SECTION 7

TRIAL STRATEGY AND TECHNIQUES IN EMINENT DOMAIN CASES

Partial takings of improved properties tend to be the most formidable to present, simply because they are usually the most complicated and deal with the most esoteric appraisal concepts, which often defy intelligible explanation.[1]

[1] 7A NICHOLS ON EMINENT DOMAIN § G13.07[5], at G13-64 (Julius L. Sackman, 3d ed. 2006), hereinafter cited as "NICHOLS ON EMINENT DOMAIN."

A. INTRODUCTION

A condemnation trial differs from other civil trials in that there usually is only one issue: the amount of compensation the landowner is entitled to receive as a consequence of a taking. A condemnation trial also differs from other civil suits in other ways. For example, a number of states use a two-stage condemnation procedure that involves an initial hearing or trial before condemnation commissioners, viewers, or appraisers and thereafter on a party's request a trial *de novo* before a jury. Moreover, discovery normally commences not with the filing of a petition but with the filing of exceptions or an appeal to an award of the condemnation commissioners or viewers.

This section will discuss some discrete areas that are especially important in an eminent domain case.[2]

B. EXPERTS AND OTHER WITNESSES

B.1. Use of Expert Testimony

B.1.a. Qualifications of an Expert

Trial preparation is critical; thus, one must identify the issues, for example concerning drainage or access, presented by a particular case and locate witnesses and relevant exhibits needed for trial. However, the principal issue in most condemnation trials is proof of the value of the property taken.[3] Thus, no witness is likely to be more important than the attorney's expert witness on valuation. For example, in a case involving a partial taking, evidence will be required concerning damages, if any, to the remainder. The proof of such value ordinarily may be accomplished only through opinion testimony of persons who have the expertise, knowledge, and experience to render an opinion, i.e. experts.

An expert is "[a] person who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder."[4] "Any…witness with superior knowledge, information, or skill concerning the valuation of the property may be qualified as an expert and testify to his [or her] opinion of value."[5] An expert, however, "should be perceived as an independent and objective witness, not as an advocate for either side…."[6]

Not only must an expert witness be an expert in the valuation of property, but also the witness must be knowledgeable concerning the specific property at issue.[7] As stated in *Ramey v. D'Agostini,*[8] first, "[a]s a general rule, 'a real estate dealer or appraiser may testify as to the value of property…if he possesses sufficient experience and knowledge of values of other similar real estate in the particular locality.'"[9] Second, "[a] general knowledge of real estate values…is not sufficient proof of competency to permit one to testify as to all real estate valuations."[10] That is, "[a] real estate appraiser must have knowledge or experience regarding the particular locality involved" and "must have knowledge of the particular matter affecting the property's value."[11] As the court explained in the *Ramey* case, "[e]ven if an expert has the requisite knowledge and experience, conclusory statements as to changes in the value of land without explanation are not admissible."[12]

An issue that may arise is whether persons such as real estate salesmen or condemnation commissioners or viewers have the requisite training and experience to qualify them as experts.[13] In general, persons who sell

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[2] As one practitioner recommends, one way to prepare for the trial of an eminent domain case is by consulting the pattern jury instructions for eminent domain cases in the attorney's jurisdiction, selecting the ones that appear to be at issue in the case, and proving the case in such a way that the evidence fits the instructions. Of course, before the jury is instructed, counsel will want to be prepared to justify any modifications that he or she feels are warranted and that enhance counsel's expert's determination of value.

[3] Mandee Broussard Baumer, *Eminent Domain: Should an Expert's Appraisal Report be Subject to Pretrial Discovery?,* 67 MISS. L. J. 801, 802 (1998), hereinafter cited as "Baumer" (noting that "what constitutes due compensation is often the sole issue in an eminent domain proceeding").

[4] BLACK'S LAW DICTIONARY (8th ed. 2004).

[5] State *ex rel.* Mo. Highway and Transp. Dep't v. Kuhlmann, 830 S.W.2d 569, 570 (Mo. App. E. Dist. 1992) (citation omitted).

[6] 7A NICHOLS ON EMINENT DOMAIN, § G13.05, at G13-27.

[7] *See* Lustine v. State Roads Comm'n, 221 Md. 322, 328–29, 157 A.2d 456, 459–60 (1960).

[8] 20 MASS. L. REP. 406, at *1 (Mass. Super. Ct. 2005).

[9] *Id.* (citation omitted).

[10] *Id.* at *1–2 (citation omitted).

[11] *Id.* at *2 (citation omitted). *See, e.g.*, Hot Spring County v. Prickett, 229 Ark. 941, 942, 319 S.W.2d 213, 214 (1959) (reversal in a case in which the owner had no experience in the real estate business and a real estate witness who testified he had made only one sale and had been in the area for 6 months); Twenty Club v. Nebraska, 167 Neb. 37, 41, 91 N.W.2d 64, 67 (1958) (holding that an appraiser was not "incompetent" to testify because "he was one of the appraisers in the original condemnation proceeding in the county court").

[12] 20 MASS. L. REP. 406, at *2 (citations omitted).

[13] *Id.* at *2 (*citing* Sprint Spectrum L.P. v. Bd. of Zoning Appeals of the Town of Brookhaven, 244 F. Supp. 2d 108, 116 (E.D.N.Y. 2003) (excluding real estate appraiser's opinion that construction of monopole would decrease the value of homes by 10 to 15 percent because the appraiser provided no support for her opinion) (*citing* Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490, 496 (2d Cir. 1999); Iowa Wireless Servs. L.P. v. City of Moline, Ill., 29 F. Supp. 2d 915, 922 (C.D. Ill. 1998))). *See also* Maritimes & Ne. Pipeline, L.L.C. v. 0.714 Acres of Land, 2007 U.S. Dist. LEXIS 62930, *27–28 (D. Mass. 2007) (stating that the only credible evidence was provided by a real

real estate or appraise real estate may be qualified to be an expert. For example, in 2007, a Nevada court found that a real estate appraiser "used properties that were comparable…and…adequately explained his reasons for considering each property as comparable based on the degree of comparability, physically, economically, and functionally."[14] Although an owner may testify, as discussed below, regarding the value of his or her property, only a witness qualified as an expert may express an opinion regarding the value of the subject property.[15]

Of course, a condemnor or owner may challenge the other's expert. For example, in one case, bias was alleged because two appraisers testifying for the county had previously done a substantial amount of work for the county.[16] Nevertheless, the court held that the admission of their testimony was proper.[17] In another case, even though it was a state employee who testified regarding the value of the subject property, the court held that the verdict was supported by credible and competent evidence.[18]

Although the majority view is that if a witness is not an owner or is not qualified as an expert in appraising the value of real estate, the witness will not be permitted to testify,[19] there may be an exception in some states. For example, in Arizona, there is authority indicating that a witness need not be qualified as a technical expert to give opinion testimony.[20] Thus, in a few jurisdictions, opinion evidence can be given by persons who are not experts but who reside or conduct business in the vicinity of the property, may have sufficient familiarity with land values in the area, and be "more able to form an opinion on the subject at issue than citizens generally."[21] There is some authority that as long as they are not identified as commissioners, commissioners may be allowed to testify regarding the value of the subject property.[22]

Jurors are the judge of a witness's credibility and determine the weight to be given to an expert's testimony.[23] Thus, "[w]hether the witness has the necessary knowledge about his [or her] property to enable him to express an opinion about its market value is a preliminary question of fact for the judge."[24] Furthermore, "[o]n appeal, questions regarding the admissibility, qualifications, relevancy and competency of expert testimony are generally left to the discretion of the trial court" and a "trial court's ruling in this regard may only be overturned if the discretion is arbitrarily exercised or abused."[25]

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estate appraiser and rejecting an engineer's plan showing a hypothetical development of the subject property).

[14] *Maritimes & Ne. Pipeline, L.L.C.,* 2007 U.S. Dist. LEXIS 62930, at *14.

[15] Boylan v. Bd. of County Comm'rs of Cass County, 105 N.W.2d 329, 331 (N.D. 1960) (upholding the trial court's decision to admit expert testimony where the proponent of the witness laid the "foundation…that the witness had passed the examination given to candidates for a degree in engineering, that he was a member of the North Dakota Society of Professional Engineers and that in his employment he had computed the cost of similar roads"); Lustine v. State Roads Comm'n, 221 Md. 332, at 328, 157 A.2d at 459 (holding that an objection was properly sustained to the testimony of an expert appraiser on valuation who had not been qualified as an expert on sand and gravel deposits and who had "made no borings, etc., to determine the amount of the sand or gravel"); Shelby County v. Baker, 269 Ala. 111, 124, 110 So. 2d 896, 908 (1959) ("The general rule applicable here is that the test of qualification has been prima facie met when it is proved that the witness testifies he knows the property and the market value of the same."); Turner v. State Roads Comm'n, 213 Md. 428, 432–33, 132 A.2d 455, 457 (1957) (agreeing that "[t]he question of whether a witness is qualified to give an opinion must be left in a large measure to the sound discretion of the trial court" but that "[i]f the witness has some qualifications, he should be permitted to testify") (citation omitted) (internal quotation marks omitted); State Roads Comm'n v. Novasel, 203 Md. 619, 626, 102 A.2d 563, 566 (1954) (holding that it was proper for a real estate expert "discussing the comparability of sales of land in the immediate neighborhood…to give an opinion as to the cost of excavating earth and how much should be allowed for excavation necessary to make the land remaining after taking available for use").

[16] Smuda v. Milwaukee County, 3 Wis. 2d 473, 475–76, 89 N.W.2d 186, 187 (1958).

[17] *Id.* at 476, 89 N.W.2d at 187.

[18] Buch v. State Highway Comm'n, 15 Wis. 2d 140, 142, 112 N.W.2d 129, 130–31 (1961).

[19] Farrell v. Farell, 69 Va. Cir. 243, 244 (Va. Cir. Ct. 2005).

[20] Parker v. State*,* 89 Ariz. 124, at 127–28, 359 P.2d 63, at 65–66 (court holding that the landowners' witness was not qualified to testify because he "did not reside or do business" in the area or "deal in the buying or selling of property"); State v. McDonald, 88 Ariz. 1, 12, 352 P.2d 343, 350 (1960) (upholding the admission of the evidence because "[o]pinion evidence is also usually admitted from persons who are not strictly experts, but who from residing and doing business in the vicinity have familiarized themselves with land values") (citation omitted) (internal quotation marks omitted).

[21] *Parker*, 89 Ariz. at 128, 359 P.2d at 65 (citation omitted).

[22] Missouri v. Max Pracht, 801 S.W.2d 90, 95 (Mo. App. E. Dist. 1990) ("Although a commissioner is competent to testify, the fact that he was a commissioner may not be made known to the trier of fact as such identification interferes with a party's right to a trial de novo in the circuit court.)" (citation omitted). *Compare with* Baumer, *supra* note 3, at 802–03 (stating that the "Mississippi Rules of Evidence prohibit…court-appointed appraisers from testifying at the eminent domain trial and further prohibit the appraiser's report from being admitted into evidence") (*citing* MISS. R. EVID. 601(c) and 706, and Hudspeth v. State Highway Comm'n, 534 So. 2d 210, 213 (Miss. 1988)).

[23] E. Tenn. Natural Gas Co. v. 7.72 Acres, 228 F. Appx. 323, at *12–13 (4th Cir. 2007) (Unrept.); Buch v. State Highway Comm'n, 15 Wis. 2d 140, 142, 112 N.W. 2d 130 (1961) ("Of course, the jury is the judge of the credibility of a witness and the weight to be given his testimony.").

[24] Southwick v. Mass. Turnpike Auth., 339 Mass. 666, 669, 162 N.E.2d 271, 273–74 (1959).

[25] Boles v. Nat'l Dev. Co., Inc*.,* 175 S.W.3d 226, 235 (Tenn. App. 2005) (citations omitted), *appeal denied*, 2005 Tenn. LEXIS 896 (Tenn. 2005).

B.1.b. Admission of Expert Opinion Based on Hearsay

In some jurisdictions, there may be an issue whether an expert may rely on hearsay or other evidence that ordinarily would be inadmissible or whether the reliance on hearsay information will preclude or result in the disallowance of an expert's testimony.[26] The admission of expert testimony in federal courts is controlled by the Federal Rules of Evidence; in a state court, the state's statutes and court's rules will apply to the admission of evidence in condemnation cases.

Under Rule 703 of the Federal Rules of Evidence, the issue of experts and their reliance on hearsay is handled in the following manner:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. *If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.* Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.[27]

According to the notes to the 2000 amendment to Rule 703, the rule was "amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted" into evidence.[28] As the notes observe, previously federal courts had "reached different results on how to treat inadmissible information when it is reasonably relied upon by an expert in forming an opinion or drawing an inference."[29]

As argued in an article preceding the 2000 amendment, when

> an expert forms an opinion based on underlying facts or data which have not been admitted into evidence, Rule 703 permits the expert to disclose and the court to admit those facts or data but only for the limited purpose of supporting, and thereby making more persuasive, the expert's opinion. Courts should allow disclosure of this information only if it meets the requirements of Rule 703, and satisfies, of course, Rule 403. Permitting such disclosure fosters truth-telling in the courtroom by allowing an expert to describe fully the reasons that support the proffered testimony or opinion.[30]

In addition, the foregoing article argues that if

> an expert has relied on facts or data not admitted into evidence, Rule 703 bars the opinion as well as the information on which it is based unless the court determines affirmatively that reliance on the facts or data was reasonable. Where the facts or data underlying the opinion are otherwise inadmissible, this inquiry is particularly crucial. Courts should not equate assessments of reasonable reliance with determinations of the reliability of the information. That is, customary reliance by experts in the field is not dispositive of reasonable reliance.[31]

Of course, in regard to state practice, counsel should be familiar with the rule in his or her jurisdiction. However, in federal court, under Rule 703, if an expert relies on hearsay or other inadmissible information, the court is to apply a balancing test in deciding whether to allow the evidence, and, if the evidence is admitted, the court is to give an appropriate limiting instruction.

> When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert's opinion, a trial court applying this Rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes on the other. The information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect. *If the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes.* See Rule 105. In determining the appropriate course, the trial court should consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances.[32]

As the notes further state, "[t]his amendment covers facts or data that cannot be admitted for any purpose

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[26] State *ex rel.* Mo. Highway and Transp. Comm'n v. Pracht, 801 S.W.2d at 94 ("It is to be expected that an owner's opinion, like that of an expert, will be based to some degree on hearsay.") (citation omitted).

[27] FED. R. EVID. 703, as amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 17, 2000, eff. Dec. 1, 2000, available at http://www.law.cornell.edu/rules/fre/rules.htm#Rule703 (emphasis supplied).

[28] *Id*.

[29] *Id*. (*citing, e.g.,* United States v. 0.59 Acres of Land, 109 F.3d 1493, 1496 (9th Cir. 1997) (error to admit hearsay offered as the basis of an expert opinion, without a limiting instruction). The note to Federal Rules of Evidence Rule 703 observes that "[c]ommentators have also taken differing views." *Id*. (*citing*, *e.g*., Ronald Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577 (1986) (advocating limits on the jury's consideration of otherwise inadmissible evidence used as the basis for an expert opinion); Paul Rice, *Inadmissible Evidence as a Basis for Expert Testimony: A Response to Professor Carlson*, 40 VAND. L. REV. 583 (1987) (advocating unrestricted use of information reasonably relied upon by an expert)).

[30] JoAnne A. Epps, *Clarifying the Meaning of Federal Rules of Evidence 703*, 36 B.C. L. REV. 53, 60 (1994) (footnotes omitted).

[31] *Id*., *supra* note 30, at 61 (emphasis supplied).

[32] Note, FED. R. EVID. 703. Note available at http://www.law.cornell.edu/rules/fre/ACRule703.htm (emphasis supplied).

other than to assist the jury to evaluate the expert's opinion" and "provides a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert."[33]

B.1.c. Effect of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970

It should be noted that URA has appraisal standards applicable to federal acquisitions[34] and federal or federally-assisted programs or projects.[35] As long as federal funds are used for a program or project, even if no federal funds are used in the acquisition of the subject real property, the Act's appraisal and acquisition requirements, including standards on qualifications of appraisers, are applicable. For an appraiser to be qualified under URA and its regulations, an agency must make a determination of the appraiser's competency or the state's certification or licensure of an appraiser may suffice to qualify the appraiser. An agency may set its own independent criteria for qualification.[36] However, if a contract appraiser is used, then he or she must be licensed or certified by the state.[37] The URA and its regulations allow for additional qualification criteria by an agency when it has been deemed necessary to effectuate the agency's statutory responsibilities.[38]

B.2. Selection of an Appraiser

One of the most critical, if not the most critical, steps in preparing for an eminent domain trial is the choice of an appraisal witness.[39] "If all possible, trial counsel should participate in the selection of the valuation expert."[40] Because there exists a bewildering array of credentials and designations, it is important for a trial attorney to choose an appraiser carefully and assure that the appraiser has the expertise and experience to express and defend his or her opinion as to the value of the property in question when cross examined.[41] Matters to consider when choosing and later preparing an appraiser for a deposition or trial include the following:

1. Verify that the appraiser sees the property prior to any alteration or removal. The best practice is for the attorney and appraiser to visit the property jointly on the date of valuation, making photographs and possibly a video of the property as close to the trial date as possible.
2. Verify an appraiser's work product because even the best appraisers may make mathematical errors, apply the law incorrectly, include noncompensable items, use an inappropriate method, or simply get the facts wrong.[42]
3. Verify an appraiser's comparable sales because an appraiser may rely too much on multiple listings or on a "spawn sheet"[43] and not cross-check the data.
4. Verify that an appraiser stays within his or her qualifications because an appraiser may be certified only for one type of property, such as residential. Some appraisers may hold themselves out as being capable of appraising property that presents special uses or problems, such as property on or under which there is hazardous waste or property on which there is equipment that is unique to a business. If there are mineral deposits in place or lumber, plant nurseries, cattle operations, or gas stations on the property or if the property is a special-use property, it may be necessary to include another appraiser with expertise in the relevant area.
5. Verify that an appraiser will be able to defend his or her opinion as it is not uncommon for an appraiser to be technically proficient but be unable to express or explain an opinion clearly or defend it under cross-examination.
6. Verify that an appraiser did his or her own work and that an appraiser properly acknowledges what portions of the fieldwork were performed by others and what steps he or she took to verify any information on which the appraiser relied.

For a suggested format for an appraiser's data and verification sheets, counsel may be interested in the one provided in *Nichols on Eminent Domain*.[44] Counsel should meet with the appraiser before a draft appraisal report is prepared to review, for example, "the comparable sales [and] any special studies and conclusions," as well as meet with the appraiser after the report is prepared to make "certain the conclusions of value are

[33] *Id*.

[34] *See* 42 U.S.C.A. §§ 4601, *et seq*., 4651 and 4652 (2007). *See* 49 C.F.R. § 24 (2007).

[35] 49 C.F.R. § 24.101(a)-(b) (2007).

[36] *Id*. § 24.103(d) (2007).

[37] *Id*. (*citing* Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. § 3331, *et seq*.). *See* 12 U.S.C. § 3345(a)-(b) (2007) (defining "state certified real estate appraiser" to "mean[ ] any individual who has satisfied the requirements for State certification in a State or territory whose criteria for certification as a real estate appraiser currently meets the minimum criteria for certification issued by the Appraiser Qualification Board of the Appraisal Foundation," including "a passing grade upon a suitable examination administered by a State or territory that is consistent with and equivalent to the Uniform State Certification Examination issued or endorsed by the Appraiser Qualification Board of the Appraisal Foundation").

[38] 12 U.S.C. § 3345(d) (2007).

[39] *See* "Choosing an Expert Appraisal Witness," available at www.propertyvalu.com/chuzxwit.htm.

[40] 7A NICHOLS ON EMINENT DOMAIN § G13.03, at G13-11. For suggestions on matters to consider in the selection of the valuation expert, *see id*. § G13.03.

[41] *See* Smith, *100 Questions Which Will Worry Weak Witnesses*, THE REAL ESTATE APPRAISER 15–16 (Feb. 1967).

[42] *See* discussion in J.D. EATON, REAL ESTATE VALUATION IN LITIGATION 205 (1995), hereinafter cited as "EATON."

[43] Brennan v. Molina, 934 S.W.2d 631, 634 (Mo. App. E. Dist. 1996) (referring to agent's use of a spawn sheet).

[44] 7A NICHOLS ON EMINENT DOMAIN, § G13.04, at G13-13–18.

in fact credible."[45] Counsel has to exercise caution so as not to be making "significant" revisions in the report that would be revealed later at a deposition or trial.[46]

There are several professional organizations that certify appraisers; for example, the Appraisal Institute[47] issues two designations, Member Appraisal Institute and Senior Residential Appraiser.[48] Another certifying organization is the American Society of Appraisers,[49] which provides designations in a number of areas. Although designations may not guarantee that a witness is qualified to render an opinion for a particular property, the designations are important in establishing a witness's qualifications and credibility based on training and knowledge.

As discussed below, other specialists may be needed as "foundational expert witnesses" at the trial such as "a surveyor, a project engineer, a land planner, a traffic engineer, a real estate market analyst, an architect, a construction contractor/builder, a hydrologist, a mining engineer, and/or a developer."[50]

B.3. Experts Other Than Appraisers

B.3.a. Engineering Experts

The construction of a new road may have many impacts on remaining property, including congestion or traffic control and impairment of access or visibility. When any one of these issues is present, a traffic engineer may be invaluable in explaining the project's impact to the witness on valuation and later to the jury.[51] A traffic engineer may explain the extent to which a property will be visible from the highway after construction of a public improvement, again a matter of particular importance for commercial property, or how traffic will be controlled from the standpoint of congestion or other safety concerns, matters that may affect a remainder's value after construction of a proposed project. For example, a Florida court ruled that the trial court improperly excluded the testimony of the property owners' engineers regarding "the suitability of residential development of [the property], the permitting process, and whether the County was responsible for any condemnation blight," stating that the lower court's ruling impermissibly "undermined the foundation for the property owners' appraisal experts and led to the exclusion of their testimony."[52]

An engineer may testify on how traffic will be able to enter and leave a remaining tract or otherwise be managed after a taking, an important issue for office buildings and other commercial establishments, as well as other properties. It must be emphasized that another expert may be needed as foundation in the record to support the expert testimony on the value of the property. In a 2005 case from the State of Washington, the court held that the facts in the record did not support the conclusions of the owner's expert, a professional traffic engineer, that there had been an impairment of access to the owner's property causing trucks to be "unable to negotiate the grade safely."[53]

Other experts one may consider using include an expert on access management, who, although similar to a traffic engineer, specializes in the effect of construction on ingress-egress and internal traffic control. A design engineer may testify how highway drainage will be handled to avoid flooding that could affect the remaining property.[54] In cases involving runoff of surface water causing possible erosion or flooding, a hydrology expert may be needed to explain the proposed construction and its effect on the utility of the remaining property.

B.3.b. Land-Use Experts

B.3.B.1. Importance of Land-Use Regulations.— Land-use experts, those who have training in the comprehensive planning of developments and public projects and in city planning, may be pivotal in establishing the highest and best use of a property. As the Georgia Supreme Court has observed, "[l]and value depends upon land use and in a zoning contest the more intense use sought by the landowner invariably would increase the value of the land in question."[55] As discussed in the next subsection, a land-use expert may be

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[45] *Id.* at G13-21.

