation cases.²⁹ Such a holding is easily analogized to the well-established rule that assessed valuation is properly considered a factor in arriving at market value to determine the amount of the deficiency judgment upon mortgage foreclosure.³⁰ It also seems consistent with the policy expressed in the statutory method of determining commercial rental value for rent control purposes.³¹ Furthermore, all real property is required to be assessed at full value.³² However, the decisions have not been uniform and several recent decisions have made New York's position even less certain.

*Long Island Lighting Co. v. Grossman*³³ reviewed New York precedent and found no authority for admissibility of assessed valuation, but was persuaded by the "majority" rule against such admissibility. It held that even though condemnation appraisers were not bound by "technical rules of evidence," they should not have considered assessed valuation. The court cited *Ridley v. Seaboard R.R.*³⁴ and quoted:

'But the tax valuation being placed on the land by the tax assessors without the intervention of the landowner, no inference that it is a correct valuation can be drawn from his failure to except that the valuation is too low. Such a valuation was *res inter alios acta*, and is not competent against the plaintiff in this action.'³⁵

Subsequently, the issue was considered by the appellate division in *Matter of City of New York (2460 Jerome Ave. Realty Co.)*.³⁶ In that case, the court ruled that assessed value must be considered in arriving at the fair value of condemned property where there

²⁹ *Matter of Simmons*, 132 App. Div. 574, 116 N.Y. Supp. 952 (3d Dep't 1909).

³⁰ *Brooklyn Trust Co. v. Ess Ess Realty Co.*, 273 App. Div. 775, 74 N.Y.S.2d 842 (2d Dep't 1947); *Adler v. Berkowitz*, 229 App. Div. 245, 240 N.Y. Supp. 597 (2d Dep't 1930), *modified*, 254 N.Y. 433, 173 N.E. 574 (1930); *First Nat'l Bank v. Goodman*, 173 Misc. 562, 18 N.Y.S.2d 562 (Sup. Ct. 1940).

³¹ N.Y. UNCONSOL. LAWS § 8524(1)(a) (McKinney 1961).

³² "Assessments shall in no case exceed full value." N.Y. CONST. art. XVI, § 2. "All real property in each assessing unit shall be assessed at the full value thereof." N.Y. REAL PROP. TAX LAW § 306.

³³ 231 N.Y.S.2d 867 (Sup. Ct. 1962).

³⁴ 124 N.C. 37, 32 S.E. 379 (1899).

³⁵ *Long Island Lighting Co. v. Grossman*, 231 N.Y.S.2d 867, 868 (Sup. Ct. 1962).

³⁶ 18 App. Div. 2d 991, 238 N.Y.S.2d 618 (1st Dep't 1963). See also *Matter of City of New York*, 8 App. Div. 2d 365, 187 N.Y.S.2d 606 (1st Dep't 1959), wherein assessed value was considered.

is no evidence of the rental value of the property in question or the sale value of comparable properties. The court thus intimated that only when other satisfactory evidence is not available should assessed value be considered.

The significance of the admissibility and effect of assessed value became apparent in *Matter of City of New York (Lincoln Square Shum Clearance Project)*.³⁷ The court considered the effect of admissions contained in applications for writs of certiorari³⁸ to reduce tax assessment of the condemned realty. Where an owner seeks to challenge the valuation as excessive, it is the practice in New York to file with the assessor a notice of protest within the time period provided by local ordinance.³⁹ If no relief is afforded by the assessor, judicial review may be sought.⁴⁰ In this notice⁴¹ and in the petition for judicial review of the assessment,⁴² the taxpayer must indicate the amount he believes to be the full value of his property. Since the owner is bound by his claimed value to the extent that a court may not give him a greater reduction than he requests,⁴³ owners tend to understate the value of their property. This evidence, coupled with evidence of assessed value, would thus frequently be detrimental to the owner of condemned property. The court in *Lincoln Square* demonstrated its awareness of this situation:

A certain degree of cynicism is no doubt warranted by the very general practice of landowners who have applied for writs of putting down estimates that vary widely from the claims that they make when the property is about to be condemned.⁴⁴

While it did not condone this practice, the court felt that the overriding consideration was the constitutional requirement that the property owner receive just compensation. The court concluded that the owner's assertion of value in the petition for review of assessment is to be treated as an opinion, to be weighed by the trier of fact along with the assessed value and other evidence.⁴⁵

³⁷ 15 App. Div. 2d 153, 222 N.Y.S.2d 786 (1st Dep't 1961), *aff'd mem.*, 12 N.Y.2d 1036, 190 N.E.2d 423, 240 N.Y.S.2d 30 (1963).

³⁸ See generally N.Y. REAL PROP. TAX LAW art. 7 for the provisions relating to judicial review of tax assessments.

³⁹ LEE & LEFORESTIER, REVIEW & REDUCTION OF REAL PROPERTY ASSESSMENTS § 2:07 (1960). For a complete list of local filing dates see *id.* at § 2:12.

