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Eminent Domain: Ohio Evidentiary Aspects in Ascertaining Market Value

Joseph Paul Valentino

NOTES

Eminent Domain: Ohio Evidentiary Aspects in Ascertaining Market Value

EMINENT DOMAIN has been defined as the taking, without the owner's consent, of private property for public use upon a making of just compensation.[1] In recent years, myriad public improvement projects have resulted in the appropriation of billions of dollars of private property and in voluminous litigation. The law of eminent domain inherently involves a direct conflict between the owner of the property taken (condemnee) and the state or other governmental agency (condemnor) as to the proper valuation of such property. The conflict typically arises in the following manner: The condemnee generally alleges that the valuation does not constitute the "just compensation"[2] to which he is constitutionally entitled, whereas the condemnor alleges that such determination indeed reflects the true value of the property. The conflict is resolved in a condemnation proceeding where generally the only issue involved is the amount of compensation to be awarded to the condemnee. The proceeding centers around a controversy as to either the elements of value or the evidentiary procedures by which these elements are translated into a monetary value.

The purpose of this Note is to analyze the evidentiary aspects of an Ohio condemnation proceeding where there has been a complete appropriation of the condemnee's property. The analysis will encompass (1) the meaning of the terms "just compensation" and "fair market value"; (2) a discussion of those items of evidence which the Ohio courts have deemed to be admissible in ascertaining the value of the appropriated property; and (3) a discussion of those items which have been specifically excluded because they do not aid in ascertaining the value of the land.

I. MEANING OF "JUST COMPENSATION"

Both the United States and Ohio Constitutions provide that an owner of private property is entitled to receive "just compensation" if his property is taken for public use.[3] In construing the term "just

[1] 1 NICHOLS, EMINENT DOMAIN § 1.11, at 7 (rev. 3d ed. 1964).

[2] *E.g.*, U.S. CONST. amend. V; see OHIO CONST. art. I, § 19, art. XIII, § 5.

[3] U.S. CONST. amend. V provides: "nor shall private property be taken for public

compensation," the courts have been reluctant to define it or to prescribe definite standards as to its application. In *United States v. Cors*,[4] for example, the Supreme Court stated: "The Court in its construction of the constitutional provision has been careful not to reduce the concept of 'just compensation' to a formula . . . [T]he Amendment does not contain any definite standards of fairness by which the measure of just compensation is to be determined."[5] Although *Cors* emphasized that the term is incapable of exact definition,[6] the Supreme Court in numerous other instances has defined the term to mean the fair market value of the property.[7]

Generally, the Ohio courts have held that the amount of compensation to which a landowner is entitled upon appropriation of his property is its fair market value.[8] However, it is imperative to note that "market value" is not an end in itself, but merely a means used in ascertaining "just compensation."[9] Thus, it appears that

use, without just compensation." OHIO CONST. art. I, § 19 provides: "Private property shall ever be held inviolate, but subservient to the public welfare. . . . [W]here private property shall be taken for public use, a compensation thereof shall first be made in money . . . and such compensation shall be assessed by a jury . . . ." See also OHIO CONST. art. XIII, § 5. *In re* Appropriation of Easements for Highway Purposes, 118 Ohio App. 285, 194 N.E.2d 151 (1963) held that "the word 'compensation' [as used in OHIO CONST. art. I, § 19] is the equivalent of the term 'just compensation' in the Fifth Amendment of the Constitution of the United States." *Id.* at 287, 194 N.E.-2d at 153.

[4] 337 U.S. 325 (1949).

[5] *Id.* at 332.

[6] *Ibid.*

[7] Dugan v. Rank, 372 U.S. 609 (1963); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. Miller, 317 U.S. 369 (1943); United States v. New River Collieries Co., 262 U.S. 341 (1923). In United States v. Cors, 337 U.S. 325 (1949), the Supreme Court recognized that generally "market value" is synonymous with "just compensation" but held that this is not a universal rule by stating:

> The Court in an endeavor to find working rules that will do substantial justice has adopted practical standards, including that of market value. . . . But it has refused to make a fetish even of market value, since that may not be the best measure of value in some cases. At times some elements included in the criterion of market value have in fairness been excluded, as for example where the property has a special value to the owner because of its adaptability to his needs or where it has a special value to the taker because of its peculiar fitness for the taker's project. *Id.* at 332.

[8] Muskingum Watershed Conservancy Dist. v. Funk, 134 Ohio St. 302, 16 N.E.2d 454 (1938); Giesy v. Cincinnati W. & Z. Ry., 4 Ohio St. 308 (1854); Naftzger v. State, 24 Ohio App. 183, 156 N.E. 614 (1927).

[9] *E.g.*, City of Cleveland v. Langenau Mfg. Co., 128 N.E.2d 130 (Ohio Ct. App. 1954); *cf.* City of Cleveland v. Carcione, 118 Ohio App. 525, 190 N.E.2d 52 (1963). In Housing Authority v. Savannah Iron & Wire Works, Inc., 91 Ga. App. 881, 87 S.E.2d 671 (1955) the court stated:

> [W]hile market value is the general yardstick in a condemnation proceeding or a suit for compensation in the nature of a condemnation proceeding, there may be circumstances in which market value and actual value are not

"just compensation" is the "fair market value" of the land unless the facts and circumstances of the particular case indicate that the property has no market value or that the use of market value would be prejudicial or result in an "unjust compensation."