[46] *Id*.

[47] *See* the Appraisal Institute's Web site for more information, available at http://www.appraisalinstitute.org/.

[48] City of Lincoln v. MJM, Inc., 270 Neb. 587, 591, 705 N.W.2d 432, 437 (2005) (noting that testifying expert was a member of Appraisal Institute); State of Texas v. Bristol Hotel Asset Co., 2007 Tex. App. LEXIS 5565, at *9 (July 18, 2007) (noting that testifying expert was a member of the Appraisal Institute), *rehearing denied*, 2007 Tex. App. LEXIS 10038 (Tex. App. 2007), *petition for review filed* (Dec. 2007).

[49] *See* the American Society of Appraisers' Web site for more information, available at http://www.appraisers.org/.

[50] 7A NICHOLS ON EMINENT DOMAIN, § G13.04, at G13-20.

[51] MooreFORCE, Inc. v. United States, 243 F. Supp. 2d 425, 439 (M.D. N.C. 2003) (court noting that the North Carolina DOT's expert, a transportation engineer supervisor, argued that the opposing expert's "analysis was improper because a reliance solely on annual average daily traffic numbers does not consider actual data collection").

[52] Savage v. Palm Beach County, 912 So. 2d 48, 52 (Fla. Dist. Ct. App. 2005).

[53] Monk v. City of Auburn**,** 2005 Wash. App. LEXIS 1958, at *21 (Wash. Ct. App. 2005) (Unrept.), *affirmed in part, reversed in part, and remanded,* 128 Wash. App. 1066 (Wash. Ct. App. 2005), *review denied by, motion to strike denied by, motion to strike granted,* 157 Wash. 2d 1023, 142 P.3d 608 (2006).

[54] *See* City of McKinney, Tex. v. Eldorado Park, LTD., 206 S.W.3d 185, 188, 190 (Tex. Ct. App. 11th Dist. 2006) (involving an expert appraiser who relied on a drainage study written by engineers*), petition for review denied*, Eldorado Park, Ltd. v. City of McKinney, 2008 Tex. LEXIS 466 (Tex. 2008).

[55] Town of Tyrone v. Tryone, LLC, 275 Ga. 383, 385, 386, 565 S.E.2d 806, 809 (2002) (noting that the Town's city planning consultant concluded in a report to the town council that the "current agricultural zoning of the property does not support establishment of economic uses, whether these are very low density residential uses or agricultural uses").

important in establishing the required zoning for a development or in proving a reasonable likelihood of a rezoning relevant to a particular property.

Because an appraiser's estimate of highest and best use must be a use of the property that is legal, land-use regulations are of utmost importance in determining a property's highest and best use and in appraising its value. Market value is not inherent in tangible real property; rather, market value results from the utility of the real estate. In a sense, market value is a measurement of a property's utility. Market value is based also on scarcity, demand, and purchasing power, factors that are influenced by zoning and other land-use regulations. Consequently, it is imperative that an appraiser be thoroughly familiar with the applicable land-use regulations and their impact on the utility and therefore the value of the property. Land-use regulations include building codes, such as structural codes, fire codes, electrical codes, plumbing codes, and health codes; comprehensive plans, zoning ordinances, and off-street parking ordinances; regulations or ordinances on environmental impact statements, management of shorelines or flood plains, and platting and shortplats;[56] and regulations concerning rent control, timber-harvesting, and air, water, and noise pollution.

Because these issues are basic to a determination of the value of property, a condemning authority should have a land-use expert as a witness so that an appraiser may rely on the land-use expert's opinions in appraising the property and later in testifying as to its value.

B.3.b.2. Importance of Zoning.—As stated, zoning and planning significantly affect the value of property. Because the zoning classification is an essential component of a property's value, a property's zoning is admissible into evidence.[57] City planners and zoning officials are particularly knowledgeable about both issues, and in the proper case should be called on to testify regarding, for example, the highest and best use of a property and whether there is a reasonable likelihood of the property's rezoning.

As pointed out in a Kansas case, a "jury would not necessarily be required to determine the actual zoning classification at the time of the taking but could take into consideration the impact of this question—and its certainty, probability, or improbability—in determining what a well-informed buyer is justified in paying and a well-informed seller is justified in accepting for property in an open market."[58] As stated in *City of San Diego v. Rancho Penasquitos Partnership,*[59]

> "[a] determination of the property's highest and best use is not necessarily limited to the current zoning or land use restrictions imposed on the property; the property owner 'is entitled to show a reasonable probability of a zoning [or other change] in the near future and thus to establish such use as the highest and best use of the property.' [Citations omitted] The property owner has the burden of showing a reasonable probability of a change in the restrictions on the property."[60]

If the zoning of property is in dispute, a jury may hear expert testimony "on the zoning classification of the property at the time of the taking."[61]

Zoning involves numerous regulatory requirements, for example, relating to setback, minimum lot size, minimum building size, parking ratios, maximum building heights, and permitted and prohibited uses. Each of these requirements should be reviewed to determine the applicability of each requirement to the subject property. Therefore, in a condemnation case both counsel and his or her expert, first, should ascertain the applicable zoning on the subject property from the current zoning map; second, reconfirm the determination with the zoning authority's staff; and, third, recheck the status of the zoning prior to trial due because of the possibility that the property owner later may have requested a change in zoning. The highest and best use of a tract of land is an important issue in any condemnation case. In determining highest and best use, an appraiser must look at the uses physically possible, legally permissible, financially feasible, and maximally profitable.

The possibility that the property could be rezoned to permit a higher and better use must be considered. In a 2005 case, the Supreme Court of Michigan held that the "defendants were properly permitted to present evidence that they had met with city officials regarding their plans for the area, and that these officials had expressed a willingness to make the required zoning changes."[62]

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[56] *See* McDonald v. Davis, 2002 Wash. App. LEXIS 730, at *2 (Wash. Ct. App. 2002) (Unrept.) (involving short-plat development).

[57] People *ex rel.* Dep't of Pub. Works v. Investors Diversified Servs., Inc., 262 Cal. App. 2d 367, 372, 68 Cal. Rptr. 663, 666 (Cal. App. 2d Dist. 1968) (holding that "it is necessary to consider the existence of any zoning law which depresses value by limiting the use to which the property may be put" but that "if there is a reasonable probability that in the near future the zoning will change, then the effect of that probability upon the minds of purchasers generally may be taken into consideration") (citation omitted).

[58] Bd. of County Comm'rs v. Smith, 280 Kan. 588, 599, 123 P.3d 1271, 1278 (2005).

[59] 105 Cal. App. 4th 1013, 130 Cal. Rptr. 2d 108 (Cal. App. 4th Dist. 2003).

[60] *Id.* at 1028, 130 Cal. Rptr. 2d at 119 (*quoting* County of San Diego v. Rancho Vista Del Mar, 16 Cal. App. 4th 1046, 20 Cal. Rptr. 2d 675 (Cal. App. 4th Dist. 1993)). *See also* Hous. Auth. of Macon v. Younis, 279 Ga. App. 599, 601, 631 S.E.2d 802, 805 (Ga. Ct. App. 2006) (stating that "'[t]estimony about the highest and best use of property…is not admissible when it involves a use precluded by applicable zoning regulations…[unless] the condemnee [can] show that a change in zoning to allow the usage is probable….'") (citation omitted).

[61] Bd. of County Comm'rs v. Smith, 280 Kan. at 599, 123 P.3d at 1278.

[62] Mich. Dep't of Transp. v. Haggerty Corridor Partners Ltd. P'ship, 473 Mich. 124, 139, 700 N.W.2d 380, 388 (2005).

> The possibility of a zoning modification must, indeed, be a "reasonable" one in order, as a matter of logic, for it to have any bearing on fair market value. However, this is only part of the equation. The "reasonable possibility" of a zoning change bears on the calculation of fair market value *only* to the extent that it *could* have affected the price that a theoretical willing buyer would have offered for the property immediately prior to the taking. Thus, the "fact that is of consequence" is the reasonable possibility of a zoning modification, *as that possibility might have been perceived by a market participant on condemnation day*.[63]

In contrast, in a Missouri case an appellate court found that the testimony of the appraisers was erroneous and prejudicial because they "were permitted to express their opinion of the value of an acre of the farm designated for multi-family or commercial use upon the basis of their opinion that there was a 'reasonable probability' the farm would be rezoned," but "they did not discount the value of a comparable sale of real estate zoned for commercial use or zoned for multi-family use."[64]

In *State ex rel. Mo. Highway and Transportation Commission v. Modern Tractor and Supply Co.*,[65] the court explained it this way:

> [W]hen determining just compensation for condemned property, it is proper to take into account rezoning which was reasonably probable just before or after the taking and which affected the fair market value of the property at either of those times. …The property '*must be evaluated under the restrictions of the existing zoning* and consideration given to the impact upon market value of the likelihood of a change in zoning.' …This may be done either by determining the subject property's value as rezoned, minus a discount factor to allow for the uncertainty that rezoning would actually take place, or by determining the property's value with its existing zoning, plus an incremental factor because of the probability of rezoning.[66]

Even in cases when there exists a substantial probability of rezoning, it is improper for any witness to value the property "as if rezoning was an accomplished fact."[67] Thus, if a "claimant proves a reasonable probability of such a rezoning or declaration of invalidity, the value of the property as zoned or restricted on the day of taking will be augmented by an increment, representing the premium a knowledgeable buyer would be willing to pay for a potential change to a more valuable use…."[68] This rule of reasonable probability "has its genesis in the rule against collateral attack of land use restrictions in condemnation proceedings."[69] That is, "[t]he validity or constitutionality of a zoning ordinance cannot be collaterally attacked in a condemnation proceeding in which the authority enacting the zoning ordinance is not a party to that proceeding."[70]

Whenever the possibility of rezoning is discussed, the probability of any such rezoning actually happening must also be proved. The probability is based at least on there being evidence of the rezoning of nearby property, on the growth pattern of the neighborhood or area, on any changes in the pattern of use, of the character of the neighborhood, of the existing or future demand for certain uses, of the physical characteristics of the land, of the age of the existing zoning, and on the likelihood of that the zoning authority will allow changes in the zoning.[71] In brief, "[t]he trier of fact may consider the effect of future rezoning or variances on the highest and best use of the condemned property when determining its value."[72]

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[63] *Id.* at 138–39, 700 N.W.2d at 388 (footnotes omitted) (emphasis in original).

[64] State *ex rel.* Mo. Highway and Transp. Comm'n v. Modern Tractor and Supply Co., 839 S.W.2d 642, 651 (Mo. App. S. Dist. 1992) (noting that the limitations vary from state to state regarding the admissibility of testimony concerning rezoning) (*citing* Annotation, *Eminent Domain—Damages—Zoning*, 9 A.L.R. 3d at 309–23).

[65] 839 S.W.2d 642 (Mo. App. S. Dist. 1992).

[66] *Id.* at 650–51 (citations omitted). *See also* State *ex rel.* Mo. Highway and Transp. Comm'n v. Sturmfels Farm Ltd. P'ship, 795 S.W.2d 581, 858 (Mo. App. E. Dist. 1990).

[67] City of Springfield v. Love, 721 S.W.2d 208, 216 (Mo. App. S. Dist. 1986) (citations omitted).

[68] Chase Manhattan Bank, N. A. v. State, 103 A.D. 2d 211, 217, 479 N.Y.S.2d 983, 988 (N.Y. App. 2d Dep't 1984) (citation omitted).

[69] *Id.* at 217–18, 479 N.Y.S.2d at 988 (noting also that "[o]ther courts have held that even if the zoning authority is a party to the condemnation proceeding, the only proper method for challenging a zoning ordinance is by direct attack, such as a declaratory judgment action") (citations omitted).

[70] State *ex rel.* State Highway Comm'n v. Graeler, 527 S.W.2d 421, 425 (Mo. App. St. Louis Dist. 1975) (*citing* Hull v. Detroit Equip. Installation, Inc., 12 Mich. App. 532, 163 N.W.2d 271, 272 (Mich. Ct. App. 1968)).

[71] City of Las Vegas v. Bustos, 119 Nev. 360, 75 P.3d 351 (2003).

[72] *Id.* at 362, 75 P.3d at 352 (footnote omitted). *See also* Broward County v. Patel, 641 So. 2d 40, 42 (Fla. 1994) (stating that the condemnee must demonstrate a reasonable probability that rezoning or a variance would be granted in the near future for it to be considered in the valuation of the condemned property). In W. Jefferson Levee Dist. v. Coast Quality Constr. Corp., 640 So. 2d 1258, 1274 (La. 1994) (footnote omitted), the court stated:

> Another major factor…affecting the probability land could be put to a certain use in the not-too-distant future, is the requirement of a permit for or the impact of a zoning ordinance on the development of the property into its asserted highest and best use. Where there is no reasonable probability a permit for the necessary development could be obtained or that a change to a zoning classification allowing such development could occur in the reasonably foreseeable future, the asserted higher use may not be considered as the highest and best use of the property for purposes of market valuation because such use would be illegal.

See also State by Com'r of Transp. v. Caoili, 135 N.J. 252, 264, 639 A.2d 275, 281 (1994) (holding that evidence of zoning changes that a reasonable buyer and seller would take into consideration in an arm's length transaction was admissible after the trial court had determined that there was sufficient

Evidence of a highest and best use of the property that is precluded by current zoning is inadmissible unless the condemnee "show[s] 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."[73] However, "'changes in land use, to the extent that they were influenced by the proposed improvement, [are] properly excluded from consideration in evaluating the property taken.'"[74] Thus, it has been held that

> "any testimony of reasonable probability of zone change may not take into account the proposed [project] or any influence arising therefrom. …The probability of rezoning or even an actual change in zoning which results from the fact that the project which is the basis for the taking was impending cannot be taken into account in valuing the property in a condemnation proceeding."[75]

There are other limitations in regard to the use of the admission of evidence of a property's zoning. For example, in *City of San Diego v. Rancho Penasquitos Partnership*, *supra*, the court held that it was proper for the trial court to grant the motion *in limine* of Rancho Penasquitos Partnership (RPP) to exclude from evidence the city's zoning regulations that prohibited a rezoning of RPP's property from agricultural use absent approval of a highway project known as SR-56. The court held that "where the condemning agency and zoning authority are the same, zoning restrictions on property to be condemned that are enacted to freeze or depress land values of property to be condemned should not be considered in the valuation of that property."[76]

B.4. Testimony by Owners

It is generally acknowledged that an owner is permitted to express an opinion regarding the value of the owner's property being taken or damaged as a result of a taking.[77] As stated in *Arkansas Oklahoma Gas Corp. v. Boggs*,[78]

> [a] landowner is generally held to be qualified to express his [or her] opinion about the value of his property. ...A landowner is entitled to show every advantage that his property possesses, present and prospective, to have his witnesses state any and every fact concerning the property that he would naturally adduce in order to place it in an advantageous light if he were selling to a private individual, and to show the availability of this property for any and all purposes for which it is plainly adopted or for which it is likely to have value and induce purchases. …The latitude allowed the parties in bringing out collateral and cumulative facts to support value estimates made by witnesses is left largely to the discretion of the trial judge.[79]

However, the right of an owner to testify as to the value of property may be limited to the owner of the fee interest in the property.[80]

B.5. Exclusion of Evidence: Motions *in Limine*

There may be inadmissible evidence that counsel knows or has reason to believe the opposing side will attempt to offer at trial. Counsel may want to use a motion *in limine* and have a determination by the court prior to trial that the anticipated evidence is inadmissible. As a Georgia court has stated, "[a] motion in limine should be granted when "there is no circumstance under which the evidence under scrutiny is likely to be admissible at trial."[81] Furthermore, "[a]lthough a trial court has broad discretion to determine the admissibility of evidence, irrelevant evidence that does not bear

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evidence that a zoning change was probable); Greene v. Burns, 221 Conn. 736, 745, 607 A.2d 402, 407 (1992) (stating that a reasonably probable change in zoning is a proper element to be considered in determining the value of condemned property).

[73] Unified Gov't of Athens-Clarke v. Watson, 276 Ga. 276, 277, 577 S.E.2d 769, 770 (2003).

[74] Rancho Penasquitos P'ship, 105 Cal. App. 4th at 1029, 130 Cal. Rptr. 2d at 120 (*quoting* People *ex rel.* Dep't Pub. Works v. Arthofer, 245 Cal. App. 2d 454, 465, 54 Cal. Rptr. 878, 885 (Cal. App. 4th Dist. 1966)).

[75] *Id.* at 1028–29, 130 Cal. Rptr. 2d at 119–20 (citation omitted).

[76] *Id.* at 1034, 130 Cal. Rptr. 2d at 124.

[77] State *ex rel*. Smith v. 0.15 Acres of Land, 53 Del. 58, 62, 164 A.2d 591, 593 (1960) (citation omitted) ("The doctrine that an owner of a chattel is qualified by reason of that relationship alone to give his estimate as to its value is supported by the great weight of authority."); Shelby County v. Baker, 269 Ala. 111, at 124, 110 So. 2d at 908 (citation omitted) ("An owner of land, by virtue of his ownership, may testify as to its value."); Ark. State Highway Comm'n v. Muswick Cigar and Beverage Co., 231 Ark. 265, 270, 329 S.W.2d 173, 176 (1959) (holding that the owner's "personal interest was something which went only to the weight his testimony should have with the jury"); People v. Frahm, 114 Cal. App. 2d 61, 63, 249 P.2d 588, 589 (1952) (holding that a sublessee operating a drive-in restaurant and a public accountant keeping the books of such business were sufficiently qualified as experts on the market value of leasehold interests to testify in an eminent domain proceeding that the sublease had a market value of 20 percent of the gross receipts whereas the sublessee was paying 10 percent as rental).

[78] 86 Ark. App. 66, 159 S.W.3d 808 (2004). *See also Southwick*, 339 Mass. at 668–70, 162 N.E.2d at 273–74 (stating that "[a]n owner of real estate or personal property having adequate knowledge of his property may express an opinion as to its value").

[79] *Id.* at 74, 159 S.W.3d at 813 (citations omitted).

[80] *See, e.g.,* State *ex rel.* Mo. Highway & Transp. Comm'n v. Kuhlmann, 830 S.W.2d at 570 (citation omitted) ("The presumption extends only to the fee owner and if he demonstrates at trial an absence of knowledge of the property or that his opinion is based on an improper standard then the presumption is rebutted and the testimony may be disallowed or stricken.")

[81] Hous. Auth. of Macon v. Younis, 279 Ga. App. 599, 631 S.E.2d 802, 803 (Ga. Ct. App. 2006) (*citing* Andrews v. Wilbanks, 265 Ga. 555, 556 (458 S.E.2d 817) (1995)).

directly or indirectly on the questions being tried should be excluded."[82]

In *Rancho Penasquitos Partnership,* discussed *supra* in connection with zoning, the court affirmed the trial court's granting of a motion *in limine* "excluding from evidence the City's zoning regulations that prohibited a rezoning of RPP's property" because the condemned property had to "be valued at its 'before' condition" so as to exclude "the fact and impact of the SR-56 project."[83] The city "could not base its valuation upon land use regulations that prohibited development pending the SR-56 project, whose very purpose was to minimize the City's acquisition costs."[84] Furthermore, the appellate court also rejected the city's argument and agreed that the trial court properly ruled that RPP's experts could testify regarding the rezoning and sale of neighboring properties; "it was a matter of proof and argument to the jury as to whether they were 'project-enhanced' or would have occurred even without SR-56."[85]

Clearly the use of motions *in limine* is important in obtaining rulings prior to trial regarding whether certain testimony or other evidence is admissible.

C. DISCOVERY IN EMINENT DOMAIN CASES

C.1. Methods of Discovery Available

As one article notes, "[i]f eminent domain statutes do not define the procedures which govern in condemnation trials, courts typically use general civil procedure rules."[86] For example, "comparable sales to be used by either party…are properly subjects of discovery—provided the rules on discovery are correctly employed."[87]

Using the Federal Rules of Civil Procedure as a guide, there are basic means or tools of discovery insofar as they are relevant to a condemnation case: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; and requests for admission. In proceedings in a federal court, the particular court's local rules should be consulted for any restrictions or limitations on the use of discovery, such as the number or form of interrogatories or the number or length of depositions. As Rule 26(b)(2)(A) states, discovery may be limited also by court order. "[T]he court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36."[88]

C.2. Mandatory Initial Disclosures

Many states have adopted a rule identical or nearly identical to Rule 26 of the Federal Rules of Civil Procedure.[89] Consequently, it is important to ascertain whether under the state court's rules initial disclosures must be made "without awaiting a discovery request" as provided for in federal practice under Rule 26(a)(1).[90] (Some proceedings are exempt from the initial disclosure requirement.[91]) There are also pretrial disclosures that must be made under Rule 26(a)(3)[92] and a duty to

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[82] *Id. (citing* Ballew v. Kiker, 192 Ga. App. 178, 179, 384 S.E.2d 211 (1989) (trial court properly excluded irrelevant evidence)).

[83] City of San Diego v. Rancho Penasquitos P'ship, 105 Cal. App. 4th at 1018, 130 Cal. Rptr. 2d at 112.

[84] *Id*.

[85] *Id.*

[86] Baumer, *supra* note 3, at 803.

[87] State Highway Comm'n v. Havard, 508 So. 2d 1099, 1104 (Miss. 1987).

[88] FED. R. CIV. P. 26(b)(2)(C) furthermore provides:

> On motion or on its own, the court must limit the frequency or extent of use of the discovery methods otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of discovery in resolving the issues.

[89] The Federal Rules of Civil Procedure were amended effective Dec. 1, 2007.

[90] As stated in FED. R. CIV. P. 26(a)(1)(A)(i)-(iv):

> (1) *Initial Disclosure.* (A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:
>
> (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment; (ii) a copy—or a description by category and location—-of all documents, electrically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment; (iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and (iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

[91] *See* FED. R. CIV. P. 26(a)(1)(B).

[92] FED. R. CIV. P. 26(a)(3)(A)-(B) states:

> (A) In General. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:
>
> (i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those

supplement one's discovery responses as provided under in Rule 26(e)(1).

