

The Relevance and Admissibility of Rezoning and Comparable Sales Occurring After the Date of Taking, When Determining the Value of Condemned Property

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The right to just compensation, when the government acquires property through eminent domain, is enshrined in the Bill of Rights¹ and all state constitutions. However, courts struggle to define how what compensation is “just”. The valuation question involves a careful appraisal of the property—its location, structures, zoning, state and municipal regulations, and so forth. Further complicating this analysis is the fact that property values can change sporadically in relatively brief periods. Plunges nationwide in real estate values in cities like Detroit and Las Vegas attest to this fact. Thus, the question of *when* a taking occurs is paramount. The “general rule is that value is fixed at the time property is actually appropriated.”² This seems like a simple determination, and under “slow take” procedures, where appropriation and compensation occur at the same time, it is. However, many states now use a “quick take” procedure, in which the government takes title to property *before* initiating condemnation proceedings. The gap between acquisition of property and when the owner actually receives compensation can be months, even years. In this interim period, many events can affect value of the property, especially changes in the real estate market and rezoning of the property.

Courts have struggled to determine what kind of post-appropriation/pre-compensation evidence to admit. Two questions stand out in particular: (1) can the jury consider appraisal reports that contain comparable sales of property that occurred *after* the date of taking; and (2) can the jury consider evidence that the property was actually rezoned *after* the date of taking, as evidence that the property was likely to be rezoned at the date of taking? The latter point is relevant because often, the potential for rezoning is a key factor for prospective purchasers and sellers.

There is no clear consensus on these two questions. Some courts answer one in the

¹ U.S. Const. amend. V (“ . . . nor shall private property be taken for public use without just compensation.”).

² 4 Nichols on Eminent Domain (3d ed.) §12A.01(1).

positive and the other in the negative. This paper presents a survey of federal and state court decisions on these two questions, hoping to offer some guidance to practitioners. Section I discusses some general impressions on retrospective appraisals. Section II examines the first question, the admissibility of comparable sales that occur *after* a taking. Section III surveys the admissibility of rezoning that occurs *after* the taking. Finally, Section IV examines some analogous situations in which courts admit retrospective evidence, such as liquidated damages.

I. General Impressions: USPAP, Nichols, and the Supreme Court

The Supreme Court's decisions are the starting point for any constitutional issue. Further, two very highly regarded sources, the Uniform Standards of Appraisal Practice (USPAP)³ and Nichols on Eminent Domain⁴, both acknowledge that post-taking evidence *can be* relevant and admissible in determining property value. However, both sources caution that such evidence must be confined within proper limits. These sources are discussed below.

A. The Constitutional Standard – Highest and Best Use

No discussion of valuation in eminent domain is complete without a review of constitutional principles. Unfortunately, Supreme Court precedent has been very open-ended on the issue of retrospective appraisals. The Fifth Amendment to the U.S. Constitution reads, “nor shall private property be taken for public use, without just compensation.”⁵ Just compensation must be sufficient for the owner to be “put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more.”⁶ One way to make an owner whole is to pay “market value”, which is “what a willing buyer would pay in cash to a willing seller.”⁷ Because a hypothetical reasonable buyer looks to future value and uses, the “highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future to the full extent that the prospect of demand for such use

³ Published by The Appraisal Foundation (2010).

⁴ See Nichols, note 2 *supra*.

⁵ U.S. Const., amend. V.

⁶ *Olson v. United States*, 292 U.S. 246, 255 (1934).

⁷ *United States v. Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396, 402, (1949); *United States v. Miller*, 317 U.S. 369, 374 (1943).

affects the market value while the property is privately held.”⁸

Hence, while courts generally determine market value as of the date of taking, the highest and best use standard means “condemnees are entitled not just to the value of their properties as used at the date of taking, but rather to the value their properties would command in the open market in light of the highest and most profitable use to which they might reasonably be devoted in the near future.”⁹ Following this standard, one sees why a court would admit comparable sales or rezoning that occurs subsequent to the date of taking, if they indicate market expectations on the date of taking.

B. USPAP

Professional appraisers and courts throughout North America generally accept USPAP as the leading standard. According to USPAP, “retrospective appraisals” are those in which the effective date of the appraisal occurs *before* the date of the report.¹⁰ This contrasts with “current appraisals”, which “occur when the effective date of the appraisal is contemporaneous with the date of the report.”¹¹ A third category of “prospective appraisals” occurs where the effective date of the appraisal is subsequent to the date of the report.¹² This type of appraisal is relevant mostly to determine cash flow projections, and is not relevant to this article.¹³

A retrospective appraisal attempts to fix a property’s value at a specific point *in the past*. For example, an appraiser might issue her report on June 1, 2011, but the report states the value of the property as of January 1, 2011. The USPAP noted the difficulty in such appraisals, which are often required where agencies use “quick take” statutes to take title before paying compensation.

A retrospective appraisal is complicated by the fact that the appraiser already knows what occurred in the market after the effective date of the appraisal. *Data subsequent to the effective date may be considered in developing a retrospective value* as a confirmation of trends that would reasonably be considered by a buyer

⁸ *Olson*, 292 U.S. at 255.

⁹ *Id.* at 246.

¹⁰ USPAP, Statement on Appraisal Standards No. 3 (SMT-3) (2010-2011).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

or seller as of that date.¹⁴

In our example, the appraiser knows what happened between January 1 and June 1. USPAP lets her rely on this knowledge, but only to confirm “trends that would reasonably be considered by a buyer or seller” as of the date of taking. For example, if a property was worth \$100,000 on January 1, and a reasonable owner predicts it will increase in value to \$150,000 by June 1, the appraiser could consider a sale of a comparable property on April 1 for \$125,000.

USPAP further limits use of subsequent data:

The appraiser should determine a logical cut-off because at some point distant from the effective date, the subsequent data will not reflect the relevant market. This is a difficult determination to make. Studying the market conditions as of the date of the appraisal assists the appraiser in judging where he or she should make this cut-off. In the absence of evidence in the market that data subsequent to the effective date were consistent with and confirmed market expectations as of the effective date, the effective date should be used as the cut-off date for data considered by the appraiser.¹⁵

Reading this paragraph, one realizes that the USPAP does not offer much guidance on determining a cut-off date. It uses the open-ended standard, “market conditions as of the date of the appraisal”. However, USPAP notes, “Use of direct excerpts from then-current appraisal reports prepared at the time of the retrospective effective date helps the appraiser and the reader understand market conditions as of the retrospective effective date.”¹⁶ Overall, USPAP indicates that the use of data subsequent to the date of taking must be determined on an ad hoc, case-by-case basis. Further, it hints that appraisers must disregard subsequent data that is wildly not consistent with “predictions” based on the market as of the date of taking, as found in appraisal reports made closer to that date.

C. Nichols on Eminent Domain

Nichols elucidates principles similar to USPAP. It cautions, “Care must be taken by the parties to ensure that strict adherence to the legal date of value does not create a valuation less or

¹⁴ Id. (emphasis added).

¹⁵ Id. (emphasis added).

¹⁶ Id.

more than just compensation.”¹⁷ Nichols strongly encourages appraisers to consider data subsequent to the date of taking, but again only to confirm or deny market trends the buyer or seller of property would have predicted on the date of taking.

Although the date of appraisal must be the correct date of valuation, the appraiser may normally apply knowledge learned after the value date. For example, the mere fact that a comparable sale occurs after the date of value does not render the sale inadmissible per se. Furthermore, subsequent zoning actions may be relevant to both land value and damages, or special benefits. *Again, such subsequent information is admissible if applied to the subject as what was known as of the date of value, or what could have reasonable been foreseen as of that date.*¹⁸

The appraiser must tie in the subsequent data to predictions as of the effective date. The treatise expands on this principle, noting that “subsequently acquired knowledge or ‘hindsight’” may be used in two situations: (a) “Where conditions which would have a definite effect upon the value of the property were in existence on the date that title vested in the condemnor, but were not discovered until a later date; or (b) Where the amount of damages depends on uncertain future events.”¹⁹ Nichols identifies a paradox in the first exception, stemming from

The use of the ‘market value’ concept as an end in itself, rather than as a means to an end. Used as an end in itself, it obviously follows that since such knowledge was unknown at the date of the taking, it could have no influence one way or the other upon the market value on that date.”²⁰

However, Nichols resolved this issue by noting that “actual value”, not “market value”, is to be ascertained²¹ “Market value is taken as the criterion of compensation, based on the proposition that it is the true measure of actual value.”²²

Essentially, USPAP and Nichols tell us more about what cannot be considered evidence than what can be. Comparable sales and rezoning subsequent to the date of taking is not automatically admissible, nor is there a blanket exclusion for such evidence. Rather, such evidence is admissible to the extent that it confirms predictions about the actual value as of the date of taking. We will see, however, that this relatively simple principle has resulted in a mosaic

¹⁷ Nichols, note 2 *supra*, § 18.16.

¹⁸ *Id.* (emphasis added).

¹⁹ *Id.*, § 12A.01(7)(a)

²⁰ *Id.*, § 12A.01(7)(b)

²¹ *Id.*

²² *Id.*

of judicial opinions.

D. Scope of Project Rule

There exists one strong prohibition on data subsequent to the date of taking, to which all federal and state courts adhere. The Supreme Court itself has stated that value created solely by the condemning agency's demand for the property is not to be factored in to the just compensation analysis.²³ For example, if property were rezoned specifically for the condemning agency's project, evidence of that zoning would likely be inadmissible. Similarly, evidence of comparable sales demonstrating increases or decreases in value *because of* the government's project are also generally excluded. The Eleventh Circuit offered a succinct summary of the rule.

This doctrine seeks to ensure that when deciding the market value of the property the fact-finding body does not consider the positive or the negative impact of any decision the Government makes within the scope of the project that prompted the taking. As a part of this doctrine, a fact finder may disregard the impact of a zoning restriction on a piece of property in determining just compensation when the Government passed the restriction for the purpose of depressing the property's value in an impending eminent domain proceeding.²⁴

The scope-of-the-project rule will emerge often in subsequent-to-date-of-takings cases, and is well worth mentioning before exploring the different jurisdictions' positions on the issue.

II. Subsequent Comparable Sales

In the commonly used comparable sales method, the appraiser examines recent sales of similar properties near the condemned property then applies various statistical tools, to determine a market value. Comparable sales must be voluntary, similar to the condemned property in location, zoning, access, and other characteristics, and not too remote in time from the date of taking.²⁵ The last factor—timing—is at issue in this paper. Most courts consider the remoteness in time of a comparable sale on a case-by-case basis, rather than using a *per se* rule excluding subsequent sales or setting specific time limits in months or years.

A. Cases Admitting Subsequent Comparable Sales— Per Se Rules Disfavored

²³ See *United States v. Cors*, 337 U.S.325, 332-34 (1949).

²⁴ *U.S. v. 480.00 Acres of Land*, 557 F.3d 1297, 1307 (11th Cir. 2009) (citing *United States v. 320 Acres*, 605 F.2d 762, 820 n. 131 (5th Cir. 1979) (internal citations omitted)).

²⁵ See USPAP, note 10 *supra*.

1. Federal Courts Admitting Post-Taking Sales Into Evidence

All federal courts allow evidence of subsequent comparable sales. The seminal decision on the issue is *United States v. 63.04 Acres of Land*²⁶, which the U.S. Second Circuit Court of Appeals decided in 1957. In overturned the trial judge's exclusion of a sale that occurred two months and 13 days after the effective date of taking, the Court stated:

*There is no absolute rule that precludes consideration of subsequent sales. The general rule is that evidence of 'similar sales in the vicinity made at or about the same time' is to be the basis for the valuation and evidence of all such sales should generally be admissible.*²⁷

The Court acknowledged, that while the scope of the project rule limited this type of evidence, it was inappropriate to enforce a *per se* exclusion of all subsequent comparable sales.

