

Zoning Issues in the Trial of Condemnation Actions

by

**Brandon L. Bowen
Jenkins, Olson & Bowen, P.C.
15 South Public Square
Cartersville, Georgia 30120
(770) 387-1373
bbowen@joandb.com**

I. THE PROSPECT OF FUTURE ZONING CHANGES

The Pattern Jury charge:

In determining the value of property, you are restricted to the uses that may be lawfully made of it at the time of the taking as set out in zoning ordinances then in effect, unless there is a possibility or a probability that a zoning ordinance will be repealed or amended so as to authorize a more valuable use in the immediate future sufficient to have an effect on the value. If you find that there is enough likelihood of change for you to consider it, you should not consider the change as an accomplished fact but only the effect that the probability would have on the value.

Council of Superior Court Judges, Suggested Pattern Jury Instructions (5th ed.), Vol. 1 (Civil), § 14.270

Department of Transportation v. Jordan, --- S.E.2d ----, 2009 WL 2620352 (Ga.App.)

In this case, the Condemnee put up evidence of value through two witnesses, the owner's son, who had analyzed comparable sales, and through an appraiser. The appraiser gave three values for the property: 1) in its current condition, 2) if redeveloped under the current zoning classification, and 3) if rezoned. He asserted that the rezoning was possible, not probable. Since he did not testify that rezoning was probable, the DOT argued that his opinion should be stricken.

The Trial Court and Court of Appeals disagreed, holding that testimony of possible rezoning was admissible, to the extent that it would have an effect on the value of the property in its current condition.

Moreover, the Court of Appeals held that because the amount awarded (\$400,000) was less than the amount testified to by the owner's son, the verdict was well within the range of admissible testimony, regardless of whether or not the appraiser's testimony was admissible.

Department of Transportation v. Patten Seed Company, 290 Ga.App. 532, 660 S.E.2d 30 (2008)
Reconsideration Denied March 26, 2008.
Certiorari Denied Sept. 9, 2008.

This case is interesting because it shows the lengths to which one may go to prove that rezoning and development are reasonably probable. A Peach County jury returned a \$996,430.01 verdict in favor of Patten Seed Company for the value of 15 acres of land taken by the DOT. The DOT appealed, contending, among other things, that the court erred in admitting speculative valuation testimony. The property in question was an agriculturally-zoned farm, but it was adjacent to a high traffic area and other commercially zoned properties. The Condemnee presented the property owner (who said he bought the property as an investment), the Peach County zoning administrator (who said rezoning and variances allowing development were "highly likely" and "reasonable"), the mayor and the city attorney of Warner Robins (who testified that the city could and absolutely would have extended water and sewer service at public expense). With this evidence, the court easily found that evidence of the value was supported by the possibility of rezoning.

Woodland Partners Limited Partnership v. DOT, 286 Ga.App. 546, 650 S.E.2d 277 (2007)

This is a case where the Condemnee's expert was not permitted to testify to value enhanced by potential changes, but the DOT's expert was. Their reason for the different treatment appears to have been in how the testimony presented.

The Condemnee challenged the DOT's expert's ability to use the fact that the property was subject to an open mining permit from the EPD (which would be difficult to exit) to support an opinion that the property had diminished value for commercial uses. The DOT called an EPD official who testified that the week of trial, the Condemnee had submitted a request to have the property released from the permit, but that request was denied because reclamation had not been performed. This was sufficient to support the appraiser's testimony.

The Condemnee's appraiser testified that the area taken (a strip for a road widening) was part of a 15-acre undeveloped portion of the property as a whole, and so he found that the 15-acre portion was consequentially damaged. He valued the 15-acre portion by using comparable sales that were approximately 1-acre developed commercial tracts. On cross-examination, the appraiser was questioned about why he had selected tracts measuring from one acre to one-and-one-half acres to value a 15.2-acre tract. He responded, "Because typically a larger parcel will sell for less per square foot than a smaller sale." Based on that testimony, the trial court struck his testimony, and the Court of Appeals affirmed, reasoning as follows:

The fact that the property is merely adaptable to a different use is not in itself a sufficient showing in law to consider such different use as a basis for compensation; it must be shown that such use of the property is so reasonably probable as to have an effect on the present value of the land.