According to one source, at least 12 states "have adopted discovery rules that go as far (or nearly as far) as Federal Rule 26(a) in requiring the mandatory disclosure of information concerning expert witnesses."[93]

C.3. Disclosure of the Identity of Experts and Their Opinions and Reports

As for the disclosure of expert witnesses and their expected opinions, Rule 26(a)(2)(A)[94] provides that in addition to the initial disclosures required by Rule 26(a)(2)(A), "a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705." Thus, the identity must be disclosed timely of any experts who testify at trial. As a state court has held, "[i]n eminent domain proceedings the paramount issue, if not the only issue, concerns the amount of the condemnee's damages. …Hence, the 'seasonable' or 'timely' discovery of the identity of expert witnesses assumes great importance."[95] One court has noted that "[a]ppraisers in a condemnation action are to be treated as any other so-called witness."[96]

When an expert is to be used in a case, not only must the person's identity be disclosed but also the disclosure must be "accompanied by a written report—prepared and signed by the witness."[97] The Federal Rules specify what the report must contain:

> [A] complete statement of all opinions the witness will express and the basis and reasons for them; the data or other information considered by the witness in forming them; any exhibits that will be used to summarize or support them; the witness's qualifications, including a list of all publications authored in the previous ten years; a

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> the party expects to present and those it may call if the need arises;
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> (ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and
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> (iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.
>
> (B) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

[93] 7 NICHOLS ON EMINENT DOMAIN § G7A.01[1][b], at G7A-8-9 (*citing* ALASKA R. CIV. P. 26(a)(2)(A) (2008) ("In addition…a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Evidence Rules 702, 703, or 705."); ARIZ. R. CIV. P. 26(b)(4); CAL. CODE CIV. PROC. § 2025; C.R.C.P. 26(a) (2008) ("Except to the extent otherwise directed by the court, a party shall, without awaiting a discovery request, provide to other parties…. In addition…a party shall disclose to other parties the identity of any person who may present…with an identification of the person's fields of expertise."); IOWA R. CIV. P. 1.508(1) (2007) ("In addition…discovery of facts known, mental impressions, and opinions held by an expert whom the other party expects to call as a witness at trial…may be obtained…."); LA. CODE CIV. PROC. art. 1425(A) (2008) ("A party may through interrogatories or by deposition require any other party to identify each person who may be used at trial to present evidence under Articles 702 through 705 of the Louisiana Code of Evidence."); ME. R. CIV. P. 26(b)(4) (2007); Md. R. 2-402(g) (2007) ("A party by interrogatories may require any other party to identify each person…whom the other party expects to call as an expert witness at trial…."); NEV. R. CIV. P. 26(b)(4) (2007); N.J. Ct. R. 4:10-2(d) (2008); TEX. R. CIV. P. 195 (2008); UTAH R. CIV. P. 26(a)(3)(A) (2007) (Utah) ("A party shall disclose to the other parties the identity of any person who may be used at trial to present evidence….")).

[94] FED. R. CIV. P. 26(a)(2) provides:

> (A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.
>
> (B) Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:
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> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
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> (ii) the data or other information considered by the witness in forming them;
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> (iii) any exhibits that will be used to summarize or support them;
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> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
>
> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
>
> (vi) a statement of the compensation to be paid for the study and testimony in the case.
>
> (C) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:
>
> (i) at least 90 days before the date set for trial or for the case to be ready for trial; or
>
> (ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within 30 days after the other party's disclosure.
>
> (D) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

[95] State *ex rel.* Mo. Highway & Transp. Comm'n v. Dooley, 738 S.W.2d 457, 461 (Mo. App. E. Dist. 1987) (citations omitted).

[96] *Id.* at 464 (internal quotations omitted) (citation omitted).

[97] FED. R. CIV. P. 26(a)(2)(B).

> list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and a statement of the compensation to be paid for the study and testimony in the case.[98]
>
> If a deadline is not set by an order of the court,
>
> the disclosures shall be made…at least 90 days before the date set for trial or for the case to be ready for trial; or if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within 30 days after the other party's disclosures.[99]

Expert witnesses may be subject to discovery depositions. Under Rule 26(b)(4)(A), "[a] party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided."[100]

C.4. Retained but Nontestifying Experts

Of course, an expert may have been retained who will not be used at trial. Under limited circumstances, discovery may be had of such an expert but only if "(i) as provided in Rule 35(b); or (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means."[101] Thus, "[m]aterials prepared in anticipation of litigation are not per se protected," because the rules permit "discovery of such materials if the requesting party shows he has 'substantial need of the materials prepared in the preparation of his [or her] case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.'"[102]

As for experts retained who will not be testifying, there may be an issue of whether the nontestifying expert at least must be identified, with some courts holding that the identity of a nontestifying expert must be disclosed and others holding that a party has to show "exceptional circumstances."[103] Even if counsel has to identify the nontestifying expert, an opposing party is likely to find it to be "extremely difficult" at least under Rule 26(b)(4)(B) or its equivalent in the states "to obtain any information concerning the substance of the nontestifying experts' reports."[104]

Finally, the identity of experts "informally consulted" does not have to be disclosed under Rule 26(b)(4).[105]

C.5. State Discovery Rules

Many states have adopted the equivalent of the federal rules, but the federal rules were amended again, effective December 1, 2007.[106] However, according to *Nichols on Eminent Domain*, "[f]or the most part, the state rules continue to follow the model utilized by Federal Rule 26 prior to its amendment in 1993."[107] Thus, states following the federal rules may or may not have adopted recent or the most recent amendments. Several states have adopted a modified version of the federal rule that requires a specific showing of need or exceptional circumstances as a condition to any expert discovery.[108] Some states have a specific prohibition of ex-

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[98] FED. R. CIV. P. 26(a)(2)(B)(i)-(vi).

[99] FED. R. CIV. P. 26(a)(2)(C).

[100] FED. R. CIV. P. 26(b)(4) provides:

> (A) Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.
>
> (B) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:
>
> (i) as provided in Rule 35(b); or
>
> (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.
>
> (C) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:
>
> (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B); and
>
> (ii) for discovery under (B), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

[101] FED. R. CIV. P. 26(b)(4)(B)(i)-(ii).

[102] Baumer, *supra* note 3, at 804–05 (footnote omitted).

[103] 7 NICHOLS ON EMINENT DOMAIN § G7A.01[2], at G7A-15, (*citing* Ager v. Jane C. Stormont Hosp. & Training Sch. for Nurses, 622 F.2d 496 (10th Cir. 1980) (holding that a party must show exceptional circumstances before the nontestifying experts have to be identified)).

[104] *Id.* at G7A-16.

[105] *Id.*

[106] *See, e.g.,* ALASKA R. CIV. PROC. 26 (2008); ARIZONA R. CIV. P. 26 (2007); C.R.C.P. 26 (2008) (Colorado); DEL. SUPER. CT. CIV. R. 26 (2008); FLA. R. CIV. P. 1.390 (2007); Ga. Unif. Super. Ct. Rule 5 (2007); IND. R. TRIAL P. 26 (2007); KY. R. CIV. P. 26 (2008); ME. R. CIV. P. 26 (2007); Nev. R. CIV. P. 26 (2007); OHIO CIV. R. 26 (2008); OR. R. CIV. P. 36 (2008) (Oregon); VT. R. CIV. P. 26 (2008) (Vermont); Va. Sup. Ct. R. 3 (2007); WASH. REV. CODE 26 (2007); and WYO. R. CIV. PROC. Rule 26 (2007).

[107] 7 NICHOLS ON EMINENT DOMAIN § G7A.01, at G7A-5.

[108] *See, e.g.,* MASS. ANN. L. R. CIV. P. Rule 26 (2007); R.I. R. CIV. P. Form 26 (2007); UTAH R. CIV. P. 26, 34 (2007) (Utah). For example:

> A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

MASS. ANN. L. R. CIV. P. Rule 26(b)(4)(B) (2007). *See also* UTAH R. CIV. P. Rules 26(b)(4)(B) (2007).

Also, for example:

pert discovery.[109] Some states have retained their former special discovery rules but have amended them to allow expert discovery.[110] In sum, counsel must be familiar with the applicable rules, because "most of the states have *not* adopted the current version of Federal Rules 26(a) and (b)(4)" but "many states have adopted specific rules addressing the exchange of appraisal reports…."[111]

C.6. Discovery of Appraisals

Under the Federal Rules of Civil Procedure, because of the Rule 26(a)(2) mandate that "a 'written report' containing a 'complete statement of all opinions to be expressed and the basis and reasons therefor' for any expert appraiser retained to provide testimony" must be produced, "the Rule seemingly requires each party to disclose an appraisal report (or the equivalent of one) for each of the *testifying* appraisers."[112] The authors of *Nichols on Eminent Domain*, however, concede that they have been "unable to find a reported decision explicitly interpreting Rule 26(a)(2) as requiring the disclosure of the actual appraisal report prepared by a party's testifying expert appraiser…."[113] Nevertheless, the authors conclude that the testifying experts' actual appraisals are discoverable under Federal Rule 26.[114]

In *United States v. Meyer,*[115] in which the court required the experts to answer questions at depositions and to produce their reports, the court stated:

> The appraisers' opinions and their factual and theoretical foundation are peculiarly within the knowledge of each appraiser and, to a degree, that of the party who employed him. The opposing party can obtain this information in advance of trial only by discovery. Since this material will constitute the substance of the trial, pretrial disclosure is necessary if the parties are to fairly evaluate their respective claims for settlement purposes, determine the real areas of dispute, narrow the actual issues, avoid surprise, and prepare adequately for cross-examination and rebuttal.[116]

> Any party may serve on any other party a request
>
> (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect, copy, test or sample any designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form), or to inspect, copy, test or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or
>
> (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

UTAH R. CIV. P. Rules 34(a).

Another example is that:

> (B) A party may discover facts known and opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

R.I. R. CIV. P. Form 26(b)(4)(B) (2007).

[109] *See, e.g.,* PA. R. CIV. P. No. 4009.1 (2007):

> Discovery of facts known and opinions held by an expert, otherwise discoverable under the provisions of Rule 4003.1 and acquired or developed in anticipation of litigation or trail, may be obtained…through interrogatories…[or] [u]pon cause shown…. A party may not discover facts known or opinions held by an expert who has been retained…by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial….

Pa. R.C.P. No. 4003.5 (2007).

[110] *See, e.g.,* Mo. Sup. Ct. R. 56.01 (2007); TEX. R. CIV. P. 195.1 (2008); Md. Rule 2-422 (2007). For example, "[a] party may discover by deposition the facts and opinions to which the expert is expected to testify." Mo. Sup. Ct. R. 56.01(b)(4) (2007). Another example is that "[a] party may request another party to designate and disclose information concerning testifying expert witnesses only through a request for disclosure under Rule 194 and through depositions and reports as permitted by this rule." TEX. R. CIV. P. 195.1 (2008). In Maryland:

> Any party may serve one or more requests to any other party (1) as to items that are in the possession, custody, or control of the party upon whom the request is served, to produce and permit the party making the request, or someone acting on the party's behalf, to inspect, copy, test or sample designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, images, sound recordings, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form) or to inspect and copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 2-402 (a); or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection, measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on the property, within the scope of Rule 2-402 (a).

Md. Rule 2-422(a) (2007).

[111] 7 NICHOLS ON EMINENT DOMAIN § G7A.01[1][b], at G7A-8.

[112] *Id.* § G7A.01[1][a], at G7A-6 (emphasis supplied).

[113] *Id.* at G7A-6, n.16.

[114] *Id.*

[115] 398 F.2d 66 (9th Cir. 1968).

[116] *Id.* at 69. *See also* Barrett v. State Highway Comm'n, 385 So. 2d 627, 628 (Miss. 1980) (holding that the landowners were entitled to discovery and that "pretrial access to information held by the commission would have been helpful to the landowners in preparing their case"). In Alaska v. Leach, 516 P.2d 1383, 1384 (Alaska 1973), in upholding an order granting an individual's motion for production of all the state's property appraisal reports on the land, including reports that the state did not intend to offer in evidence, the court ruled "that the very nature of a condemnation case in and of itself constitutes

However, in *Hoover v. United States Dep't of the Interior,*[117] the Fifth Circuit stated that the "essence of the decision in *Meyer* is not that appraisals per se are discoverable, but that landowners should be able to discover the opinions and views of the appraisers in order to prepare for effective cross-examination."[118]

Nichols also notes that "[i]n contrast to the new Federal Rule, there is nothing in the old rule (followed by most states) that requires, in the first instance, the production of actual 'reports' for each testifying expert."[119] Consequently, attorneys may have to resort to other means of discovery to obtain more information or perhaps the actual appraisal.[120] Nevertheless, "[s]everal jurisdictions have enacted laws providing for the mutual exchange of appraisal reports during eminent domain proceedings."[121] In short, there seems to be a lack of uniformity in approach. Statutes, for example, in California, New York, and Texas "require disclosure of information relating to expert appraisers in eminent domain proceedings,"[122] whereas in some states the rules "do not require that the appraisal reports be exchanged but rather qualify that the information contained therein may be discovered."[123] Local rules also may provide for the exchange of appraisal and other expert reports.[124]

State rules vary regarding the discoverability of expert documents and opinions, but there are cases holding, whether by statute or rule of court, that appraisal reports must be produced or the expert's opinions at least must be disclosed during discovery if timely requested by the opposing party.[125] Counsel, therefore, must be familiar with the applicable state rules; for example, a state with discovery rules similar to the pre-1993 Federal Rules of Civil Procedure could even require counsel to show a "compelling need" before obtaining an adversary's appraisal report.[126] Many condemnation attorneys may prefer to enter into a stipulation providing for the mutual exchange of appraisers' reports because they may not want to produce "such a valuable piece of information without any assurance of getting the same quality of information in return."[127]

As indicated previously, Rule 26(b)(4)(B) "does not protect the identity or opinions of experts unless the information or opinions were developed or acquired 'in anticipation of litigation or preparation for trial.'"[128] Thus, appraisal reports prepared for tax assessment offices or for other municipal purposes are discoverable, as well as appraisals that a condemnee may have obtained for purposes other than litigation or preparation for trial.[129]

Two objections that one may anticipate regarding the production of expert reports such as appraisal reports or of the underlying documents or information are the attorney-client privilege and the attorney work-product doctrine. As for the attorney-client privilege, "[t]he majority of courts…do not apply the attorney-client privilege to eminent domain experts who merely appraise property and reduce their findings to writing."[130] As for the attorney work-product doctrine, although "some courts protect expert appraisal reports from discovery under the work product doctrine…the majority of courts hold that the work product doctrine does not protect experts' documents."[131] Of course, counsel must be "careful about written communications be-

'exceptional circumstances' within the intendment of Civil Rule 26(b)(4)(B) and therefore justifies the superior court's discovery order."

[117] Hoover v. United States Dep't of the Interior, 611 F.2d 1132, 1140 (5th Cir. 1980) (footnote omitted).

[118] *Id.*

[119] 7 NICHOLS ON EMINENT DOMAIN § G7A.01[1][b], at G7A-9.

[120] *Id.* at G7A-10.

[121] *Id. See also* Baumer, *supra* note 3, at 808 (stating that "some jurisdictions require mandatory disclosure of…appraisal reports") (*citing* Connie C. Sandifer & Timothy J. Chang, *The Advantageous Use of Discovery in Eminent Domain*, SB48 ALI-ABA 183, 189 (1997) (listing six states mandating exchange of appraisal reports) and Uniform Eminent Domain Code § 702 (1974))).

[122] Baumer, *supra* note 3, at 808–09 (*citing* CAL. CIV. PROC. § 1258.210 (West 1998); N.Y. Ct. Rules § 202.61 (McKinney 1997); TEX. PROP. CODE ANN. § 21.0111 (West 1995)).

[123] *Id*. at 809 (*citing* N.J. STAT. ANN. § 20:3-6 (West 1997); MD. R. CIV. P. 3-421(A)(3) (Michie 1997)).

[124] 7 NICHOLS ON EMINENT DOMAIN § G7A.01[1][b], at G7A-10.

[125] *See* discussion in 7 NICHOLS ON EMINENT DOMAIN § G7A.01[1][a] & [b]. *See* City of Santa Clarita v. NTS Technical Systems, 137 Cal. App. 4th 264, 40 Cal. Rptr. 3d 244, 275–76 (2006) (requiring the exchange of expert witness information and valuation data under the statute) (citing CAL. COM. CODE § 1258.210 (2007)). Also cited in Baumer, *supra* note 3, are: New Jersey v. Town of Morristown, 129 N.J. 279, 27-288, 609 A.2d 409, 413–14 (1992) (condemnor required to disclose to condemnee appraisal reports used in calculating offer of compensation); Gerhart v. Honeoye Storage Corp., 88 A.D. 2d 757, 451 N.Y.S.2d 481, 482 (N.Y. App. 4th Dep't 1982) (requiring parties to exchange appraisal reports); Utah Dep't of Transp. v. Rayco Corp., 599 P.2d 481, 490-91 (Utah 1979) (requiring production of expert's appraisal report when landowner cross-examines appraiser); United States v. 23.76 Acres of Land, 32 F.R.D. 593, 596 (D. Md. 1963) (requiring government's real estate appraiser to answer deposition questions regarding his opinions).

[126] 7 NICHOLS ON EMINENT DOMAIN § G7A.01[1][b], at G7A-11–12.

[127] *Id*. § G7A.01[1][a], at G7A-7.

[128] *Id* § G7A.01[4], at G7A-17.

[129] *Id.*

[130] Baumer, *supra* note 3, at 814 (*citing* Note, *Condemnation in Indiana: Discovery of Expert Appraisal Reports*, 8 VAL. U. L. REV. 409, 434–35 (1974)). *See also* 7 NICHOLS ON EMINENT DOMAIN § G7A.02, at G7A-20.

[131] *Id.* at 814 (*citing* Lee Mickus, *Discovery of Work Product Disclosed to a Testifying Expert Under the 1993 Amendments to the Federal Rules of Civil Procedure*, 27 CREIGHTON L. REV. 773, 784–85 (1994) (stating that "bulk of the authority recognizes that the work product doctrine does not protect documents generated by experts who are expected to testify")).

tween counsel and the appraiser, especially in the age of e-mail," that could be subject to discovery and production.[132]

C.7. Discovery Based on Other Statutes

Although the Federal Freedom of Information Act (FOIA), 5 U.S.C. § 552, provides for broad powers of access to public information from federal agencies, the statute may not be used as a substitute for discovery or to expand one's ability to discover documents in a legal action that are otherwise protected from discovery. A person's rights under the Federal FOIA are neither diminished nor enhanced by a need arising during litigation for an agency's documents.[133] In other words, the need for a document is irrelevant to whether a statutory exemption allows an agency to withhold a document.[134] Although there are a variety of statutes at the state level with respect to obtaining public records and information, which may operate differently in the discovery arena than the federal rules with respect to FOIA, state public information acts for the most part also do not broaden the ability of a litigant to obtain discovery.[135]

The URA[136] and its implementing regulations[137] set out specific guidelines for the acquisition of property involving federal funds. Although there is no specific requirement that an appraisal must be given to a landowner, an owner or his or her representative must be given an opportunity to be present; the agency's offer cannot be lower than the appraised value; the agency must submit a summary statement of the basis for the offer of just compensation; and the agency must make all reasonable efforts to contact the owner or his or her representative to discuss its offer, including the basis for it.[138]

D. VOIR DIRE AND JURY SELECTION

As with other trials, if provable facts are presented clearly so that a jury comprehends the issue or issues in the case, more often than not the jury will arrive at an appropriate outcome. Because of the importance of the members of any jury, *voir dire* is the most important first contact with the jury.[139] Assuming the local rules of practice allow the attorney to conduct the *voir dire*, the *voir dire* should be used not only to discover any potentially biased juror but also to educate and impress the jury regarding the justness of one's cause. There are, of course, texts devoted to the techniques of effective jury selection.[140]

E. PRESENTATION OF EXPERT TESTIMONY

Valuation is the primary issue in a condemnation trial; hence, although there are other important facets of the trial, trial counsel necessarily must focus on the presentation of expert testimony and an effective cross-examination of the opposing party's expert or experts.

A condemnation trial presents some unique problems for an attorney. At its best, a condemnation case is one of the least interesting cases for a juror. The attorney therefore is challenged to choose witnesses and exhibits, as well as his or her own words and actions, that will maintain the jury's focus on the issues. With the exception of the owner, it is quite likely that the witnesses for both parties will be appraisal and engineering experts skilled both in their professions and in testifying effectively. The trier of the facts usually will be a jury that is unfamiliar with the technical aspects of valuation but which the jury nonetheless must evaluate. Furthermore, many if not most trials will be relatively brief, not permitting much time for thorough preparation for cross-examination and rebuttal evidence. In fact, skilled opposing counsel may attempt to time the appearance and length of the direct examination of an expert witness to prevent opposing counsel from being able to prepare overnight for cross-examination. However, either because of restrictions imposed by the rules of court or because of cost, each party may have only one or possibly two experts upon which to base an entire case, thus greatly increasing the importance of cross-examination and rebuttal evidence.

Any expert witness, including one on valuation, should present his or her well-supported opinion in a clear, easy-to-follow manner that is understandable by a layperson. Some experienced counsels recommend reducing an expert's opinion to the lowest common denominator. Most, if not all, attorneys believe it is best to keep the expert's opinion as straightforward as possible so that an untrained person will be able to understand the opinion and the basis for it.

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[132] 7 NICHOLS ON EMINENT DOMAIN § G7A.01[1][b], at G7A-11.

[133] Hoover v. U.S. Dep't of Interior, 611 F.2d at 1143 (citing "executive privilege" and prohibiting the discovery of an outside appraiser's report when the landowner filed suit under the Freedom of Information Act).

[134] 7 NICHOLS ON EMINENT DOMAIN § § G7A.01[1][b], at G7A-11.

[135] In *Hoover*, *supra*, "the court pointed out that as a general rule, a party is not entitled to his or her opponent's expert appraisal report (under the old rule)." 7 NICHOLS ON EMINENT DOMAIN § G7A.01[1][b], at G7A-11.

[136] 42 U.S.C. § 4651, *et seq.* (2008).

[137] 49 C.F.R. § 24.1, *et seq.* (2008).

[138] 42 U.S.C. § 4651(2)-(3) (2007); 49 C.F.R. § 24.102(c)-(f) (2007).

[139] S.L. Brodsky & D.E. Cannon, *Ingratiation in the Courtroom and in the Voir Dire Process: When More Is Not Better*, 30 LAW & PSYCHOL. REV. 103 (2006); Bruce Sales, *The Art and Science of Conducting the Voir Dire*, 9 PROF. PSYCHOL. 367 (1978).

[140] JEFFREY T. FREDERICK, AMERICAN BAR ASSOCIATION, MASTERING VOIR DIRE AND JURY SELECTION: GAIN AN EDGE IN QUESTIONING AND SELECTING YOUR JURY (2005); WILLIAM J. BRYAN, THE CHOSEN ONES: OR, THE PSYCHOLOGY OF JURY SELECTION (1971).

With respect to the organization of the direct examination of the expert and the presentation of his or her opinion, the following approach is suggested:

1. The qualification of the expert.
2. A description of the appraisal process.
3. A specific description of the work undertaken.
4. A description of the property.
5. The property's highest and best use.
6. One or more of the approaches to valuation (e.g., cost, income, and sales).
7. The final estimate of value.[141]

The parties' experts' testimony will be based on identical facts, such as the location of the property, the areas before and after the taking, the engineering of the condemnor's project vis-à-vis the subject property, the number and location of existing improvements on the property, the present use of the property, the property's existing use, the zoning and other governmental regulations applicable to the property, and the utilities now serving or available to serve the property. Nevertheless, the experts' testimony may diverge because of differences in the opposing experts' opinions and conclusions.

There are a number of areas for potential disagreement: the highest and best use of the property; whether comparable sales are indeed comparable; the probability of zoning changes; the analysis of income data to project future income; the analysis of construction costs and depreciation figures for improvements; and the damages, if any, to the remaining property caused by changes in size or shape of the property, access to the property, loss of improvements on the property, or the remaining property's proximity to the condemnor's project. There are myriad aspects of valuation that affect the basis of an expert's opinion, as well as the degree of importance placed by an expert on each factor. Therefore, any divergence in an expert's opinion relating to value is not based necessarily on the existence of different facts but on opinions and conclusions that differ concerning the effect of certain facts on the expert's opinion of the value of the property before and after an acquisition. Adequate preparation thus requires, among other things, effective use of discovery.

