

Probability of Rezoning: Legal Considerations

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I. Why Reasonable Probability Of Rezoning May Be Considered

A. Bring Real World Into The Courtroom

B. Highest And Best Use

- Legally permissible
- Physically possible
- Financially feasible

C. Willing Buyer/Willing Seller

D. Definition of Fair Market Value

- “Market Value” means the most probable price estimated in terms of cash in United States dollars or comparable market financial arrangements which the property would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable.

II. When Can Prospect Of Rezoning Be Considered

A. General Principles

- “. . . the property must not be evaluated as though the rezoning were already an accomplished fact. It must be evaluated under the restrictions of the existing zoning and consideration given to the impact upon market value of the likelihood of a change in zoning.” *State v. McMinn*, 88 Ariz. 261, 264 (1960) (citation omitted).

- No matter how probable an amendment may seem, an element of uncertainty remains and has its impact upon the selling price. At most a buyer would pay a premium for that probability in addition to what the property is worth under the restrictions of the existing ordinance. *Id.*

B. Evidence Cannot Be Speculative

- There must be evidence of “reasonable probability” as distinguished from “possibility” and “speculation.” *Town of Paradise Valley v. Young Fin. Servs., Inc.*, 177 Ariz. 388, 391 (App. 1993)
- “Evidence which has a material bearing on market value should be admissible, without regard to whether it relates to an eventuality that might or might not occur in the ‘near’ or more ‘distant’ future, as long as the prospect of the event has substantial present influence on market value. It seems to us that the real purpose of the ‘near future’ and anti-‘remote or speculative’ qualifications of the rule stated in *Nichols* is to exclude consideration of an asserted prospective rezoning which is nothing much more than a figment of a bullish owner's imagination.” *Moschetti v. City of Tucson*, 9 Ariz. App. 108, 113 (1969), *overruled on other grounds*, *City of Tucson v. Rickles*, 15 Ariz. App. 244 (1971)

C. Project Influence Rule

- The “project influence doctrine” excludes all references to the probability of changes in value which occur because of a proposed project of the condemning authority. *Town of Paradise Valley v. Young Fin. Servs., Inc.*, 177 Ariz. 388, 391 (App. 1993)
- “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 the condemnation proceeding. *Id.*

III. When is Rezoning Reasonably Probable

A. Overview Of The Zoning And Development Process

- General/Comprehensive Plan
- Zoning
- Platting/site plan
- Variances
- Permitting

B. Intricacies of Zoning Layers And Requirements

- General Plan
- Special Plans
- Overlay Zones
- Area Plans
- Planned Area Developments
- Spacing requirements
- Submittal requirements
- Traffic studies
- Dedication requirements

C. Considerations and Risks

- Zoning - highly discretionary process
- Development horizon
- Processing time
- Costs to rezone
- Development costs
- Neighborhood opposition
- Referendum
- Local idiosyncrasies

IV. How Do You Prove/Disprove Probability Of Rezoning

A. Appraiser

B. Zoning attorney

- Gold standard
- Likelihood of success in particular jurisdiction

C. Civil engineer

- What would development look like

D. Economist

- Supply/demand
- Development horizon

E. Real estate broker

- Market studies
- Rent rates, unit pricing
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- F. City planner
 - Local concerns
 - Historical precedent
 - Zoning nuances

- G. Community organizer
 - Neighborhood opposition

V. Motion Practice

A. Trial Court As Gatekeeper

- It is the trial court's responsibility to make a preliminary determination that there is sufficient evidence to establish reasonable probability of rezoning so as to permit expert opinions of value based upon that probability. *Town of Paradise Valley v. Young Fin. Servs., Inc.*, 177 Ariz. 388, 392 (App. 1993)

B. *Orme School* Standard

- An issue should be taken from the jury, though, only “if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense.” *Id.*

VI. Examples

Probability of Rezoning: Appraisal Considerations

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- I. Appraiser due diligence: What factors to consider?
 - a. Discussion with property owner
 - i. Current zoning
 - ii. Owner plans- any plans for rezoning or concept plans?
 - b. Considering Probability of Rezoning
 - i. Current zoning
 - ii. Designation under neighborhood plan/general/comprehensive plan
 - iii. Is plan amendment required?
 - iv. Site factors
 - v. Surrounding uses
 - vi. Recent rezoning in the area
 - vii. Discussions with planning/zoning officials
 - viii. Highest and best use considerations
 - c. Is there evidence that there is a reasonable probability the property could be rezoned?
 - i. Should not value a property based upon rezoning if this standard is not met
- II Adjusting comparable sales
 - d. Discussions with local participants on costs
 - i. Unlikely to find enough comparable sales that also require rezoning. Likely to use already zoned comparable sales.
 - ii. Costs will vary. Costs are higher if a plan amendment is required, etc.
 - iii. Typically there is a percentage adjustment to comparable sales that do not require rezoning, rather than flat figure
 - iv. Percentage will vary based upon overall property values- different for a 30 acre parcel selling at a lower price than 500 acre parcels selling at higher prices.
 - v. Rezoning cost is not only the actual cost to rezone

1. Risk rezoning may not be successful
2. Buyer/Property owner wants incentive
3. Holding costs during rezoning period
4. Typically will include an incentive on top of the actual rezoning cost to account for the risk and holding period.

III Rezoning Considerations in Takings

- a. In Partial acquisitions, must consider rezoning factors in valuing the property
 - i. If rezoning is reasonably probable, will government entity require any right of way to be dedicated upon rezoning?
 - ii. If dedication of right of way is required, market would only value the land to be dedicated based upon current zoning, not potential zoning
 - a. Conversations with market participants
 - b. Review of purchase contracts
 - iii. If appraising for a partial acquisition, land to be dedicated would be valued based upon current zoning. Any acquisition beyond the area to be dedicated would be valued based upon potential rezoning.
 - iv. Example