Although the general rule is that the measure of compensation is the fair market value of the land, the court still must determine what is meant by the term "market value." Generally, it has been defined as the price a purchaser who is willing but not obliged to buy the property would pay to an owner who is willing but not obliged to sell the property, considering all the uses to which the land was adapted and might reasonably be applied.[10] In *Sowers v. Schaeffer*,[11] the Ohio Supreme Court, recognizing that the measure of compensation is the market value of the property, stated:

> "[I]n determining the amount of compensation, or the market value of the property taken, each case must be considered in the light of its own facts, and every element which can fairly enter into the question of value, and which *an ordinarily prudent business man* would consider before forming a judgment in making a purchase, should be considered."[12]

Another recent decision,[13] emphasizing that *only* such facts are admissible, held that the trial court had committed prejudicial error in instructing the jury to consider every element "which would influence *any intended purchaser's* estimate of the market value of such property."[14] Therefore, it appears that the Ohio courts would admit all those items which an owner would stress upon a buyer with whom he is negotiating a sale, excluding only those items

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the same, and in such event the jury may consider the actual value of the land or interest therein appropriated. *Id.* at 885-86, 87 S.E.2d at 676.

[10] 4 NICHOLS, *op. cit. supra* note 1, § 12.2[1], at 48-54. For a similar definition by the Ohio Supreme Court, see Preston v. Stover Leslie Flying Serv., Inc., 174 Ohio St. 441, 450, 190 N.E.2d 446, 452 (1963).

[11] 155 Ohio St. 454, 99 N.E.2d 313 (1951).

[12] *Id.* at 459, 99 N.E.2d at 317, quoting from 29A C.J.S. *Eminent Domain* § 136 (5), at 555-57 (1965). (Emphasis added.)

[13] Masheter v. Yake, 9 Ohio App. 2d 327, 224 N.E.2d 540 (1967).

[14] *Id.* at 331, 224 N.E.2d at 543. The court stated:

> Nor is market value, or damages, determined by the influence these elements would have on *any intended purchaser.* Some prospective purchasers would be influenced or react differently to such elements than would others, even to the extent of being arbitrary. A nervous person might not be able to stand noise, whereas a deaf person would not be bothered. A childless or bold person would not fear the proximity of fast moving traffic to the extent that a timid person or one with several young children would. A person having no car would not be as concerned about access to his property as would a person owning a car. The test of influence or consideration relates not to *any intended purchaser* but to an *ordinarily prudent business man.* *Id.* at 332, 224 N.E.2d at 543.

which an ordinarily prudent businessman would not consider if he were purchasing the property.

The application of the "voluntary seller — willing prudent buyer" test to ascertain "just compensation" is seemingly a legal fiction, since in reality the sale is a forced sale. Further, since land is deemed unique, the application of such a test without considering the bargaining power of the specific individuals involved is wholly imaginary. However, since no better system has been devised, market value continues to be the recognized measure of compensation when land is appropriated by eminent domain.

Therefore, in a condemnation proceeding, the court is faced with the difficult task of admitting that evidence which would as fairly and accurately as possible represent the market value of the condemned land, while excluding that evidence which is either misleading to the jury or which the fictitious prudent buyer would consider as merely "puffing" on the part of the seller. An analysis of the admissible and excludable items, as so deemed by the Ohio courts when attempting to establish the market value of a parcel of land, will clarify the term "just compensation" and illustrate whether or not it has been received by the condemnee.

II. Ascertaining Market Value

Generally, any evidence competent under the general rules of evidence and relevant to the question of value is admissible.[15] In Ohio, admission of evidence rests upon the sound discretion of the trial court.[16] It would be mere speculation to specifically enumerate those items which are admissible and those items which are excluded in establishing the market value of condemned property in any given case.[17] However, some elements, if properly presented, have been universally held to be admissible by the Ohio courts as tending to establish the market value of the appropriated property.

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[15] See, *e.g.*, Ohio Turnpike Comm'n v. Ellis, 164 Ohio St. 377, 131 N.E.2d 391 (1955), *appeal dismissed*, 352 U.S. 806 (1956); Muskingum Watershed Conservancy Dist. v. Funk, 134 Ohio St. 302, 16 N.E.2d 454 (1938); *In re* Appropriation of Easements for Highway Purposes, 93 Ohio App. 179, 112 N.E.2d 411, *dismissed sub nom.* Baron v. Kaver, 158 Ohio St. 285, 109 N.E.2d 3 (1952); Naftzger v. State, 24 Ohio App. 183, 156 N.E. 614 (1927).

[16] Noble v. Flowers, 108 Ohio App. 1, 160 N.E.2d 383 (1959), where the court stated: "It must be remembered that the admission or rejection of evidence in appropriation proceedings is primarily a matter of discretion with the trial court, and reviewing courts have been loathe, in the absence of abuse of that discretion, to tamper with the results." *Id.* at 3, 160 N.E.2d at 385.

[17] See *ibid.*

A. Highest and Best Use

The Ohio courts have held that market value does not depend upon the present use or any particular use of the land by the owner, but rather is arrived at by considering the best and most profitable use to which the property can reasonably and practically be adapted.[18] Thus, in *Sowers v. Schaeffer*[19] the Ohio Supreme Court stated that "in estimating the value of property in an appropriation proceeding, it must be valued as to its worth generally, not for any particular use but for any and all uses for which it may be suitable."[20] The *Schaeffer* case has been construed very liberally, as evidenced by the case of *Ellis v. Ohio Turnpike Comm'n*,[21] where the Ohio Supreme Court held that a landowner was permitted to show a *particular use* of the property as distinguished from a *general use* by stating that "evidence tending to show a particular use was admissible because in logic and reason the highest and best use of the property cannot be shown without giving one or more particular uses for which it is available."[22] Therefore, it appears that the landowner can show any and all uses for which his property is suitable, but is not prohibited from showing a particular use which may be the most profitable. The adoption of such a test prevents the property owner from being economically penalized for using his land in a manner which is not the most profitable economic use.

