

REASONABLE PROBABILITY OR UNREASONABLE SPECULATION?

Eminent Domain Section

Over the past forty years, Florida courts have expanded the ability to allow contingent land use approvals to be considered in determining the fair market value of condemned property. First, in *Board of County Commissioners of State Inst. v. Tallahassee Bank & Trust Co.*, 100 So.2d 67 (Fla. 1st DCA 1958), the reasonable probability of rezoning was allowed to be considered if it is found reasonably probable that property would be put to the other possible use within the immediate future.

Next, in an effort to level the playing field for condemning authorities, *Broward County v. Patel*, 641 So.2d 40 (Fla. 1994) expanded the use of reasonable probability to allow consideration of the probability that a property's value may be enhanced by the receipt of quasi-judicial zoning variances that could possibly mitigate or cure severance damages. Although expanding the concept of reasonable probability, *Patel* imposed certain important limitations on its use that are oftentimes overlooked. First, *Patel* was limited solely to consideration of zoning variances in determining fair market value and severance damages. However, it is

common practice for a variety of contingent governmental approvals to be considered, although they may have different approval criteria, such as DRI development orders, land use plan amendments, conditional uses, and numerous other approvals.

Another important limitation imposed by *Patel* concerning contingent approvals was that their occurrence cannot be considered an absolute certainty. Testimony that an approval will definitely occur is barred unless the government can make a legally binding guarantee. However, under Florida law, a local government is prohibited from making such a promise. See *Chung v. Sarasota County*, 686 So.2d 1358 (Fla. 2d DCA 1996). Furthermore, if reasonable probability is found to exist, its effect must be factored into the fair market value equation. In other words, because a knowledgeable buyer would not offer fair market value if it was uncertain whether a property could receive variances, a downward adjustment to fair market value must be made. Notwithstanding *Patel's* mandate that the degree of probability be factored into the equation, experts for both condemners and property owners,

at their own peril, consistently overlook this need for adjustment and base fair market value on the absolute certainty of receiving rezonings or other land use approvals.

The most recent expansion of the reasonable probability doctrine occurred in *Morr v. Department of Transportation*, 667 So.2d 888 (Fla. 2d DCA 1996), wherein a junkyard asserted a business damage claim, although it was illegally operating in a zoning district that prohibited such a use. However, the court allowed consideration of the probability that the illegal business could receive a zoning approval and, thus, qualify for business damages.

The *Morr* decision represents an illogical application of reasonable probability as it does not consider value of condemned property, but whether or not a use may qualify for business damages. *Morr* is also contrary to *Patel* as it would require a jury to conclude with absolute certainty (without the benefit of a governmental guarantee) that a business could or could not become legal.

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