As noted, the property's highest and best use will be one issue on which the experts would be expected to testify, particularly if the highest and best use of the property is in dispute. One authority maintains that with respect to testimony by an appraiser regarding the highest and best use of the subject property, "the appraiser is generally well advised to testify under direct examination only as to the analytical methodology used in determining highest and best use, without specificity."[142] However, "[i]f the appraiser's estimate of highest and best use is questioned under cross-examination…the appraiser is often allowed to explain, in detail and with specificity, the process employed to arrive at the highest and best use conclusion."[143]

Many seminars, programs, and publications provide training and information regarding various aspects of trial practice, such as effective openings, closings, direct and cross-examination, the admission of evidence, the handling of exhibits, and the making of objections. *Nichols on Eminent Domain* includes a chapter on trial procedures and techniques covering such matters as pretrial preparation, identification of trial issues, trial planning, including experts and depositions, conduct of the trial, and other issues.[144] Another chapter is devoted to trial tactics and strategies in the presentation of comparable sales.[145] It should be noted that the treatise also devotes a chapter to sample testimonies of the type that may be expected in an eminent domain trial, including illustrative direct examinations, cross-examinations, and redirect examinations of a condemnee's and condemnor's appraiser.[146]

F. USE OF DEMONSTRATIVE EVIDENCE

F.1. Use of Photographs and Other Visual Aids

Of course, "[t]rial tactics and strategies sometime involve a degree of showmanship."[147] Photographs and videos are especially helpful in familiarizing a jury with property and the effect of a condemnation. "[D]igital images take the form of videos and photographs," and "[m]ore and more attorneys are utilizing digital images to support and illustrate their arguments in front of both judicial and administrative panels."[148] If properly authenticated,[149] photographs and videos usually are admissible into evidence without difficulty.[150] However,

[141] EATON, *supra* note 42, at 500.

[142] EATON, *supra* note 42, at 106.

[143] *Id*.

[144] 7 NICHOLS ON EMINENT DOMAIN, ch. G8.

[145] 7A NICHOLS ON EMINENT DOMAIN, ch. G13.

[146] *Id*., ch. G13A. *See id*. at § G13A.03 in regard to the cross-examination of the landowner's expert appraisal witness. *See also* Smith, *100 Questions Which Will Worry Weak Witnesses*, THE REAL ESTATE APPRAISER 15–16 (Feb. 1967).

[147] *Id.* § G13.07[6], at G13-66 (giving examples).

[148] Catherine Guthrie & Brittan Mitchell, *The Swinton Six: The Impact of State v. Swinton on the Authentication of Digital Images*, 36 STETSON L. REV. 661, 663, 669 (2007).

[149] Dina v. People *ex rel.* Dep't of Transp., 151 Cal. App. 4th 1029, 1039, 60 Cal. Rptr. 3d 559, 567 (Cal. App. 2d Dist. 2007) (upholding trial court's decision that photographs and other evidence not properly authenticated in a case for inverse condemnation, nuisance, and negligence), *review denied*, 2007 Cal. LEXIS 9723 (Cal. 2007).

[150] Inglewood Redevelopment Agency v. Akliu, 153 Cal. App. 4th 1095, 1116 64 Cal. Rptr. 3d 519, 535 (2007) (stating that the trial court found the Agency's offer of $35,000 for goodwill was not unreasonable, possibly in part because of photographs offered into evidence suggesting that the owner was performing automotive repairs without a license), *modified*, 2007 Cal. App. LEXIS 1360, *rehearing denied,* 2007 Cal. App. LEXIS 1553, *request denied*, 2007 Cal. LEXIS 12889 (Cal. 2007); Tunica County v. Matthews, 926 So. 2d 209*,* 217 (Miss. 2006) (upholding admission of photographs for the purpose for which they

admissibility depends on the purpose for which the photograph is offered and whether it accurately depicts the property. For example, in *Arkansas State Highway Comm'n v. Post*.,[151] the court held that the trial court "erred by admitting the photograph of the piles of dirt and dead trees that had resulted from the ongoing construction work. Evidence is inadmissible in partial-taking cases when it pertains to the temporary conditions of the property during the course of construction."[152] The court held that the "testimony in no way clarified to the jury that the conditions depicted in the photograph were merely temporary."[153]

As for aerial photographs, although there are commercial sources, it may be possible to obtain them inexpensively from sources that already have them, such as a county assessor's office in the county where the property is located, the local Agricultural Stabilization Conservation Services Office or the equivalent, or a transportation department.[154] Other sources include the United States Geological Survey, and the Tennessee Valley Authority and other power suppliers, as well as the Internet, where satellite images are accessible.

Of course, as with any demonstrative evidence, photographs or videos should illustrate a detail important to the property, usually should be in color, and should be large enough to be seen easily. One practitioner reports that a computer-enhanced photograph has been admitted to show how construction would appear when completed. Although no recent eminent domain cases were located dealing specifically with computer-enhanced photographs, other cases have permitted their use with proper foundation and authentication.[155] According to a New Jersey court, "the use of a computer-generated exhibit requires a more detailed foundation than for just photographs or photo enlargements," and testimony is required from a witness "who possesses sufficient knowledge of the technology used to create the exhibits."[156]

Videos are especially useful in assisting jurors in understanding problems concerning access, surface water, or drainage, or with the moving of equipment or inventory.[157] In *Trustees of Wade Baptist Church v. Mississippi State Highway Commission,*[158] although upholding the trial court's refusal to admit into evidence a videotape offered after a jury's view of the property for the "purpose of 'refreshing their minds,'" the court stated that "properly qualified and authenticated videotapes are often quite valuable aids to the trier of facts and they may be used in evidence in the courts of this state. …Where properly qualified and authenticated and not redundant, we welcome them."[159]

Plats, maps, plans, models, PowerPoint presentations, or just about anything an attorney may imagine may assist a jury's understanding.[160] The condemning authority presumably has surveyed the subject property and will have had plans drawn by the time it initiates condemnation of the property. However, unless there is a stipulation regarding the admission of certain trial aids, counsel will need to lay a proper foundation to assure their admission. Furthermore, during discovery, it is important to be precise when making discovery requests. A request for photographs does not include necessarily a request for any videotapes.[161]

As noted, zoning critically affects the use and value of a property. In some instances, rather than rely solely on oral testimony regarding an applicable ordinance,

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were offered); In re Acquisition of Real Prop. by Village of Marathon, 174 Misc. 2d 800, 802, 666 N.Y.S.2d 365, 367 (N.Y. Sup. Ct. 1997) (holding that the failure to include photographs of comparables was not a sufficient reason to strike an appraisal but noting that under the applicable rule, appraisal reports "may contain photographs of the property under review and of any comparable property that specifically is relied upon by the appraiser, unless the court otherwise directs") (*citing* 22 N.Y. COMP. CODES R. & REGS. 202.59[g][2]) (internal quotations omitted); State *ex rel.* Mo. Highway & Transp. Comm'n v. Vitt, 785 S.W.2d 708, 712 (Mo. App. E. Dist. 1990) (holding that "[t]he admission of photographs, being within the discretion of the trial court, will not be disturbed on appeal absent an abuse of that discretion") (citation omitted).

[151] 330 Ark. 369, 955 S.W.2d 496 (1997).

[152] *Id.* at 375, 955 S.W.2d at 499.

[153] *Id.* at 376, 955 S.W.2d at 499.

[154] Hudspeth v. State Highway Comm'n, 534 So. 2d 210, 214 (Miss. 1988) (reversing a trial court order that, *inter alia*, had denied discovery of photographs in the possession of the Commission).

[155] Nooner v. Arkansas, 322 Ark. 87, 104, 907 S.W.2d 677, 680 (1995) (Affirming the defendant's conviction, the court stated that with regard to computer-enhanced photographs, "[r]eliability must be the watchword" and "the reliability of the enhanced photographs was attested to by multiple witnesses.").

[156] Rodd v. Raritan Radiologic Assocs., P.A., 373 N.J. Super. 154, 169–70, 860 A.2d 1003, 1012 (2004) (reversing and holding that the computer-imaging displayed to the jury in a medical malpractice case was "susceptible of being accepted as substantive evidence") (*id*., 373 N.J. Super. at 170–71, 860 A.2d at 1012).

[157] Most jurisdictions permit the use of videos. 7A NICHOLS ON EMINENT DOMAIN § 13.06, at G13-36. *See also* Cal. State Auto. Ass'n v. City of Palo Alto, 138 Cal. App. 4th 474, 41 Cal. Rptr. 3d 503 (Cal. App. 6th Dist. 2006) (apparently no issue regarding the use of video equipment to inspect the condition of a pipe), *review denied, request denied*, 2006 Cal. LEXIS 9072 (Cal. 2006).

[158] 469 So. 2d 1241, 1247 (Miss. 1985).

[159] *Id.* (citation omitted). *But see* City of Fort Smith v. Findlay, 48 Ark. App. 197, 207, 893 S.W.2d 358, 364 (1995) (upholding the trial court's ruling that a video tape showed "only the conditions that existed after the taking and gives the jury no basis for comparing the drainage conditions before and after the taking").

[160] Demonstrative evidence may include any one or more of the following: a blackboard, chart, graph, diagram, rendering, an enlargement of a document, color coding, projection slides, actual objects, or computer analysis or representation. *See* Eaton, *supra* note 42, at 465.

[161] County of Dallas v. Harrison, 759 S.W.2d 530, 531 (Tex. Ct. App. 5th Dist. 1988) (holding that "the County's request for production of photographs did not include a request for production of the video tape at issue").

counsel may want to have the ordinance admitted into evidence and shown to the jury via a computer-generated enlargement or have the ordinance displayed on a large poster board and easel for maximum effectiveness.

F.2. Hand-Made and Computer-Generated Models

Models may be used in imaginative ways. One attorney has described a case that involved the acquisition of a multi-use property. The property's current, primary use was for the underground mining of high-grade limestone deposits. A model of the entire property was constructed to show the jury each and every use of the property, which included residential, agricultural, industrial, and mining. The model was constructed with dowels so that when they were removed the jury could see the property's subsurface and remaining deposits.

The only reported case that has been located regarding the use of a model is *Commonwealth, Department of Transportation v. Becker.*[162] The transportation department objected at trial to the introduction of evidence concerning the owner's planned subdivision of his property and his use of a model and overlay to illustrate his testimony. The bases for the objection were that the model and overlay were inaccurate and misleading.[163] However, without addressing directly the department's argument, the court affirmed the judgment.[164]

Finally, depending on the issue, a condemnation attorney may be able to take advantage of a computer-generated model.[165]

F.3. Charts

Charts and diagrams are helpful trial aids. For example, counsel may use an exhibit as a way of graphically representing comparable sales data.[166] On the other hand, with regard to items of damages that are noncompensable, counsel may want to present the evidence visually to the jury rather than merely relying on testimony. For example, because "[t]raffic is generally not a proper element to be taken into consideration when determining the damage arising from the condemnation of land,"[167] it is a type of noncompensable damage that could be illustrated by use of a chart, diagram, or similar trial aid.

G. JURY VIEW OF THE PROPERTY

Although many states' statutes provide for a jury view, in other states, whether a jury may view the property is a decision committed to the discretion of the trial judge.[168] In a majority of the states, a jury view "constitutes evidence to be considered by the fact finder in conjunction with other evidence presented during the trial…."[169]

The importance of a jury view should not be underestimated. For example, in *Lehigh-Northampton Airport Authority v. Fuller,*[170] the court stated that "[w]here the jury views the premises, as in this case, its award is entitled to special weight upon appellate review. This Court has also held that the jury may base its decision on its own judgment and disregard the expert testimony entirely."[171] Similarly, in *Trowbridge Partners, L.P. v. Mississippi Transportation Commission,*[172] the court stated that it had "a long-standing history of not disturbing jury verdicts in eminent domain proceedings, especially when the jury has viewed the property being taken and the evidence in the record supports the jury's finding."[173] Although in some jurisdictions a jury view may be used infrequently, in the proper case a view may be of assistance to a jury, as well as to counsel on an appeal challenging a determination of compensation.

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[162] 118 Pa. Commw. 620, 546 A.2d 1282 (Pa. Commw. Ct. 1988).

[163] *Id.* at 626, 546 A.2d at 1286.

[164] *Id.* at 627, 546 A.2d at 1286.

[165] United States v. 87.98 Acres of Land, 530 F.3d 899, 906-907 (9th Cir. 2008) (In an appeal reviewing a district court's exclusion of expert testimony regarding electromagnetic fields (EMF), the appellate court stated that the expert's "computer models and studies are direct evidence…that EMF risk exist[s]," but that the exclusion of the evidence was not prejudicial because of other evidence that was allowed); N. Natural Gas Co. v. Nash Oil & Gas, Inc., 526 F.3d 626 (10th Cir. 2008) (affirming district court's dismissal of an action but noting that *Northern's* expert had used a "computer-generated reservoir-simulation model" to predict the flow of gas through porous media); *but see* Smith v. Papio-Missouri River Natural Res. Dist., 254 Neb. 405, 410, 576 N.W.2d 797, 802 (1998) (In holding that the Court of Appeals erroneously concluded that there was no evidence that it was reasonably probable that the Smith property could be used for residential purposes in the immediate future, the court noted, *inter alia*, that there was expert testimony in the record to the effect that "the FEMA floodway maps are computer-generated models that are inaccurate as to the actual elevations of land within a floodway."). *See also* City of Wichita v. Trs. of the Apco Oil Corp. Liquidating Trust, 306 F. Supp. 2d 1040 (D. Kan. 2003) (groundwater modeling); Jackson v. N.Y. State Urban Dev. Corp., 110 A.D. 2d 304, 310, 494 N.Y.S.2d 700, 704 (N.Y. App.,1st Dep't 1985) (holding that the Urban Development Corporation (UDC) had employed "the most appropriate computer model" to calculate automobile emissions and that UDC's calculations were reliable).

[166] 7A NICHOLS ON EMINENT DOMAIN § G13.06, at G13-37.

[167] State *ex rel.* Mo. Highway and Transp. Comm'n v. Mertz, 778 S.W.2d 366, 368 (Mo. App. E. Dist. 1989).

[168] 5 NICHOLS ON EMINENT DOMAIN § 18.08[1], at 18-54.

[169] *Id.* § 18.08[3], at 18-59.

[170] 862 A.2d 159 (Pa. Commw. Ct. 2004), *appeal denied*, 2005 Pa. LEXIS 3158 (Pa. 2005).

[171] *Id.* at 167 (2004) (*citing* Redevelopment Auth. of the City of Phila. v. Nunez, 109 Pa. Commw. Ct. 240, 530 A.2d 1041 (Pa. Commw. Ct. 1987); *Appeal of Redevelopment Auth. of the City of Scranton*, 156 Pa. Commw. Ct. 388, 627 A.2d 292 (Pa. Commw. Ct. 1993)).

[172] 954 So. 2d 935 (2007).

[173] *Id.* at 944. *See also* Miss. Transp. Comm'n v. Highland Dev., LLC*,* 836 So. 2d 731, 736 (Miss. 2002) (noting that "if there is any substantial evidence supporting the award, we will not interfere, especially when the jury has viewed the property") (citations omitted).

H. ADMISSIBILITY AND USE OF THE COMPARABLE SALES METHOD

H.1. Admissibility of Comparable Sales

As discussed in Section 6, *supra*, of the three traditional approaches to valuation—comparable sales, income, and cost—the comparable sales or market data approach is preferred.[174] The income and cost methods involve assumptions not found in the comparable sales approach that make them less reliable in determining market value. One source notes, however, that the term "comparable sales approach" is preferred to the term "market data approach" because all three methods—sales, income, and cost— "require the use of market data."[175] In any case, wherever possible, the three approaches should be used to support one another.[176]

Obviously, parcels of real estate are seldom if ever alike.[177] In general, dissimilarities between properties offered as comparables affect the weight accorded to the evidence rather than preclude the admissibility of the evidence. The issue is whether there is a reasonable comparability between the subject property and the properties being offered as comparables. The term comparable or similar does not mean identical.[178] Thus, "[n]o general rule can be laid down governing the degree of similarity which must exist between properties sold and that condemned to make evidence of sales admissible" and the decision whether to receive such "evidence must be determined by the trial judge within the proper limits of his discretion."[179]

Parcels may "have neither exactly the same location, nor exactly the same juxtaposition to other properties."[180] However, as stated in a 2007 case, "[c]omparable sales must relate to and possess similar qualities to the land involved in the sale."[181] Consequently, whether evidence of the values of other properties is admissible depends on whether the properties are sufficiently similar in character and location and in other ways that affect value.[182] Moreover, as discussed in a later subsection, because of the differences even in properties said to be comparable to the subject property, appraisers are allowed to adjust the comparable sales in determining the value of the condemned property.[183]

As stated, evidence of voluntary sales of similar property in the vicinity of the property reasonably close in time to the taking is usually admissible as evidence of the value of the subject property.[184] As discussed in connection with Federal Rules of Evidence, Rule 703, one question that may arise is whether a court or jury may consider testimony of comparable sales as independent, substantive evidence of value or only as support for an expert's opinion of value.[185] A trial attorney's method of presentation of his or case may depend on what the state's courts have ruled regarding the admission of hearsay evidence when expert testimony is offered on the sales prices of similar properties. *See* discussion in Section B.1.b. *supra*.

According to one authority, "[m]ost jurisdictions allow the price of comparable land to be admitted as direct, or independent, evidence of the market value of the property in dispute."[186]

> Independent substantive evidence of the value of the condemned property is a form of direct proof. It requires the testimony of at least one of the parties to the sale…. This type of proof was deemed necessary in many jurisdictions to avoid reliance on hearsay testimony given by a real estate expert witness in collecting and confirming information on comparable sales.[187]

As stated, the second basis for admission of evidence of comparable sales is "not as direct evidence of the value of the property under consideration, but in support of, and as background for, the opinion testified to

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[174] United States v. Abbey, 2007 U.S. Dist. LEXIS 5701, at *4 (E.D. Mich. 2007) (noting that a "'comparable sale' analysis has long been and remains the preferred method of establishing a property's 'fair market value'") (citation omitted); United States v. 25.02 Acres of Land, Douglas, 495 F.2d 1398, 1400 (10th Cir. 1974).

[175] EATON, *supra* note 42, at 197. There is a minority view holding that "sales may only be admitted on cross-examination." *Id*. at 199 (explaining the reasons for the minority view). Furthermore, some states have enacted legislation allowing such evidence as an exception to the hearsay rule. *Id*. Such evidence is allowed in federal court under Federal Rules of Evidence Rule 703. *See id*.

[176] EATON, *supra* note 42, at 158. *See* Miss. Transp. Comm'n v. Williamson, 908 So. 2d 154, 157 (Miss. Ct. App. 2005) (acknowledging that Mississippi accepts all three approaches to valuation), *cert. denied*, 2005 Miss. LEXIS 477 (Miss. 2005).

[177] 7A NICHOLS ON EMINENT DOMAIN § G13.02[2], at G13-4.

[178] McKinney Indep. Sch. Dist. v. Carlisle Grace, Ltd., 222 S.W.3d 878, 886 (Tex. Ct. App. 5th Dist. 2007) ("[C]omparable sales are just that; they are not required to be identical….") (citations omitted), *petition for review filed*, Aug. 8, 2007.

[179] State Highway Comm'n v. McNiff, 395 P.2d 29, 31 (Wyo. 1964) (citation omitted).

[180] State Road Comm'n v. Wood, 22 Utah 2d 317, 320, 452 P.2d 872, 874 (1969).

[181] Trowbridge Partners, L.P. v. Miss. Transp. Comm'n, 954 So. 2d at 940 (citation omitted).

[182] State Road Comm'n v. Wood, 22 Utah 2d 320, 452 P.2d 874 (footnote omitted).

[183] Trowbridge Partners, L.P. v. Miss. Transp. Comm'n, 954 So. 2d 940.

[184] EATON, *supra* note 42, at 198 (stating that "[e]vidence of comparable sales has been admitted in nearly all jurisdictions, but the reasons for admitting such evidence vary"); *see also* City of Portland v. Therrow, 230 Or. 275, 281, 369 P.2d 762, 765 (1962).

[185] 7A NICHOLS ON EMINENT DOMAIN § G13.02[3], at G13-7. *See* Honolulu v. Bishop Trust Co., 48 Haw. 444, 462–63, 404 P.2d 373, 385 (1965), stating that evidence of comparable sales may be admitted "upon two separate theories and for two distinct purposes") (citation omitted).

[186] EATON, *supra* note 42, at 199.

[187] 7A NICHOLS ON EMINENT DOMAIN § G13.02[3], at G13-7.

by an expert as to the value of the property taken."[188] In an instance, when "evidence of sales of similar property is offered not as substantive proof of value, but merely in support of, and as background for, the opinion of an expert as to the value of the land in question," the requirement of foundation for the evidence is not as "strict."[189] For example, in *Department of Transportation v. Brannan,*[190] the court held that although the transportation department argued that "the jury was not authorized to use the comparable sales in determining the value of the acquired land…it was not inappropriate for the sales to have been presented to the jury because the sole purpose for the evidence was to state the factual basis of the expert's opinion…."[191] Thus, "[t]he modern trend has been to liberalize the admission of comparable sales, especially when presented in support of an expert's opinion of value, relying on vigorous cross-examination on the facts surrounding the comparable sales to impeach that expert's opinion of value."[192]

Although it may not matter to an appraiser whether evidence of comparable sales is admitted as direct evidence or as support for his or her opinion, there is a practical consideration, as courts "will often rule on the comparability of a sale, as a matter of law, before the appraiser is allowed to testify to the price of the comparable."[193] The condemnation attorney must be aware of local practice regarding whether evidence of comparable sales is admissible into evidence "by pretrial conference, motions in limine, voir dire of the expert, proffer, objection at the time of presentation, motions to strike or some other local practice."[194] Indeed, there may be a local rule that limits the number of comparable sales.[195] Of course, with respect to testing the admissibility or credibility of the opinion of an expert witness on valuation it is proper to inquire into the expert's knowledge of voluntary sales of comparable property in the vicinity of the property.

In sum, the primary concern is with what constitutes a comparable sale.[196] Sales of property located near the one involved in the case and reasonably close to the time of the taking are admissible to aid the trier of fact in determining the compensation to which an owner is entitled. Whether sales are sufficiently close in time to the taking of the property to be fairly comparable to the subject property usually is a matter committed to the discretion of the trial judge.[197] The court may permit an attorney considerable latitude concerning what constitutes comparable sales and leave it to the opposing party to show by cross-examination or otherwise any differences in the comparables.[198] Moreover, "[a] trial court's determination of the acceptability of sales as comparables will not be reversed in the absence of clear error."[199]

H.2. Application of the Comparable Sales Approach

H.2.a. Comparable Size

Although a difference in the size of parcels does not necessarily make a sale not comparable, clearly size is a factor that makes one sale different from another.[200] Whether a sale of different size is comparable depends on many circumstances. For example, in *Township of Wayne v. Cassatly,*[201] a case involving the taking of a 40-acre parcel, the court upheld the trial court's exclusion of various sales. First, as to one sale, it "really consisted of two sales separated by about nine months. One sale involved somewhat over ten acres, and the other in excess of eight acres."[202] Second, as to other sales properly excluded, they were "parcels located in other municipalities and counties, at substantial distance from the subject property, and had as their only similarity the fact that they were located near major shopping centers."[203]

In a South Carolina case, sales of property from the same 160-acre tract ranging from to 1.8 to 2.57 acres were held not to be comparable to the 8.87 acres that the state was condemning.[204] In an Iowa case in which

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[188] Honolulu v. Bishop Trust Co., 48 Haw. 444, at 462, 404 P.2d 373, at 385 (*quoting* United States v. Johnson, 285 F.2d 35, 40–41 (9th Cir. 1960) (internal quotation marks omitted).