⁴⁰ N.Y. REAL PROP. TAX LAW § 706.

⁴¹ LEE & LEFORESTIER, *op. cit. supra* note 39, at § 2:14.

⁴² N.Y. REAL PROP. TAX LAW § 706. See also LEE & LEFORESTIER, *op. cit. supra* note 39, at § 3:15.

⁴³ *People ex rel. Interstate Land Holding Co. v. Purdy*, 236 N.Y. 609, 142 N.E. 303 (1923).

⁴⁴ 15 App. Div. 2d 153, 163, 222 N.Y.S.2d 786, 795 (1st Dep't 1961).

⁴⁵ *Id.* at 163-64, 222 N.Y.S.2d at 795-96. The court explained that its ruling did not imply that there is one value for condemnation and another

Conclusion

Assessed valuations are fixed by public officials charged with the duty of placing a fair market value on all realty in a district. The assessor is an expert who generally has no knowledge of, or interest in, the condemnation litigation. There would thus appear to be no objection to the admission of assessed value as some evidence of market value to be considered with all other factors. Yet, various rationales have been used by courts to prevent its admission.

The objections that the evidence is hearsay or *res inter alios acta*⁴⁶ are not substantial. The assessor is a public official; his acts are presumptively valid and the assessment rolls are public records, entitled to confidence without cross-examination. As a public official, the assessor acts for some branch of local or state government and thus may frequently be identified with the condemnor, even if the condemnor is a non-governmental body which has been delegated eminent domain powers.

As a limitation on its general admissibility, it must be recognized that when the property owner has not participated in the assessment, assessed value should not be used against him. If he does object or affirmatively assents to the assessment, it is held to be an admissible declaration against interest. However, if the assessed value is less than market value, the owner cannot reasonably be expected to object. It is doubtful that courts would impose a duty to question a favorable valuation or that the imposition of such a duty would encourage owners, other than those with property likely to be condemned, to object.

Nevertheless, it seems unfair to admit the assessed valuation as a declaration against interest by the condemnee without similarly permitting it to be introduced by him as a declaration against interest on the part of the condemnor. This anomalous conclusion is frequently justified by the holding that the assessor, acting for tax purposes, may not circumscribe the public interest in condemnation awards.⁴⁷ But, assessed value is already generally admissible against the condemnor to impeach or contradict witnesses, especially the assessor himself. It would seem fair to allow the owner to introduce evidence of assessed value against the condemnor, both in cross-examination and directly. This approach would not be inimical to the public interest, for the public interest is that

for taxation. It declared that "value is the same regardless of the nature of the proceeding. However the same property may have different values at different times." *Id.* at 163, 222 N.Y.S.2d at 795-96.

⁴⁶ It has been recognized that there are many exceptions to the *res inter alios acta* rule. See *Brinkley v. Liberty Mut. Ins. Co.*, 331 S.W.2d 423 (Tex. Civ. App. 1959).

⁴⁷ *United States v. Certain Parcels of Land*, *supra* note 23.

the property owner receive just compensation. Furthermore, if such a position is adopted, assessed value does not bind the condemnor; it is merely used as some evidence of value for the consideration of the trier of fact.

In jurisdictions in which there is no requirement that property be assessed at market value or where the inaccuracy of assessments has been statistically proven, refusal to admit assessed value seems justified. The courts in such jurisdictions are forced to utilize rules of evidence to compensate for this inadequate assessment procedure. Statutory re-evaluation of both assessment and its admissibility is necessary in such jurisdictions. But, in jurisdictions in which the assessment relates to market value, assessed value may be given the weight to which an act of a public official is entitled. A recent assessment is a disinterested statement by an expert and may be an invaluable assistance in the determination of just compensation.



SPECIFIC PERFORMANCE AND INSOLVENCY — A REAPPRAISAL

Equity courts have long imposed rather narrow restrictions on the availability of specific performance as a remedy for breach of contract. These restrictions are controlled by the concept of the adequacy of the remedy at law. The plaintiff's prayer for specific performance depends for its success on his ability to demonstrate that the remedy at law is, in fact, inadequate. Showing the uniqueness of the subject matter of the contract or the speculative character of the damages is usually sufficient to demonstrate such inadequacy. However, the insolvency of the defendant has generally not been accepted as a sufficient basis. It will be the purpose of this note to examine the soundness of this position and to explore the possibility of arriving at a more satisfactory alternative.

Specific Performance in General

Specific performance of a breached contract has long been considered by courts of equity to be an exceptional remedy, as contrasted to the ordinary relief of money damages. This attitude reflects the general character of equitable relief as complementary and supplementary to relief at law.¹ It has been the historical function of courts of equity to provide an injured party with an effective remedy only in those cases where the remedy at law is

¹ WALSH, EQUITY 22-26 (1930).