Furthermore, the fact that the owner is prohibited by a restrictive covenant in his deed from using the property in a certain manner does not prevent him from showing that such prohibited use is the best and most valuable use to which the property is suitable.[23]

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[18] See text accompanying notes 19-22 *infra.*

[19] 155 Ohio St. 454, 99 N.E.2d 313 (1951).

[20] *Id.* at 458, 99 N.E.2d at 317. See also Board of County Comm'rs v. Thormyer, 169 Ohio St. 291, 159 N.E.2d 612 (1959); Cincinnati & S. Ry. v. Executor of Longworth, 30 Ohio St. 108 (1876); Goodin v. Cincinnati & Whitewater Canal Co., 18 Ohio St. 169 (1868). In Olson v. United States, 292 U.S. 246 (1934) the Supreme Court stated:

> The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. *Id.* at 255.

[21] 124 N.E.2d 441 (Ohio Ct. App. 1955).

[22] *Id.* at 446.

[23] In Board of County Comm'rs v. Thormyer, 169 Ohio St. 291, 159 N.E.2d 612 (1959), evidence pertaining to the value of the land for commercial purposes was admitted even though the county commissioners held title to such land under a deed

It therefore appears that in ascertaining market value, the best and most valuable use to which the land can reasonably and practically be applied is the proper measure of compensation, and neither the present use nor any specific limitation of the owner as to the use or disposition of his property can diminish such compensation.

Inherent in the definition of the "highest and best use" rule of valuation are the limitations upon it.[24] It appears that, for the rule to be applicable, the landowner must first show that the property is adaptable to another use and that there is a reasonable probability that the property could be put to such use in the foreseeable future.[25] The 1882 case of *Trustees of Cincinnati So. Ry. v. Garrard*[26] aptly summed up the limitations of the highest and best use rule of valuation by stating:

> Real estate, being immovable, cannot be taken to market; the market must be taken to it; and therefore the question is not, merely, fitness for use, but taking it where it is, the probabilities of its being wanted. Being a question of present value, the wants to be considered *are those of the present; the probabilities of the future are not to be taken into account, except as they would affect the present. Being the value as between seller and buyer today, it is to be viewed in its condition and surroundings to-day, the same as it would be by buyers and sellers.*[27]

Thus, if an ordinarily prudent buyer would consider the proposed use as affecting the present market value of the land, it appears that

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which prevented them from selling or using the property for any purpose other than a children's home. The Ohio Supreme Court held that such evidence was admissible, stating that if the donor had foreseen an appropriation of the property, he would not have wanted the state to benefit from the deed restrictions by enabling it to appropriate the property for less than it was worth. *Id.* at 300, 159 N.E.2d at 618.

[24] In United States v. Cooper, 277 F.2d 857 (5th Cir. 1960), for example, the Government alleged that the trial court erred in permitting the jury to value the land as a potential dam site where the condemnee offered no proof that there was a reasonable probability that the land would be used as a dam by anyone other than the federal government. In reversing the district court, the court of appeals held that "in addition to proof that the land offered a site on which it would be practicable to build a dam . . . it was incumbent on the plaintiffs to prove that there was also a reasonable *likelihood* that it would be so used in the *reasonably near future.*" *Id.* at 859. (Emphasis omitted.) See also Olson v. United States, 292 U.S. 246, 256-57 (1934); Sowers v. Schaeffer, 155 Ohio St. 454, 99 N.E.2d 313 (1951).

[25] City of Columbus v. Zanes, 120 Ohio App. 229, 201 N.E.2d 837 (1964). The court stated:

> In determining the market value of this easement taken, you should consider the highest and best use for the property at the time of the taking of the easement and in the reasonably foreseeable future. . . . However, merely possible use of the property many years in the future is too speculative and should not be considered. *Id.* at 232, 201 N.E.2d at 839.

[26] 8 Ohio Dec. Reprint 389 (Ohio C.P. 1882).

[27] *Id.* at 391. (Emphasis added.)

such proposed use would be admissible. However, if such buyer would consider the use as not being reasonably probable, but merely of speculative or imaginary value, it appears that evidence of such use would be inadmissible. The test as to whether a proposed use is admissible seems to be whether such use would actually influence the price an ordinarily prudent businessman would be willing to pay for the condemned land.

B. Date of Valuation

Another element which must be considered prior to computing market value is the date on which the property should be valued. In *Director of Highways v. Olrich*,[28] the Supreme Court of Ohio enunciated the general rule that property is valued as of the date of the trial unless there has been a prior taking, in which event compensation is determined as of the time of that taking.[29]

Prior to the adoption of the Ohio Uniform Eminent Domain Act,[30] the Ohio courts had held that a taking occurred when there had been an entry upon the land either manifesting an intent to exercise dominion over the property[31] or substantially interfering with the owner's right to use or enjoy the property.[32] It appears that a physical entry upon the land is required, and whether or not a particular entry will constitute a taking often involves a difficult factual determination.[33] The Uniform Act does not afford a solution to the problem since it permits the agency to enter for the purpose of making surveys, soundings, drillings, appraisals, and examinations.[34] However, it does provide that the court shall enter an order granting possession of the property to the agency only after the agency either pays the amount of the award to the property owner or deposits such amount with the court.[35] Therefore, it appears that under the act there will not be deemed a taking un-

[28] 5 Ohio St. 2d 70, 213 N.E.2d 823 (1966).