[189] *Id.* at 463, 404 P.2d 385 (*quoting Johnson*, 285 F.2d at 40–41).

[190] 278 Ga. App. 717, 629 S.E.2d 481 (2006), *cert. denied*, 2006 Ga. LEXIS 720 (Ga. 2006).

[191] *Id.* at 719, 629 S.E.2d 483.

[192] 7A NICHOLS ON EMINENT DOMAIN § G13.02[3], at G13-9.

[193] EATON, *supra* note 42, at 199.

[194] 7A NICHOLS ON EMINENT DOMAIN § G13.02[3], at G13-10.

[195] *Id.* § G13.04, at G13-20.

[196] Rademann v. State Dep't of Transp., 252 Wis. 2d 191, 209, 642 N.W.2d 600, 608 (Wis. Ct. App. 2002) (stating that "income evidence is never admissible where there is evidence of comparable sales") (citation omitted), *review denied*, 254 Wis. 2d 261, 648 N.W.2d 476 (2002).

[197] *Id.* at 204, 642 N.W.2d 606.

[198] State Road Comm'n v. Wood, 22 Utah 2d 320, 452 P.2d 874 ("Because of the responsibility of the trial judge as the authority in charge of the trial, he is allowed considerable latitude in his judgment upon the matter; and his ruling should not be disturbed unless it appears he was clearly in error, and that this redounded to the prejudice of the complaining party.").

[199] Rademann v. State DOT, 252 Wis. 2d 204, 642 N.W.2d 606 (citation omitted).

[200] Bd. of Trustees of the Univ. of Ill. v. Shapiro, 343 Ill. App. 3d 943, 952, 799 N.E.2d 383, 390 (Ill. Ct. App. 1st Dist. 2003) (stating that "[e]vidence of the sale of improved property is inadmissible as a comparable sale of a vacant property unless the properties are otherwise closely comparable in size, use, zoning and locale") (citation omitted).

[201] Township of Wayne v. Cassatly, 137 N.J. Super. 464, 349 A.2d 545 (N.J. Super. Ct. 1975).

[202] *Id.* at 470, 349 A.2d at 548.

[203] *Id.*

[204] S.C. State Highway Dep't v. Estate of League, 251 S.C. 368, 374, 162 S.E.2d 532, 534 (1968) (stating that "[t]he dissimilarities between the parcels [involved] in the prior sales and the land being acquired in this proceeding, especially as to

the state condemned 17 acres of a farm, the court agreed that it was difficult to find comparable sales but held that it was proper to admit evidence of comparable sales, which included a sale of 160 acres that was 13 mi from the property, a sale of unspecified size that was 15 mi from the property, and a sale of 320 acres of unspecified distance from the property.[205] Furthermore, it has been held that "sales of several parcels of land from one-half to five acres for residential purposes in the vicinity of the plaintiffs' farm" were comparable to 5.5-acre and 12.4-acre tracts being taken by condemnation.[206]

In *Trowbridge Partners, L.P., supra,* the court agreed with the trial court's determination that the appraiser "considered seven comparable sales, with similar qualities to the sale in question, to determine the fair market value of the property…."[207] Thereafter, the appraiser "made positive adjustments for size to the comparable sales that involved larger tracts of land than the condemned property…."[208] In the determination of value, the appraiser "relied solely upon the comparable sales that were similar in size to the remaining parcels" [and] because he "did not consider the comparable sales involving larger tracts of land," the appraiser did not make adjustments to the properties for size.[209]

In a California condemnation of property for airport expansion, the court upheld the admission of evidence of leased properties at other airports. In doing so the court recognized that "there is an obvious danger in admitting evidence as to the rental value of larger parcels; their greater size may make them more flexible and valuable, even in terms of price per-unit of surface area, than the condemned land."[210] The court held, however, that when leases are admitted into evidence regarding parcels smaller than the owner's land, "it is the defendant's parcel which, due to its size, might be more valuable per-unit of surface area. Consequently, it has been held that transactions in property of smaller sizes are not per se noncomparable."[211]

H.2.b. Distance from the Property

Another important factor to consider is the distance between properties. For example, in addition to the above cases in which the courts also considered distance from the subject property, a New Jersey court held that sales of properties, which differed materially in size from the subject property and were located from 3 to 22 mi from the property being condemned, were not comparable sales.[212]

H.2.c. Proximity in Time to the Taking

The closer a sale is to the date of the taking of the condemned property the more relevant the sale is, but "there is 'considerable latitude in the exercise of discretion by the lower court in determining comparable sales….'"[213] In Maryland, for example, "'the comparable sales approach estimates market value by looking to recent voluntary sales transactions involving properties similar to the subject property, and adjusts for any differences between each comparable property sold and the subject property.'"[214] Nevertheless, "Maryland has adopted as a 'rule of thumb' the 'five year–five mile' rule; that is, sales concluded more than five years prior to the date of the taking and those more than five miles from the property can be excluded."[215] In Maryland, however, experts still may adjust more "remote in time sales…for time by use of the consumer price index…in very limited circumstances…absent the availability of alternative, preferable methods."[216] Other courts may find that comparable sales that are not close to the date of taking are too remote to be admissible. As one court has stated, it must be shown that the purchases were very recent and "that values have not changed in the area since the purchase" for evidence of comparable sales to be admissible.[217]

H.2.d. Sales After the Date of Taking

Typically, an expert must use sales of comparable property prior to the date of the taking. However, in some circumstances, it may be possible for an expert to rely on a sale or sales after the date of the taking, if uninfluenced by the condemnation, and make upward or downward adjustments based on inflation. Indeed, sales 5 months and not more than 20 months after the date of valuation have been held to be admissible.[218]

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size and commercial advantages due to location, were sufficient to justify and sustain the rulings of the trial judge").

[205] Perry v. Iowa State Highway Comm'n, 180 N.W.2d 417, 419–20 (Iowa 1970).

[206] Van De Hey v. Calumet County, 40 Wis. 2d 390, 394, 161 N.W.2d 923, 925 (1968).

[207] Trowbridge Partners, L.P. v. Miss. Transp. Comm'n, 954 So. 2d at 940.

[208] *Id.*

[209] *Id.*

[210] City of Ontario v. Kelber, 24 Cal. App. 3d 959, 971, 101 Cal. Rptr. 428, 436 (Cal. App. 4th Dist. 1972).

[211] *Id.* (citation omitted).

[212] Township of Wayne v. Cassatly, 137 N.J. Super. at 470, 349 A.2d at 548–49.

[213] Bern-Shaw Ltd. P'ship v. Mayor & City Council, 377 Md. 277, 292, 833 A.2d 502, 511 (2003) (citation omitted).

[214] *Id. (citing* Wash. Suburban Sanitary Comm'n v. Utils., 365 Md. 1, 10 n.5, 775 A.2d 1178, 1183 n.5 (2001)).

[215] *Id.* at 292–93, 833 A.2d at 511 (*quoting* Taylor v. State Roads Comm'n, 224 Md. 92, 167 A.2d 127 (1961) and *citing* State Roads Comm'n v. Adams, 238 Md. 371, 209 A.2d 247 (1965); Maryland Pattern Jury Instructions, MPJI-Cv 13:3(c)(3)(c) (4th ed. 2002)).

[216] *Id.* (*citing* Colonial Pipeline v. Gimbel, 54 Md. App. 32, 456 A.2d 946 (Md. Ct. Sp. App. 1983)).

[217] *Id.* at 294, 833 A.2d at 512 (holding that in a case involving a taking in 2000, a "1982 sale, unadjusted to present value, was not 'recent' enough to have had any measure of probity").

[218] Burchell v. Commonwealth, 350 Mass. 488, 490, 215 N.E.2d 649, 651 (1966) (stating that a statement in the applicable statute at the time that

However, sales after the date of valuation also have been ruled inadmissible, such as a sale made 2 years later.[219]

H.2.e. Sales to the Condemnor

As noted by one authority, "[b]efore a property can be considered a comparable, the appraiser must ensure that the sale was an *open market transaction.*"[220] Comparable sales must have been voluntary arms-length sales; that is, the owner of a comparable property must have sold the land "freely and not under compulsion."[221] The majority rule is that sales made to an agency with the power of eminent domain are not admissible because they are not considered to be open-market transactions.[222]

For example, a recent opinion by the North Carolina Court of Appeals states that

> [t]he majority rule is "that evidence as to the price paid by the same or another condemning agency for other real property which, although subject to condemnation, was sold by the owner without the intervention of eminent domain proceedings, is rendered inadmissible to prove the value of the real property involved merely because the property was sold to a prospective condemnor."[223]

The court explained that

> [t]he rationale is that a sale to a prospective condemnor is in effect a forced sale; that at best it represents a compromise and consequently furnishes no true indication of the price at which the property could be sold in the open market to a "willing buyer"; that the condemnor may pay more in order to avoid the expense and uncertainty of the condemnation proceeding, while the seller may accept less in order to avoid the same or similar burdens. This reasoning also applies to amounts paid by a condemnor for neighboring land taken for the same project—however similar the lands may be—whether the payment was made as the result of a voluntary settlement, an award, or the verdict of a jury.[224]

Although another court states that "[j]urisdictions are split on the issue of whether a purchaser's power of eminent domain by itself renders a sale compulsory and not voluntary,"[225] some courts have permitted the use of such sales on the basis that the identity of the purchaser—an agency with the power to condemn—goes to the weight of the evidence and not its admissibility.[226] According to a 2006 Michigan decision, Michigan follows the "minority approach" that sales to a condemnor are not inadmissable.[227] The court observed that "[o]ther jurisdictions…have recognized that purchases by public bodies are not inevitably tainted with threats of compulsion" and that some states do not regard the power of condemnation "as a 'club' held by [the] government" but as a "'defense against extortion' by government."[228] Thus, in Michigan and other states, such as Hawaii, following the minority rule,

> [t]he admissibility of such evidence as to its probative value weighed against elements of compulsion, coercion,

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> "[t]he damages for property taken under this chapter shall be fixed at the value thereof before the recording of the order of taking…" *does not bar the admission of evidence of subsequent sales* which the judge, without abuse of discretion, rules to be material as the value at the time of taking)

(*citing* Roberts v. Boston, 149 Mass. 346, 21 N.E. 668, 670 (1889) (emphasis supplied).

[219] Booras v. Iowa State Highway Comm'n, 207 N.W.2d 566, 567 (Iowa 1973). *See In re Condemnation of 23.015 Acres*, 895 A.2d 76 (Pa. Commw. Ct. 2006), *appeal denied*, 590 Pa. 670, 912 A.2d 839 (2006), in which the Commonwealth Court noted that under 26 P.S. § 1-705(2)(i):

> (2) A qualified valuation expert may testify on direct or cross-examination in detail as to the *valuation of the property on a comparable market value*, reproduction cost or capitalization basis, which testimony *may include* but shall not be limited to the following:
>
> (i) The price and other terms of any sale or contract to sell the condemned property or *comparable property* made within a reasonable time *before or after the date of condemnation*.

8 95 A.2d, at 83, n.5 (emphasis supplied).

[220] Eaton, *supra* note 42, at 204 (emphasis in original) (identifying seven conditions that normally, but not always, must be met for a sale to be considered a voluntary sale).

[221] Bd. of Pub. Bldgs. v. GMT Corp., 580 S.W.2d 519, 523 (Mo. App. E. Dist. 1979).

[222] Pinczkowski v. Milwaukee County, 286 Wis. 2d 339, 352, 706 N.W.2d 642, 648 (2005) (stating that "'the price paid in settlement of condemnation proceedings, or the price paid by the condemnor for similar land, even if proceedings had not been begun, where the purchaser has the power to take by eminent domain, is not admissible'" and that "[t]his general rule of inadmissibility is firmly rooted in market principles and logic") (citation omitted); Miss. Transp. Comm'n v. Williamson, 908 So. 2d 154, 158 (Miss. Ct. App. 2005) (noting that sales of properties made to agencies vested with the power of eminent domain cannot be used as comparable sales because such exchanges are more akin to compromises), *cert. denied*, 920 So. 2d 1008 (Miss. 4, 2005); City of Austin v. Capitol Livestock Auction Co., Inc., 434 S.W.2d 423, 438 (Tex. Ct. Civ. App. 3d Dist. 1968).

[223] City of Charlotte v. Ertel, 170 N.C. App. 346, 349, 612 S.E.2d 438, 441, 442 (N.C. Ct. App. 2005).

[224] *Id.* at 350, 612 S.E.2d at 442.

[225] *Phoenix Redevelopment Corp.*, 812 S.W.2d 881, 884 (Mo. Ct. App. 1991).

[226] Honolulu Redevelopment Agency v. Pun Gun, 49 Haw. 640, 642, 426 P.2d 324, 325 (1967) (stating that "we think the better view is that *such evidence should not be automatically excluded as a matter of law*" and that

> [i]f it can be shown to the satisfaction of the trial court that the price paid was sufficiently voluntary to be a reasonable index of value, or that there is a necessity for the evidence because the only sales of comparable property in the area in recent years have been to the condemnor, such evidence should be admitted)

(emphasis supplied) (citations omitted).

[227] City of Detroit v. Detroit Plaza Ltd. P'ship, 273 Mich. App. 260, 730 N.W.2d 523 (Mich. Ct. App. 2006), *appeal denied*, 478 Mich. 925, 733 N.W.2d 42 (2007) (*following* Honolulu Redevelopment Agency v. Pun Gun, 49 Haw. 640, 426 P.2d 324 (1967)).

[228] 273 Mich. App. at 280–81, 730 N.W.2d at 534–35 (citation omitted).

> or compromise [should be] left to the trial court in its discretion so that the jury may be placed in the best position to pass upon the ultimate question of fact," and … therefore, "evidence of other sales to a condemnor used in support of an expert witness' opinion is admissible in the discretion of the trial court.[229]

A slightly different approach seems to be illustrated by *Phoenix Redevelopment Corp., supra,* in which the court stated that in Missouri the rule is that

> the price of property sold to a purchaser with the power of eminent domain is admissible EXCEPT when (1) the offeror's own evidence shows the sales were made after condemnation proceedings started; or (2) there is evidence from which a trial judge reasonably should have concluded that the sale was not voluntary; or (3) the opposing party produces other evidence that the sale was not voluntary.[230]

Finally, there is authority holding that if an agency with the power of eminent domain uses a straw man to acquire property and the real purchaser is later identified, the sale should not be admitted into evidence.[231]

H.2.f. Sales of Property With Different Zoning or Uses

The zoning classification of a property is an essential component of its value.[232] An issue that may arise is whether a property that is zoned differently from the subject property is still a comparable property.[233] A difference in zoning does not always render a sale one that is not a comparable sale. For example, the Illinois Supreme Court has held that zoning differences do "not render other types of evidence of value inadmissible."[234]

As stated previously, because no two properties are alike, expert witnesses must make adjustments for the differences in the properties.[235] However, one court rejected the use of adjusted *commercial* sales to value properties primarily used for *industrial* purposes.[236] The court stated that "[t]o permit a witness…to relate to the jury sales of tracts obviously not similar, and then 'adjust' these sales and the prices paid to the opinion of the witness so as to call them 'comparable' is to set up an unlimited artificial standard by which almost any conceivable sale could be 'adjusted' so as to be made available in support of opinion as to value."[237]

Another difficulty that may arise is an attempted comparison of vacant land with improved land. The problem with comparing sales of improved property with sales of unimproved property is that prices are either facts or they are not. For example, without evidence in the deed showing how much was paid for a parcel of land and how much was paid for a building thereon, it is not possible without the testimony of a seller or purchaser to establish what the purchaser paid only for the land to enable an appraiser to compare the price of the land with the land being condemned.

In *State ex rel. State Highway Commission v. Klipsch,*[238] the Missouri Supreme Court made clear that in Missouri "a witness may not testify as to his opinion of the value of comparable land."[239] What the rule means is:

> [T]he "witness cannot state his opinion of the value of neighboring land. If the price at which such land was sold is in evidence and bears against his own contention, he may, within reasonable limits, point out the difference between the two lots, but he cannot state his opinion upon the effect of the differing features or upon the elements of value of the two lots. The rule is strict; if the jury is to be aided by evidence in regard to property similarly situated, it must be by facts and not by opinions."[240]

However, a more recent appellate court opinion in *City of Lee's Summit v. R & R Equities, LLC*[241] states that

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[229] *Id.* at 281, 730 N.W.2d at 535 (citation omitted).

[230] *Phoenix Redevelopment Corp.*, 812 S.W.2d at 884 (emphasis in original) (holding that the trial court erred in allowing the condemnee but not the corporation to admit into evidence comparable sales figures derived from properties located in the same neighborhood and sold under the threat of condemnation) (citation omitted).

[231] *See* City of Chicago v. Ave. State Bank, 4 Ill. App. 3d 235, 239, 281 N.E.2d 66, 69 (1972) (stating that as to the issue of whether "the sellers knew that the Illinois Bell Telephone Company was the actual purchaser…the court acted well within the bounds of reasonable discretion in rejecting [the] evidence").

[232] Maritimes & Ne. Pipeline, L.L.C. v. 0.714 Acres of Land, 2007 U.S. Dist. LEXIS 62930, at *14.

[233] Township of Wayne v. Cassatly, 137 N.J. Super. at 470, 349 A.2d at 548 (excluding comparable sales where zoning was one factor); City of Chicago v. Albert J. Schorsch Realty Co., 127 Ill. App. 2d 51, 73, 261 N.E.2d 711, 721 (Ill. App. 1st Dist. 1970) (holding that "defendants were not prejudiced by the court's exclusion of their zoning exhibits…[as] [t]hey were in fact permitted to present their theory of a reasonable probability of rezoning to the jury"), *cert. denied*, 402 U.S. 908, 91 S. Ct. 1381, 28 L. Ed. 2d 649 (1971).

[234] Metro. Sanitary Dist. of Greater Chicago v. Indust. Land Dev. Corp., 121 Ill. App. 2d 393, 393, 257 N.E.2d 532, 533 (Ill. App. 1st Dist. 1970).

[235] *See* R.I. Props. v. Providence Redevelopment Agency, 2003 R.I. Super. LEXIS 19 (R.I. Super. 2003), and R.I. Props. v. Providence Redevelopment Agency, 2003 R.I. Super. LEXIS 19 (R.I. Super. 2003) (involving adjustments for a potential retail and commercial property and three comparable sales of properties to account for differences between the property and the comparables).

[236] State v. Cloud Constr. Co., 476 S.W.2d 395 (Tex. Ct. Civ. App. 3d Dist. 1972).

[237] *Id.* at 398 (affirming the trial court's decision that even though there was error in the court's admission of testimony concerning the value of land, which was not comparable to the appellee's land, the amount awarded the appellee was well within the range of admissible testimony on value) (citation omitted).

[238] 392 S.W.2d 287 (Mo. 1965).

[239] *Id.* at 290 (citation omitted), characterizing this as the "Massachusetts Rule."

[240] *Id.* (citations omitted).

[241] 112 S.W.3d 38 (Mo. App. W. Dist. 2003), *rehearing denied*, 2003 Mo. App. LEXIS 1170 (Mo. Ct. App. W. Dist. 2003).

> [b]asing an opinion of [an] unimproved property's value on a comparison with the sale of [an] improved property is neither absolutely right nor absolutely wrong. Because no two properties are exactly alike, using a sale of improved, but otherwise comparable, property to determine the value of unimproved property is permissible so long as, as a matter of law, the properties are sufficiently similar that the sale assists the jury in determining the condemned property's fair market value.[242]

Thus, "[t]he degree of similarity is the determining factor. 'The question becomes how improved must the sale [of the improved property] be to warrant its exclusion.' If the properties are sufficiently similar, any differences between them go to weight rather than to admissibility."[243]

In *City of Lee's Summit, supra,* the court agreed, however, with the city that the owner's expert improperly compared the sale of improved property with the owners' unimproved property. Even though the witness testified that the improvements on the improved property did not add to the land's value, the court agreed that the witness used "improper opinion-on-opinion evidence."[244] The court held that the use of church property was not a proper comparable sale because it was markedly dissimilar in character from the owners' property.[245]

H.2.g. Use of Non-Cash Sales as Comparable Sales

It has been held that "bona fide offers to purchase property for cash, in the absence of evidence of comparable sales, are some evidence of fair cash market value."[246] Although sales must be for cash, the price may have been paid partly in cash with the balance in the form of a mortgage.[247] Although most jurisdictions also allow evidence of sales that were installment sales,[248] a comparable sale must have been made for money and not wholly or partially for consideration other than money, such as an exchange for other property.[249]

For example, in *Reynolds v. Coleman,*[250] the court held that a "transaction was not a 'sale' capable of evidencing the fair market value of the [property] as a matter of law. The evidence…clearly demonstrates that the…transaction was part of a complex arrangement involving a tax shelter syndication and was not a conveyance of property to a typical purchaser from a typical seller."[251] Such a transaction is not one that is "governed by…open market considerations."[252]

H.2.h. Adjustments to Comparable Sales

The best comparable sales are those that require "the fewest adjustments to equalize them to the property under appraisal."[253] With respect to the adjustment of comparable sales, "when the comparable is inferior to the subject property, the comparable is adjusted upward to reflect its inferior characteristic."[254] Moreover, sales may be adjusted in the following suggested sequence based on the property rights conveyed, financing, conditions of sale, expenditures made immediately after purchase, market conditions, location, physical characteristics, economic characteristics, use/zoning, and nonrealty components of value.[255]

An expert witness must identify the factors that affected his or her judgment regarding adjustments and show on a percentage or dollars-and-cents basis how the comparables were adjusted;[256] the failure to do so may result in a reversal.[257] In appraising the value of a build-

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[242] *Id.* at 40–41 (citations omitted).

[243] *Id.* at 41 (citation omitted) (internal quotation marks omitted).

[244] *Id.* at 40.

[245] *Id.* at 42.

[246] Village of Lake Villa v. Stokovich, 211 Ill. 2d 106, 134, 810 N.E.2d 13, 30 (2004), *rehearing denied*, 2004 Ill. LEXIS 999 (Ill. 2004), *cert. denied*, 543 U.S. 943, 125 S. Ct. 354, 160 L. Ed. 2d 256 (2004).

[247] Ark. State Highway Comm'n v. Rhodes, 240 Ark. 565, 567, 401 S.W.2d 558, 560 (1966) (noting for example that "[t]he witness carefully explained to the jury that in the 1959 sale for $57,500.00, the purchase price had been $10,000.00 cash and a mortgage for $47,500.00," a sale that was "in all respects admissible").

[248] EATON, *supra* note 42, at 205.

[249] The City of Cheyenne v. Frangos, 487 P.2d 804, 805 (Wyo. 1971) (reversing but not addressing one of the city's arguments, which was that some sales were actually "trades"); Dep't of Bus. and Econ. Dev. v. Baumann, 56 Ill. 2d 382, 384, 308 N.E.2d 580, 581 (1974) (stating that "evidence offered to prove a comparable sale must show that the sale was for money, and not wholly or partially for a consideration other than money, such as an exchange of land").

[250] 173 Ill. App. 3d 585, 527 N.E.2d 897 (1988).

[251] *Reynolds,* 173 Ill. App. 3d at 595, 527 N.E.2d at 904.