The generality of this rule [of the admissibility of post-taking sales] is limited, however, by the consideration that a condemnation itself may increase prices and the government should not have to pay for such artificially inflated values. . . . *But that possibility does not produce a hard and fast exclusionary rule.* In every case it is a question of judgment as to the extent of this danger and, particularly where a judge is sitting without a jury, it would seem the better practice to admit the evidence and then to weigh it having due regard for the danger of artificial inflation.²⁸

Because of the importance of the comparable sale to the property in question, the Court reversed the decision of the trial court, and remanded the case for a new trial. In reality, the Court's decision was a textbook application of the USPAP principles discussed above, which recommend that data subsequent to the date of taking be compared with data at or before the date of taking. A zoning change prior to the taking had significantly impacted property values, which the post-taking comparable sales demonstrated when coupled with pre-taking comparable sales that had occurred before the rezoning. The court elaborated, "The general rule is that evidence of 'similar sales in the vicinity made at or about the same time' is to be the basis for the valuation and evidence of all such sales should generally be admissible."²⁹ Of course, the "at or about the

²⁶ 245 F.2d 140 (2d Cir. 1957).

²⁷ Id. at 144 (citing *United States v. 5139.5 Acres of Land*, 200 F.2d 659, 662 (4th Cir. 1952); 1 Orgel, Valuation Under Eminent Domain, § 139 (2d Ed.1953)).

²⁸ Id. (emphasis added) (internal citations omitted).

²⁹ Id. (quoting *5139.5 Acres of Land*, 200 F.2d at 662).

same time” is a limiting factor. The comparable sale here was about 2½ months subsequent to the date of taking—a short time frame.

Like the Second Circuit, other federal courts have shown a reluctance to adhere to hard and fast *per se* rules. In *United States v. 68.94 Acres of Land in Kent County*³⁰, The Third Circuit followed *63.04 Acres* when it reversed the trial court’s imposition of a *per se* rule that all subsequent comparable sales were inadmissible.

The majority of circuit courts have rejected a *per se* rule in eminent domain proceedings prohibiting the introduction of evidence of post-taking comparable sales. Thus, the district court must determine the comparability of post-taking sales in each case on a case-by-case basis. A blanket exclusion of post-taking comparable sales is appropriate only where there is some showing that the condemnation event itself has inflated the sale price of the comparable properties.³¹

The land had been condemned on April 3, 1987, and the owner sought to introduce comparable sales in 1988 and 1989. This is a much broader timeframe than *63.04 acres*, which involved a gap of only 2½ months. Of course, the Third Circuit did not sign off on such a long period between the date of taking and the comparable sales. The court merely remanded to the district court to determine admissibility under a three-part test.

Where there is no evidence of inflated prices attributable to the taking event and thus no absolute exclusion of after-sales applies, the trial court must make separate findings of the comparability of each of the proffered comparable properties to the condemnee’s property. Courts have generally recognized that comparability is a function of three variables: the respective characteristics of the properties, their geographic proximity to each other, and the closeness in time of the sales.³²

The Eastern District of New York applied this case-by-case method of determining the admissibility of post-taking comparable sales in *U.S. v. 7.14 Acres of Land*³³, where the court stated,

In deference to the decision in *United States v. 63.04 Acres, Etc.*, 2 Cir., 245 F.2d 140, et seq., evidence was received of one or more sales that were negotiated and concluded after the date of his taking. It is not understood that the Court in that case went so far as to decide what such sales must be deemed to have

³⁰ 918 F.2d 389 (3d Cir. 1990).

³¹ Id. at 398 (citing *Olson*, 292 U.S. at 256; *63.04 Acres*, 245 F.2d at 144).

³² Id. at 399 (citing *U.S. v. 320.0 Acres of Land, More or Less, Etc.*, 605 F.2d 762, 798 (5th Cir. 1979)).

³³ 198 F. Supp. 120 (E.D.N.Y. 1961).

demonstrated to the trier of the facts concerning fair market value as at the critical date.³⁴

Because the comparable properties being considered were not interior parcels like the property in question, the Court determined that “[t]he post-taking sales are therefore of no help in establishing the probable market value of the piece of property on [the date of taking].”³⁵ The Court thus found the post-taking comparable properties were inadmissible, not because they were sold after the date of the taking, but because they were not truly comparable to the condemned property.

In *United States v. 4.85 Acres of Land*³⁶, the 9th Circuit reaffirmed that subsequent comparable sales must be analyzed on a case-by-case basis, under three-factor rubric of characteristics of the properties, proximity, and closeness of time.³⁷ The Court cautioned, “Courts should also be cognizant of the possibility that the condemnation itself has enhanced the value of the proffered comparable sales, as that factor may weigh against admission.”³⁸ Further, “‘except in unusual instances,’ differences in the location, characteristics, and timing of potential comparable sales should “go to the weight of the evidence rather than . . . to the admissibility.”³⁹ The 9th Circuit was similarly reluctant to set per se timeframes, remanding to the district court to consider sales that were 1¼, 1½, and 3½ years subsequent to the date of taking.⁴⁰

It appears nearly all federal circuits have adopted this three-factor balancing test, or something approximating it.⁴¹ There are no federal courts that have a *per se* prohibition on evidence of comparable sales subsequent to the date of taking. State courts, however, are mixed.

³⁴ Id. at 125.

³⁵ Id.

³⁶ 546 F.3d 613 (9th Cir. 2008)

³⁷ Id at 619 (citing *68.94 Acres*, 918 F.2d at 399).

³⁸ Id. (citing *68.94 Acres*, 918 F.2d at 399; *320.0 Acres*, 605 F.2d at 800; *63.04 Acres*, 245 F.2d at 144).

³⁹ Id. (citing *691.81 Acres*, 443 F.2d at 463).

⁴⁰ Id. at 619.

⁴¹ See, e.g., *United States v. 691.81 Acres*, 443 F.2d 461, 463 (6th Cir. 1971) (possibility of artificial price inflation “[could not] be determined through use of a general exclusionary rule prior to trial”); *United States v. 1,129.75 Acres of Land*, 473 F.2d 996, 998 (8th Cir. 1973) (admission of subsequent comparable sales rests in trial courts discretion); *United States v. 0.161 Acres of Land*, 837 F.2d 1036, 1044 (11th Cir. 1988) (district court abused its discretion by adopting a per se rule, given the “preference for allowing the fact-finder to decide what, if any, weight to attach to evidence of post-taking sales”); *El Paso Natural Gas Co v. FERC*, 96 F.3d 1460, 1464 (C.A.D.C. 1996) (timing of sales and comparability of properties are to be balanced in determining whether to admit comparable sales).

2. State Courts Permitting Post-Taking Sales Into Evidence

Some state courts have also addressed the issue of post-taking sales, with most applying the case-by-case analysis method and ruling in favor of the admissibility of such sales. These courts have found such evidence to be relevant to the determination of the value of the property at the time of the taking, and thus admissible at trial. The only remaining question, then, was whether the proposed comparable sales were similar enough to the condemned property to pass the balancing tests of the Rules of Evidence, such as Federal Rule of Evidence 403 and its state analogues.

a. Massachusetts

One of the earliest cases to consider the issue was *Roberts v. City of Boston*⁴², in which the Supreme Judicial Court of Massachusetts held that the post-taking sales of two estates were admissible. Although both properties were sold after the date of taking, the court stated,

The lands sold were near to that of the petitioner, and similar to it, and similarly situated. One sale was about five months, and the other more than twenty months, after the taking of the petitioner's land. *The mere lapse of time after the taking did not render the evidence of the sales incompetent, and, as the circumstances appear in the evidence, the discretion of the court seems to have been rightly exercised in admitting the evidence.*⁴³

Because of its express recognition of the admissibility of post-takings sales, other state courts have followed and cited the *Roberts* opinion when addressing the issue.

⁴² 149 Mass. 346; 21 N.E. 668 (1889).

⁴³ *Id.* at 354 (emphasis added).

b. Wyoming

In refusing to grant error for the admission of a post-taking sale, the Wyoming Supreme Court in *Morrison v. Cottonwood Dev. Co.*⁴⁴ cited *Roberts* approvingly. In *Morrison*, the Court affirmed the trial court's decision to admit evidence of a comparable sale occurring a year after the taking, finding the sale to be voluntary, in an area where land values had not changed significantly either before or after the time of the taking.⁴⁵

c. Illinois

In *Forest Preserve District v. Kean*⁴⁶, the Illinois Supreme Court had the opportunity to address the post-taking sales issue. Looking to precedent, the court noted, "Evidence of voluntary sales of lands in the locality similar in character is admissible in determining the value of the land sought to be condemned."⁴⁷ The court also looked to Massachusetts precedent for its finding that,

Whether the sales were of lands in the locality and so similar in character as to make such evidence competent is a question largely within the discretion of the trial court. But such discretion is not unlimited. If the court can see that evidence of such sales would not afford any just measure of value of the land taken it should not be admitted.⁴⁸

Further, the court noted in *Forest Preserve District v. Barchard*⁴⁹, that

in this State no general rule can be laid down to definitely fix the degree of similarity of the properties, the nearness of time of the sales and the distance of the properties sold. These are matters with which the trial judge is conversant and must rest largely in his discretion.

Similarly, the court looked to *Lewis on Eminent Domain* for the proposition that

In regard to the degree of similarity which must exist between the property concerning which such proof is offered and the property taken, and the nearness in respect of time and distance, no general rules can be laid down. These are matters with which the trial judge is usually conversant and they must rest largely in his discretion.⁵⁰

⁴⁴ 38 Wyo. 190, 202; 266 P. 117 (1928).

⁴⁵ Id. at 202.

⁴⁶ 298 Ill. 37; 131 N.E. 117 (1921).

⁴⁷ Id. at 47 (citing *O'Hare v. Chicago, Madison and Northern Railroad Co.* 139 Ill. 151; 28 N.E. 151 (1891), overruled on other grounds, *Schnackenberg v. Towle*, 4 Ill. 2d 561, 123 N.E.2d 817 (1954)).

⁴⁸ Id. (citing *Chandler v. Jamaica Pond Aqueduct Corporation*, 122 Mass. 305 (1877)).

⁴⁹ 293 Ill. 556, 562; 127 N.E. 878 (1920).

⁵⁰ Id. at 562-563 (citing *Lewis on Eminent Domain*, 2d ed. § 443).

Finally, citing the Massachusetts decision, *Benhan v. Dunbar*⁵¹, the court stated that

*[P]roof of sales of property distant from a half mile to six miles, and ranging in time from one to eight years previous, was held competent. It will be seen from the testimony that the sales testified to were of land in several respects not entirely similar to appellant's land, but the proof disclosed to the jury wherein they were dissimilar in character, location and transportation facilities. These things affected the weight and value of that testimony, but we are of opinion it cannot be held it was entirely incompetent and that the admission should reverse the judgment.*⁵²

Overall, the Illinois Supreme Court follows the trend of deferring to the trial court's discretion when it comes to admission of subsequent comparable sales.

d. Texas

Texas courts have also indicated that post-taking sales are admissible as comparable sales. In *Housing Authority of the City of Dallas v. Hubbard*⁵³, the Texas Court of Civil Appeals refused to hold admission of post-taking comparable sales to be a source of error. In discussing comparable sales from two, five, and ten months after the taking, the court noted, "We agree with appellant that when property is taken by condemnation the condemnor should not have to pay an increased value due to the public improvement itself. But we find no testimony in the record to support the contention that such was the fact in this case."⁵⁴ The court refused to state as a matter of law that the values of comparable sales are always elevated by such projects, and therefore the post-taking sales were properly admitted.⁵⁵

The outcome in *Hubbard* reinforced the decision of the Court of Civil Appeals in *Housing Authority of Dallas v. Shambry*,⁵⁶ which upheld the admission of comparable sales five months after the date of the taking. In *Shambry*, the Court stated,

We believe that evidence as to such comparable sales was admissible in order to show that the estimates of the value of the property in controversy was fair and reasonable. Such comparison may be worthless by reason of time and location, but may be considered in connection with the weight to be given the testimony of the witnesses.⁵⁷

⁵¹ 103 Mass. 365 (Mass. 1869).