[29] *Id.* at 72, 213 N.E.2d at 825. See also Nichols v. City of Cleveland, 104 Ohio St. 19, 135 N.E. 291 (1922); Thormyer v. Joseph Evans Ice Cream Co., 167 Ohio St. 463, 150 N.E.2d 30 (1958).

[30] OHIO REV. CODE §§ 163.01-.22 (Supp. 1966). For a discussion of the relevant portions of the act, see Note, *Ohio's Uniform Eminent Domain Act: Transfer of Title and Possession*, 27 OHIO ST. L.J. 525 (1966).

[31] Cincinnati v. Smallwood, 106 Ohio App. 496, 150 N.E.2d 310 (1958) (dictum).

[32] See Thormyer v. Joseph Evans Ice Cream Co., 167 Ohio St. 463, 150 N.E.2d 30 (1958).

[33] *Ibid.*

[34] OHIO REV. CODE § 163.03 (Supp. 1966).

[35] OHIO REV. CODE § 163.15 (Supp. 1966).

less the court grants an order to such effect, and, in the absence of such order, the property will be valued as of the date of trial.

There are exceptions to the general rule, however, as illustrated by *City of Cleveland v. Carcione*,[36] where the city adopted an urban renewal plan in the area of appellant's property. The city notified all area residents of the plan and proceeded to raze the buildings as it acquired title to the land. When appellant's property was appraised, the jury was instructed to value the property as of the date of trial, at which time many of the buildings were delapidated and vandalized. The court held that due to the facts and circumstances of the case, the property should be valued at a date prior to the initiation of the urban renewal project which depreciated the value of the property.[37] Although the court recognized the rule that, unless there is a prior taking, the property is to be valued as of the date of trial,[38] it refused to apply such rule by stating in effect that the facts and circumstances of the case should determine the valuation so as to assure the condemnee of receiving "just compensation" as required by the Ohio Constitution.[39] Although the reasoning of the *Carcione* case is based upon the practical considerations of fairness and expediency, the Ohio Supreme Court in the *Olrich* case limited *Carcione* to its facts and reaffirmed the traditional rule that valuation is determined at the time of trial unless there is a prior taking.[40]

However, in *City of Akron v. Alexander*,[41] the trial court had refused to grant appellant's request to have the jury view the premises despite statutory language to the contrary.[42] The court reasoned that the rights of the property owner would be prejudiced because of the substantial depreciation in value of the surrounding area since the inception of an urban renewal project. It therefore held that a view of the premises by the jury is not evidence, but rather is used solely to enable the jurors to better understand the evidence offered by the parties.[43] Furthermore, the court stated that

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[36] 118 Ohio App. 525, 190 N.E.2d 52 (1963).

[37] *Id.* at 533, 190 N.E.2d at 57.

[38] *Id.* at 532, 190 N.E.2d at 57.

[39] *Ibid.*

[40] Director of Highways v. Olrich, 5 Ohio St. 2d 70, 74, 213 N.E.2d 823, 826 (1966).

[41] 5 Ohio St. 2d 75, 214 N.E.2d 89 (1966).

[42] OHIO REV. CODE § 719.10.

[43] 5 Ohio St. 2d at 77, 214 N.E.2d at 91.

> where the view would cause an injustice to the property owner and deprive him of compensation to which he is entitled, and where the evidence of valuation is not alleged to be complex or unclear, the legislative purpose would not be served in granting a view of the premises.[44]

Thus, an analysis of *Carcione*, *Alexander*, and *Olrich* demonstrates that condemned property should be valued as of the date of trial unless there has been a prior taking or unless the facts and circumstances are such that valuing the property as of the date of trial would be prejudicial to the owner. It should be noted that a corollary to this rule is that the fair market value of the property cannot be enhanced by the value of the public improvement.[45] This is only equitable, for the owner should not be permitted to obtain an economic windfall.

III. Computing Market Value

A. Comparable Sales

There is a conflict of authority as to whether the sales price of land similar to that being appropriated is admissible to show that land's market value.[46] A great majority of jurisdictions hold that such evidence is admissible if the conditions surrounding the sale are similar and if the sale of the comparable property was neither too remote in time nor of such a character as to indicate that it did not represent the true value of the property.[47] Those jurisdictions which exclude evidence of comparable sales justify it by stat-

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[44] *Id.* at 78, 214 N.E.2d at 91.

[45] Thus, in Nicols v. City of Cleveland, 104 Ohio St. 19, 135 N.E. 291 (1922) the court stated in a headnote that

> where one entire plan has been adopted for a public improvement and from the inception a certain tract of land has been actually included therein, the owner of such tract in a condemnation proceeding therefor is not entitled to an increased value which may result from the improvement, where its appropriation is a condition precedent to the existence of the improvement.

[46] See Annot., 85 A.L.R.2d 113 (1962); 5 Nichols, *op. cit. supra* note 1, § 21.3 and cases cited therein for a discussion of both views.