Even where a different use is shown to be reasonably probable, the jury cannot evaluate the property as though the new use were an accomplished fact; the jury can consider the new use only to the extent that it affects the market value on the date of taking.

Housing Authority of the City of Macon v. Younis et al., 279 Ga.App. 599, 631 S.E.2d 802 (2006)

In this case, the Court of Appeals held that the trial court should not have allowed testimony of value based upon the potential for commercial use of property, because it was still subject to an old federal desegregation order requiring it to be used for a public playground.

Department of Transportation v. Southeast Timberlands, Inc., 263 Ga.App. 805, 589 S.E.2d 575 (2003)

This was a condemnation of 378 acres of land to provide for wetland mitigation. The DOT paid in \$285,000, but the jury awarded \$886,000. Strangely enough, the DOT objected to the Condemnee's witnesses testifying to the highest and best use of the property as a wetland mitigation bank.

The Condemnee presented expert evidence that the area taken was a wetland that had been highly modified, but could be cheaply restored, making it uniquely suited for an off-site wetlands mitigation bank. The DOT objected because it had not been turned into a wetlands mitigation bank on the date of taking; indeed the Condemnee intended to develop the property as a golf community, but may have used the area taken for an

on-site mitigation bank for that development. However, the DOT had acquired mitigation bank permits prior to the date of taking.

The Court allowed the testimony, explaining that the witness “merely testified that the land's highest and best use was as a wetlands mitigation bank.... testimony about how many mitigation credits the land could yield simply explained and reinforced [the] determination of the land's highest and best use; it was not a post-taking valuation of the land. Moreover, [the expert witness] did not assume that the land already had been developed into a wetlands mitigation bank. To the contrary, he testified that the land would need to be restored to its original wetlands state, and he explained the costs associated with restoration and maintenance.” Further, the property’s owner was able to base his opinion as to the property’s value based upon this evidence of highest and best use.

DOT also objected to the Condemnee’s testimony of consequential damages based upon the area taken being intended to be a marina for the intended residential development, and the loss of the marina would devalue the development as a whole. However, the testimony was presented not as if the development was an accomplished fact, but as a possible use that affected the fair market value of the property. The valuation of the property was presented as per acre value of the undeveloped land, rather than per lot value of developed property.

Finally, the DOT objected to the Condemnee’s evidence on the grounds that it was inconsistent: the actual damages (\$1.5 million) were based upon the potential for

the use of property as an off-site wetlands mitigation bank, but the consequential damages (\$2.5 million) were based upon the use of the property as a high-end residential development, with the area taken being a marina. However, the Court of Appeals did not find this to be reversible error, because the amount awarded was less than either valuation.

Unified Government of Athens-Clarke County v. Watson, 276 Ga. 276, 577 S.E.2d 769 (2003)

The Unified Government of Athens-Clarke County condemned 50 acres near the University of Georgia. At the time of condemnation, the property was zoned for single family development, but it had been zoned for multi-family development, and evidence was presented that it likely would be rezoned for multi-family uses. On certiorari, the Supreme Court affirmed, reiterating that the value of property as influenced by the potential for use in a different zoning classification was admissible, but only if there is evidence that the change in zoning was reasonably probable:

Testimony about the “highest and best use” of property, by itself, is not admissible when it involves a use precluded by applicable zoning regulations in effect as of the date of taking of the property. For such evidence to be admissible, the condemnee must show that a change in zoning to allow the usage is probable, not remote or speculative, and is so sufficiently likely as to have an appreciable influence on the present market value of the property.

The Supreme Court also reiterated that the standard for reviewing the trial court’s determination of whether such evidence is admissible is the manifest abuse of discretion.