⁵² *Kean*, 298 Ill. at 48 (emphasis added).

⁵³ 274 S.W.2d 165 (Tex. Civ. App. 1954).

⁵⁴ *Id.* at 167.

⁵⁵ *Id.* at 167-68.

⁵⁶ 252 S.W.2d 963 (Tex. Civ. App. 1952).

⁵⁷ *Id.* at 965-66 (citing Texas Law of Evidence, McCormick and Ray, 908; *Joyce v. Dallas County*, 141 S.W.2d 745 (Tex. Civ. App. 1940)).

Continuing, the court cited *Nagelin v. State*⁵⁸, stating,

Other propositions complain of the trial court's actions in ruling upon the admissibility of certain testimony. A detailed discussion of these propositions would serve no useful purpose. It is sufficient to say that when issues such as values are involved, the trial court is vested with an extensive discretion as to the admissibility of testimony relating thereto.⁵⁹

As with many other states, Texas has applied the case-by-case approach to valuation evidence, with the courts erring on the side of admissibility and deference to the trial court.

e. Hawaii

In another early state case permitting post-taking sales to be admitted into evidence, the court in *Hawaii v. Heir of Halemano Kapahi*⁶⁰ looked to a well-respected treatise for the proposition that

[The courts] usually assume that if property similar in other respects has been sold within a reasonable time to the taking, its sale price is relevant in determining the market value of property taken. As to what constitutes a reasonable time, a wide discretion is vested in the trial court and the appellate courts are reluctant to reverse the lower court's determination as a matter of law. In the usual run of cases, a sale within a year is admitted as a matter of course.⁶¹

Cognizant of the concern that such evidence would not truly represent the market value at the time of the taking, the court continued, noting,

In any case, however, a finding that the evidence falls within a reasonable time does not imply that market conditions are precisely the same and it remains open to either party to dispute the significance of the sale by proving a change in market conditions. Generally speaking, the courts make no distinction between sales occurring prior to the taking and sales consummated after the date when title has vested in the condemner.⁶²

Therefore, according to the court, “[t]he test is the similarity of the lands and the reasonableness of the time of sale in order to have any application to the value of the land taken at the time of condemnation, which is the sole question before the jury.”⁶³

⁵⁸ 153 S.W.2d 269 (Tex. Civ. App. 1941).

⁵⁹ Id. at 270.

⁶⁰ 48 Haw. 101; 395 P.2d 932 (1964).

⁶¹ Id. at 111 (citing 1 Orgel on Valuation Under Eminent Domain (2d ed.) § 139).

⁶² Id.

⁶³ Id. at 112.

With the principles stated above in mind, the court in *Heir of Halemano Kapahi* ultimately held that:

Where evidence of a comparable sale or lease is offered, the trial judge may, in his discretion, admit or exclude it considering such factors as the time of the transaction, size shape and character of the comparable land, and whether there has been any enhancement or depression in value. *It makes no difference whether the transaction occurred before or after the date of condemnation so long as it is not too remote a period of time and the land is reasonably comparable, having been neither enhanced or decreased in value by the project or improvement occasioning the taking.* The weight to be given such evidence is for the jury. The trial judge's determination as to the admissibility or non-admissibility of such evidence will not be upset on appeal unless it is a clear abuse of discretion.⁶⁴

f. Michigan

Basing its opinion largely on the decision in *Heir of Halemano Kapahi*, and on the principle that “[e]vidence regarding value is to be liberally received,”⁶⁵ in *Detroit v. Drinkwater, Taylor & Merrill, Inc.*,⁶⁶ the Michigan Court of Appeals held,

The reasoning of *Hawaii [v. Heir of Halemano Kapahi]* is logical and persuasive and not inconsistent with Michigan law. It is within the sound discretion of the trial court whether the sale of property referred to took place within a reasonable time of the taking. The trial court's reasoning in the present case follows the reasoning of the *Hawaii [v. Heir of Halemano Kapahi]* Court. The trial court did not abuse its discretion by permitting the appraisal experts to utilize comparable sales occurring within one to four months after the dates of taking in determining fair market value.⁶⁷

This decision squared soundly with the Michigan Supreme Court's decision in *Wayne Co. Bd. of Road Comm'nrs. v. GLS LeasCo*⁶⁸, in which the Court stated that sales, not too remote in time and not shown to lack probative value, were admissible.⁶⁹

In light of the permissive standard applied to post-taking sales, it appears that Michigan courts have addressed the different types of retrospective evidence on an issue-by-issue basis, achieving somewhat mixed results. Based on public policy grounds, the Michigan Supreme Court has refused to look retrospectively to determine whether a party was guilty of educational

⁶⁴ Id. at 112-113 (emphasis added).

⁶⁵ *In re Memorial Site, City of Detroit v. Cristy*, 316 Mich. 215, 200; 25 N.W.2d 174 (1946).

⁶⁶ Unpublished opinion of the Court of Appeals of Michigan, issued Aug. 9, 2005 (Docket Nos. 251799, 251800, 251801, 251802, 251869, 251870).

⁶⁷ Id. at 35.

⁶⁸ 394 Mich. 126; 229 N.W.2d 797 (1975).

⁶⁹ Id. at 141.

malpractice⁷⁰, and as discussed later, to admit evidence of a rezoning occurring 2½ years after a taking.⁷¹ The court has also noted that in cases of the constructive discharge of an employee, the date of the discharge is when the employee elects to leave, and not when the employer’s harmful actions occurred.⁷² Because such decisions are often situational and may be highly policy driven, it is important to consider decisions in the jurisdiction regarding retrospective evidence in these other contexts as well.

g. Missouri

In *State Hwy. Comm. v. Wertz*⁷³, the Missouri Supreme Court considered the trial court’s evidentiary ruling that excluded sales nine months and twelve months after the date of taking. The court stated that despite finding authority both for and against admitting evidence of post-taking sales, “the better rule is that evidence of comparable sales made after the date of taking is generally as admissible as evidence of sales made prior to the taking and subject to the same discretionary authority of the trial court.”⁷⁴ In support of this holding, the court cited directly from *Heirs of Halemano Kapahi*, noting, “[i]t makes no difference whether the transaction occurred before or after the date of condemnation so long as it is not too remote a period of time and the land is reasonably comparable. . . .”⁷⁵

h. North Carolina

In *Department of Transportation v. Tilley*⁷⁶, a North Carolina Court of Appeals reversed a trial court’s exclusion of post-taking comparable sales. The two excluded sales had occurred ten

⁷⁰ See *Page v. Klein Tools, Inc.*, 461 Mich. 703; 610 N.W.2d 900 (2000) (Plaintiff claimed that his injuries in a fall from a utility pole were due to improper instruction at a trade school, but the Court refused to recognize educational malpractice in Michigan. Among other things, the Court found that the injury was too remote in time and place from the allegedly negligent instruction, and that the connection between the injury and the alleged negligence were remote at best.).

⁷¹ See *Dept. of Transp. v. Haggerty Corridor Partners*, 473 Mich. 124; 700 N.W.2d 380 (2005).

⁷² See *Jacobson v. Parda Fed. Credit Union*, 457 Mich. 318, 327-28; 577 N.W.2d 881 (1998) (“[T]o say that a discharge occurred whenever an employer’s action that resulted in the discharge occurred would be to set a date of occurrence in retrospect. . . . We decline the defendant’s invitation to depart from our longstanding rule that discharge occurs when a reasonable person in the employee’s place would feel compelled to resign. In analyzing such circumstances, we cannot know what place the employee is in, and hence evaluate her conduct, until she actually resigns.”).

⁷³ 478 S.W.2d 670 (Mo. 1972).

⁷⁴ *Id.* at 677.

⁷⁵ *Id.* at 674 (citing *Halemano Kapahi*, 48 Haw. at 111).

⁷⁶ 524 S.E.2d 83 (N.C. Ct. App. 2000).

and twelve months following the condemnation, and were excluded by the trial court solely because they occurred after the date of the taking.⁷⁷ In concluding that the trial court had abused its discretion in excluding the sales in question, the Court of Appeals stated that “[w]hen the value of property is directly at issue, voluntary sales of property similar in nature, location, and condition to the land involved in the suit are admissible as circumstantial evidence of the condemned land's value, so long as the voluntary sales are not too remote in time.”⁷⁸ The court noted that “[w]hether the properties are sufficiently similar is a matter within the sound discretion of the trial court.”⁷⁹ Finally, the court held that “[w]e conclude that the trial court abused its discretion here because it excluded the two 1997 sales solely because they occurred after the date of taking.”⁸⁰ The court expanded on its holding, further stating that:

Plaintiff contends, and the trial court apparently agreed, that any voluntary sales occurring after the date of taking, such as the two 1997 sales here, are *per se* excludable. We disagree with plaintiff's stringent interpretation of the law in this State. *Our courts have only required that the similar sales not be too remote in time from the date of the taking; nowhere have we affirmatively required that the sales also be prior to the taking.*⁸¹

i. Connecticut

In *Tilcon Minerals v. Commissioner of Transportation*,⁸² the court held that the admission of evidence from test pits dug after the date of taking were relevant evidence, despite the claim that no one had such knowledge about the property on the date of taking. *Tilcon* relied on the Supreme Court of Connecticut's decision in *Tandet v. Urban Redevelopment Commission*⁸³, which held that in calculating market value after a partial taking, “[E]vidence of actual damages caused by the taking is not to be received to alter the formula for awarding just compensation or to modify the legal effect of the taking, but to show more accurately the nature

⁷⁷ Id. at 377-78.

⁷⁸ Id. at 377 (citing *Power Co. v. Winebarger*, 300 N.C. 57, 65; 265 S.E.2d 227 (1980)).

⁷⁹ Id. (citing *City of Winston-Salem v. Cooper*, 315 N.C. 702, 711; 340 S.E.2d 366 (1972)).

⁸⁰ Id.

⁸¹ Id. (emphasis added).

⁸² Unpublished opinion of the Superior Court Of Connecticut, Jud. Dist. Of Windham, issued Oct. 20, 2000 (Docket No.058636).

⁸³ 179 Conn. 293; 426 A.2d 280 (1979).

of the property interest taken by the condemnor.”⁸⁴ To this end, stated the court, “[s]ince the court's function is to award just compensation for the property taken, it is both unnecessary and misleading to rely upon "uncertain prophecy" instead of experience either to increase or to diminish a condemnation award.”⁸⁵

B. Jurisdictions Not Admitting Post-Taking Sales

While the majority of jurisdictions admit post-taking comparable sales or leave it in the trial court’s discretion, some courts have determined that sales occurring after the date of the taking are inadmissible. Courts espousing this minority position find that such evidence may prove too prejudicial and might not truly reflect the value of the property at the time of the taking.

One such jurisdiction is Louisiana. In *State, Through Dept., Hwy. v. Rosenblum*⁸⁶, the court held that the admission of post-taking sales as comparable sales was inappropriate in determining the value of the property in question.⁸⁷ In support of this holding, the court stated that “[i]n an effort to assure the similarity between a given comparable and the property expropriated, the courts have consistently held that transactions which followed the date of the taking should not be used.”⁸⁸ The court acknowledged that post-taking transactions could be “considered in support of an appraiser’s finding of an annual increase in value antecedent to the taking”⁸⁹, and that a post-taking transaction “can be useful in confirming the value of the property”⁹⁰ by indicating market trends. Further, “while a subsequent sale could not be used to determine the market value of expropriated property, such a sale was permissible for the purpose of showing the ‘market trend.’”⁹¹

⁸⁴ Id. at 287.

