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Real Property—Eminent Domain—Valuation

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the intent of the parties is manifest, the easement will be sustained.[14] Where a developer of land sells lots with reference to a map on which squares, parks, or beaches are designated, and representations are made by the developer that such areas are for the use of the owners, purchasers of such lots acquire an easement therein by implication.[15]

It appears from the fact that virtually no use was made of the premises during the period in question that the Court is not so concerned with how much use is required in order to determine if the easement be necessary, but rather with giving effect to the grantor's intention and the grantee's reasonable expectations. Such intentions and expectations become especially apparent when in direct reference to a map or plot.

Eminent Domain—Valuation

Evaluation of property in eminent domain proceedings is a process of weighing many variants and intangibles. Certain criteria and formulae have been evolved in an effort to assist the courts in their determinations. One method is "capitalizing the income", used frequently in rent-producing property cases. Here, the rental received is divided by a percentage representing the prevailing local rate of return for the type of property involved. The resultant figure represents the capital amount necessary to yield the same amount of income to the claimant as he has been receiving in the past. To illustrate, where six thousand dollars was the annual rate reserved and the local rate of earning six per cent, one hundred thousand dollars would be the appropriate award.

It should be clear that an increase in the rate employed will cause a decrease in the capital sum and vice versa. The validity of the method is the subject of dispute and has been variously characterized as: "one of the best tests of value",[16] and "barely a rough guess".[17]

In *In Re City of New York (Manhattan Tower)*,[18] Special Term accepted the capitalization sales of the City's expert in arriving at its award, although expressing grave misgivings as to their correctness, stating that the award was at least ten per cent greater than he would have given if the experts

14. *Williamson v. Salmon*, 233 N. Y. 657, 135 N. E. 958 (1922).
15. *Wilkinson v. Nassau Shores*, 304 N. Y. 614, 107 N. E. 2d 93 (1951); *Williamson v. Salmon, supra* note 14; *Erit Realty Corp. v. Sea Gates Ass'n.*, 259 N. Y. 466, 182 N. E. 85 (1932); *White v. Moore*, 161 App. Div. 400, 146 N. Y. Supp. 593 (2d Dep't 1914).
16. 5 NICHOLS, EMINENT DOMAIN §19.2 (3d Ed. 1952).
17. JAHR, LAW OF EMINENT DOMAIN §149 (1953).
18. 1 N. Y. 2d 428, 136 N. E. 2d 478 (1956).

had not fixed such low rates. He, however, felt bound to accept their judgment in the matter.

The Appellate Division[19] revised the awards downward, stating, in a per curiam opinion, that the rates used "did not duly consider the general depreciated condition of the area". The Court of Appeals reinstated the awards of Special Term, holding that the findings of the Appellate Division were without support in the record. This was because the revised award when expressed in terms of rate of return were in excess of the highest rate testified to at the trial.

The power of the Appellate Division to revise the trial court's findings whenever the evidence indicated a different award and not merely when an erroneous theory was adopted below or a grossly excessive amount awarded, was recognized. However, the revision must have support in the record. As there was no testimony to any higher rate than that adopted by the Special Term, it seemed clear to the majority that the appellate court had attempted to impose their subjective judgment for that of the experts. As the statute limited the trier of fact to a judicial consideration of the evidence, this was unjustifiable.[20]

Two dissenters point out that the lower court did not revise the rates but only the awards. They suggest that the Appellate Division adopted a method of evaluation other than that employed by the Special Term and that the revised amounts had ample support if one considered the other evidence in the record. This assumption is based on an allusion in the opinion below that revision was necessitated because Special Term did not give proper weight to the "conflicting testimony".

As there was no conflict as to rates which could justify the revised figures, the dissenters infer that the evidence in question was the other testimony in the case. The dissent seems to be the product of a conviction, shared by the two lower courts, that the experts had erred.

It is suggested that the trial court might have solved his dilemma, if unsatisfied with the expert testimony before him, by calling in other experts on his own motion. The right to do this is well recognized in this country.[21]

19. 286 App. Div. 821, 142 N. Y. S. 2d 333 (1st Dep't 1955).
20. ADMIN. CODE OF THE CITY OF NEW YORK §B 15-19.0.
21. *State v. Beaver Portland Cement Co.*, 169 Or. 1, 124 P 2d 524 (1942); *State v. Horne*, 171 N. C. 787, 88 S. E. 433 (1916); *O'Connor v. National Ice Co.* 56 Super 410, 4 N. Y. Supp. 537, *aff'd.*, 121 N. Y. 662, 24 N. E. 1092 (1890); See generally, 9 WIGMORE, EVIDENCE §2484 (3d Ed. 1940).