[47] *Ibid.* Thus, in United States v. 329.05 Acres of Land, 156 F. Supp. 67 (S.D.N.Y. 1957) the court, in explaining the majority view, stated:

> Sales of the same property or those of a comparable character in the same neighborhood in recent times constitute the best evidence upon which to establish value in a condemnation proceeding.
>
> Nonetheless, no one sale can be conclusive since almost every piece of land is different from every other piece of land in its particular characteristics. All that we can do is study several sales, note the dates thereof and the types of land involved, and arrive at some figure which makes allowances for such differences as are apparent. *Id.* at 71. (Citations omitted.)

ing that such evidence introduces a multitude of collateral issues which tend to mislead the jury and consume unnecessary time.[48]

The basic theory of the comparable sale approach is that evidence of what a "real" purchaser paid for a parcel of property on a certain date and under certain conditions may support a logical inference that, had a *similar* piece of property been offered at the same time, a similar price could have been obtained.[49] As the number of sales increase, the probability approaches almost certainty as to the price that could be obtained. Thus, the court or jury is enabled to reason by comparison as to how much an "ordinarily prudent businessman" would pay, and how much an owner who is "willing but not obliged to sell" would accept as of a certain date for the property being condemned.[50] The fallacy of the comparable sales approach is that since no two parcels of real estate are exactly alike, it would be impossible to find a parcel of real estate which is identical to the parcel of property that is being condemned. However, there may be enough similarities to enable the court to make a reasonable comparison. One writer has stated that

> whether such evidence shall be admitted does not depend upon any fundamental principle of the law of evidence, but is purely a practical one, depending upon whether there is a net gain or loss to the orderly and expeditious administration of justice . . . by the use of such evidence.[51]

Since the trial court possesses broad discretionary powers as to the admission or exclusion of value evidence,[52] it is necessary to enunciate the guidelines of comparison which the appellate courts have adopted in determining whether the trial court has abused its discretion when admitting or excluding evidence of comparable sales. In *Director of Highways v. Bennett*,[53] the court indicated that as a prerequisite to introducing a comparable sale, a party must show such sale was fair and voluntary;[54] that the properties were

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[48] See note 46 *supra* and accompanying text.

[49] Hershman, *Compensation — Just and Unjust: A Study in Eminent Domain*, 21 BUS. LAW. 285, 309 (1966).

[50] *Ibid.*

[51] 5 NICHOLS, EMINENT DOMAIN § 21.3[1] (3d ed. 1964).

[52] See text accompanying note 16 *supra*.

[53] 118 Ohio App. 207, 193 N.E.2d 702 (1962).

[54] In Naftzger v. State, 24 Ohio App. 183, 156 N.E. 614 (1927), the court stated that "sales by sheriffs and sales that are in the nature of a compromise, or are affected by an element which does not enter into similar transactions made in the ordinary course of business, not being a fair criterion of value, are not admissible in evidence." *Id.* at 185, 156 N.E. at 615.

similar in their geographic proximity, size, and use;[55] and that the time of such sale was reasonably near the time of valuing the condemned property.[56] Although the appellate courts have formulated these necessary guidelines, they have stated that the guidelines should be determined by the trial court, and in the absence of an abuse of discretion, the trial court's determination will not be disturbed.[57]

There appears to be a conflict as to whether a comparable sale is admissible on direct examination or only on cross-examination. In the 1904 case of *Cincinnati v. Eversman*,[58] an Ohio common pleas court held that similar sales were admissible on direct examination since they often provided safe guides in determining market value.[59] However, in *Cleveland T. & V. Ry. v. Gorsuch*,[60] it was held objectionable to ask a witness as to the *general selling price* of lands in the neighborhood within a comparatively short time. The circuit court reversed stating that evidence of the *general selling price* of land is admissible but that evidence of prices in particular sales is inadmissible.[61] The *Gorsuch* case thus appears to stand for the proposition that a witness may testify as to the general selling price of lands in the neighborood on direct examination but is not permitted to specifically state the selling price of a particular piece of property.

In *Muccino v. Baltimore & Ohio Rd.*[62] the court, recognizing the conflict, stated that "neither of these rules permits a witness, upon direct examination, to state what 'the general selling price of land in the neighborhood' is."[63] Therefore, the *Muccino* case does not

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[55] See generally Hershman, *supra* note 49, at 310-15 for a well-documented discussion of the criteria of similarity. See also Knollman v. United States, 214 F.2d 106 (6th Cir. 1954).

[56] *Ibid.*; 118 Ohio App. at 213, 193 N.E.2d at 707. See also Ohio Turnpike Comm'n v. Ellis, 164 Ohio St. 377, 131 N.E.2d 391 (1955), *appeal dismissed*, 352 U.S. 806 (1956); Naftzger v. State, 24 Ohio App. 183, 156 N.E. 614 (1927).

[57] *E.g.*, Knollman v. United States, 214 F.2d 106 (6th Cir. 1954); Ohio Turnpike Comm'n v. Ellis, *supra* note 56; Muccino v. Baltimore & Ohio Rd., 33 Ohio App. 102, 168 N.E. 752 (1929).

[58] 4 OHIO L. REP. 140 (C.P. 1904).

[59] *Id.* at 147.

[60] 18 Ohio C.C. Dec. 468, 471 (1905), *aff'd*, 76 Ohio St. 609, 81 N.E. 1186 (1907).

[61] *Id.* at 472.

[62] 33 Ohio App. 102, 168 N.E. 752 (1929).