⁸⁵ Id.

⁸⁶ 344 So.2d 424 (La. App. 1 Cir. 1977).

⁸⁷ Id. at 425-26.

⁸⁸ Id. at 425 (citing *Dept. of Hwys. v. Colby*, 321 So.2d 878 (La.App. 1st Cir. 1974); *Dept. of Hwys. v. Christy*, 283 So.2d 533 (La.App. 1st Cir. 1973); *Dept. of Hwys. v. St. Tammany Homestead Assn.*, 304 So.2d 765 (La.App. 1st Cir. 1975)).

⁸⁹ Id. at 426 (citing *St Tammany Homestead*, 304 So.2d at 775).

⁹⁰ Id. (citing *Dept. of Hwys. v. Guste*, 319 So.2d 468, n.1 (La.App. 4th Cir. 1975)).

⁹¹ Id. (citing *Dept. of Hwys. v. DeRouen*, 228 So.2d 659 (La.App. 3rd Cir. 1969)).

While the court in *Rosenblum* noted that courts have not permitted post-taking sales to be used as comparable sales for the purposes of valuation, it also indicated that this is not an absolute as a matter of law, stating that “[f]uture cases may disclose a unique situation where there are no available pretaking comparables, thus necessitating the use of posttaking sales. Such, however, is not the case at hand.”⁹² Thus, although the Louisiana courts seem to have decided not to admit post-taking sales as comparable sales for the purposes of valuation, they still appear to be applying a variation of the case-by-case analysis approach to such evidence.

III. Evidence of Rezoning After the Date of Taking

The severity and the complexity of the zoning restrictions that are imposed upon a property can dramatically affect the value of the property on the open market. Because one of the primary purposes of condemnation proceedings is to determine the “just compensation” due to the property owner, zoning issues can have a dramatic impact on the value that will be placed on the land at trial. When the zoning of the property remains unchanged between the time of the taking and the trial, the only issue to be determined is the effect of the current zoning and whether or not there is a reasonable possibility of rezoning. If, however, the property is rezoned after the date of the taking and before the date of the trial, the trial court must wrestle with the additional decision as to whether or not such information is admissible at trial.

Unlike post-taking comparable sales, which courts have generally permitted subject to the general rules of evidence, courts have issued widely varying opinions regarding the admissibility of post-taking zoning changes. Because a zoning change is a discrete event with a precise date of approval, the disparity between pre-rezoning and post-rezoning is often more dramatic than with sales of property before or after a specific date. Because of this fact, courts have generally subscribed to one of three different perspectives on the admissibility of post-taking rezoning at trial. Some courts have been highly restrictive of such evidence, holding it to be something that would not be known to a market participant at the time, thus making it irrelevant to a determination of market value *at the time of the taking*. Other courts have found such evidence to

⁹² Id.

be relevant as to whether or not a market participant would have taken the possibility of such an event into account when appraising the property, but would still find such evidence inadmissible due to the fact that it would likely prove to be substantially more prejudicial than probative. Finally, some courts have found that such information is highly relevant, and ought to be admitted into evidence, but with explicit jury instructions that it is only to be used to determine whether such a rezoning was a reasonable possibility at the time of the taking, and thus would be accounted for by a market participant. Which approach is adopted often varies from court to court, and even among the different members of a given court, as will be seen below.

A. Jurisdictions Permitting Evidence of Post-Taking Rezoning

1. Federal Cases Admitting Evidence of Post-Taking Rezoning

The prevailing standard in federal courts is that parties to a condemnation suit may submit evidence of a “reasonable possibility” that rezoning will occur or a permit will be issued, increasing or decreasing the value of property. The Fifth Circuit summarized the reasoning behind this rule, relating the issue back to the “reasonable purchaser” standard discussed above.

However, it is not at all uncommon within regulatory systems for permits or variances to be granted, or for the regulations themselves (especially zoning regulations) to be changed. And since the prospect of obtaining a permit or a change of zoning classification is a factor that might well be considered by a prospective purchaser, and thus a factor affecting the price a willing buyer would pay for the property, it will often represent an element of fair market value. Accordingly, it is well settled law that if the landowner can demonstrate a "reasonable possibility" that a permit would be issued or that rezoning will occur, thereby freeing the property for a use which otherwise would be precluded by regulatory restrictions, the owner is entitled to have that "reasonable possibility" considered by the jury, provided of course that the use is otherwise a practicable and reasonably probable one.⁹³

One can imagine that a zoning change that occurs after the date of taking would often be evidence of a “reasonable possibility” of rezoning at the date of taking. This would also conform to USPAP and Nichols, which state that subsequent evidence of comparable sales and zoning is relevant where it verifies market expectations buyers and sellers would have had at the date of taking. Indeed, federal courts have admitted evidence of zoning changes subsequent to takings.

⁹³ *320.0 Acres*, 605 F.2d at 819.

In 1958, the Second Circuit in *United States v. Meadow Brook Club*⁹⁴ considered a case where land was zoned residential at the time of the taking, but an application for rezoning was approved at a later date. The court stated that although property is generally valued based on the existing restrictions, “if there is a reasonable possibility that the zoning classification will be changed, this possibility should be considered in arriving at the proper value.”⁹⁵ Indeed, because the lower court had considered the current as well as potential uses, the award of the trial court was upheld. *Meadow Brook* stated that it was proper for the trial court to consider to what extent the possibility of rezoning would affect the value of the property as of the date of the taking, and that such a determination depends on the degree of probability that the zoning would occur, the imminence of the change, the effectiveness of the opposition to the change, and other conjectural factors.⁹⁶ However, “It would be improper to value the property as if it were actually being used for the more valuable purpose. But the ‘extent that the prospect of demand for such use affects the market value while the property is privately held’ should enter into the calculation.”⁹⁷

Also in 1958, the Eastern District of New York in *United States v. 765.56 Acres of Land*⁹⁸ considered the damage inflicted when a condemnor sought aviation easements limiting building heights for the properties in question. In considering the question, the Court considered the impact of zoning restrictions that were not in place at the time of condemnation, but which had been imposed by the time of the trial. The Court noted that:

At the time of the institution of this condemnation action, the lands here involved were entirely without zoning. Zoning regulations had been under consideration, however, for some time, and of course it is necessary, in appraising rights of this character and lands of this nature, to consider the possibility and probability of the future use of this land for housing and residential purposes and the appropriate zoning for such use. . . The testimony shows that at the time of trial such zoning had become a fact and that the lands are now zoned for residential and agricultural purposes, with a height limitation of 35 feet for any buildings or structures.⁹⁹

⁹⁴ 259 F.2d 41 (2nd Cir. 1958), *cert denied* 358 U.S. 921 (1958).

⁹⁵ *Id.* at 45.

⁹⁶ *Id.*

⁹⁷ *Id.* (quoting *Olson*, 292 U.S. at 255).

⁹⁸ 164 F. Supp. 942 (E.D.N.Y. 1958)

⁹⁹ *Id.* at 947 (citing *United States v. 50.8 acres*, 149 F. Supp. 749 (E.D.N.Y. 1957)).

The Court also stated that any damage resulting from the easements sought must be considered in light of the zoning restrictions – either present or prospective – for the area. Because the zoning in question would have limited development in the area in a similar fashion to the easements, the Court found no damage or diminution in value of the landowners’ property.

The issue of rezoning subsequent to the date of taking appears much less frequently in federal courts than the issue of subsequent comparable sales. Nonetheless, one recent case indicates *Meadowbrook* is still good law. In *Desert Citizens Against Pollution v Bisson*, 231 F.3d 1172 (9th Cir. 2000), a coalition of environmental groups sued the Bureau of Land Management over a deal it made to purchase property. The Court agreed with the coalition that the bureau used an outdated appraisal that failed to take account a subsequent rezoning of the property for landfill use. Though not strictly a condemnation case, it still demonstrates that subsequent rezoning is a relevant factor in property valuation. Additionally, the second circuit reaffirmed *Meadowbrook* in *In re Investors Funding Corp. of New York*¹⁰⁰, where it held

the possibility of a zoning change and the probable value of property after the zoning change must be “considered” when appraising the value of the property prior to the change. Critically, however, “the property must not be evaluated as though the rezoning were already an accomplished fact. It must be evaluated under the restrictions of the existing zoning (with) consideration given to the impact upon market value of the likelihood of a change in zoning.”¹⁰¹

2. State Cases Permitting Evidence of Post-Taking Rezoning

a. New Jersey

In *Hwy Comm'nr. v. Gorga*¹⁰², the Supreme Court of New Jersey explicitly affirmed that a post-taking rezoning could be admitted into evidence, if the evidence was confined to its proper role. In *Gorga*, the trial court had refused to admit evidence at trial that the property in question had been rezoned ten months after the date of the taking. On appeal, the appellate court found that this exclusion, along with the overly restrictive jury instructions issued at trial, were a source

¹⁰⁰ 529 F.2d 134 (2d. Cir. 1979).

¹⁰¹ Id. at 136 (quoting Nichols, note 2 *supra*, §§12.322(1), 12-657).

¹⁰² 26 N.J. 113; 138 A.2d 833 (1958) (affirming *Hwy. Comm'nr v. Gorga*, 45 N.J. Super. 417; 133 A.2d 349 (N.J. Super. Ct. App. Div. 1957)).

of reversible error requiring a new trial.¹⁰³ In affirming the decision of the appellate court, The court clarified the ruling of the lower court, noting “[i]t is generally agreed that if as of the date of taking there is a reasonable probability of a change in the zoning ordinance in the near future, the influence of that circumstance upon the market value as of that date may be shown.”¹⁰⁴ Although the Supreme Court agreed with the Appellate Court that evidence of rezoning is relevant and should be admissible, it also stated,

[T]he true issue is not the value of the property for the use which would be permitted if the amendment were adopted. Zoning amendments are not routinely made or granted. A purchaser in a voluntary transaction would rarely pay the price the property would be worth if the amendment were an accomplished fact. No matter how probable an amendment may seem, an element of uncertainty remains and has its impact upon the selling price. At most a buyer would pay a premium for that probability in addition to what the property is worth under the restrictions of the existing ordinance.¹⁰⁵

With this principle in mind, the court noted that although the evidence of post-taking zoning was should have been admitted, it was improper for the defendant-landowners to testify only to the value of the property had it been rezoned.¹⁰⁶ The court found it troubling that no testimony was directed to what a willing buyer would be willing to pay, when taking into account the probability that the land would be rezoned in the future.¹⁰⁷

Having expressed its concerns with the evidence presented at trial, in addition to the evidence that was excluded at trial, the court held that:

We agree with the Appellate Division that an amendment of the ordinance which came into being after the date of taking should not be excluded solely because of the time sequence. But such evidence should be carefully confined to its proper role. It may serve only to support the reasonableness of the factual claim that on the date of taking the parties to a voluntary sale would have recognized and been influenced by the probability of an amendment in the near future in fixing the selling price. The fact would still remain that on the date of taking the property was otherwise zoned, and the value as of that date must still be reached on the

¹⁰³ *Gorga*, 45 N.J. Super. at 423-24.