[252] *Id.*

[253] Eaton, *supra* note 42, at 204.

[254] Maritimes & Ne. Pipeline v. 0.714 Acres of Land, L.L.C., 2007 U.S. Dist. LEXIS 62930, at *14.

[255] *Id.*

[256] Cheyenne v. Frangos, 487 P.2d 804, at 807 (holding that although

> the witness stated…his method took into account inflation, availability of land, and the commercial use to which the land could be utilized…we are forced to conclude…that this expert erroneously reached his result mechanically since he did not make adjustments for prices of the properties more or less similar to that here taken)

(*citing* Latham Holding Co. v. State, 16 N.Y.2d 41, 46, 261 N.Y.S.2d 880, 883, 209 N.E.2d 542, 544 (1965) (stating also that

> an expert cannot reach his result mechanically by a mere mathematical process by averaging front footage sales prices of parcels having obvious differences one from another as denoted by their locations and sales prices, without making adjustments for the prices of those that are more similar or dissimilar to the one in question).

[257] Geffen Motor, Inc. v. State of New York, 33 A.D. 2d 980, 307 N.Y.S.2d 389, 390 (N.Y. App. 4th Dep't (1970) ("The claimant's appraiser did not give a dollar and cents adjustment in any instance between the comparable and the subject land; neither did he give a breakdown percentage-wise nor state the

ing, an expert must "'present[] the court with a report of the sales of comparable properties and a breakdown depicting how much of the purchase price was allocated to the land and how much to the buildings.'"[258] Although the averaging of the sales prices of comparables usually is not allowed, there is some authority supporting the averaging of sales prices.[259]

An appraiser must "estimate[] the degree of similarity or difference between the subject property and comparable sales by considering various elements of comparison…."[260] The appraiser must make "[adjustments] to the sale prices of the comparables because the values of the comparables are known, while the value of the subject property is not known. Through this comparative procedure, the appraiser estimates one or more kinds of value as of a specific date."[261] After making the necessary adjustments, the appraiser must "correlate" the values "into a final value estimate for the property being appraised. This correlated value is *not* an average of the various value indications developed."[262]

I. ADMISSIBILITY AND USE OF THE INCOME CAPITALIZATION APPROACH

I.1. Admissibility of the Income Approach

As discussed in more detail in § H.2, *infra*, the income capitalization approach values property based upon the present day worth of the stream of income the property is expected to produce.[263] Although many jurisdictions have recognized that the income capitalization approach is acceptable, particularly in cases involving farm land and land with minerals in place,[264] with respect to other situations there appear to be some fairly well-accepted rules concerning when the approach may or may not be used. First, the courts generally have rejected the use of the income approach if there is evidence of comparable sales.[265] Second, "'[t]he capitalization of income approach is used to value income-producing property when it is completely taken.'"[266] Therefore, the "[u]se of the income method in a case of partial taking is improper,"[267] as it is when "only land and improvements are taken and the business is continued."[268] Third, "'[i]ncome cannot be capitalized to produce a residual value where the appropriated land is neither producing income nor equipped to do so.'"[269] There are other situations in which the income approach may not be permitted, such as in the valuation

factors which entered into his judgment. His failure to do so affords no basis for review of his testimony and it is insufficient to justify an award.") (citations omitted); Paterson Redevelopment Agency v. Bienstock, 123 N.J. Super. 457, 459, 303 A.2d 598, 599 (N.J. Super. Ct. 1973) (reversing when "the plaintiff's expert was completely unaware of the damaged condition of the building and, when it was disclosed at trial, made no adjustment on account of it, the trial court declined to instruct the jury to disregard the sale") (citation omitted).

[258] Mastrobuono v. Providence Redevelopment Agency, 850 A.2d 944, 947 (R.I. 2004) (citation omitted).

[259] Sun-Lite P'ship v. Town of West Warwick, 838 A.2d 45, 48 (R.I. 2003) (affirming and holding that, notwithstanding Sun-Lite's argument on appeal that the trial justice erred by averaging the adjusted values of certain comparables, "[t]he appraisal process is designed to adjust for the differences between properties in order that valuations of dissimilar properties may be compared").

[260] *Id.* (quoting the appraiser's testimony) (internal quotation marks omitted).

[261] *Id.* at 48–49 (quoting the appraiser's testimony) (internal quotation marks omitted).

[262] Eaton, *supra* note 42, at 225 (emphasis in original) (noting that the averaging of the values of the comparable sales is a "faulty procedure").

[263] *See* Eaton, *supra* note 42, at 194 (stating that "[t]he income capitalization approach is a procedure…that acknowledges that a relationship exists between the amount of net income a property can produce and its market value.… [C]apitalization theory has been modified and expanded more than any other concept within the appraisal process").

[264] Marseilles Hydro Power, LLC v. Marseillers Land and Water Corp., 2004 U.S. Dist. LEXIS 25276 at *1 (income approach rather than the cost approach applied); Willsey v. Kansas City Power & Light Co., 6 Kan. App. 2d 599, 603, 631 P.2d 268, 272 (1981) (stating that "[a]n expert witness may take the gross profit from a business and reduce it to rent and then capitalize the rent for the purpose of arriving at the value of the property on which the business is located"); Dep't of Pub. Works and Bldgs. v. Brockmeier, 128 Ill. App. 2d 395, 262 N.E.2d 345, 348 (1970) (income from a sod-producing farm); Salt Lake County v. Kazura, 22 Utah 2d 313, 316, 452 P.2d 869, 871 (1969) (the court not accepting "the plaintiff's…argument that the evidence of projected income of the hotel is so uncertain and conjectural that estimates of value in which it was used should have been rejected"); Boring v. Metro. Edison Co., 435 Pa. 513, 521, 257 A.2d 565, 569 (1969) (stating that an appraiser's setting a specific value on a lease conveyed the impression that "this specific amount was lost by the Condemnees by virtue of the condemnation and was recoverable as a separate item of damages") (citation omitted).

[265] Lataille v. Hous. Auth. of City of Woonsocket, 109 R.I. 75, 77, 280 A.2d 98, 99 (1971).

[266] W.R. Assocs. v. Comm'r of Transp., 751 A.2d 859, 867 (Conn. Super. 1999) (*quoting* State *ex rel.* Highway & Transp. Comm'n v. Edelen, 872 S.W.2d 551, 557 (Mo. App. E. Dist. 1994) (internal quotation marks omitted). *See also* State *ex rel.* State Highway Comm'n v. Mann, 624 S.W.2d 4, 10 (Mo. 1981) (en banc) (stating the "use of the capitalization of income method where there is a partial taking is speculative").

[267] 751 A.2d at 867 (*quoting* State *ex rel* Highway & Transp. Comm'n v. Kuhlmann, 830 S.W.2d at 571) (internal quotation marks omitted). *See also* Humble Oil & Refining Co. v. State, 15 A.D. 2d 686, 223 N.Y.S.2d 448 (N.Y. App. 3d Dep't 1962) ("Where there is a complete taking, the capitalization method is proper…but here where there is only a partial taking there is no basis for the application of such a method."), *aff'd,* 12 N.Y.2d 861, 187 N.E.2d 791, 237 N.Y.S.2d 338 (1962).

[268] 751 A.2d at 867 (*citing* State v. Lewis, 142 So. 2d 652, 656 (La. App. 1st Cir. 1962)).

[269] 751 A.2d at 867 (*quoting* Lucre Corp. v. Gibson, 657 N.E.2d 150, 153 (Ind. App. 4th Dist. 1995), *cert. denied*, 519 U.S. 950, 117 S. Ct. 362, 136 L. Ed. 2d 253 (1996)).

of churches[270] or hotels[271] or other special-use properties; when the appraiser did not capitalize the income but merely applied a discount factor to the income;[272] or when the income is deemed to be unstable.[273]

In *West Haven Housing Authority v. CB Alexander Real Estate, LLC,*[274] the court stated that in using the income capitalization approach the appraiser must:

> (1) estimate gross income; (2) estimate vacancy and collection loss; (3) calculate effective gross income (i.e., deduct vacancy and collection loss from estimated gross income); (4) estimate fixed and operating expenses and reserves for replacement of short-lived items; (5) estimate net income (i.e., deduct expenses from effective gross income); (6) select an applicable capitalization rate; and (7) apply the capitalization rate to net income to arrive at an indication of the market value of the property being appraised. …The process is based on the principle that the amount of net income a property can produce is related to its market value. …This approach only has utility where the property under appraisal is income producing in nature. [275]

If the Model Eminent Domain Code is used as a guide, a "valuation witness may consider actual or reasonable net income attributable to the property when used for its highest and best use, capitalized at a fair and reasonable interest rate."[276] An appraiser must consider what the property would generate in annual gross rental income if the property were rented completely. The property's rent must be compared with rental income from similar properties.[277] In most instances an expert will determine the reasonable, annual, rental value of the property and, thereafter, subtract for items such as operating expenses, taxes, and vacancy rate to arrive at a net figure.[278] Based on the resulting analysis, "the appraiser estimates the economic, or market rent applicable to the property…."[279] The estimate of present worth is the amount that a willing buyer would pay for the right to receive the stream of income generated by the property.[280]

The majority view is that actual rent earned by real estate is to be used to estimate value or to be considered as one factor in arriving at an appraiser's reconstructed operating statement income.[281] "[H]owever, …the in-

[270] City of Baltimore v. Concord Baptist Church, Inc., 257 Md. 132, 141, 262 A.2d 755, 760 (1970) (stating that the "experts…conceded that capitalization of income is an inappropriate approach and all save the City's expert agreed that comparable sales are virtually unavailable for use in the appraisal of church property").

[271] Chicago Land Clearance Comm'n v. Darrow, 12 Ill. 2d 365, 373, 146 N.E.2d 1, 6 (1957) (holding that the trial court properly excluded owners' offer to prove the gross income, expenses, and net income from the operation of the hotel).

[272] Boring v. Metro. Edison Co., 435 Pa. 513, 521, 257 A.2d 565, 569 (1969).

[273] Saunders v. State, 70 Nev. 480, 483, 273 P.2d 970, 971 (1954).

[274] W. Haven Hous. Auth. v. CB Alexander Real Estate, LLC, 2007 Conn. Super. LEXIS 174 (Jan. 16, 2007) (Unrept.), *aff'd*, 107 Conn. App. 167, 944 A.2d 1010 (2008).

[275] *Id.* at *10–11 (citation omitted).

[276] 4 NICHOLS ON EMINENT DOMAIN § 12B.08[4], at 12B-56. The Model Eminent Domain Code "does not preclude admission of evidence that a business being conducted on the property is in fact profitable, if, under the circumstances a prospective purchaser would consider this as a measure of its suitability for business purposes." *Id*.

[277] It should be noted that a "[v]aluation based upon an estimate of the potential income which might be realized from utilization by the owner of the property in a manner of which it is capable (but of which he has not as yet availed himself) has been rejected on the ground that such income is too uncertain and conjectural to be acceptable." *Id.* § 12B.08[2], at 12B-52.

[278] EATON, *supra* note 42, at 194.

[279] *Id*. at 175.

[280] Carroll County Water Auth. v. L.J.S. Grease & Tallow, Inc., 274 Ga. App. 353, 357 n.21, 617 S.E.2d 612, 617 n.21 (2005) (stating that "[t]he income approach is defined as converting reasonable or actual income at a reasonable rate of return (capitalization rate) into an indication of value" and that "'[t]he income approach necessarily takes into account what future earnings would be were the property interest not extinguished") (citations omitted) (internal quotations omitted).

[281] County of Clark v. Sun State Props., Ltd., 119 Nev. 329, 345, 72 P.3d 954, 964 (2003) (Maupin, J., dissenting) (stating that "one such consideration [in making a purchase] is 'the rental value of the property condemned, as well as the actual rent which the property produces, because such elements of value are material in the determination of 'just compensation for the land taken'") (footnote omitted), *cert. denied*, Pyles v. Clark County, 540 U.S. 1177, 124 S. Ct. 1405, 158 L. Ed. 2d 77 (2004); United States v. Corbin, 423 F.2d 821, 824, 825 (1970) (holding in a case in which an owner lacked adequate books and records and both sides had used arbitrary elements in constructing income that the method used was not an improper one); Kozecke v. State, 34 A.D. 2d 599, 600, 308 N.Y.S.2d 488, 490 (N.Y. App. 3d Dep't 1970) (holding that although the state argued that rental value could not be based upon gallonage sold where there was no actual lease between the owner of the fee and the subtenant, "other evidence in the record indicat[ed] a direct relationship between the location of the subject premises and the fair market value resulting from the capitalization of rental values based on gallonage leasing"); Hicks Realty Assocs. v. State, 34 A.D. 2d 866, 310 N.Y.S.2d 825, 826 (N.Y. App. 3d Dep't 1970) (holding that an adjustment by the respondent's appraisers of the actual rentals to a higher figure was not supported by the record), *aff'd*, 32 N.Y.2d 662, 295 N.E.2d 797 (1973); Majal Realty Corp. v. State, 23 A.D. 2d 941, 942, 259 N.Y.S.2d 915, 916 (N.Y. App. 3d Dep't 1965) (holding that an appraisal was not erroneous because actual rent was used instead of economic rent or comparable rent); State v. Hollis, 93 Ariz. 200, 204, 379 P.2d 750, 752 (1963) ("Income from a business must be distinguished from income from the intrinsic nature of the property itself. If the property is rented for the use to which it is best adapted, the actual rent received, capitalized at the rate which local custom adopts for the purpose, forms one of the best tests of value and, accordingly, evidence of rent actually received at a time reasonably near the time of taking should be admitted."); Winepol v. State Roads Comm'n of Md., 220 Md. 227, 230, 151 A.2d 723, 725 (1959) (holding that because

come capitalization method 'can be effective only with thorough data including accurate actual income….'"[282] In a case in which a discounted cash flow analysis (DCF) (discussed below) was accepted, a Connecticut court in discussing the income approach stated:

> There appears to be no dispute in the cases on the propriety of using the income capitalization method in properly providing rental income and the defendant Housing Authority does not dispute use of this approach as such. But as discussed in *Matter of City of Albany*, [136 A.D.2d 818, 523 N.Y.S.2d 652 (App. Div. 1988)] "this method should be carefully scrutinized even where appropriate; therefore while it may be the only usable method under certain circumstances, its use must be based on a foundation which minimizes conjecture and uncertainty"….[283]

Furthermore, "[w]hile actual rentals are not an absolute criterion, nevertheless, where…there is no claim that the leases were improvident or that their terms were unusual, they should be considered in determining rental value."[284]

Assuming the leased income is equal to the economic rental of the property and assuming the property is leased to a responsible tenant on a long-term basis, the leased income approach is available to determine value.[285] Although many courts have approved the approach, some courts have held that it is the only approach that is applicable if the building has been under lease for a long time.[286] Unless a proper foundation for the evidence is offered and some foundation for the figures used is presented, some courts have been unwilling to permit an appraiser to reconstruct an operating statement.[287]

I.2. Derivation of the Income Capitalization Rate

A factor or rate must be developed from market data and applied to the net income of a property to indicate the property's market value. There are two principal methods for deriving the rate of capitalization—a rate

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> [t]here was explicit, competent testimony that, except for the coming of the road, the property would have been available for, and rented as, stores and apartments…[c]apitalization of the income which a property will produce is relevant and pertinent evidence of its value to a willing purchaser…and, so, on its market value)

(citation omitted).

[282] W. Haven Hous. Auth. v. C.B. Alexander Real Estate, 2007 Conn. Super. LEXIS 174, at *11 (citation omitted) (footnote omitted).

[283] *Id.* at *18. *See also* State v. Bare, 141 Mont. 288, 377 P.2d 357, 363 (1962); Dodge, Comm'r of Pub. Works v. Estate of Hiscock, 51 A.D. 2d 652, 378 N.Y.S.2d 202, 203 (N.Y. App. 4th Dep't 1976) (reversing finding in a condemnation case where rental value was based merely on appraiser's statement and where the record did not contain supporting evidence).

[284] Motsiff v. State, 32 A.D. 2d 729, 301 N.Y.S.2d 786, 787 (N.Y. App. 4th Dep't 1969), *aff'd,* 26 N.Y.2d 692, 257 N.E.2d 42, 308 N.Y.S.2d 860 (1970) (citations omitted). *See also* CMRC, Ltd. v. State, 2 A.D. 3d 303, 768 N.Y.S.2d 598 (N.Y. App. 1st Dep't 2003) (holding that the lower court properly valued the building signage at the actual rental), *appeal denied*, 5 N.Y.3d 704, 834 N.E.2d 780 (2005); Riverhead v. Saffals Assocs., Inc., 145 A.D. 2d 423, 424, 535 N.Y.S.2d 389, 390 (N.Y. App. 2d Dep't 1988) (holding that "[t]he actual income generated by the property in question is generally the surest indicator of its value").

[285] *See* discussion in EATON, *supra* note 42, at 174–75 (noting that some courts have rejected the income capitalization approach because the property was not actually rented, whereas other courts hold "that evidence of rental value is admissible even where the owner occupied the property himself and did not actually rent it") (*Id.* at 176).

[286] City of Buffalo v. Migliore, 34 A.D. 2d 334, 335, 312 N.Y.S.2d 142, 143 (N.Y. App. 4th Dep't 1970) (reversing the lower court that had used primarily the market data approach and stating that "[t]he proper method of fixing value would have been capitalization of income [when] [t]he property had been leased to a reputable tenant for many years and was income producing at the time of the appropriation") (citation omitted); State v. Hollis, 93 Ariz. 200, 204, 379 P.2d 750, 752 (1963) ("Income from a business must be distinguished from income from the intrinsic nature of the property itself. If the property is rented for the use to which it is best adapted, the actual rent received, capitalized at the rate which local custom adopts for the purpose, forms one of the best tests of value and, accordingly, evidence of rent actually received at a time reasonably near the time of taking should be admitted."); Honolulu v. Bishop Trust Co., 48 Haw. at 465, 404 P.2d at 386 (stating, however, that "[e]vidence as to long-term leases of property in a great city, or as to the rental value of other property similarly situated, may or may not be competent, depending upon the particular facts of the case."); *In re Port of New York Auth.*, 2 N.Y.2d 296, 301, 159 N.Y.S.2d 825, 826, 140 N.E.2d 740, 741 (1957) (stating that a lease for a rental in excess of the reasonable rental value may be considered as an item of value if the excess is due to the availability of the property for a particular use by the tenant in occupation*);* United States v. Certain Interests in Prop. in Champaign County, 165 F. Supp. 474 (E.D. Ill. 1958) (discussing capitalization of the leasehold interest), *aff'd in part, rev'd in part*, 271 F.2d 379 (7th Cir. 1959); United States v. Certain Interest in Prop. in Monterey County, 186 F. Supp. 167 (N.D. Cal. 1960) (discussing capitalization of leasehold valuation); In re Pub. Schs. 49, Borough of Bronx, City of N.Y., 41 Misc. 2d 654, 656, 246 N.Y.S.2d 715, 717 (N.Y. Sup. Ct. 1963) (noting use of the Inwood tables); United States v. Certain Interests in Prop. in Cumberland County, State of N.C., 185 F. Supp. 555, 557 (E.D. N.C. 1960) (using Inwood coefficient).

[287] United States v. Corbin, 423 F.2d 821, 827–28 (10th Cir. 1970) (noting that in connection with the valuation of a fish-farm operation, "[t]he capitalization approach was further refined to a capitalization of rent approach because the landowners had no evidence available that the property had in fact been income producing" and that "[t]herefore an arbitrary rent income had to be constructed"); *Hicks Realty Assocs.*, 34 A.D. 2d 866, 310 N.Y.S.2d 825, 826 (1970) (holding that the respondent's appraisers' adjustments to the gross rentals were not supported by the record and amounted to "sheer speculation"); City of Chicago v. Giedraitis, 14 Ill. 2d 45, 51, 150 N.E.2d 577, 580–81 (1958) (stating that "even though evidence of actual rental receipts may be admissible in a condemnation proceeding to determine the property value…we know of no instance in which speculative or future anticipated rentals were held to be competent valuation factors") (citations omitted)).

derived from comparable sales and a yield rate based on DCF.[288] As seen in the note below, there are some eminent domain cases illustrating the use of the DCF technique in the income capitalization approach.[289] As one authority points out, "[b]ecause the courts recognize the importance of the capitalization rate, they often insist that the rates selected be supported by market data," and "[t]he most easily understood method of rate selection is direct sales comparison."[290]

An appraiser applies the capitalization rate to the net rental figure to obtain a market value.[291] The capitalization rate selected by an expert is a rate based on an analysis of market factors, including prevailing interest rates, and is used to convert a property's income into the property's fair market value.[292] When presenting the income capitalization approach to a jury, one authority suggests illustrating "the relationship between value, income, and rate of return with something familiar to most jurors, such as the operation of a savings account."[293] Furthermore, although appraisers have various ways of deriving the capitalization rate, it has been said that the direct capitalization method "using an overall capitalization rate extracted directly from comparable sales…is often difficult to attack effectively on cross-examination."[294]

I.3. Building to Land Ratio

Building-to-land ratio is important when attempting to value property based on the income capitalization approach. In *Continental Assurance Co. v. Mayor of Lynbrook,*[295] the court cautioned that "'[i]n using capitalization of income it is important to ensure that an improper distortion is not introduced because of disproportionate values assignable to land and buildings….'"[296] The court held that "the [trial] court erred in rejecting petitioner's split rate building residual technique, and in using respondents' expert's over-all capitalization rate which transparently failed to identify and provide for a building recapture factor."[297] The court emphasized that although "'an over-all rate of capitalization is useful, it may be vulnerable unless it is based upon separate capitalization rates computed by one or another residual method on land and buildings….'"[298]

I.4. Business Profits and Valuation

Another rule widely followed is that "evidence of the profits of a business conducted upon land taken for public use is not admissible in proceedings for the determination of compensation because the evidence is too speculative, uncertain and remote to be considered as a basis for ascertaining market value.'"[299] The reason is that income derived from business ventures or operations depends to a great extent on the managerial capabilities of the individual operating the business.

Consequently, "[m]ost jurisdictions…limit [the] use of the income method to situations where 'profits are derived from the intrinsic nature of the real estate itself, as distinguished from the profits derived from a

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[288] EATON, *supra* note 42, at 174–75. In Eaton's opinion, the DCF analysis is unlikely to gain traction for use in eminent domain cases. *See id*. at 193 (stating that "[b]ecause of the drawbacks in DCF analysis and the danger of its misuse, its applicability in eminent domain valuation is severely limited").

