

INTERAGENCY LAND ACQUISITION CONFERENCE

POSITION PAPER

On the issue whether a non-economic highest and best use can be a proper basis for the estimate of market value.

INTRODUCTION

The Interagency Land Acquisition Conference is an organization composed of representatives of federal agencies engaged in the acquisition of real estate for public uses. The Conference was established on November 27, 1968, by invitations issued by the Attorney General. The Conference chairperson is the Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, and the Conference Executive is the Chief of the Land Acquisition Section of the Environment and Natural Resources Division, Department of Justice.

The Conference conducts its business by *ad hoc* committee called into session as land acquisition issues arise that affect the federal land acquiring agencies. For example, when the Freedom of Information Act (FOIA) was enacted, the Conference was called into session and developed a position paper regarding the release of government appraisal reports under FOIA. The Conference was also responsible for the development of the *Uniform Appraisal Standards for Federal Land Acquisitions* published in 1972, as well as the 1973 and 1992 revisions thereof, which establish guidelines for appraisals prepared for the purpose of federal land acquisition. When the subject under Conference consideration is valuation, as here, the agencies are generally represented on the Conference by their Chief Appraisers.

The member agencies of the Conference whose representatives participated in this project are:

U.S. Department of Justice
U.S. Army Corps of Engineers
General Services Administration, FPRS
General Services Administration, PBS
Housing and Urban Development, MF
Housing and Urban Development, SF
Bureau of Land Management
U.S. Fish and Wildlife Service
U.S. Forest Service
Department of Transportation, FHWA
National Park Service
U.S. Navy
Western Area Power Administration
U.S. Postal Service
Bureau of Indian Affairs
Bureau of Reclamation
Pennsylvania Avenue Development Corporation
Bonneville Power Administration

Federal Aviation Administration

The Conference convened in late 1994 to consider the issue that is the subject of this paper. It was decided by the Conference that a committee should be appointed to study the issue and draft a position paper for consideration by the Conference. The committee appointed consisted of the representatives of the following Conference members:

U.S. Department of Justice
U.S. Forest Service
U. S. Fish and Wildlife Service
Bureau of Land Management
Bonneville Power Administration
U.S. Army Corps of Engineers
Department of Transportation, FHWA
National Park Service

The committee developed a draft position paper and submitted it to the members of the Conference. Following receipt of comments and suggestions from Conference members, a modified final version of the paper was presented to the Conference members and approved.

THE ISSUE

Is a non-economic highest and best use a proper basis for the estimate of market value?

This question has been analyzed by the Conference with reference to the *Uniform Appraisal Standards for Federal Land Acquisitions*, (Washington, D.C.: U.S. Printing Office, 1992).

BACKGROUND

Public concern over the environment the past several years has resulted in legislatively mandated land acquisitions for the sole purpose of conservation, wildlife habitat, or preservation of the lands in their natural state. Because of the nature of these acquisition programs and the goals they are intended to achieve, much of the land acquired is held in large ownership blocks, is remotely located, has suffered little human encroachment, and is of minimal economic utility or value.

Historically, the appraisal of such lands would bring about such economic highest and best use estimates as timber production, grazing, marginal recreation, or hold for speculative appreciation. Recently however, a small group of appraisers and others have advocated that the highest and best use of such lands is for the very purpose for which the government is acquiring them - such as preservation in their natural state, or other non-economic uses.

The validity of appraisals, based on non-economic highest and best uses, as legitimate estimates of market value has been the subject of numerous articles in professional journals, and has been the subject of committee research and/or forums at the national meetings of the International

Right-of-Way Association, the American Society of Farm Managers and Rural Appraisers, and the Appraisal Institute. In many of these articles and forums it has been suggested that estimates of such value are not estimates of market value, but rather estimates of value in use, value to the government or public, natural value, or public interest value.¹

Value estimates and appraisal reports have been developed on this premise of "preservation" as a property's highest and best use. Legal counsel for some property owners have submitted these reports to Conference members urging that they be accepted as reliable opinions of market value. They have argued that such reports are in conformance with the *Uniform Appraisal Standards for Federal Land Acquisitions*, (Washington, D.C.: U.S. Printing Office, 1992), the *Uniform Standards of Professional Appraisal Practice*, and are in keeping with generally accepted definitions of highest and best use and market value.

Conference members, to whom such reports have been submitted, have found within them a common thread. Authors of these reports have adopted a definition of highest and best use that encompasses consideration of non-economic uses. The appraisals develop an indication of value that clearly falls outside of the traditionally accepted definition of market value.