¹⁰⁴ *Gorga*, 26 N.J. at 116 (citing *United States v. 50.8 Acres of Land*, 149 F. Supp. 749, 752 (E.D.N.Y. 1957); *Bd. of Ed. of Claymont Special Sch. Dist. v. 13 Acres of Land*, 131 A. 2d 180, 183 (Del. Super. Ct. 1957); *Roads Comm'n v. Warriner*, 211 Md. 480, 128 A. 2d 248, 250 (Md. Ct. App. 1957); *Hwy Comm'n v. Williams*, 289 S.W. 2d 64, 67 (Mo. Sup. Ct. 1956); *City of Austin v. Cannizzo*, 153 Tex. 324; 267 S.W. 2d 808 (Tx. Sup. Ct. 1954); *Long Beach City High Sch. Dist. v. Stewart*, 30 Cal. 2d 763, 185 P. 2d 585 (Cal. Sup. Ct. 1947)).

¹⁰⁵ *Id.* at 117.

¹⁰⁶ *Id.* at 117-18.

¹⁰⁷ *Id.*

basis of facts as they then would have appeared to and been evaluated by the mythical buyer and seller.¹⁰⁸

Citing *Jones*, the Supreme Court of New Jersey held that “an award may be made on the basis of an impending rezoning (as an accomplished fact), minus a discount factor to allow for the uncertainty.”¹⁰⁹ Although again, this was a case involving a *potential* for rezoning, not an actual rezoning subsequent to the date of taking. However, the citation to *Jones* and this quote indicates a subsequent actual rezoning would be admissible evidence in New Jersey.

b. Massachusetts

In *Roach v. Newton Redevelopment Authority*¹¹⁰, the Massachusetts Supreme Court considered whether evidence of a post-taking rezoning should be admitted at trial. The court was asked to determine whether there was a reasonable possibility at the time of the taking that the land would soon be rezoned from residential to commercial uses. Initially the case was heard without a jury, and the judge found “there was a reasonable probability that a zoning change could be obtained for that purpose by a private individual. I find that such a zoning change was obtained by the Newton Redevelopment Authority and that this land is presently being utilized for these purposes.”¹¹¹ The case was reheard before a jury, but the original findings of the first judge were read to the jury. When asked “Just prior to the takings in 1969 and 1970 (and for these purposes they may be considered as one taking), was there a reasonable probability that the land in question owned by the petitioner would soon be rezoned from single family residence use to commercial or business use?”, the jury responded, “Yes”.¹¹² Based on these facts, the appellate court found sufficient evidence to permit a jury to reach such a conclusion. Keeping in mind that “the fact that a potential use is prohibited by the zoning law at the time of the taking does not prevent its consideration as an element of value ‘if there was then a reasonable prospect that the bar would soon be lifted,’” and that in deciding whether such a use should be considered,

¹⁰⁸ Id. at 118 (emphasis added).

¹⁰⁹ *New Jersey v. Caoili*, 135 N.J. 252, 272-273; 639 A.2d 275 (1994) (quoting Nichols, note 2 *supra*, § 12C.03[2]; citing *Jones*, 45 A.D.2d at 927).

¹¹⁰ 381 Mass. 135; 407 N.E.2d 1251 (Mass. 1980).

¹¹¹ Id. at 136.

¹¹² Id.

“the judge has a margin of ultimate discretion”,¹¹³ the court further observed that “[a]ctual amendment of the zoning law, subsequent to the taking, may be ‘weighty evidence’ of such a prospect.”¹¹⁴ However, the court also noted, “a person whose land is taken for public use cannot recover the enhancement in value due to the improvement for which the land is taken.”¹¹⁵ Therefore, the court concluded, “a probability of rezoning or an actual change in zoning cannot be taken into account if it ‘results from the fact that the project which is the basis for the taking was impending.’”¹¹⁶

Having established the tension between the relevance of the post-taking rezoning and the potential for inflated land values resulting from the project, the Court elected to admit evidence of post-taking rezoning in a limited role. The court cited *Gorga* for the principle that the “limited role” of such evidence must be only to prove the status of the property as of the date of the taking.¹¹⁷ In keeping with this principle, rather than speculating as to the city’s motives in rezoning the property, the court elected to permit the post-taking rezoning evidence to be admitted only to demonstrate the possibility that a private developer could have obtained the same rezoning.¹¹⁸

c. Maryland

In *Reindollar v. Kaiser*¹¹⁹, the Court of Appeals of Maryland decided a case where zoning laws had taken effect after the date of taking of the property in question. The question was whether or not the evidence of the subsequent zoning could be admitted at trial when determining the value of the property taken. In *Reindollar*, the trial court had instructed the jury that “[y]ou may take into consideration the fact that Howard County Zoning Laws had not become operative at the time the property was taken, so that at that time it could have been

¹¹³ Id. at 136-37 (citing *Skyline Homes, Inc. v. Commonwealth*, 362 Mass. 684, 687; 290 N.E.2d 160 (1972); *Colonial Acres, Inc. v. North Reading*, 3 Mass. App. Ct. 384, 386-387; 331 N.E. 2d 549 (1975); Nichols, note 2 *supra*, § 12.322[1]).

¹¹⁴ Id. at 137 (citing Nichols, note 2 *supra*, § 12.322[2], n.11).

¹¹⁵ Id. (citing *Cole v. Boston Edison Co.*, 338 Mass. 661, 665-666; 157 N.E.2d 209 (1959)).

¹¹⁶ Id. (citing Nichols, note 2 *supra*, § 12.322).

¹¹⁷ Id. at 138 (citing *Gorga*, 26 N.J. at 118).

¹¹⁸ Id.

¹¹⁹ 195 Md. 314; 73 A.2d 493 (1950).

utilized or sold for any purpose the owner decided to utilize or sell it.”¹²⁰ At trial, the lack of zoning at the time of the taking was brought out, and it was noted that the use at the time of the taking was unregulated. By implication, this also makes clear that at the time of the taking, the land was regulated by the zoning code. The court noted, “the compensation to which appellees [landowners] in this case were entitled was the actual market value of the property condemned at the time of the taking”,¹²¹ which should have reflected the unrestricted use at the time. Thus, although the trial court had permitted the admission of evidence that the land had been rezoned subsequent to the taking, the Court of Appeals found that the judge’s instruction did not clearly prejudice the Appellee-landowner, and thus the trial court’s decision was affirmed.

d. New York

In a very brief decision, the Supreme Court of New York, Appeals Division, addressed the post-taking rezoning issue in *Jones v. State*.¹²² In *Jones*, the court held that despite the fact that the parcel in question was zoned residential at the time of the taking, “claimant acquired parcels on each side of his 60-foot lot before the appropriation, thus indicating that there existed a reasonable probability of an imminent change in zoning for this assembled parcel from residential to commercial, justifying a commercial use as found by the court.”¹²³ Furthermore, the court stated, “Before the case was tried the assembled parcel had been rezoned to commercial. In these circumstances, we should allow for the 60-foot lot a commercial valuation . . .”¹²⁴

e. Texas

¹²⁰ Id. at 322.

¹²¹ Id. (citing *Bonaparte v. M. & C. C. of Baltimore* 131 Md. 80, 83; 101 A. 594 (1917) (“ The availability of the property for a particular use, contributing to its market value, is not to be ignored merely because it has not in fact been applied to that use. The valuation for condemnation purposes must disregard the effect of the public project, for which the property is acquired, but must take into consideration all the uses to which it is capable of being applied at the time of the appropriation and which affect its marketability.”)).

¹²² 357 NYS2d 554; 45 A.D.2d 927 (N.Y. App. Div. 4th Dept. 1974).

¹²³ Id. at 554.

¹²⁴ Id. (citing *Mastroieni v. State of New York*, 266 NYS2d 178; 25 A.D.2d 463 (N.Y. App. Div. 3d Dept. 1966).

Texas courts have also had the opportunity to address the post-taking rezoning question, although in a slightly different context. In *City of Austin v. Cannizzo*¹²⁵, the Supreme Court of Texas addressed the appeal of a condemnation case in which the lower court had permitted testimony on uses not permitted under the property's zoning at the time of the taking. In *Cannizzo*, the court stated that “[a]s to the point on allowing consideration of value of the 4.57 acres for commercial purposes in the face of contrary zoning restrictions, we do not regard this as error.”¹²⁶ The court instead elected to acknowledge that “In the willing seller-willing buyer test of market value it is frequently said that all factors should be considered which would reasonably be given weight in negotiations between a seller and a buyer.”¹²⁷ According to the court, “this would exclude consideration of purely speculative uses to which the property might be adaptable but wholly unavailable but would permit consideration of all uses to which the property was reasonably adaptable and for which it was, or in reasonable probability would become, available within a reasonable time.”¹²⁸ Based on its analysis above, the court stated

We are unwilling to lay down a hard and fast rule that in arriving at market value consideration may never be given to a use for which property is reasonably suitable and adaptable but which use is presently prohibited by a zoning ordinance. It is a matter of common knowledge that cities frequently lift zoning ordinances or reclassify property in particular zones when the business or wants of the community justifies that type of action in the interest of the general public welfare.¹²⁹

While acknowledging its willingness to consider evidence of alternative uses, the court noted, however, that “if the trial judge is satisfied from the evidence as a whole that there is no reasonable probability that existing restrictions may be lifted within a reasonable time, he should exclude evidence of value based on use for any purposes other than those to which it is restricted.”¹³⁰ In the end, the court adopted the rule that:

[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

¹²⁵ 153 Tex. 324; 267 S.W.2d 808 (1954).

¹²⁶ Id. at 332.

¹²⁷ Id. at 332-33 (citing 29 C.J.S. Eminent Domain, § 159, 1023).

¹²⁸ Id. at 333.

¹²⁹ Id. at 334.

¹³⁰ Id.

restrictions, he should admit testimony of present value based on prospective use of the property for purposes not then available. Whenever such testimony is admitted it would not do violence to the definition of "market value" suggested in the Carpenter case by adding thereto so as to have it read: You are instructed that the term "market value" is the price which the property would bring when it is offered for sale by one who desires, but is not obliged to sell, and is bought by one who is under no necessity of buying it, *taking into consideration all of the uses to which it is reasonably adaptable and for which it either is or in all reasonable probability will become available within the reasonable future*. This definition will permit the jury to give such weight to the probability of the lifting of restrictions as it thinks a prospective purchaser would give.¹³¹

The decision of the Texas Court of Civil Appeals in *Texas Electric Service Co. v. Graves*¹³² shed some further light on the rule that the Texas Supreme Court had established in *Cannizzo*. In *Graves*, the court considered a takings case where the landowners had offered into evidence a statute that had not become effective until four months after the date of taking.¹³³ The Appellant-condemnor had presented motion in limine to exclude the evidence, and had also objected to the admission of the evidence at trial, based on the fact that the statute was not in effect at the time of the taking. Both the motion in limine and the objections on relevancy grounds were overruled, and the evidence of the passage of the statute was admitted into evidence.¹³⁴ First, the court noted that due to the possibility that a hypothetical willing buyer would take into account the potential for the regulatory change, similar potential changes should be admissible as one determinant of market value. The court continued on to state that this "is comparable to the rule adopted in the contemplated rezoning cases."¹³⁵ Based on this principle the court observed that:

No testimony is presented that at the time of the taking there was a reasonable probability that the statute would soon be effective, but as a matter of fact it was effective some four months later and long before the trial of this case. *In the zoning cases it has been held that if subsequent to the taking and before the trial the ordinance was actually amended to permit the previously forbidden use then that of itself was weighty evidence of the existence at the time of the taking of the fact that there was a reasonable probability of an imminent change.*¹³⁶

¹³¹ Id. (emphasis original).

¹³² 488 S.W.2d 135 (Tex. Civ. App. 8th Dist. 1972).

¹³³ Id. at 137.

¹³⁴ Id.