II. PARTICULAR CASES WHERE ZONING AFFECTED OUTCOME OF CONDEMNATION TRIAL

A. Non-conforming uses

Simmons v. Department of Transportation, 225 Ga.App. 572, 484 S.E.2d 332 (1997)

This issue in this case was whether the property owner had a legal non-conforming use that was not permitted by the zoning classification, and whether he was entitled to be compensated for the property taken as so valued. The property owner bought the subject property and established a trucking business prior to zoning or business license ordinances being enacted. When zoning was enacted, the property was zoned for agricultural uses, but it grandfathered legal non-conforming uses. Then a business license ordinance was adopted. There were several years after that business license ordinance was adopted that the property owner did not know of the requirement and did not obtain a license. When he discovered the license requirement, he obtained his license on a yearly basis until the DOT condemned. The DOT argued that because there were a number of years that the business was operated without a business license, it was not a legal nonconforming use, was not grandfathered, and the property could only be valued as agricultural property. After the taking, the property owner sought to have the property rezoned, but that was denied because moving the business out of the taking area would negatively affect neighbors. Therefore, the property owner sought the value of the property as used by the business.

After the jury hung, the judge granted a judgment consistent with the DOT's position. The Court of Appeals reversed, finding that since the County had granted business licenses, it treated the property as a legal non-conforming use, and this was an issue that the DOT did not have standing to raise. Therefore, the property owner "was constitutionally entitled to just and adequate compensation for the value of his property on the date of taking including consequential damages to his business and expenses for relocation."

B. Parking

Lee v. Department of Transportation, 191 Ga.App. 1, 380 S.E.2d 726 (1989)

This is a seminal case for consequential damages based upon diminished utility and value as a result of the loss of parking. Here, the Condemnee planned to build an office building. Prior to the date of taking, the owner and the City of Atlanta became aware that part of the property would be taken, reducing the available parking area. The property owner had planned to build a 14,000 square foot building, but with knowledge of the taking, the City would only allow a 10,400 square foot building. The permits for such building were granted before the date of taking. After the date of taking, the Condemnee sought the difference in the value of the property with a 14,000 square foot building and a 10,400 square foot building.

The appellate court held that it did not matter that the permit was issued before the date of taking, because it was clearly solely the result of the knowledge of the impending taking. Therefore, the property owner was entitled to consequential

damages resulting from diminished property value because of the smaller building size. However, he was not entitled to lost rent or profits from the unbuilt finished area that was lost.

Steele et al. v. Department of Transportation, 295 Ga.App. 244, 671 S.E.2d 275 (2008)

This case presents the parking issue, but has a different result from Lee, because there was no evidence that the property owner actually intended to expand his existing building. The subject property was a shopping center consisting of a 15,000 square foot building and a parking lot containing 73 spaces. The Condemnees sought to be compensated for diminished ability to expand their building because of lost parking, but the trial court held this was speculative, because there was no evidence that they actually intended to expand their building. The Court of Appeals did not rule on whether this was the correct decision, because the Condemnees did not make a proffer of proof as to how the lost ability to expand would diminish the fair market value of the property. The Court of Appeals found that the error was not preserved. Luckily for the Condemnees, the judgment was reversed on other grounds.

Department of Transportation v. Ogburn Hardware & Supply, Inc. et al., 273 Ga.App. 124, 614 S.E.2d 108 (2005)

This was an inverse condemnation case, but the issues on appeal should be equally applicable to a traditional condemnation case. The DOT widened a road, reducing a hardware store's available parking from 10 to 2. The parties disputed whether the widening occurred on an existing right-of-way, or private property, hence

the inverse condemnation nature of the action. The Court of Appeals stated the standard for determining damages in a condemnation case (whether inverse or direct), as being the 5-step method. “Consequential damages in a partial taking of property are shown by the difference between the fair market value of the remaining property prior to the taking and the fair market value of the remaining property after the taking.” The property owner’s expert determined consequential damages by looking at the cost to cure the loss of parking. The DOT objected, and on appeal the Court of Appeals held that while the cost to cure itself is not the measure of damages, it is admissible evidence of the measure of damages. In this case, “the appraiser used the cost to cure as an important factor in reaching his conclusion as to the value of the remainder after the taking and thus in determining the consequential damages[,]” and so the evidence was admissible.