Under established law the criterion for just compensation is the fair market value of the property at the time it is acquired.² Because the purpose of the *Uniform Appraisal Standards for Federal Land Acquisitions* is to set forth the principles applicable to the appraisal of property for Federal land acquisitions by both direct purchase and condemnation,³ only estimates of market value are applicable to federal land acquisitions. Absent legislative mandate, any other type of value estimate is unacceptable for Federal land acquisition purposes.

HIGHEST AND BEST USE

¹ The Conference finds the term "public interest value" inappropriate and misleading. After a review of several of these reports the Conference has concluded that what is being estimated is not a value, but a prediction of the price at which a transaction will be consummated between two specific parties rather than market value. *The Dictionary of Real Estate Appraisal*, 3d. ed. (The Appraisal Institute, 1993) defines "price" as "The amount a particular purchaser agrees to pay and a particular seller agrees to accept under the circumstances surrounding their transaction."

² *Uniform Appraisal Standards for Federal Land Acquisitions*, (Washington, D.C.: U.S. Printing Office, 1992), §A-2, p. 3, citing *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984); *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 9 (1984); *United States v. Miller*, 317 U.S. 369, 373-378 (1943); *Olson v. United States*, 292 U.S. 246, 255 (1934); *United States v. Petty Motor Co.*, 327 U.S. 372, 377-378 (1946).

³ *Ibid.*, p. 1.

Fair market value is to be determined with reference to the property's "highest and best use" - that is, the highest and most profitable use for which the property is adaptable and needed or likely to be needed in the near future.⁴

A proposed highest and best use requires a showing of a reasonable probability that the land is both physically adaptable for such use **and** that there is a need or demand for such use in the reasonably near future; physical adaptability alone is insufficient.⁵

Highest and best use cannot be predicated on a demand created solely by the project for which the property is taken (*e.g.*, rock quarry, when only market is highway project for which property was taken). A proposed highest and best use cannot be the use for which the government is acquiring the property (*e.g.*, missile test range, airfield, park), unless there is a prospect and demand for that use by others than the government.⁶

The use to which the government will put the property after it has been taken is, as a general rule, an improper highest and best use. It is the value of the land taken which is to be estimated, not the value of the land to the taker. If it is solely the government's need which creates a market for the land, this special need must be excluded from consideration by the appraiser. Only on the rare occasion that a private demand for the land exists, for the same use for which it is being acquired by the government, is it proper for the appraiser to conclude that the highest and best use of the property is that use for which it is being acquired by the government.⁷

From the above it is clear that highest and best use, as used in the *Uniform Appraisal Standards for Federal Land Acquisitions*, is to be estimated in economic terms. Implied in the forgoing is that highest and best use is an economic concept, not a social concept. This position is supported by modern appraisal textbooks.

Therefore, the analysis and interpretation of highest and best use is an *economic* study of market forces focused on the subject property.⁸ The benefit a real estate development [or non-development in the case of preservation] produces for a community or the amenity contribution provided by a planned project (*i.e.*, the

⁴ *Ibid.*, §A-3, p. 8, citing *Olson v. United States*, 292 U.S. 246, 255 (1934).

⁵ *Ibid.*, p.9, citing *Olson, supra*, 292 U.S. at 256; *United States v. 341.45 Acres of Land*, 633 F.2d 108, 111 (8th Cir. 1980), cert. denied, 451 U.S. 938 (1981).

⁶ *Ibid.*, pp. 9-10 (citations omitted).

⁷ *Ibid.*, §B-1 14, pp. 73-74.

⁸ *The Appraisal of Real Estate*, 10th ed., (Chicago: Appraisal Institute, 1992), 276-277 (emphasis added).

public space in a park-like area) are not considered in the appraiser's analysis of highest and best use.⁹

CONCLUSIONS

For the above reasons, it is the Conference's position that a non-economic highest and best use is not a proper basis for the estimate of market value and, accordingly, that a highest and best use of conservation, preservation, or other use that requires the property to be withheld from economic production in perpetuity, is not a valid use upon which to estimate market value. Such an estimate is, therefore, not in conformance with the *Uniform Appraisal Standards for Federal Land Acquisitions*.

ADOPTED this 14th day of April, 1995.

Interagency Land Acquisition Conference

By: /s/

Lois J. Schiffer, Conference Chairperson

By: /s/

William J. Kollins, Conference Executive

⁹ *Ibid.*, 276, fn. 1.