¹³⁵ Id. at 137 (citing *City of Austin v. Cannizzo*, 153 Tex. 324; 267 S.W.2d 808 (1954); *State v. Rankin*, 445 S.W.2d 581 (Tex.Civ.App. 13th Dist. 1969)).

¹³⁶ Id. (citing Nichols, note 2 *supra*, §12.322(2)) (emphasis added).

Thus, regarding the post-taking statutory change, the court held that “we feel the broad general discretion of the trial court should control as to the receipt of this evidence. *If the zoning ordinances are admissible, then likewise the restrictive statute.*”¹³⁷

Read together, *Graves* and *Cannizzo* indicate that Texas courts consider post-taking rezoning and regulation to be relevant to the question of whether or not such changes were a reasonable possibility at the time of the taking.

f. Iowa

In *Reeder v. Iowa State Hwy. Comm.*¹³⁸, the Supreme Court of Iowa considered a case where the plaintiff-landowner had submitted evidence of a rezoning of the area in question eight months after the taking. The evidence was submitted as evidence of the highest and best use of the land, and he challenged the admissibility of the defendant’s testimony regarding the plaintiff’s objective in seeking the change in zoning. In addressing the issue, the court first noted,

[C]onsiderable latitude is allowed in the admission of evidence of the capabilities of land affected by a condemnation and the uses to which it may reasonably be adapted. It is true there must be a present demand for the land for such uses or reasonable expectation of such demand in the near future. *It must be remembered too that such evidence is to be considered only for the effect it has on market value at the time of the taking, not at some future time.*¹³⁹

The court then acknowledged that the trial court had permitted introduction of the zoning ordinance that had been enacted more than eight months after the taking in question. The court then stated that the Plaintiff’s introduction of this evidence was to show that the enactment of the zoning ordinance, per se, proved that the highest and best use *at the time of the taking* was for commercial use. In response, the court stated,

Bearing in mind the ordinance was adopted more than eight months after condemnation, the claim made by plaintiff is manifestly lacking in substance. . . [E]nactment of a zoning ordinance subsequent to condemnation does not alone establish either adaptability or nonadaptability of a tract of land for any particular purpose *at time of taking*. And any inferences in that direction, arising from adoption of a rezoning ordinance, may always be rebutted.¹⁴⁰

¹³⁷ Id. (citing *City of Tyler v. Ginn*, 225 S.W.2d 997 (Tex.Civ.App. 1949), *cert. denied*, 148 Tex. 604; 227 S.W.2d 1022 (1949); Rayburn, Texas Law of Condemnation, §141)) (emphasis added).

¹³⁸ 166 N.W.2d 839 (Iowa 1969).

¹³⁹ Id. at 841 (citing *Mohr v. Hwy. Comm’n.*, 255 Iowa 711, 720; 124 N.W.2d (1963)) (emphasis in original).

¹⁴⁰ Id. at 842-43.

Based on this principle, the court acknowledged that evidence of post-taking zoning is admissible at trial, but it does not *per se* establish the highest and best use of the land, and it also is subject to rebuttal evidence by the opposing party. In conclusion, the *Reader* court stated that:

The classification of plaintiff's land at time of taking is not subject to question. It was then zoned residential. And as we held in *Mohr v. Iowa State Highway Commission*, [citation omitted] evidence as to uses to which land may reasonably be adapted is to be considered only for the effect it has on market value at time of taking, not at some later date.¹⁴¹

¹⁴¹ Id. at 844.

B. Jurisdictions Not Permitting Evidence of Post-Taking Rezoning

While some jurisdictions have permitted evidence of rezoning subsequent to the date of taking, others have refused to admit such information into evidence. While the justifications may vary, generally they depend on either a lack of relevance due to their inability to affect the market value as of the date of the taking, or a concern that, although relevant, such information will prove more prejudicial than probative. Although it is difficult to find federal cases taking such a position, a number of state decisions are addressed below.

2. State Cases Not Admitting Post-Taking Rezoning Evidence

a. New Jersey

Although New Jersey courts are cited above as allowing post-taking rezoning into evidence, there are situations in which they do not. The Superior Court of New Jersey, Appellate Division decided *Hwy. Comm'nr. v. Speare*¹⁴², where the trial court had permitted testimony regarding the possibility of rezoning, and on appeal the court summarized the relevant principles of law, stating,

In short, if the parties to a voluntary transaction in agreeing upon the price as of the date of the taking, would give recognition to the reasonable probability of a zoning amendment, or the granting of a variance for a given use, such factors may be shown as bearing upon value.¹⁴³

When the zoning ordinance for the relevant parcel was invalidated after the landowners award for the taking had been established, the landowner sought a new trial in light of the updated zoning of the land. The landowner also sought to admit evidence of a subsequent sale of a portion of the remainder parcel as evidence of the value of the land taken. The court denied the condemnee's request for a new trial, stating that the possibility of such a change in zoning could have been presented at trial with due diligence, that the sale of the remainder could have been raised at trial, and that granting a new trial would result in constant re-litigation of the issue whenever any decision regarding a zoning ordinance is overruled by a higher court.

¹⁴² 86 N.J. Super. 565; 207 A.2d 552 (N.J. Super. Ct. App. Div. 1965).

¹⁴³ Id. at 576 (citing *Gorga*, 26 N.J. at 117).

The court held that the request for a new trial was properly denied regarding both pieces of proposed “newly discovered evidence”. First, the contract of sale for the remainder occurred 27 months after the date of taking, it could likely have been brought to the attention of the Court at trial, and it contained a number of contingencies, including one that a subsequent rezoning be approved for specific construction. The second piece of newly discovered evidence was the invalidation of the zoning ordinance as applied to the parcel taken, subsequent to the date of the taking. The court determined that such information was not relevant to any determination of fair market value at the time of the taking, stating,

Appellant's argument, in substance, is predicated upon the fact that Halpern, the Commissioner's expert, based his opinion of value upon a residential use only and gave no consideration to a possible commercial use. In this he relied upon the zoning ordinance in effect at the time of the taking and the fact that subsequently there had been manifestations that residential zoning would continue to be maintained in the area. On the other hand, appellant's experts testified that the highest and best use, and the only use to which the property was adapted, was commercial.¹⁴⁴

In concluding that the evidence of rezoning did not constitute new evidence requiring a new trial, the court noted,

Appellant's contention that the property should not have been considered as being restricted to residential use was fully developed at the trial and the possibilities of commercial use through rezoning or variance were extensively explored. . . . *Since the suit was not instituted until after the taking, it was not a factor which would have been taken into consideration in arriving at the fair market value as of that time.* Additionally, the evidence could have been produced at the trial by the exercise of due diligence, either through a motion to adjourn the case *sub judice* or to consolidate the cases and delay the trial of the condemnation case until the action in lieu of prerogative writs had been determined. Appellant, a party to both suits, elected to remain silent. Public policy and sound jurisprudence dictate that there must be a finality to judgments and an end to litigation.¹⁴⁵

Following the principle established in *Speare*, the Court in *Comm'nr. of Transp. v. Market Associates*¹⁴⁶ considered a case where the likelihood of the invalidation of the local zoning ordinance was likely at the time of the taking. With that in mind, the court stated that:

¹⁴⁴ Id. at 584.

¹⁴⁵ Id. at 584 (citing *Paradise v. Great Eastern Stages, Inc.*, 114 N.J.L. 365, 367-68 (1934); *Hodgson v. Applegate*, *supra*, 31 N.J. 29, 43 (App. Div. 1959)).

¹⁴⁶ 134 N.J. Super. 282; 340 A.2d 663 (N.J. App. Div. 1975).

This likelihood, in turn, rendered it at least reasonably probable that there would be a change of those zoning regulations in the near future. Consequently, the determination of the trial judge that, as of the date of taking, there was no reasonable probability of a zone change in the near future, was in error and must be reversed, and the cause remanded for trial.¹⁴⁷

Upon remand the court stated that both sides would be permitted to admit evidence of the market value of the land as restricted by the current zoning, plus the premium that a willing buyer would pay for that land, based on the possibility that the land would subsequently be rezoned.¹⁴⁸

Summarizing this principle, the court stated that:

[E]vidence as to the market value of the property for the uses which would be permitted if the zoning change were in fact adopted or which would be permitted were the property to remain unzoned following the likely judicial declaration of invalidity of the regulations in effect as of the date of taking, may be submitted. But such testimony may be received only for the limited purpose of explanation by the expert of his opinion of the then market value as affected by the reasonable probability of a zone change in the near future, and the jury should be instructed accordingly.¹⁴⁹

With the aforementioned principles in mind, the court held that:

The circumstance that this court in 1974 did in fact declare invalid the 1968 zoning regulations governing the use of this property [citation omitted], and that thereafter the Supreme Court denied certification [citation omitted] is of no significance on the issue of value in this litigation; nor does it sanction proof by the landowner of the market value of the property on the basis of its highest and best use as though it were unregulated or unzoned at the time of the taking. The value must be determined in the light of the attendant facts and circumstances as of the date of the taking -- including the existence of the uninvalidated zoning regulations, and the reasonable probability of their being changed by reason of their likely invalidity.¹⁵⁰

Thus, the court determined that the possibility of post-taking zoning may be considered in calculating the value of the property at the time of the taking, but evidence of subsequent invalidation of the zoning ordinance would not be admissible, as it would not be considered one of the attendant facts and circumstances that were known as of the date of the taking.

b. New York

¹⁴⁷ Id. at 285.

¹⁴⁸ Id. (citing *Gorga*, 26 N.J. at 113).

¹⁴⁹ Id. at 285-86

¹⁵⁰ Id. at 286.

New York has also found that zoning decisions subsequent to the taking are sometimes not relevant to proving the probability of a zoning change at the time of the taking. In *Ridgefield Realty Corp. v. State*¹⁵¹, the Appellate Division of the Supreme Court of New York considered a case where the trial court rejected the claimant’s proposed highest and best use of the property, finding that the claimant “had not shown a reasonable probability that there would be a change in zoning so as to permit the property to be used as a gasoline service station.”¹⁵² In affirming the lower court’s decision, the court noted that “The burden of proving the existence of a reasonable probability of a zoning change *at the time* of taking is on the claimant.”¹⁵³ In rejecting claimant’s offer of evidence of two gas stations permitted to be built two years after the taking, and of a shopping center that was in the planning stages at the time of the taking, the Court stated that “Claimant’s reliance upon developments occurring after the appropriation constituted a failure of claimant to prove the reasonable probability of a zoning change.”¹⁵⁴

c. Ohio

In *Masheter v. Kebe*¹⁵⁵, the Court of Appeals of Ohio considered whether the trial court should have considered the rezoning of a remainder parcel, when valuing a property. The property in question was taken for interstate highway construction, and the remainder was rezoned from residential uses to highway interchange uses. The trial court had instructed the jury to consider the value in terms of the zoning existing at the time of the taking, which was residential for the parcel taken, and interchange for the remainder. The Court of Appeals agreed with the property owner that it was improper for the trial court to consider the value of the remainder in light if its rezoned interchange uses. Testimony from the Mayor of Westlake indicated that the interchange zoning is peculiar to superhighways, without which it would not exist. Cognizant of this fact, the court stated,

¹⁵¹ 346 N.Y.S.2d 493; 42 A.D.2d 807 (N.Y. App. 3d Dept. 1973).

¹⁵² Id. at 494.

¹⁵³ Id. (citing *Comstock v. State of New York*, 331 N.Y.S.2d 908; 39 A D 2d 790 (N.Y. App., 3d Dept. 1972); *Masten v. State of New York*, 206 N.Y.S.2d 672; 11 A D 2d 370 (N.Y. App., 3d Dept. 196)).

¹⁵⁴ Id.

¹⁵⁵ 34 Ohio App. 2d 32; 295 N.E.2d 429 (Ohio. Ct. App. 8th Dist. 1973).