Department of Transportation v. Arnold, 243 Ga.App. 15, 530 S.E.2d 767 (2000)

In this case, the DOT took most of the parking lot of a property that had for many years been used as a business. The property owner showed that he could not operate the business in the original location any longer, because DOT took substantially all of his parking, and he sustained a permanent loss in business related to moving from the original location. Therefore, the business was totally destroyed as a chiropractic office at the taking location. The DOT objected to the entry of business losses either as a separate element or to support a finding of consequential damages. The Court of Appeals held that “evidence of business losses attributable to the taking is admissible in

a condemnation action where such losses are sought as a separate element of damages as to unique or peculiar property as well as when such evidence shows a diminution of value of the land not taken.” Because the property was well situated for a commercial operation and had for many years been associated with the Arnold family business, “the property not only was unique but also peculiar, so that the fair market value standard of evaluation was constitutionally inadequate to value such property interest.” Therefore, business losses were admissible as a separate element of damages. Moreover, because the business losses showed how the property was devalued for use by other potential buyers, it was admissible to prove consequential damages.

Department of Transportation v. Camvic Corporation et al., 284 Ga.App. 321, 644 S.E.2d 171 (2007)

This is a very long decision that has a simple point: if a condemnee wishes to claim business losses resulting from a taking, it must put the DOT on notice, either in the notice of appeal, or in some fashion. Here, CVS wished to obtain business losses resulting from lost parking on its leasehold property. The DOT argued that since the notice of appeal did not specify business losses, they could not be recovered. However, because interrogatory responses and even the consent order setting the case for trial identified business losses as an issue, the court found that they were properly in issue.

C. Variances and Setbacks

Moss v. Hall County Board of Commissioners, 197 Ga.App. 76, 397 S.E.2d 493 (1990)

The County took property for a street widening, and the Condemnee argued that he was entitled to consequential damages due to the fact that County setback requirements after the taking would disproportionately reduce the buildable area on his property. In response, and over objection, the County entered into evidence a number of similar situations where variances were granted to reduce the harm of the taking. The jury awarded a judgment equal to the County's evidence of value, and the property owner appealed. The Court of Appeals held that because the evidence was related to whether or not there was a possibility or probability of a zoning change that would affect value, it was admissible.

Department of Transportation v. Bacon Farms, L.P., 270 Ga.App. 862, 608 S.E.2d 305 (2004)

The DOT took 18 acres of a 480-acre farm in Wilkinson County. The property had kaolin, which had never been mined. The DOT presented witnesses that said that the kaolin was of poor quality and difficult to extract, such that it added no value to the property. The property owner presented witnesses that testified that there was a substantial amount of kaolin, both in the area taken and in a larger "buffer zone" where mining would not be permissible after the taking. The property owner then testified that it should be compensated at the amount computed by the amount of kaolin in the

ground times the average price for kaolin. The trial court allowed this testimony, and the jury appeared to follow this reasoning, but the Court of Appeals reversed:

Under Georgia law, the presence of mineral deposits on condemned land is a relevant factor to be considered in determining the overall value of the property. Georgia courts adhere to the widely held principle that “[l]and containing valuable deposits may be of greater market value than land without such deposits, but the land and the deposits constitute one subject matter and there cannot be separate recovery for the land and also for the deposits.”

The Court of Appeals went on to hold that while the price times the number of kaolin units were not the measure of compensation, they were both relevant facts to consider in valuing the property. But in this case, there was no deduction presented for the costs of mining, only the income was presented. Without presenting the costs, the amount of anticipated income was speculative and inadmissible. And this would be true for both the evidence used to prove the actual damages and consequential damages in the buffer zone. The Court reiterated as to the buffer zone, and the measure of consequential damages is the difference in the value of the property before and after the taking.