[289] However, there are eminent domain cases in which the discounted cash flow technique has been used or attempted. *See* Miller v. Glacier Dev. Co., L.L.C., 284 Kan. 476, 484, 161 P.3d 730, 738 (2007) (noting in a condemnation proceeding by the Kansas DOT the owner's expert's use of the income approach and discounted cash flow analysis), *cert. denied*, 128 S. Ct. 1657, 170 L. Ed. 2d 355 (2008); Portland Natural Gas Transmission Sys. v. 19.2 Acres of Land, 195 F. Supp. 2d 314, 326 (Mass. 2002) (finding that an expert's use of the DCF method with regard to valuation in the taking of temporary easements to be flawed); Union Pac. R.R. v. 174 Acres of Land Located in Crittenden County, 193 F.3d 944, 947 (8th Cir. 1999) (holding that excluded testimony would not have changed the verdict when the district court refused to allow an expert "to present an alternative income or discounted cash flow approach to valuing the land"); Clearwater Plaza Ltd. P'ship v. Urban Redevelopment Comm'n, 1998 Conn. Super. LEXIS 3234, at *9 (Conn. Super. 1998) (Unrept.) (court employing a different approach where the DCF analysis of the experts produced valuations that differed by $5 million); Davis v. S. Fla. Water Mgmt. Dist., 715 So. 2d 996, 998 (Fla. App. 4th Dist. 1998) (not resolving "what role the discounted cash flow model might otherwise play in considering highest and best use and fair market value had Appellants not raised the matter") (footnote omitted); Todesca/Forte Bros. v. State Dep't of Transp., 1994 R.I. Super. LEXIS 20, at 50 (R.I. Super. 1994) (rejecting as unreliable and inaccurate the discounted cash flow analysis presented by respondent's expert witnesses for lacking "an adequate foundation" or "industrial or engineering support" and for being based on unreliable U.S. Bureau of Mines reports); Crocker v. Miss. State Highway Comm'n, 534 So. 2d 549, 554 (Miss. 1988) (stating that "there is ongoing debate concerning the relevance of traditional capitalization techniques and the validity of discounted cash flow analysis") (citation omitted) (internal quotation marks omitted).

[290] Eaton, *supra* note 42, at 184. *See id*. at 185 for an example of "how overall capitalization rates can be developed from comparable sales…."

[291] *Id*. at 194.

[292] *See* ENCYCLOPEDIA OF REAL ESTATE APPRAISING 41–43 (3d ed. 1978) (discussing income approach).

[293] Eaton, *supra* note 42, at 182.

[294] *Id*. at 183. *See id*. at 184–85 for a table showing how overall capitalization rates may be determined from comparable sales.

[295] 113 A.D. 2d 795, 493 N.Y.S.2d 773 (N.Y. App. 2d Dep't 1985), *appeal after remand*, 130 A.D. 2d 745, 515 N.Y.S.2d 720 (N.Y. App. 2d Dep't 1987), *appeal denied*, 71 N.Y.2d 805, 524 N.E.2d 877, 529 N.Y.S.2d 276 (1988).

[296] *Id.* at 798, 493 N.Y.S.2d at 777 (citation omitted).

[297] *Id.* at 798, 493 N.Y.S.2d at 776.

[298] *Id.* at 798, 493 N.Y.S.2d at 777 (citation omitted).

[299] Ventura County Flood Control Dist. v. Security First Nat'l Bank, 15 Cal. App. 3d 996, 999, 93 Cal. Rptr. 653, 654 (Cal. App. 2d Dist. 1971) (citation omitted) (internal quotations omitted).

business operated on the land.'"[300] Thus, "income from property in the way of rents is a proper element to be considered in arriving at the measure of compensation to be paid for the taking of property."[301] Actual rent, "capitalized at the rate which local custom adopts for the purpose, forms one of the best tests of value…."[302]

Business profits usually are not the type of income that may be capitalized for the purpose of the income approach.[303] As a North Carolina court explained recently, although "[i]njury to a business, including lost profits, is [a] noncompensable loss…revenue derived directly from the condemned property itself, such as rental income, is distinct from profits of a business located on the property" and thus is compensable.[304] Accordingly, "[w]hen evidence of income is used to valuate property, 'care must be taken to distinguish between income from the property and income from the business conducted on the property.'"[305] In a later North Carolina case on the same issue, the court illustrated its point with this example: "if identical adjoining stores were taken in the condemnation of a shopping center, the owners of these two stores should be entitled to the same amount in damages, even if one owner ran a profitable fine jewelry business, while the other operated a failing shoe repair shop."[306]

Nevertheless, there are cases in which the use of business profits has been approved.[307] In *State Highway Commission v. Lee,*[308] the Supreme Court of Kansas, adopting what is regarded as the minority view, used the income approach by taking into account the income to be derived from the future sales of sites to be developed from what was presently undeveloped land.[309] The court stated that "[t]he importance of our decision herein lies in the application of the income approach used in the valuation of condemned property which is imminently ready for development."[310]

Other courts have used income derived from a business conducted on the property to determine the value of property, the rationale being that the income that was capitalized was not business profits but rather a rental value derived from an analysis of business income.[311] Thus, in some situations, "[e]vidence of business volume may be admitted…when it can be shown that is the basis of market value and/or economic rent within the industry."[312] As an earlier case explained, "the increasing vogue of leases of business property reserving rentals computed on a percentage of the volume of business transacted by the tenant, [makes it] artificial and illusory to reject an expert opinion of rental value that takes into account the volume of business which experience has shown a particular piece of property is capable of producing…."[313]

If the property is "unique," there may be a basis for recovery of lost profits as occurred in *Housing Authority of Atlanta v. Southern Railway Co*.[314] The Supreme Court of Georgia affirmed that part of the Court of Appeals' decision that allowed the condemnee Southern Railway to recover lost profits in a condemnation proceeding brought by the Housing Authority. The Court of Appeals had held that because "Southern had shown through ample evidence that it had 'suffered a business loss (whether partial or total), that the business was unique to Southern and the profits were…not…remote or speculative' it was entitled to recover the $132,500 the jury had awarded it for lost profits."[315]

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[300] Commonwealth v. R.J. Corman R.R. Co./Memphis Line, 116 S.W.3d 488, 496 (Ky. 2003) (citation omitted).

[301] Ventura County Flood Control Dist. v. Security First Nat'l Bank, 15 Cal. App. 3d at 999, 93 Cal. Rptr. at 654 (citation omitted) (internal quotations omitted).

[302] 4 NICHOLS ON EMINENT DOMAIN § 12B.10, at 12B-70.

[303] Lechliter v. State, 185 Neb. 527, 530, 176 N.W.2d 917, 919 (1970) ("There can be no damage allowed for the destruction of the business. The only issue relating to the business is the extent to which the operation of the business on the land enhanced the value of the property.")

[304] Dep't of Transp. v. M.M. Fowler, Inc., 361 N.C. 1, 7, 637 S.E.2d 885, 890 (2006).

[305] *Id.* (citation omitted).

[306] City of Charlotte v. Hurlahe, 178 N.C. App. 144, 149, 631 S.E.2d 28, 31 (2006) (holding that the owners' evidence of the net income from the operation of a parking lot on the property was not inadmissible evidence of lost profits and that each expert had performed the necessary calculations to convert rental income to fair market value), *petition withdrawn*, 360 N.C. 644, 636 S.E.2d 804 (2006).

[307] EATON, *supra* note 42, at 176 (noting that "[a] number of states have made specific statutory provisions allowing payment for the taking or destruction of business under certain circumstances") (*citing* California, Georgia, Florida, Louisiana, New York, Pennsylvania, and Vermont).

[308] 207 Kan. 284, 485 P.2d 310 (1971).

[309] *Id.* at 299, 485 P.2d at 321 (stating that although "[i]t must be conceded if it is established…that future development of the condemned tract is speculative, valuation of such tract based upon the development approach may be erroneous" but that "[i]f develoment, however, is not speculative but imminent, as here, then the development approach for valuing the property is a fair and reasonable approach").

[310] *Id.* at 299, 485 P.2d at 321–22.

[311] Sunnybrook Realty Co. v. State, 11 A.D. 2d 888, 203 N.Y.S.2d 286 (N.Y. App. 3d Dep't 1960), *aff'd,* 9 N.Y.2d 960, 176 N.E.2d 203, 217 N.Y.S.2d 227 (1961). *See also* Killip Laundering Co. v. State, 32 A.D. 2d 579, 580, 299 N.Y.S.2d 33, 35 (N.Y. App. 3d Dep't 1969); Private Prop. for Mun. Courts FAC v. Kordes, 431 S.W.2d 124, 126 (Mo. 1968) (upholding the use of the income approach for a parking lot business); State v. Ellis, 382 S.W.2d 225 (Mo. App. Springfield Dist. 1964) (holding that a gallonage figure derived from sales of gasoline was proper); St. Louis Hous. Auth. v. Bainteri, 297 S.W.2d 529, 535 (Mo. 1957) (indicating that fair market value may be based on a customary standard or formula used in the oil business).

[312] EATON, *supra* note 42, at 176.

[313] State Roads Comm'n v. Novosel, 203 Md. 619, at 624, 102 A.2d 563, at 565 (1954).

[314] 245 Ga. 229, 264 S.E.2d 174 (1980).

[315] *Id.* at 229, 264 S.E.2d at 175.

In affirming, the Georgia Supreme Court held that "[o]nce a condemnee gets over the hurdle of proving the property to be 'unique,' proving damages by an alternative, non-fair market value method is the sole remaining burden, and a question for the jury."[316] The court held:

> The jury was presented with testimony concerning the income method of valuation, one of the acceptable non-fair market value methods. As the Court of Appeals noted, the amount awarded Southern for lost profits was within the figures mentioned representing a range of expected loss, and the jury chose a sum to award. It was not incorrect to instruct the jury on lost profits as a means of awarding just and adequate compensation because the income approach necessarily takes into account what future earnings would be were the property interest not extinguished, which Southern's was.[317]

A later article, however, explains that in Georgia

> [b]usiness damages became compensable as a separate item of compensation in 1966 when the supreme court decided *Bowers v. Fulton County* [221 Ga. 731, 146 S.E.2d 884 (1966]. Before 1966 an owner could use business damage evidence to prove the value of the property before and after the taking, but an owner could not recover business damages as a separate item."[318] The article explains that after the *Bowers* case, there was a "drift toward the uniqueness requirement…."[319]

Although it is beyond the scope of this section to discuss one state's law in any detail, it appears that the law developed in Georgia in such a manner that, for example,

> "[w]hen the business belongs to the landowner, total destruction of the business at the location must be proven before business losses may be recovered as a separate element of compensation. On the other hand, when the business belongs to a separate lessee, the lessee may recover for business losses as an element of compensation separate from the value of the land whether the destruction of his business is total or merely partial, provided only that the loss is not remote or speculative."[320]

In eminent domain cases in Vermont, compensation for land taken may include compensation for business losses because "[c]ompensation for business losses is statutory."[321] Vermont is "one of the few states to recognize loss to the individual over and above the value of the land."[322] Thus,

> [i]n Vermont, the value of the land taken at its highest and best use is first calculated, and then, if "'the plaintiff has suffered a loss to his business which has not necessarily been compensated for in the allowance made for his land,'" separate damages must be awarded for business loss. …*Compensation for business losses, however, is not the same as valuation of the property through consideration of the profits made by the business*.[323]

Finally, it may be noted that there is authority holding that a "condemnee may recover damages for lost profits when the condemnee has demonstrated that the condemnor caused unreasonable delay in bringing the action to trial."[324]

I.5. Variations in the Income Approach

There are several variations of the income capitalization approach, some of which will be noted briefly.[325]

First, with the gross rent multiplier approach an appraiser obtains a multiplier based on an examination of comparable properties and then divides the gross incomes of the properties into the price for which the properties sold to derive a gross rent multiplier or GRM.[326] Courts may refuse to permit the use of the method unless it is supported with an adequate foundation. As stated in a federal court decision, "to have probative value, that opinion or estimate must be founded upon substantial data, not mere conjecture, speculation or unwarranted assumption."[327]

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[316] *Id.* at 231, 264 S.E.2d at 176.

[317] *Id.*

[318] Charles M. Cork, III, *A Critical Review of the Law of Business Loss Claims in Georgia Eminent Domain Jurisprudence*, 51 MERCER L. REV. 11, 12 (1999) (footnotes omitted).

[319] *Id*. at 18 (footnote omitted) (noting that the trend continued in Hinson v. Dep't of Transp., 135 Ga. App. 258, 259, 217 S.E.2d 606, 607 (Ga. Ct. App. 1975), in which the court stated that "[t]he destruction or loss of a business being operated upon the condemned property requires compensation where the land is shown to be 'unique'")).

[320] *Id.* at 22 (*quoting* Dep't of Transp. v. Dixie Highway Bottle Shop, Inc., 245 Ga. 314, 315, 265 S.E.2d 10 (1980)).

[321] *In re Appeal of Condemnation Award to 89-2 Realty*, 152 Vt. 426, 429, 566 A.2d 979, 980 (1989) (*citing* Penna v. State Highway Bd., 122 Vt. 290, 295, 170 A.2d 630, 634 (1961)).

[322] *Id.* (citation omitted).

[323] *Id.* at 429–30, 566 A.2d at 981 (*citing* Penna v. State Highway Bd., 122 Vt. 290, 295, 170 A.2d 630, 634 (1961) (some citations omitted) (emphasis supplied).

[324] County of Clark v. Sun State Props., Ltd., 119 Nev. 329, at 331, 72 P.3d 954, at 955.

[325] For a more detailed discussion of the various permutations of the income approach, *see* ch. 9 in EATON, *supra* note 42, at 173.

[326] *See*, generally, W. Bay Christian Sch. Ass'n, Inc. v. R.I. Dep't of Transp., 2007 R.I. Super. LEXIS 24, at *8 (R.I. Super. Ct. 2007) (agreeing with an appraiser's approach to the valuation of certain duplexes taken based on "the rental income each duplex could potentially generate…."); Lechliter v. State, 185 Neb. 527, at 531, 176 N.W.2d 917, 920 (upholding the granting of a new trial when "[t]he method used by plaintiffs' expert [was]…based upon the value of the real estate and improvements, plus a projection of possible profits for 8 years for the loss of the business").

[327] United States v. 179.26 Acres of Land, 644 F.2d 367, 372 (10th Cir. 1981) (stating without mentioning the gross rent multiplier method that because "'the law is not wedded to any particular formula or method for determining the fair market value as the measure of just compensation…[it] may be based upon comparable sales, reproduction costs, capitalization of net income, or an interaction of these determinants) (*quoting* Sill

A few cases identified in the note below were located in which the courts accepted the GRM approach in the valuation of billboards.[328] In addition, a few cases were located in which real property was taken by condemnation and the expert for the condemnor or the condemnee was permitted to give an opinion of value that included an income capitalization approach using a GRM.[329]

The court, however, may not necessarily permit an expert essentially to give an opinion of value using two forms of the income approach, such as a GRM approach and another method that purports to capitalize the rent. For example, in *Crocker v. Mississippi State Highway Commission,*[330] a strip of land was taken from an owner of a sporting goods business. The owner's expert, Morrow, gave an opinion of value based on "the market data approach" pursuant to which he "determined comparable property had a gross rent multiplier of 6.8 (fair market value of comparable property divided by its annual rental value)…."[331] Besides using the market data approach and the replacement cost method, the expert "used the income approach, a reconstructed income statement."[332] However, the trial court sustained an objection to Morrow's last approach, described as a "capitalized rent loss" method.[333] The Supreme Court of Missouri agreed with the trial court, holding that

> [w]hat [Morrow] is attempting through the disputed testimony is nothing more than a second income approach. Moreover, his projected rental loss of $49,000.00 is quite comparable to the yields of his other approaches to value. *Crocker had already given one valuation analysis using an income approach* to fair market value.[334]

Implicit in the *Crocker* decision, of course, is that the income method using a GRM is an acceptable method of valuation. However, the court observed that "'not all appraisers agree on the appropriate income valuation techniques to be applied today, and there is ongoing debate concerning the relevance of traditional capitalization techniques and the validity of DCF.'"[335] It may be noted, first, that the court in *Crocker* regarded the expert's rejected method as a variation of the residual method, an attempt "to input a lost rental income amount as a residual value, and then capitalize it to show its present value." However, the court did not reject the expert's methodology on that basis: "While it may be a twist on the concept of residuals (because the method is particularly suited for rent producing properties), …it is not incorrect nor improper per se."[336]

A second variation of the income approach is the use of a yield capitalization method that "is accomplished with [a] *mortgage-equity formula*, which is referred to as the *Ellwood equation*."[337] The approach enables an appraiser or a court to analyze an investment property by directly taking into consideration the effect on the valuation of property of the amortization of the mortgage and of depreciation or appreciation of the component parts of the investment.[338] A few cases note the use

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Corp. v. United States, 343 F.2d 411, 416 (10th Cir. 1965), *cert. denied*, 382 U.S. 840, 86 S. Ct. 88, 15 L. Ed. 2d 81 (1965)).

[328] Fla., Dep't of Transp. v. Powell, 721 So. 2d 795, 798 (Fla. App. 1st Dist. 1998) (holding in a billboard case that it was not improper for the expert witness for the owner of the billboard and leasehold to use the gross rent multiplier in testifying regarding the valuation of the billboard); Minnesota v. Weber-Connelly, Naegele, Inc., 448 N.W.2d 380, 385 (Minn. Ct. App. 1989) (stating that Minn. Stat. ch. 173 (1988) provides a special mechanism (separate from the general purpose and procedure of ch. 117 applicable to eminent domain procedures) that is directed specifically to the taking of billboards and that it was not erroneous for the trial court to conclude "that the most logical and fair method of providing just compensation for billboards was the gross rent multiplier"). *See also* Whiteco Indus., Inc. v. City of Tuscon, 168 Ariz. 257, 812 P.2d 1075 (1990) (reversing the trial court's award for the billboard owner because the billboard owner's leases had expired but also disagreeing with, but not specifically discussing, the use of the gross rent multiplier approach used by Whiteco's expert).

[329] *In the Matter of the City of N.Y. (Clinton Urban Renewal Project),* 59 N.Y.2d 57, 61, 449 N.E.2d 1246, 1247, 463 N.Y.S.2d 168, 169 (1983) (stating in a case in which the city's appraiser used a gross rent multiplier that "both sides agreed upon capitalization of net rental income as the proper measure of fair market value but differed as to the part played by the actual use in the determination of rental income"); Warren v. Waterville Urban Renewal Auth., 235 A.2d 295, 298 (Maine 1967) (condemnor's expert testifying without objection and "using several recognized and sound approaches to market values, such as the reproduction cost less depreciation, sales of comparable properties, and capitalization of income obtained by use of a gross rent multiplier"); City of New Haven *ex rel*. New Haven Bd. of Educ. v. Reg'l Rehab. Inst. of Conn., 2005 Conn. Super. LEXIS 1651, at *7, 30 (Conn. Super. Ct. 2005) (Unrept.) (noting that the condemnee's expert was permitted to testify regarding use of a gross rent multiplier in valuing the property along with other methods but the court finding that the witness's testimony was inconsistent on comparable sales data used by the expert).

[330] 534 So. 2d 549 (Miss. 1988).

[331] *Id.* at 551.

[332] *Id.* (The third method was described in this fashion:

> Here, all revenues and expenses were imputed, and the net capitalized. Morrow assumed gross income of $8,148.00/yr ($700/month rent minus vacancy loss) and expenses of $1,954.00/yr (fire insurance, taxes, repairs), for a net of $6,194.00/yr. Morrow then applied to that figure a capitalization "technique," for which there is no testimony, that shows before value of $56,500.00.)

[333] A proffer showed that the opinion was based "on capitalized rent loss, which Morrow described as annual rent loss ($450/month: the value of the gun shop alone, not the apartment) 'capitalized at 11% and we came up with the $49,000.00 that we mentioned.'" *Id*. (citation omitted).

[334] *Id.* at 553–54 (footnote omitted) (emphasis supplied).

[335] *Id*. at 554 n.3 (quoting THE APPRAISAL OF REAL ESTATE 347 (1983)).

[336] *Id.* (citation omitted).

[337] EATON, *supra* note 42, at 193 (emphasis in original).

[338] *See* discussion in EATON, *supra* note 42, at 193 (stating that "[t]o use the mortgage-equity method, the appraiser must project the property's net income over the entire projection term and estimate what the sale price of the property (as a

of the Ellwood tables, but no eminent domain cases were located that applied the mortgage-equity formula in regard to the income approach.[339] Although no other method discussed herein allows direct, independent consideration of these factors, one may want to be cautious in considering the use of this approach in an eminent domain case: "While this method of capitalization certainly has its place, its place is not in the courtroom;"[340] "[p]lacing the Ellwood equation on an exhibit board is a sure way to lose the trier of fact."[341]

Third, another variation of the income approach is the residual method, a technique that allows "for the capitalization of income allocated to an investment component of unknown value after all investment components with known values have been satisfied," such as land, buildings, or mortgages.[342] For example, the building-residual method subtracts "the value of the land from the sale price of the property [that] yields the value of the improvements, which [is] then divided by the total square foot of the improvement to arrive at a per square foot unit price [of the] building only."[343] As stated in the *Crocker* case, *supra*, "the present worth of but one of the values in a property (i.e., land, improvements, reversionary interest) may be estimated separate from the whole. This is known as residual appraisal."[344] The development approach is a form of the residual method, as it is used "for valuing undeveloped acreage [by] discounting the cost of development and the probable proceeds from the sale of developed sites."[345]

Although some courts have approved the use of the building-residual technique,[346] other courts generally reject the land-residual method of capitalization for being too speculative.[347] One authority argues that the residual approach has "no place in the courtroom or in eminent domain valuation" and that the procedure is appropriate only to determine the highest and best use of the subject property.[348] Because "[a] very important element in commercial or industrial properties is the land to building ratio,"[349] the use of an overall rate and a property residual does not eliminate the erroneous valuation produced if the subject property and the comparable sales have different land-to-building ratios.[350]

Although no recent cases were found discussing the method, a New York court in an earlier case stated "that an over-all rate may be vulnerable unless it is based upon separate capitalization rates computed by one or another residual method on land and building. Thus, one makes sure that an improper distortion is not introduced because of disproportionate values assignable to land and building."[351] *Nichols on Eminent Domain* notes that

> [r]esidual value analysis is more vulnerable to attack when used to estimate the value of the land by subtracting the value of the building, since determining the value of a building is subject to many more vagaries (depreciation, physical, functional and economic obsolescence) than using land sales to estimate the value of the land.[352]

J. ADMISSIBILITY AND USE OF THE COST-LESS-DEPRECIATION APPROACH

J.1. Admissibility of the Cost Approach

The cost approach to structural value traditionally has been used in determining compensation under fire policies for losses based on the fair value or cash value of improvements covered by such policies.[353] Experts use

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percent of present value) will be at the end of the projection period").

[339] Kemp Indus., Inc. v. Safety Light Corp., 857 F. Supp. 373, 377 (D. N.J. 1994) (*quoting* in connection with the economics of a purchase-leaseback of property the ELLWOOD TABLES FOR REAL ESTATE APPRAISING AND FINANCING 115 (2d ed. 1967)).

[340] EATON, *supra* note 42, at 193.

[341] *Id*. at 193, 194. *See id*. at 185–87 for a discussion of the approach.

[342] 7A NICHOLS ON EMINENT DOMAIN § G9A.04[1][c], at G9A-37.

[343] *Id*. § G13.07[5], at G13-65–66.

[344] Crocker v. Miss. State Hwy. Comm'n, 534 So. 2d at 554, n.3 (*quoting* WILLIAM N. KINNARD, INCOME PROPERTY VALUATION 238 (1971)).

[345] 7A NICHOLS ON EMINENT DOMAIN § G9A.04[1][c], at G9A-37.

[346] Wolnstein v. State, 33 A.D. 2d 990, 307 N.Y.S.2d 402 (N.Y. App. 4th Dep't 1970) (appellate court applying the building residual technique); *In re Cross-Bronx Expressway*, 195 Misc. 842, 855, 82 N.Y.S.2d 55, 60 (N.Y. Sup. Ct. 1948) (approving the use of the Inwood and other tables); *Bishop Trust Co*., 48 Haw. at 481, 404 P.2d 394 ("It is well settled that improvements affixed to land have only such value as they add to the land.").