Thus, the zoning was a direct result of the construction of the highway and would not have existed without the highway. Therefore, the familiar rule that property taken by condemnation proceedings should be valued irrespective of the effects of the improvement upon it [citation omitted] applies to considering a zoning change connected with and brought about by the improvement.¹⁵⁶

Thus, this decision was essentially based on the scope-of-the-project rule. The court determined that forcing the property owner's experts to limit their testimony only to those uses that were permissible under the rezoning that resulted from the condemnation project itself was prejudicial, and served as grounds for reversal. The case was remanded for determination of the value of the taking and the remainder without consideration of the rezoning that would not have occurred without the project for which the condemnation was initiated.

d. Louisiana

In *Department of Hwys. v. Finkelstein*¹⁵⁷, the Court of Appeals of Louisiana held that zoning changes made after the date of the condemnation, if not the result of the project for which the condemnation was initiated, cannot be considered in offsetting the severance damages to remaining parcels of the defendant's land. In *Finkelstein*, the Court stated that because the taking occurred before January 1, 1975, the rezoning act of 1975 was inapplicable to any determinations of severance damages, and the provisions of a previous statute applied. Therefore, according to the court:

[S]everance damages are to be determined as of the date of trial. This provision was statutorily intended to specify that damages suffered by the remainder should be reduced by special benefits which result from the completion of the project, it was not intended to deprive the owner of compensation for damages sustained by his property because of a general increase in the value of the land between the taking and the trial.¹⁵⁸

Furthermore, the court stated,

Severance damages are the difference between the before and after values of the remainder less any special benefits to the remainder as a result of the project. Just as general appreciation in land values is not allowed in diminution of severance

¹⁵⁶ Id. at 431.

¹⁵⁷ 340 So.2d 1040 (La. App. 1976).

¹⁵⁸ Id. at 1045 (citing *Dept. of Hwys. v. Society for Propagation*, 321 So.2d 393 (La. App. 1st Cir. 1975); *Dept. of Hwys. v. William T. Burton Indus.*, 219 So.2d 837 (La. App. 3rd Cir. 1969)).

damages, so too, zoning changes, resulting from causes other than a completed highway project, may not be employed to offset severance damages.¹⁵⁹

Although the court found that a property owner's severance damages might be offset by the increase in value of a remainder parcel, the offset can only be applied if the increase in value is a direct result of the project for which the taking was initiated. If, however, the increase in value is the result of a rezoning event that is independent of the project for which the condemnation was initiated, then no offset may be applied. Because of the court's concern about the potential for the landowner to lose compensation because of an independent post-taking zoning change, the Court affirmed the lower court's decision to exclude the zoning change from consideration when determining the severance damages resulting from the taking.¹⁶⁰

As cited in *Finkelstein*, the Court of Appeals of Louisiana examined the manner in which severance damages are to be calculated for a partial taking. In *Department of Hwys. v. Mayer*¹⁶¹, the court stated,

It has been held that where, as in the case at hand, a zoning change has, in fact, taken place between expropriation and trial, the test must be whether the zoning change resulted from the project involved. LSA-R.S. 48:453 provides that severance damages shall be determined as of the time of trial. A literal construction of the statute would dictate consideration of all operative factors existing at the time of trial even though such factors were not present at the time of taking.¹⁶²

However, the court noted, "Such a rigid interpretation was rejected in *Department of Hwys. v. William T. Burton Industries*."¹⁶³ In *Burton Industries*, there was a delay of seven years between the date of the taking and the trial, and regarding the fixing of severance damages the *Mayer* Court cited *Burton Industries*, which held that:

In our view, however, the provision that severance damages be valued as of the date of the trial was statutorily intended to specify that the damages the remainder suffers should be reduced by special benefits which result to it from the completion of the highway construction, not to deprive the landowner of compensation for damages sustained by his tract because of any general increase in the value of land between the taking and the trial. We do not believe that the

¹⁵⁹ Id. (citing *Dept. of Hwys. v. Mayer*, 257 So.2d 723 (La. App. 1st Cir. 1971)).

¹⁶⁰ Id.

¹⁶¹ 257 So.2d 723 (La. App. 1st Cir. 1971).

¹⁶² Id. at 739.

¹⁶³ 219 So.2d 837 (La. App. 3d Cir. 1969).

legislature intended to deprive a landowner of damages to his property undoubtedly caused him by the taking, simply because -- in the long interval between the taking itself and the subsequent completion of the long-term major highway construction project -- his property had increased in value due to generally improved economic conditions, along with all lands in the area (and, probably, most other lands in the entire State).¹⁶⁴

Regarding the admissibility of post-taking evidence of rezoning as a justification for reduced severance damages, the Court held that:

The Department's request for a remand to show a rezoning of subject property to Commercial classification following the time of trial must be denied. *We believe the legislature has wisely and properly restricted proof of damages in these cases to such reasonable possibilities as exist at the time of taking, as reflected by the circumstances existing at the time of trial.* To remand at this point would only lead to the possibility of a request for a subsequent remand based upon circumstances that have occurred since trial upon the initial remand. Such a situation would be intolerable. Every matter must have a terminal point. For the reasons stated, we cannot consider the leases, which the Department has attached to its motion to remand.¹⁶⁵

Following the original Appellate hearing in *Mayer*, the case was heard *en banc* by the Court of Appeals, and the court noted,

In determining severance damages when there has been a partial taking, we must first find the value of the entire tract as it was prior to the taking and without considering the effect of the improvement. Next, the value of the remainder, immediately after the taking as enhanced or damaged by the taking must be found. If any part of the enhancement or damage is general as to all properties similarly situated, such part may not be considered in arriving at the "after" value of the remainder. To the after value, so determined, must be added the compensation paid for the part taken. If the sum of these two is less than the before value, the difference is the severance damage suffered by the property.¹⁶⁶

In addressing the benefit-offset principle, which would later be applied in *Finkelstein*, the Court stated that,

If, at the time of the trial, the Department is able to prove that the property has enjoyed special benefits as the result of the improvement, these may be offset against the severance damages. General benefits, such as are common to all properties similarly situated, or which have resulted from economic expansion, may not be used to offset severance damages.¹⁶⁷

¹⁶⁴ *Mayer*, 257 So.2d at 739 (citing *Burton Industries*, 219 So.2d at 842).

¹⁶⁵ *Id.* at 740.

¹⁶⁶ *Id.* at 742.

¹⁶⁷ *Id.* (citing *Burton Indus.*, 219 So.2d at 837).

The court thus decided that although severance damages can be offset by benefits conferred by the project, benefits coming from a general appreciation of land values between the taking and the trial shall not be employed to reduce the government's burden and to deprive the landowner of just compensation. For this reason, the Court refused to admit evidence of post-taking rezoning, amended the damages, and affirmed the trial court's decision.

e. Missouri

Another case involving the issue of post-taking rezoning in appraising the value of a parcel of property was raised in *Union Electric Co. v. McNulty*.¹⁶⁸ In *Union Electric*, the Supreme Court of Missouri heard the property owner's appeal of a motion for a new trial that had been granted by the trial court. The condemning authority believed that jury's damage award to be against the weight of the evidence, and the court affirmed the motion, finding that it was inappropriate for the appellant's witness to value the property based on industrial use when no such use existed in the area, nor was in demand in the area.

In *Union Electric*, the condemnor paid the damages assessed into court on October 30, 1959, and then on November 2, 1959, the count court adopted a zoning map and regulations for the county. The zoning provisions, however, were not entered into evidence. Instead, the appellants contended that the highest and best use was for heavy and light industry, and their experts testified to that effect. The trial court found error in the fact that the Appellants had no evidence that the land in question was suitable for industrial use, nor was there evidence that there was demand in the area for such use. Indeed, the Appellant's expert witness admitted that no such uses were anywhere in the area.

In affirming the trial court's grant of a new trial, the Court stated that:

In determining the uses of which the property is capable, it is necessary to have regard to the existing business or wants of the community or such as may reasonably be expected in the immediate future. This means only that the fact of the property's capability or adaptability to the use may be considered as an element of its present value. Mere speculative uses cannot be considered. There must be some probability that the land would be used within a reasonable time for the particular use to which it is adapted. The adaptability of the land for a

¹⁶⁸ 344 S.W.2d 37 (Mo. 1961).

particular purpose is immaterial unless the present market value is enhanced thereby. There must be a present demand for the land for such purpose or a reasonable expectation of such demand in the near future.¹⁶⁹

Thus according to the *Union Electric* Court, the lack of evidence of the proposed highest and best use was too speculative to justify the jury award, and thus a new trial was warranted. Even though the zoning had changed soon after the deposit of the funds, the zoning change was not admitted into evidence, and was thus unavailable to support the Appellant's expert witness testimony.

However, in *Kansas City Power & Light Co. v. Jenkins*¹⁷⁰, the Missouri Court of Appeals held that evidence of the condemnor's proposed rezoning was admissible to show enhanced value of property, because the rezoning was not specifically related to the project. In other words, evidence of rezoning is admissible if the scope-of-the-project rule does not apply.

f. Colorado

In *Williams v. Denver*¹⁷¹, the Supreme Court of Colorado directly addressed the issue of post-taking rezoning. The zoning of the two parcels in question had changed between the filing of the petition in eminent domain and the date trial. The court decided whether the property should be valued under the zoning at the time of the taking or at the time of the trial. The two defendant-owners of the property that had been taken sought to have the property value reflect the zoning change, but failed to convince the court. However, this decision was based on the scope-of-the-project rule, because the zoning change was purely the result of the government's planned improvement, and would not have occurred without it. The court acknowledged:

It may be that under some circumstances evidence of a probable change in zoning may be admitted where such change is unrelated to the acquisition of the subject property. However, where the change in zoning results from the taking of the subject property, as is the case here, it is not admissible under the authority we have previously cited herein.¹⁷²

¹⁶⁹ Id. at 40.

¹⁷⁰ 648 S.W.2d 555 (Mo. App. 1983)

¹⁷¹ 147 Colo. 195; 363 P.2d 171 (1961).

¹⁷² Id.

Thus, the exclusion of evidence in *Williams* appears to represent a determination that post-taking rezoning is not *per se* inadmissible as a matter of law, but is instead inadmissible if appearing to be a result of the project for which the condemnation was implemented in the first place.

Further, the court indicated, “if the rezoning happened to devalue the property instead of raising it, as defendants contend here, then it obviously would be unjust to defendants to assess such diminution against them. Fair compensation in condemnation cases does not include speculative values either lowering or raising the compensation to be paid.”¹⁷³ In support of this principle, the court noted that:

It rarely happens that proceedings for the condemnation of land for the public use are instituted without months, years, and, in some instances, decades of time spent in preliminary discussion and in the making of tentative plans. These discussions and plans are usually known to the owners and other persons interested in land in the vicinity of the proposed improvement, and are matters of common talk in the neighborhood. If the projected public work will be injurious to the neighborhood through which it will pass, the fact that it is hanging like the sword of Damocles over the heads of the land owners in the vicinity cannot but fail to have a depressing effect upon values, and on the other hand, if it is expected that the improvement will be of such a character as to benefit the surrounding land, values usually rise in anticipation of the construction of the improvement.¹⁷⁴

In other words, while owners are not entitled to a windfall from rezonings that result in the scope of the government’s project, neither will they be punished if such rezonings devalue the property.

g. Washington

The Court of Appeals of Washington considered the post-taking issue in *State v. Templeman*.¹⁷⁵ In *Templeman*, the condemning authority had condemned a portion of the defendant’s parcels for highway purposes. The trial court had found that no compensation was due to the property owner, finding the highway project to have conferred a special benefit on the property that offset the compensation required for the taking of the property.

