OPINION NO. 69-098

Syllabus:

1. In an appropriation proceeding the immediate prospect of zoning change to the advantage of a property is material in determining its value upon the day of taking, and any attempt by statute arbitrarily to exclude from jury consideration prospective uses presently prohibited by zoning is an attempt to limit the property owner's right to obtain compensation from a jury as contemplated by Section 19, Article I of the Constitution of Ohio and by the Fifth Amendment to the Constitution of the United States.

2. The purpose of Section 5511.01, Revised Code, is not to exclude from consideration in an appropriation proceeding all competent evidence of prospective uses presently prohibited by zoning, but rather to prevent the actual granting of a zoning change or issuance of a building or other specified permit so as not to shift the burden of proof on the question of likelihood of a zoning or use change from the property owner to the appropriating agency.

To: Pearl E. Masheter, Director, Dept. of Highways, Columbus, Ohio
By: Paul W. Brown, Attorney General, August 5, 1969

You have requested my opinion as to the effect of the Section 5511.01, Revised Code, moratorium on zoning changes and building permits on determination of the value of a property being appropriated, with particular reference to determination of the highest and best use of the property for appraisal purposes.

Section 5511.01, Revised Code, provides in pertinent part as follows:

> "* * * Before any zoning change or subdivision plat is approved and before any permit for land use or the erection, alteration, or moving of a building is granted affecting any land within three hundred feet of the centerline of a proposed new highway or highway for which changes are proposed, as described in the certification by the director, or within a radius of five hundred feet from the point of intersection of said centerline with any public road or highway, the authority authorized to approve the zoning change or subdivision plat or the authority authorized to grant the permit for land use or the erection, alteration, or moving of the building shall give notice, by registered or certified mail, to the director, and shall not approve a zoning change or subdivision plat or grant a permit for land use or the erection, alteration, or moving of a building for one hundred twenty days from date notice is received by the director. During such one hundred twenty day period and any extension thereof as may be agreed to between the director and any property owner, notice of which has been given to the authority to which the application has been made, the director shall proceed to acquire any land needed by purchase or gift, or by initiating proceedings to appropriate, or, make a finding that acquisition at such time is not in the public interest. Upon purchase, initiation of appropriation proceedings, or a finding that acquisition is not in the public interest, the director shall notify the authority from which notice was received of such action. Upon being notified that the director has purchased or initiated proceedings

> to appropriate such land the said authority shall refuse to rezone land or to approve any subdivision plat that includes the land which the director has purchased or has initiated proceedings to appropriate, and such authority shall refuse to grant a permit for land use or the erection, alteration, or moving of a building on the land which the director has purchased or initiated proceedings to appropriate. Upon notification that the director has found acquisition at that time not to be in the public interest, or upon the expiration of the one hundred twenty day period or any extension thereof, if no notice has been received from the director, said authority shall proceed in accordance with law."

This language was added to Section 5511.01, supra, effective August 11, 1967.

The rights of a property owner in an eminent domain proceeding are established by Section 19, Article I, Ohio Constitution, and by the Fifth Amendment to the Constitution of the United States. The latter says simply, "nor shall private property be taken for public use, without just compensation." The Ohio Constitution is somewhat more detailed,

> "Private property shall ever be held inviolate, but subservient to the public welfare. When taken * * * for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money * * *; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

The courts of Ohio, in applying and interpreting these constitutional guarantees, have held that the question to be decided in an appropriation proceeding is the value of the property for any and all uses for which it may be suitable, including the most valuable uses to which the property can lawfully, reasonably and practically be adapted. Sowers v. Schaeffer, 155 Ohio St. 454 (1951); Board of County Commissioners v. Thormyer, 169 Ohio St. 291 (1959).

In determining the most valuable uses to which a property can be put, the zoning classification of the property is a key factor. The question often arises to what extent evidence is admissible in an appropriation trial of the possibility or likelihood of a favorable change in the zoning classification which would make the property more valuable than

under the then existing zoning. Such a question was presented in City of Euclid v. Lakeshore Co., 102 Ohio App. 96 (1956), and the court in that case stated as follows at p. 112:

> "There being no evidence to support the contention that within the reasonable foreseeable future and in the reasonable administration of the zoning laws of the city of Euclid a reduction of the zoning classification of the property taken in these proceedings will be likely to occur and likewise, by reason of the legislative policy of this state in declaring such evidence inadmissible in an appropriation case, we affirm the trial court in limiting the expert evidence as to the value of the several parcels taken to the highest and best use when considered for the uses permitted within the zoning ordinance applicable to such property as of the date of the trial of the case."

The "legislative policy" that the court was referring to was Section 719.09, Revised Code, which at that time provided that "in arriving at such assessment of compensation for such lot or parcel, any use or occupancy which is in violation of any statute or ordinance, shall be excluded from consideration in determining fair market value." That chapter of the Code, of course, was applicable to appropriations by municipal corporations. Moreover, since that time, most of Chapter 719 (including Section 719.09), Revised Code, has been repealed and has been replaced by Chapter 163, Revised Code. Chapter 163, supra, does not contain any provision analogous to Section 719.09, supra.

Subsequent court decisions have indicated, if only by implication, that evidence of the likelihood of a zoning change would be admissible under certain circumstances. For example, in Board of Education v. Graham, 15 Ohio App. 2d, 196 (1968), the court found that there was no competent evidence (such as from officials responsible for administering the zoning laws) to support the property owner's contention that a reduction of the zoning classification would be likely to occur.

I believe that your question was definitively answered in the case of In re Appropriation of Easement for Highway Purposes Over Property of Darrah et al., 118 Ohio App. 315 (1963), where the court held as follows at page 319:

> "Since the immediate prospect of zoning change to the advantage of the property is material in determining its value upon the day of taking, any

> attempt by statute to exclude this evidence or opinions based thereon is an attempt to limit the property owner's right to obtain compensation from a jury as contemplated by Section 19, Article I of the Constitution of Ohio, and by the Fifth Amendment to the Constitution of the United States.
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> "A constitutional question arises as to what is just compensation compatible with the requirement of the Fifth Amendment to the federal Constitution and Section 19, Article I of the Ohio Constitution when prospective uses presently prohibited by zoning are arbitrarily excluded as matters to be considered in calculating fair market value on the date of taking. United States v. Meadow Brook Club, 259 F. (2d), 41."

It should be noted that the court rendered its opinion notwithstanding the provisions of Section 719.09, supra, which was still in effect at that time.

It is a standard rule of construction that legislative enactments are not to be interpreted in such a way as to be in violation of constitutional provisions, where such a result can be avoided without doing violence to the clear meaning of the words. In conformity with that principle, it is my opinion and you are hereby advised that the purpose of Section 5511.01, Revised Code, as amended effective August 11, 1967, is not to exclude from consideration in an appropriation proceeding all competent evidence of highest and best use of a parcel even where such use might involve a variation from existing zoning, but is rather to maintain the status quo during appropriation proceedings so as not to shift the burden of proof on the question of likelihood of a zoning or use change from the property owner to the appropriating agency. This is not a change in the substantive rights of the property owner but is merely a procedural measure affecting the evidentiary aspects of the determination of just compensation.