[63] *Id.* at 107, 168 N.E. at 754. See also Naftzger v. State, 24 Ohio App. 183, 184, 156 N.E. 614, 615 (1927), which held that the average price obtained in sales in the neighborhood was admissible to show the fair market value of the condemned property.

solve the problem of admissibility on direct examination but does determine that it is not proper to permit the witness to testify as to the general selling price of neighboring lands. Although *Muccino* conflicted with but did not specifically overrule *Gorsuch*, it must be remembered that the latter was affirmed by the Ohio Supreme Court.[64] Nevertheless, it appears certain that a witness may not testify as to the specific selling price of adjacent property on direct examination.[65] In *Cleveland T. & V. Ry. v. Gorsuch*,[66] it was held proper to ask an opposing party's witness the selling price of a particular tract of land because such price does not fix the value, nor does the time at which such sale was consummated alone determine the present value.[67] The court concluded that these elements are admissible only as tending to show present value.[68] Other courts[69] have admitted such evidence on the rationale that the knowledge of the witness is being tested to help determine the weight that should be given him as an expert witness as to value.[70]

Although it is thus permissible on cross-examination to inquire as to the selling price of comparable lands for the purpose of testing the knowledge and competency of the witness, it is prejudicial error "to incorporate into such inquiries a statement or assumption that such sales at prices named have in fact occurred."[71]

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64 Cleveland T. & V. Ry. v. Gorsuch, 76 Ohio St. 609, 81 N.E. 1186 (1907).

65 Masheter v. Yake, 9 Ohio App. 2d 327, 329, 224 N.E.2d 540, 542 (1967); Muccino v. Baltimore & Ohio Rd., 33 Ohio App. 102, 168 N.E. 752 (1929); Naftzger v. State, 24 Ohio App. 183, 156 N.E. 614 (1927); Cleveland T. & V. Ry. v. Gorsuch, 18 Ohio C.C. Dec. 468, 472 (1905), *aff'd*, 76 Ohio St. 609, 81 N.E. 1186 (1907).

> In De Rose v. Cleveland, 14 Ohio L. Abs. 176 (Ct. App. 1933), the court asserted that while there has been some confusion among the courts and authorities the better rule adopted by the Ohio courts is that a witness called as to values of real estate, after being qualified as an expert, may state in his direct examination in chief that he is acquainted with the values of real estate in the vicinity of the property in litigation and that he knows the sale price of specific parcels or tracts of similar quality and location, *but he cannot testify in chief what those sale prices were. Id.* at 178. (Emphasis added.)

66 18 Ohio C.C. Dec. 468 (1905), *aff'd*, 76 Ohio St. 609, 81 N.E. 1186 (1907).

67 *Id.* at 472.

68 *Ibid.*

69 W. M. Southern Realty Co. v. Schmidt, 3 Ohio App. 70 (1914).

70 *Id.* at 75. In Muccino v. Baltimore & Ohio Rd., 33 Ohio App. 102, 168 N.E. 752 (1929), the court, in justifying the rule, stated: "Each party has an opportunity on cross-examination to develop all competent evidence as to other sales for the purpose of determining the weight to be given to the opinions of the witnesses as to value, and usually the ends of justice will be best promoted by confining the parties to such a course." *Id.* at 105, 168 N.E. at 753.

71 Masheter v. Yake, 9 Ohio App. 2d 327, 330, 224 N.E.2d 540, 542 (1967), where the witness was asked the following question: " 'Do you have any record of recent sale from Jessie Wyantt to Ed Barringer — the second house east of the old church *which sold for $10,600.00*, within the last three weeks?' " In holding that the admission of

It is also interesting to note that it is improper to illicit on cross-examination the price paid for neighboring lands that have been previously taken in other condemnation proceedings.[72] In rejecting such evidence, it has been stated:

> A negotiated sale to the state of Ohio of land to be used for highway right of way is not a voluntary sale, for the state has to have the land and the seller has to sell or undergo proceedings in eminent domain. The price resulting has no direct relation to fair market value and does not constitute proof thereof.[73]

The reason for the rule seems to be that if the price were admissible, the jury might construe such price as the fair market value of the condemned land, when in fact the condemning authority may have been willing to pay more than the true value of the land in order to avoid litigation.[74]

It is submitted that the court could curb this fear in its phrasing of the instructions to the jury and that such prices should be admissible, not for the purpose of setting a floor or ceiling as to the property's valuation, but as simply another aid to the jury in arriving at the fair market value of the condemned property.

Similarly, it seems that the selling price of comparable lands should be admissible on direct examination, since the reason for using the comparable sale approach is to show that such land is similar to the condemned land and that this similar land is valued at or was purchased for a certain monetary amount, such amount tending to show the present market value of the appropriated property. The reasoning of the Ohio courts in refusing to allow a witness to testify on direct examination as to the specific selling price of a comparable piece of property is tenuous, particularly since opposing counsel always has the opportunity to cross-examine the

such question was prejudicial error, the court stated: "[W]e hold that the trial court committed error . . . [in permitting] the questions of the owner's counsel, which assumed comparable sales at stated prices when such sales had not been previously testified to and no proper foundation had been laid to show the sales comparable." *Ibid.* See also Morison v. Cleveland, 32 Ohio C.C. Dec. 215 (1911).

[72] Masheter v. Yake, *supra* note 71, at 329, 224 N.E.2d at 541-42.

[73] *Id.* at 329, 224 N.E.2d at 542. Further, in Naftzger v. State, 24 Ohio App. 183, 156 N.E. 614 (1927), the court stated:

> What the party condemning has paid for other property is generally held to be incompetent. In most such cases the party "must have the particular property, even if it costs more than its true value. The fear of one party or the other to take the risk of legal proceedings ordinarily results in the one party paying more or the other taking less than is considered to be the fair market value of the property. For these reasons such sales would not seem to be competent evidence of value in any case, whether in a proceeding by the same condemning party or otherwise." *Id.* at 185, 156 N.E. at 615.