In conducting its analysis of the principle of “special benefits” in Washington law, the court examined the trial court’s jury instruction 11, which stated that “Any increase in the fair market value of the real property to be acquired prior to the date of valuation caused by the

¹⁷³ Id. at 201.

¹⁷⁴ Id. at 201(citing Nichols, note 2, *supra*, 122).

¹⁷⁵ 39 Wn. App. 218; 693 P.2d 125 (Wash. App. 1984).

public improvement for which such property is acquired will be disregarded in determining the compensation for the property.”¹⁷⁶ The court admitted that the instruction properly stated the Washington law under *Pierce Cy. ex rel. Bellingham v. Duffy*.¹⁷⁷ The Court further acknowledged that, when calculating the value of the land taken, in addition to disregarding the increase or decrease in land value resulting from the condemnation, “[l]ikewise, rezoning which is the result of a proposed improvement cannot be considered in valuing the land taken.”¹⁷⁸ As a result of its analysis, the court found that the trial court had properly addressed the issue and that the case was properly submitted to the jury, and that the instructions were properly administered by the trial court.

¹⁷⁶ Id. at 127.

¹⁷⁷ 104 Wash. 426; 176 P. 670 (1918).

¹⁷⁸ Id. (citing *Lange v. State*, 86 Wn.2d 585; 547 P.2d 282 (1976); *State v. Kruger*, 77 Wn.2d 105; 459 P.2d 648 (1969); *State v. Sherrill*, 13 Wn. App. 250; 534 P.2d 598, *review denied*, 86 Wn.2d 1002 (1975)).

h. Michigan

Finally, the most recent and most comprehensive analysis of the post-taking issue was in a Michigan Supreme Court case, *Dept. of Transp. v. Haggerty Corridor Partners*.¹⁷⁹ In *Haggerty Corridor*, the court considered the admissibility of post-condemnation rezoning of land from residential to commercial. In reversing a verdict favoring the property owners, the court affirmed the decision of the Court of Appeals that the trial court improperly admitted evidence that 2½ years after the taking in question, the property was rezoned from residential to commercial. The case arose from the state's acquisition of approximately 51 acres in the City of Novi for construction of the M-5 to Haggerty Road connector. The state's good faith offer was based on the property's zoning as single family residential and agricultural. The property owners rejected the offer and the state sued in December 1995. Approximately 2½ years later, in May 1998, Novi rezoned the property for office/service/technology uses. At trial, the state presented evidence that at the time of the taking, it was unlikely the property would be rezoned to permit commercial development. Specifically, the state's appraiser testified that it was economically feasible to develop the parcel, both before and after the taking, as a residential subdivision, and that in 1995, it was not reasonably possible that the land would be rezoned for commercial use. The property owner responded, however, that as of the taking in 1995, the property was likely to be rezoned to allow for its planned use as an office park. The property owners' appraiser testified that the land could not have been profitably developed as residential property and that the rezoning was imminent at the time of the taking. Further, consistent with that theory and over the objections of the state, which the trial court rejected, the property owner presented evidence that in May 1998, the property was in fact rezoned for commercial uses. The trial court denied the state's motion in limine to bar the evidence and also its alternative request to present evidence that the rezoning took place solely as a result of the taking.

¹⁷⁹ 473 Mich. 124; 700 N.W.2d 380 (2005).

A majority of the Court of Appeals panel held that the trial court abused its discretion in allowing the jury to consider the evidence of the post-taking zoning change and that the error was not harmless. It reversed the award in favor of the property owner and remanded for further proceedings. The dissenting Court of Appeals judge opined that the evidence was properly admitted and that because the state had not pled enhancement in its complaint, the trial court also properly rejected the state's alternative request to introduce evidence that the rezoning was directly attributable to the condemnation proceedings.

The Supreme Court affirmed, determining that the evidence of post-condemnation rezoning was inadmissible, that the state was prejudiced, and that the trial court compounded the error when it refused to allow the state to rebut the post-taking evidence by demonstrating that the rezoning was directly attributable to the condemnation itself. The majority noted that any information regarding the likelihood of a rezoning available *at the time of the taking* was admissible. Thus, the property owners were properly permitted to present evidence that they had met with city officials regarding their plans, that officials had expressed a willingness to make the required zoning changes, that the local chamber and other members of the business community supported the proposed zoning change, and that the municipality's economic development coordinator did not believe that the property was appropriate for single-family development. However, in contrast to this evidence, the post-taking event of the rezoning was irrelevant because it did not make the fact of consequence – that information regarding the reasonable possibility of a zoning change may have affected the market value of the property on the date of the taking – more probable or less probable. The majority acknowledged that some courts have permitted the introduction of post-taking rezoning evidence, but it rejected the reasoning employed by those courts. In her concurring opinion, Justice Kelly determined that the evidence of rezoning was legally relevant but was also unfairly prejudicial such that it should not have been admitted. In her view, the prejudicial effect of evidence of subsequent rezoning on the determination of fair market value substantially outweighed its relevance. The dissenting opinions would have affirmed the lower court's determination that the evidence of post-taking

rezoning is relevant and admissible but then would have held that the trial court abused its discretion in prohibiting the state from introducing evidence that the post-taking rezoning was caused by the taking.

Other jurisdictions, including Arizona, California, and Florida have indicated that evidence of a reasonable probability of rezoning can be considered as evidence.¹⁸⁰ This indicates evidence of actual reasoning could be admitted to prove the likelihood of rezoning at the time of taking.

IV. Retrospective Evidence in Other Contexts

As courts continue to address the issues of post-taking rezoning and post-taking sales, it is important to consider the other contexts in which the courts have analyzed the admissibility of retrospective evidence. In particular, there are other areas in which courts have reached a general consensus, such as in the area of liquidated damages and subsequent remedial measures in personal injury cases.

¹⁸⁰ See, e.g., *Paradise Valley v. Young Fin. Svcs.*, 177 Ariz. 388; 868 P.2d 971 (1993) (evidence of reasonable probability that special use zoning permit would be issued is admissible to prove enhanced value of property zoned residential); *Merced Irrigation Dist. v. Woolstenhulme*, 4 Cal. 3d 378; 483 P.2d 1 (1971) (reasonable probability of zoning changes can likely be considered as a factor in valuation); *Bd. of Comm. of State Institutions v. Tallahassee Bank and Trust Co.*, 108 So. 2d 74, 83-84 (Fla. 1959) (Evidence of reasonable probability of rezoning can be considered.).

A. Liquidated Damages

Many contracts have incorporated liquidated damage clauses as a means of approximating the value of a breach of the given contract, and as a means of limiting the liability to which the parties may be subjected. Generally, such contracts will be upheld by the courts as long as the clause makes an actual attempt to evaluate the potential damage, and not simply to punish the breaching party. As noted in the treatise *Corbin on Contracts*¹⁸¹, “[t]here are some cases in which the court has refused to enforce the agreement to pay a specified sum on the express ground that the actual injury done was either nothing at all or was not hard to determine and was very much less than the agreed sum.”¹⁸² *Corbin* also notes,

When the parties have made a reasonable forecast as to just compensation for an injury that later in fact occurs and that is very difficult of accurate estimation, the defendant should never be allowed to introduce evidence the purpose of which is to substitute the estimate of a jury for the prior reasonable estimate of the parties. But the defendant should be allowed to show that there has in fact been no injury at all, or that the injury is not the one that the parties in fact estimated in advance, or that the injury that has occurred is not at all difficult of accurate estimation and that the pre-estimate is in material error.¹⁸³

Indeed the rationale of permitting retrospective evidence to be admitted in liquidated damages cases closely parallels the issue of retrospective evidence in eminent domain cases. The liquidated damage clauses are permitted in the first place because they are an attempt to estimate the actual damages that would be expected in the event of a breach of the contract, just as some courts have held that market value in eminent domain cases is utilized in an attempt to capture the intrinsic value of the property taken. In such cases, therefore, if it can be conclusively proven that the original belief was not a reasonable representation of the actual harm caused, then it would not be just to permit damages for the incorrect amount.

B. Remedial Measures in Personal Injury Cases

¹⁸¹ 11-58 *Corbin on Contracts*, §1063.

¹⁸² *Id.* See, e.g., *Massman Const. Co. v. City Council of Greenville*, 147 F.2d 925 (5th Cir. 1945); *The Colombia*, 197 F. 661 (S.D. Ala. 1912) (\$100 / day demurrage for ship repairs running overtime was unenforceable where it was shown that the ship would have earned no income during the delay).

¹⁸³ *Id.*

Another situation where courts have addressed the admissibility of retrospective evidence is in the area of subsequent remedial measures following an injury or harm. Indeed, Federal Rule of Evidence 407 explicitly states,

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. . . .¹⁸⁴

Because most states have adopted some variation of the Federal Rules of Evidence, this explicit rejection of the admissibility of subsequent remedial measures applies to proceedings in most state courts as well. It has been noted, however, that although the rule has been codified in Rule 407 to avoid the uneven application of the common law doctrine in this area, "it appears that the Rule against admitting evidence of subsequent repairs has not regained its vitality and many still view it as a rule of inclusion rather than exclusion."¹⁸⁵ It has also been noted that the Rule includes exceptions that are non-exclusive¹⁸⁶, and that the exception for impeachment evidence encourages gamesmanship on the part of attorneys.¹⁸⁷

The justification for the inadmissibility of subsequent remedial measures primarily has its basis in public policy, in that:

Rule 407 is based on the policy of encouraging potential defendants to remedy hazardous conditions without fear that their actions will be used as evidence against them. The extrinsic policy basis for Rule 407 is that allowing evidence of subsequent remedial measures would discourage owners from improving the condition causing the injury because of their fear of the evidential use of such improvement to their disadvantage.¹⁸⁸

In addition to the public policy rationale for the Rule, it has also been argued that:

Evidence of subsequent remedial measures is incompetent or inadmissible because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is

¹⁸⁴ FRE 407.

¹⁸⁵ 29 Am.Jur.2d Evidence, §464.

¹⁸⁶ FRE 407 ("This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, *such as* . . .").

¹⁸⁷ 29 Am.Jur.2d Evidence, §464.

¹⁸⁸ 29 Am.Jur.2d Evidence, §464.

calculated to distract the minds of the jury from the real issue and to create a prejudice against the defendant.¹⁸⁹

Thus, while public policy plays a large role in the manner in which courts have interpreted Rule 407, they have also performed a more formal Rule 403 analysis, finding that the prejudice against the defendant will generally outweigh the probative value of such evidence in the minds of the jury. While there may be important policy issues in the eminent domain context as with subsequent remedial measures, courts must consider whether the parallel between the two categories of retrospective evidence warrants similar treatment.

V. Conclusion

While most courts acknowledge the time at which property is to be valued, they often disagree as to what evidence will be admissible to prove that value. Often, this determination will depend on the court's perception of the difference between "market value" and "actual value". Courts seeking to prove actual value may be more permissive regarding post-taking evidence, holding it to be an indicator of the intrinsic value of the property, whether or not that value was accounted for by the market. On the other hand, some courts have strictly subscribed to the theory that market value is the goal in determining just compensation, and therefore post-taking evidence is to be restricted to a much greater degree. Finally, many courts have yet to squarely address these post-taking issues. As more courts elect to do so, these perspectives will be illuminated in greater detail, and perhaps a greater consensus will be reached.

¹⁸⁹ Id. (citing *Columbia & P. S. R. Co. v Hawthorne*, 144 U.S. 202 (1892); *Camp Bird v. Larson*, 152 F. 160 (8th Cir. 1907); *McGarr v. Nat'l. & Providence Worsted Mills*, 24 R.I. 447; 53 A. 320 (1902); *Worthy v. Jonesville Oil Mill*, 77 S.C. 69; 57 S.E. 634 (1907)).