Legal
Recycling Appraisals — Proceed With Care

By Gideon Kanner

Recycling old cans and paper is said to be a good thing to do, but recycling appraisals proved to be troublesome to a condemning agency in a recent case. It is a familiar rule that in valuing the condemned property, appraisers may not consider any increment of value that arises from the condemnor's proposed use of the subject property. This is based on the premise that ordinarily the private market has no interest in the type of land uses favored by the government, and therefore the owner is not deprived of any element of market value when he cannot consider such matters. But that rule has its limitations; for example, some improvements are of interest to both the private and public sectors, and so consideration of the suitability of the subject property for the use that the public contemplates (but which happens to be of interest to the private market as well) may be appropriate. Likewise, the government's changes in zoning in contemplation of the post-condemnation use may be significant, as the following two cases indicate.

In *Baltimore v. Kelso Corp.* (Md.) 416 A. 2d 1339, the city took the position that the subject property was worth only $78,291. However, the owner was able to show that the city's plans contemplated getting the Social Security Administration to move onto the property and construct an office building on it. To accomplish this, the city had a "re-use" appraisal prepared, in which it represented to the G.S.A. that the property was worth some four times the amount it contended for in the condemnation action. The owner was able to bring these facts out in the condemnation, and recovered an award of $261,275. The city appealed, but its arguments were found unpersuasive. The appellate court invoked a quaint archaic word and accused the city of "floccinaucinihilipilification" (look that one up, readers) in turning down its appeal. While such "re-use" appraisals may not be used to show an enhanced value of the subject property because of the contemplated public use, they may be admissible to show that the land was suitable for the proposed "re-use," and hence that a change in zoning to facilitate it would be probable. Also, since the court viewed the city's position with respect to the two appraisals as inconsistent, it opined that the two appraisals were also admissible on the issue of judging the weight and credibility of the city's appraiser's opinion.

A similar decision was rendered by the Supreme Court of Massachusetts in *Roach v. Newton Redevelopment Agency* (Mass.) 407 N.E. 2d 1251. Pursuant to Massachusetts procedure, the case went to trial before a judge who awarded $559,481, after noting expressly that there was a probability of zone change. This finding was based on the fact that the condemning agency had actually obtained a rezoning of the subject property by the time of trial. The landowner then availed himself of a statutory right to a trial by jury which awarded $559,481. The condemnor appealed, but the appellate courts affirmed the trial court's judgment.

This case actually turned on a procedural point which is interesting nevertheless because it illustrates how information may in some cases be presented to a jury, that has a profound impact on valuation. Here, under Massachusetts procedure, in the jury trial the presiding judge had read to the jurors the decision and findings of the first judge who originally tried the case without a jury. In so doing, he read to the jury the first judge's decision as to probability of zone change. The condemning authority's appellate position was further made difficult by the fact that it had not objected to such reading and hence was in no position to complain on appeal. Moreover, the second trial judge read to the jury an instruction requiring it not to consider any effect on zoning created by the project for which the subject property was acquired, and there was no indication that this correct instruction was in any way "contaminated" by the fact that the jury also heard the first judge's decision containing a finding that a change in zoning was probable. While evidence of post-taking rezoning cannot in itself be used to show enhanced value of the subject property, it can nevertheless be weighty evidence that a change in zoning was probable as of the time of taking, and perhaps that the owner might have obtained it as well, had there been no taking.