[74] *Ibid.*

witness in order to discredit his credibility and competency. Such inadmissibility only results in the jury's being deprived of a valuable aid in their attempt to find the fair market value of the appropriated property.

B. *Prior Sales of the Condemned Property*

In *Tennessee Gas Transmission Co. v. Mattevi*,[75] a court of appeals held that evidence of a prior selling price for property which is the subject of an appropriation proceeding is admissible if the following conditions are satisfied:

(a) The sale must be bona fide.
(b) The sale must be voluntary, not forced.
(c) The sale must have occurred relevantly in point of time; and
(d) The sale must cover substantially the same property which is the subject of the appropriation action.[76]

Further, in *Ohio Turnpike Comm'n v. Ellis*,[77] the Supreme Court of Ohio held that the admissibility of the price paid by the owner of the property is within the sound discretion of the trial court.[78]

It appears that the most important of the above factors is the time period between the date the owner purchased the property and the date such property was taken in eminent domain.[79] Thus, in *Mattevi* the appellate court held that the trial court exercised sound discretion in excluding the price which the defendants had paid for their land nine years before the condemnation proceeding.[80] However, it must be noted that, even if admissible, such price does not fix the present value of the property but is only admitted as tending to show present value.[81]

Although some jurisdictions hold that bona fide offers to purchase the appropriated property are admissible as tending to show the present value of the land,[82] the Ohio courts have rejected such

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[75] 144 N.E.2d 123 (Ohio Ct. App. 1956).

[76] *Id.* at 126.

[77] 164 Ohio St. 377, 131 N.E.2d 397 (1955), *appeal dismissed*, 352 U.S. 806 (1956).

[78] *Id.* at 388, 131 N.E.2d at 406.

[79] *E.g.*, Ohio Turnpike Comm'n v. Ellis, 164 Ohio St. 377, 131 N.E.2d 397 (1955), *appeal dismissed*, 352 U.S. 806 (1956); Tennessee Gas Transmission v. Mattevi, 144 N.E.2d 123 (Ohio Ct. App. 1956); Naftzger v. State, 24 Ohio App. 183, 156 N.E. 614 (1927).

[80] 144 N.E.2d at 126.

[81] Director of Highways v. Bennett, 118 Ohio App. 207, 213, 193 N.E.2d 702, 707 (1962).

[82] See 5 NICHOLS, *op. cit. supra* note 51, § 21.4[1] and cases cited therein.

offers as not being competent.[83] The Supreme Court has agreed, stating that the reason an offer to purchase should not be admissible is that "it is of a nature entirely too uncertain, shadowy and speculative to form any solid foundation for determining the value of the land."[84] It is submitted that if in the discretion of the trial court the party seeking to introduce such evidence can show that the offer was bona fide, that the offeror was reasonable, and that he could comply with the offer if it were accepted, then an offer to purchase should be admissible for its probative value. The weight to be given such offer would then be within the province of the jury.

Although the Ohio courts reject offers to purchase, it appears that offers to sell the land by the owner are admissible as possible declarations against interest. The *Ellis* case held that the owner's financial statement which valued the land a good deal lower than he claimed in the appropriation proceeding was admissible as a declaration or admission against interest bearing on the weight and credibility to be accorded the owner's claim as to the value of his land.[85] The case of *City of Cleveland v. Grisanti*[86] emphasized that the statement must have been made within a relatively short period of time prior to the appropriation proceeding. There the owner had made a statement for tax valuation six years earlier. The court held that such statement was inadmissible as being too remote in time.[87] In any event, the Ohio courts have generally held that the assessed valuation of property is not evidence of its value for other than tax purposes.[88] However, in *Toledo Consol. St. Ry. v. Toledo Elec. St. Ry.*,[89] evidence of the tax valuation of the condemned property was admissible as a declaration against interest since the owner made out the valuation report.[90] Since *Grisanti* did not specifically hold that an owner's declaration concerning the tax valuation of his property is inadmissible per se, it appears that the Ohio rule is that an owner's statement concerning the valuation of his property

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[83] *E.g.*, Plymouth & Shelby Traction Co. v. Dempsey, 9 Ohio N.P. (n.s.) 65 (C.P. 1909).

[84] Sharp v. United States, 191 U.S. 341, 348-49 (1903).

[85] 164 Ohio St. at 382, 131 N.E.2d at 402.

[86] 187 N.E.2d 515 (Ohio Ct. App. 1963). See also Ohio Turnpike Comm'n v. Ellis, 164 Ohio St. 377, 131 N.E.2d 397 (1955), *appeal dismissed*, 352 U.S. 806 (1956).

[87] 187 N.E.2d at 517.

[88] *E.g.*, Bana v. Pittsburgh Plate Glass Co., 76 N.E.2d 625, 628 (Ohio Ct. App. 1947); Cincinnati So. Ry. v. Banning, 12 Ohio L. Abs. 259 (Ct. App. 1922).

[89] 5 Ohio C.C. Dec. 643 (1893).