[347] 7A NICHOLS ON EMINENT DOMAIN § G9A.04[1][c], at G9A-37.

[348] EATON, *supra* note 42, at 167, 168.

[349] 7A NICHOLS ON EMINENT DOMAIN § 13.07[3], at G13-57.

[350] *In the Matter of the City of N.Y. in re James Madison Houses*, 17 A.D. 2d 317, 321, 234 N.Y.S.2d 799, 803 n.** (App. Div. 1962).

> (While, for convenience, it is useful to use an over-all rate of capitalization, it is true that an over-all rate may be vulnerable unless it is based upon separate capitalization rates computed by one or another residual method on land and building. Thus one makes sure that an improper distortion is not introduced because of disproportionate values assignable to land and building.)

(citations omitted).

[351] *Id.* at 321, 234 N.Y.S.2d at 803.

[352] 7A NICHOLS ON EMINENT DOMAIN § G13.07[5], at G13-66, n.13.

[353] *See, e.g.,* Schreiber v. Pac. Coast Fire Ins. Co., 195 Md. 639, 645, 75 A.2d 108, 111 (1950) (stating that although some courts hold that "'actual cash value' is equivalent to cost of reproduction less depreciation," the court was of the opinion that "the best considered cases hold that cost of reproduction is not the measure of "actual cash value"…but…very important evidence of value") (citations omitted).

the approach in utility-rate cases, as well as for purposes of tax assessments and mortgage loans.[354]

In general, absent some special showing, evidence of reproduction cost is not admissible in a condemnation proceeding because the method almost invariably inflates the valuation of the property.[355] "To say that the cost approach is generally disliked by the courts is an understatement."[356] Use of the production cost of a structure results in a valuation that may not be approached very often in actual negotiations in the market. Some courts hold that reproduction cost evidence is admissible only in those cases in which indicia of value is not available using another method.[357]

Assuming the cost approach is admissible, the majority view permits evidence of the approach upon direct examination provided certain conditions are satisfied.[358] For example, the interest condemned must be one of complete ownership, the improvements must be adapted to the site, reproduction must be a reasonable business venture, and a proper allowance must be made for depreciation.

If the cost-less-depreciation of separate items plus the value of the land is offered as equivalent to the fair market value of the whole, one view seems to be that the cost-less-depreciation of an individual item seems to represent the best measure of the degree to which that item enhances the land.[359] Another view permits the cost approach when no other approach is indicated but dislikes the approach because it violates the unit rule; the latter view opposes the separate valuation of items such as buildings, fixtures, or trees.[360] That is, what is valued is the whole—the land as enhanced by its improvements and all of its attributes—not the sum of the values of the parts.

In sum, the cost approach generally is used when there are no comparable sales or an income stream to appraise or is used simply as a check against a valuation reached by another method.[361]

J.2. Replacement Versus Reproduction Cost

The terms replacement and reproduction are often used interchangeably;[362] however, the term replacement refers to the current structural costs of improvements that are similar in size and utility, whereas the term reproduction means duplication.[363]

As a Connecticut court has explained,

> A cost approach can be premised on one of either two types of cost: Reproduction Cost and Replacement Cost. A reproduction cost is the estimated cost to construct an exact duplicate or replica of the building. This would entail the same design, materials and quality. Replacement cost on the other hand is an estimate of the cost to construct a building of equal utility but not necessarily of equal design, materials or quality. …[T]he use of replacement cost eliminates the need to estimate some forms of depreciation such as functional obsolescence. Nevertheless, any economic impact from the functional obsolescence, such as increased operating expenses from an inefficient building design, must still be considered.[364]

In regard to estimating reproduction or replacement cost, the three standard methods are

> the quantity survey method, the unit-in-place method, and the comparative-unit method. The quantity survey method is generally considered the most accurate, while the comparative-unit method is the least reliable. Whichever method is used by the appraiser, it is important that all indirect costs be included in the cost estimate and that entrepreneurial profit be considered as an element of cost.[365]

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[354] *See, e.g., In re New Jersey Power & Light Co*., 9 N.J. 498, 89 A.2d 26 (1952) (involving denial of proposed increased rates for electric service); Chesapeake & Potomac Tel. Co. v. Pub. Serv. Comm'n, 201 Md. 207, 93 A.2d 249 (1952) (holding that the Public Service Commission took reproduction costs into account when making its determination regarding a rate increase).

[355] Curry v. Lewis & Clark Natural Res. Dist., 267 Neb. 857, 866, 678 N.W.2d 95, 102 (2004) (stating that "the reproduction cost method as an independent test of value "may be used only in rare cases where there is a lack of comparable sales of similar property, where the structures on the property are in some sense unique, or where the character of the improvements is unusually well adapted to the kind of land upon which they exist") (citation omitted). *But see* State v. Bishop, 800 N.E.2d 918, 924–25 (Ind. 2003) (stating that in eminent domain proceedings virtually all courts have limited consideration of enhancement value to the evidence of the replacement or reproduction cost of the appropriated sign, less depreciation).

[356] EATON, *supra* note 42, at 158.

[357] *Curry*, 267 Neb. at 866, 678 N.W.2d 102.

[358] *See* EATON, *supra* note 42, at 158–60.

[359] State v. Bishop, 800 N.E.2d 918, 924–25 (Ind. 2003), *reh. denied,* 2004 Ind. LEXIS 375 (Ind. 2004). *See also* United States v. 55.22 Acres of Land, 411 F.2d 432 (9th Cir. 1969); Bridges v. Alaska Hous. Auth., 375 P.2d 696 (Alaska 1962); Adams v. Ark. State Highway Comm'n, 235 Ark. 837, 362 S.W.2d 425 (1962).

[360] City of Houston v. Lakewood Estates, 381 S.W.2d 697 (Tex. Ct. Civ. App. 1964); State v. Improved Parcel of Land, 55 Del. 487, 168 A.2d 513 (1963), *overruled,* State *ex rel.* Price v. Parcel No. 1-1.6401 Acres of Land, 243 A.2d 709 (Del. 1968); Commonwealth v. Rankin, 346 S.W.2d 714 (Ky. 1961).

[361] S. Minn. Beet Sugar Coop. v. County of Renville, 737 N.W.2d 545, 555 (Minn. 2007) (citation omitted) (noting that at least two approaches should be used by an appraiser because the alternative value can serve as a check for the other).

[362] EATON, *supra* note 42, at 161.

[363] *Id.* (stating that "[*r*]*eproduction cost* is the current cost to reconstruct the improvements physically using the same or very similar materials; *replacement cost* is the cost of constructing improvements equal in utility to those being appraised") (emphasis in original).

[364] Comm'r of Transp. v. Bakery Place Ltd. P'ship, 50 Conn. Supp. 299, 309, 925 A.2d 468, 474–75 (Conn. Super. Ct. 2005) (citation omitted).

[365] EATON, *supra* note 42, at 161. Eaton also explains that entrepreneurial profit historically has been built into estimates of value based on the cost approach but is now recognized as a separate item of cost. The term "is a market-derived figure that reflects the amount an entrepreneur expects to receive for his

As discussed in Section 6, *supra*, the cost approach assumes that the cost of construction of improvements on the property, less depreciation, plus the value of the site approximates the fair market value of the improved property. As one authority emphasizes,

> reproduction cost can never be the *criterion* of value.… [E]vidence of structural value is admissible under proper circumstances, but even in such cases it is improper merely to aggregate structural value with land value.…[366]

> The proper measure of just compensation is market value of the land with the buildings on it.… When…it is shown that the character of the buildings is well adapted to the location, the structural cost of the buildings, after making proper deductions for depreciation by wear and tear, is a reasonable test of the amount by which the buildings enhance the market value of the property.[367]

In *Department of Transportation v. Foster,*[368] the court held that it was proper for the transportation department's appraiser and for the condemnees' appraiser to use the comparable sales approach in valuing the land based on "its current residential zoning classification in combination with the possibility and probability that it [would] be rezoned commercial."[369] As for the house on the property, neither appraiser used the comparable sales approach; the department's appraiser used the income approach, whereas the condemnees' appraiser used the cost-less-depreciation method. The court held that "[b]ecause the valuations of the land and improvements were thus independent of one another, use of the different methods was appropriate."[370]

J.3. Value the Land as if Vacant

Although previous discussion indicated that developed land may not be compared with undeveloped land, for the cost-less-depreciation approach an appraiser must determine the highest and best use of the property, as if vacant, and then value the land pursuant to the comparable sales approach.[371] An appraiser adds the value of the improvements as determined below to the value of the land of the subject real property.

J.4. Value Improvements as if New and Depreciate

As stated, with the cost approach, an appraiser estimates the reproduction or replacement cost as of the date of valuation, deducts an amount equivalent to his or her estimate of accrued physical depreciation and, if applicable, of inherent or functional obsolescence. As a practical matter, most cost estimates are a mix of replacement and reproduction costs. Changes in technology, materials, and style dictate the substitution of modern substances and workmanship for antiquated materials and methods. In other areas, building materials and construction techniques have maintained constancy so as to permit reasonable duplication. For example, massive stone foundations and walls are usually replaced by concrete and steel, whereas carpentry and craftsmanship are often reproduced.

J.5. Depreciation of Improvements

Appraisers express depreciation in three ways: "physical depreciation—curable and incurable; functional obsolescence—curable and incurable; and external obsolescence—incurable. (In the past, external obsolescence has also been referred to as *environmental obsolescence* or *economic obsolescence*.)"[372]

Physical depreciation, calculated from the moment a building is completed, is the result of ordinary wear and tear on the improvement caused by weather, water, gravity, people, and, in some cases, animals.[373] An appraiser reproduces the improvement on the date of the valuation, not the date the improvements were actually constructed. Thus, wear and tear, even in a market that reflects rising real estate prices, must be taken into consideration. It has been observed by one court that "the cost approach is less reliable when the building improvements are older and reaching the end of their economic life. This is because of the difficulty in estimating a sound measure of depreciation for an old building."[374] Cross-examination about physical depreciation may assist counsel in detecting whether an expert witness understands the market forces that support a competent opinion of a property's value.

Functional depreciation relates to the function of property and its layout, style, and design and often reflects changing styles and technology.[375] In determining functional depreciation, an appraiser considers additions to real estate that may reflect differing styles of architecture or the necessity for additional heating or air conditioning or for blocking of views from windows or porches. Physical and functional items found to be correctible economically are referred to as curable; the cost of the cure often is a reasonable measure of depreciation and functional obsolescence. For example, a

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or her contribution. It represents the degree of risk and expertise associated with the development of a project." *Id*. at 168.

[366] 4 NICHOLS ON EMINENT DOMAIN § 12B.11[1], at 12B-82, 83.

[367] *Id.* at 12B-84-85.

[368] 262 Ga. App. 524, 586 S.E.2d 64 (2003).

[369] *Id.* at 526, 586 S.E.2d at 66.

[370] *Id.* at 526–27, 586 S.E.2d at 66 (footnote omitted).

[371] United States v. 6.45 Acres of Land, 409 F.3d 139, 143 (3d Cir. 2005); Dep't of Transp. v. Fleming, 112 N.C. App. 580, 585, 436 S.E.2d 407, 411 (N.C. App. 1993) (stating that "[t]he cost approach used by plaintiff's witnesses…values the land as if it were vacant and then adds the depreciated value of the improvements"); Norman's Kill Farm Dairy Co. v. State, 53 Misc. 2d 578, 582, 279 N.Y.S.2d 292, 297 (Ct. Cl. 1967) (stating that the court had "correlated its discount for depreciation of the improvements with its discount from the present value of the land as if it were vacant.…").

[372] EATON, *supra* note 42, at 163 (emphasis in original).

[373] *Id.* (stating that "[d]epreciation is a loss in the value of improvements from any cause.…").

[374] Comm'r of Transp. v. Bakery Place Ltd. P'ship, 50 Conn. Supp. 299, 308–09, 925 A.2d 468, at 474.

[375] *See* EATON, *supra* note 42, at 163–64.

house on a septic system near a public sanitary sewer line has curable functional obsolescence.

On the other hand, the term "economic obsolescence," now referred to as "external obsolescence," seeks to measure forces operating outside the boundaries of a particular tract that directly affect its value.[376] Extrinsic factors such as a change in neighborhood characteristics that may render a structure ill-adapted to its site; a lone dwelling in an area that has become entirely commercial or a nearby noxious manufacturing operation are examples of external depreciation. As with physical and functional depreciation, external depreciation, usually referred to as damage to the remainder, is expressed as a percentage. The analysis applies only to physically and functionally depreciated improvements and not to the land. It is seldom that the percentage of such depreciation may be measured accurately; thus, an appraiser's experience and judgment are important.

Finally, fixtures are items which, though once personal property, have become parts of the realty through actual or constructive annexation.[377] Fixtures, particularly machinery, are often subject to economic obsolescence related to advances in technology and to changing demand for the products of manufacture.

J.6. Use of Cost Manuals

A crude determinant of replacement cost is the use of factors based on footage.[378] Under this method, a unit cost is selected from a publication that purports to furnish reliable data of the cost of labor and materials nationwide on a square- or cubic-foot basis. After prescribed adjustments for time, location, and structural characteristics, the unit so found is multiplied by the number of units under construction in a building that is under consideration. The method has little to recommend it other than a convenient guide or beginning tool of reference. That is, cost data based on a manual requires independent verification by thorough research on the current costs of labor and materials in the specific area under consideration. One authority suggests that, regardless of whether in some jurisdictions the use of a published cost service as the sole source of data presents a hearsay problem, the method is "viewed with skepticism by some courts."[379]

K. THE DEVELOPMENT APPROACH

The development approach is also known as the lot method, the developer's residual method, the anticipated use method, the developer's absorption method, and the subdivision approach.[380] The general rule, however, is that "[i]f there are comparable sales, then the evidence of value based on a developmental approach should be excluded."[381] The development method values undeveloped land on the basis that the land is already improved with a specific use and subtracts the costs to develop that use.

According to one authority, there usually is no question regarding the use of the development approach "when the property being appraised is either raw land or fully subdivided land" but "[a] problem arises when the land…is neither raw acreage nor a fully developed subdivision…."[382] The best approach with respect to the valuation of "raw subdivision land" is the comparable sales method, with the development method being used to support the value indicated by the comparable sales approach.[383] On the other hand, the development approach may be indicated when the subject property falls somewhere between being raw acreage and fully subdivided land.[384]

The development approach is said to be the "primary" appraisal method and possibly the only method in three specific situations:

1. The appraiser concludes through proper market analysis that the property in question does, in fact, have a highest and best use for subdivision purposes.
2. Comparable before or after sales are lacking.

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[376] *Id.* at 163.

[377] Escondido Union Sch. Dist. v. Casa Suenos De Oro, Inc., 129 Cal. App. 4th 944, 962, 963, 29 Cal. Rptr. 3d 89, 100–01 (Cal. App. 4th Dist. 2005) (stating that "California condemnation law, in keeping with most jurisdictions, has long incorporated an expansive view toward improvements to realty and compensable fixtures" and that "the common law's traditional three-prong test for fixtures—intention, annexation and adaptability—generally has been used"). *See* discussion in EATON, *supra* note 42, at 61–61, 72.

[378] State Farm Fire & Cas. Co. v. Evans, 956 So. 2d 390, 396 (Ala. 2006), *reh. denied,* 2006 Ala. LEXIS 401 (Ala. 2006) (noting that during a reinspection program of potentially underinsured dwellings, State Farm used data on "square footage, residence type, construction type, etc., and used the Boeckh calculator to calculate a new estimated replacement-cost figure"). *See also* Kingston Urban Renewal Agency v. Strand Props., 33 A.D. 2d 594, 304 N.Y.S.2d 413, 415 (N.Y. App. 3d Dep't 1969) (holding with respect to the condemnation of a building not a specialty that "[a]lthough evidence of reproduction cost less depreciation was admissible as an element or circumstance to be considered along with all other circumstances in arriving at a proper award, it was not admissible as a measure of damages"). *See also* Hous. and Redevelopment Auth. v. First Ave. Realty Co., 270 Minn. 297, 303, 133 N.W.2d 645, 650 (1965) (approving an expert witness's use of schedules, referred to by the court as memoranda to refresh the expert's recollection, that the witness compiled containing the costs of reproduction of the condemned structure).

[379] EATON, *supra* note 42, at 162.

[380] *Id*. at 245; Lehigh-Northampton Airport Auth. v. Fuller, 862 A.2d at 166 n.3.

[381] Consultation, Inc. v. City of Lawrence, 5 Kan. App. 2d 486, 491, 619 P.2d 150, 154 (1980) (affirming the trial court's decision finding that there were comparable properties and excluding the developmental or income approach to valuing property).

[382] EATON, *supra* note 42, at 256.

[383] *Id*. at 268 (noting also that generally "the courts will not allow the development approach to be admitted into evidence when it is applied to raw subdivision land") (*Id*. at 269).

[384] *Id*. at 269.

3. Sufficient market and technical data are available to estimate reliably the value of the property being appraised using the development approach.[385]

Earlier cases in Pennsylvania, for example, had rejected the development approach because it was too speculative.[386] However, in *Lehigh-Northampton Airport Authority v. Fuller,*[387] the condemnees had filed plans for a residential subdivision of the subject 107-acre parcel of land prior to the taking. The court stated:

> Although the use of the "Development Approach" has never been squarely before this Court in a condemnation proceeding, it is an approach commonly currently used in the field to value multiple unimproved lots in a subdivision or potential subdivision as a unit. In using the Development Approach to find the true market value the expected sale prices of the lots are considered as well as the direct and indirect development and marketing cost.
>
> Modern appraisal methods demand modern approaches which should be recognized by our courts so long as a proper foundation is laid to eliminate speculation….[388]

In the *Lehigh-Northampton Airport Authority* case, the court relied on cases in which "[t]he developmental approach to *assessing property* has been accepted by many courts as an appropriate valuation method"[389] and held "that the record reveals that the Condemnees did lay the proper foundation for the 'lot method' appraisal or 'developer's residual approach.'"[390]

In a 2006 case, *In re Condemnation of 23.015 Acres,*[391] the court not only did not reject the development method but also stated that in the *Lehigh-Northampton Airport* case

> [t]he proper foundation for use of the development method was laid by demonstrating "that the land was ripe for development, that their expectation of securing all of the necessary zoning and other required permits was reasonable, and that the development of the property was within the reasonably foreseeable future." …
>
> In this case, the record reveals that the best and most desirable use for the Property was as a residential development. The Showalters also testified that the planning authorities had been favorably disposed to a subdivision of the Property before Pennridge offered to buy it. It is not necessary for the Showalters to prove that all zoning and other permits had been finally secured; *under Lehigh-Northampton Airport they only had to demonstrate*
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> *that their "expectation" for approval was reasonable, and that the development was within the "reasonably foreseeable future."* …The trial court prevented the Showalters from offering relevant evidence prepared for the condemnation proceedings, and the Showalters were prejudiced by the exclusion of that evidence.[392]

There is other authority seemingly recognizing or upholding the use of the development approach.[393] Nevertheless, the method may produce a valuation greatly in excess of a valuation determined by any other method.[394] One reason is that an appraiser must analyze the future expenses; determine when the property may

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[385] *Id*. at 246.

[386] Thorsen v. Johnson*,* 745 P.2d 1243, 1246 (Utah 1987) (stating in a case involving injury to property that a jury is "'not to inquire what a speculator might be able to realize out of a resale in the future, but what a present purchaser would be willing to pay for it in the condition it is now in'") (citation omitted); Dep't of Highways v. Schulhoff, 167 Colo. 72, 77, 445 P.2d 402, 405 (1968) ("It is proper to show that a particular tract of land is suitable and available for subdivision into lots and is valuable for that purpose. It is not proper, however, to show the number and value of lots as separated parcels in an imaginary subdivision thereof."); State Road Comm'n of W.Va. v. Ferguson, 148 W. Va. 742, 748, 137 S.E.2d 206, 210 (1964) (stating that "[e]vidence of the value of a tract of land based upon the total price of proposed lots into which the tract may be divided has been held improper and inadmissible in other jurisdictions"); Barnes v. N.C. State Highway Comm'n, 250 N.C. 378, 389, 109 S.E.2d 219, 228 (1959) ("It is proper to show that a particular tract of land is suitable and available for division into lots and is valuable for that purpose, but it is not proper to show the number and value of lots as separated parcels in an imaginary subdivision thereof."); N. Ind. Pub. Serv. Co. v. McCoy*,* 239 Ind. 301, 309, 157 N.E.2d 181, 185 (1959) ("'It is proper to inquire what the tract is worth, having in view the purposes for which it is best adapted; but it is the tract, and not the lots into which it might be divided, that is to be valued.'") (citation omitted).

[387] *See* Lehigh-Northampton Airport Auth. v. Fuller*,* 862 A.2d at 167 (affirming the trial court's holding that the condemnees placed development of the land squarely within the realm of a reasonable certainty).

[388] *Id.* (citation omitted).

[389] *Id.* at 166 (emphasis supplied) (*citing* Penn's Grant Assocs. v. Northampton County Bd. of Assessment Appeals, 733 A.2d 23, 28, n.11 (Pa. Commw. Ct. 1999); Clifford v. Algonquin Gas Transmission Co., 413 Mass. 809, 604 N.E.2d 697 (1992); Robinson v. Town of Westport, 222 Conn. 402, 610 A.2d 611 (1992); Ramsey County v. Miller, 316 N.W.2d 917 (Minn. 1982); United States v. 147.47 Acres of Land in Monroe County, Pa., 352 F. Supp. 1055 (M.D. Pa. 1972)).

[390] 862 A.2d 167.

[391] 895 A.2d 76 (Pa. Commw. Ct. 2006), *appeal denied*, 590 Pa. 670, 912 A.2d 839 (2006).

[392] *Id.* at 85 (citations omitted) (emphasis supplied).

[393] United States v. 174.12 Acres of Land, 671 F.2d 313, 316 (9th Cir. 1982) (holding that the "evidence was sufficient to support the jury's apparent conclusion that development of a port was a remote possibility"); United States v. 67.59 Acres of Land, 447 F. Supp. 844, 846 (M.D. Pa. 1978) (property owner "testified to what he envisioned as the potential development of his property had it not been condemned"); United States v. 100 Acres of Land in Marin County, 468 F.2d 1261, 1267 (9th Cir. 1972) (rejecting the government's contention that the trial court erred in allowing "testimony as to the reasonable probability that adjoining state owned tidelands would have been available in connection with the development of the subject property" because "evidence as to the reasonable probabilities of its use is admissible and may be considered" (citation omitted)), *cert. denied*, 414 U.S. 822, 94 S. Ct. 119, 38 L. Ed. 2d 54 (1973).

[394] *See* EATON, *supra* note 42, at 252.

be sold or developed; and select a discount rate that should be applied for delay until development.[395] Such estimates may be difficult to make, and if a factor is eliminated in using the approach the method may produce an extremely high valuation.[396]

A final word of caution may be in order regarding the use of the development approach: "[T]he development approach to value is generally quite time-consuming…and expensive…. [N]o other type of condemnation case requires as much pretrial conferences and pretrial preparation as a case involving the development approach to value."[397]

[395] *Id*.

[396] *Id*.

[397] *Id*. at 270.