[90] *Id.* at 654-55.

for tax purposes may be admissible as an admission against interest in a subsequent condemnation proceeding. However, if the owner neither participated in fixing the assessed tax valuation nor made any written requests or declarations concerning such valuation, then the assessed tax valuation of the condemned property is inadmissible to show the present value of such property. Further, it appears that, in Ohio, offers to sell are admissible as an admission against interest if in the sound discretion of the trial court the date of such admissions was not so remote in time as to materially destroy their evidentiary value.[91]

C. *Income Valuation*

Another method which has been used to determine the market value of *revenue-producing property* is the capitalization of the income derived from such property.[92] The income approach to valuation is a mathematical process for converting present and future rents into capital value which is computed by direct, indirect, or residual methods.[93] Generally, the courts make a sharp distinction between the income from the *business conducted on the real estate* and the income which is attributable solely or primarily to the *use of the property itself.*[94] Therefore, the attorney is confronted with allocating the profits from the land between these two sources.

In *Sowers v. Schaeffer*[95] the Supreme Court of Ohio held that profits derived from businesses conducted on the premises are inadmissible since "such profits are too speculative, depending as they do upon the acumen and skill of the one who carries on the business."[96] Losses resulting from inconvenience, interference with business, and loss of goodwill or anticipated future profits have also been found inadmissible.[97] Therefore, the Ohio rule appears to be that evidence as to a loss of income is inadmissible where such in-

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91 See cases cited notes 85-87 *supra* and accompanying text.

92 See generally Comment, 43 NEB. L. REV. 137 (1964) for a discussion as to how income valuation is computed. See also 5 NICHOLS, *op. cit. supra* note 51, ch. XIX; Hershman, *Compensation — Just and Unjust: A Study in Eminent Domain*, 21 BUS. LAW. 285 (1966).

93 *Ibid.*

94 See notes 95-98 *infra* and accompanying text.

95 155 Ohio St. 454, 99 N.E.2d 313 (1951).

96 *Id.* at 459, 99 N.E.2d at 317. See also Preston v. Stover Leslie Flying Serv., Inc., 174 Ohio St. 441, 190 N.E.2d 446 (1963); Cleveland Boat Serv., Inc. v. City of Cleveland, 165 Ohio St. 429, 136 N.E.2d 274 (1956).

97 City of Bellevue v. Stedman, 63 Ohio App. 150, 154-56, 25 N.E.2d 695, 697-98 (1939).

come is derived from a business conducted on the premises and dependent upon the managerial skills of the particular businessman or if the lost income is occasioned by the appropriation of the particular business by the condemnor. However, absent the above factors, evidence of such profits is admissible as tending to show the value of the property.[98]

Thus, it has been held that "rental value" is one of the elements to be considered in fixing the fair market value of the property and that evidence as to existing rents is admissible.[99] The court justified the admission of such rentals by stating that "a prospective purchaser of rental property is certain to be interested in established rentals as evidence of value. The jury should not be deprived of similar assistance."[100] However, in other cases, the Ohio courts have held that *probable* rents, that is, rents that would be derived if the property were used in a certain manner, are inadmissible as being contingent and speculative.[101] Furthermore, evidence of the rental value of property *similar* to that being appropriated is also inadmissible.[102] Therefore, only the existing rental value of the property is admissible, and neither the probable rental value nor the rental value of similar property are inadmissible, seemingly because an ordinarily prudent businessman would not consider these if he were purchasing the condemned property. However, it is submitted that an ordinarily prudent businessman would consider probable and similar rentals and would also consider the profits of a business conducted on the condemned land if he were purchasing such land. Therefore, should not such profits be also admissible as tending to show the present value of the appropriated land? It is submitted that such profits should be admissible within the sound discretion of the trial court, considering such factors as the nature of the business and the degree of customer contact with the owners of such business.

IV. CONCLUSION

As the changing needs of society demand an increase in the

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[98] *E.g.*, Avondale v. Cincinnati & Avondale Turnpike Co., 10 Ohio Dec. Reprint 82 (C.P. 1884); City of Cincinnati v. Scarborough, 6 Ohio Dec. Reprint 874 (Dist. Ct. 1880).

[99] *In re* Appropriation of Easements for Highway Purposes, 109 Ohio App. 6, 10, 163 N.E.2d 181, 185 (1959).

[100] *Ibid.* See also State v. Linder, 111 Ohio App. 146, 165 N.E.2d 460 (1959).

[101] *E.g.*, Powers v. Hazelton & L. Ry., 33 Ohio St. 429, 434 (1878).

[102] Cincinnati So. Ry. v. Banning, 12 Ohio L. Abs. 259, 260 (Ct. App. 1922).

governmental appropriation of private property, it is certain that there will be a corresponding increase in the already-voluminous condemnation proceedings. In such a proceeding, the court is faced with the difficult task of insuring that the condemnee is justly compensated. In other words, the function of the courts is to insure that the condemnee receives the fair market value of his land. Although the Ohio reviewing courts have formulated certain legal guidelines, the admission or exclusion of valuation evidence rests upon the sound discretion of the trial court.

This Note has discussed those items of evidence which the Ohio courts generally deem to be either admissible or inadmissible as tending to show the present market value of appropriated property and has analyzed the reasons for such admission or exclusion. However, the competency of the evidence cannot extend beyond the facts and circumstances of the particular case, and the admissibility of such evidence is dependent upon the attorney's ability to convince the court that such evidence is competent to assist the jury in ascertaining the fair market value of the property.

The possibility of legislative intervention as to the admissibility of elements of valuation is both undesirable and highly unlikely. Thus, any reform in the present Ohio valuation methods must necessarily result from the imagination, preparation, skill, and ability with which the evidence is presented. This process offers the greatest probability of the condemnee's receiving the just compensation to which he is constitutionally entitled.

JOSEPH PAUL VALENTINO