

Memorandum 79-10

Subject: Study K-100 - Evidence of Market Value (Comments on tentative recommendation)

The Commission in December 1978 distributed for comment its tentative recommendation to make the Evidence Code property valuation rules applicable to all cases where market value is in issue, with the exception of property taxation cases. A copy of the tentative recommendation is attached to this memorandum.

The responses to the tentative recommendation are appended as Exhibits 1 through 20. This memorandum analyses the responses. After reviewing the points raised, the Commission should determine whether to submit the tentative recommendation, with or without changes, to the Legislature as a final recommendation.

General Reaction

The general reaction to the tentative recommendation was favorable. Seven of the respondents approved the recommendation without exception or qualification. See Exhibits 4 (gold) and 10 (gold) (public entities); 5 (blue) and 11 (blue) (law professors); 7 (pink), 8 (yellow), and 9 (green) (practitioners). Five respondents generally favored the tentative recommendation and had a few suggested changes. See Exhibits 12 (white) and 18 (white) (practitioners); 14 (yellow) (member of public); 16 (gold) and 20 (yellow) (judges); 19 (pink) (law student). The general feeling is summed up by Mr. Magit (Exhibit 7--pink), "I find that the adoption of the tentative recommendation is long overdue and I would hope that the Legislature will enact the recommendation promptly. In my own experience, I have struggled with the proof of valuation problem and could not understand why the statute in question was restricted to condemnation cases."

The remaining respondents were opposed to the tentative recommendation unless specified changes are made. See Exhibits 1 (pink), 3 (green), and 6 (white) (practitioners); 2 (yellow), 13 (pink), 15 (green), and 17 (blue) (appraisers).

There were a few minor or technical criticisms addressed to the draft. The staff will make these technical changes in the draft if the Commission decides to submit it as a recommendation.

Evidence Code § 810

The draft of Section 810 states that the Evidence Code valuation rules are to apply in all cases other than property taxation cases. The State Board of Equalization (Exhibit 10--gold) specifically approves the proposal to exclude property taxation from coverage; Mr. Whitaker (Exhibit 12--white) agrees but suggests that the Commission work towards ultimately bringing the property taxation rules under the Evidence Code. The staff agrees with Mr. Whitaker in principle, but the Commission's initial proposals to cover property taxation met with such strong opposition from all sectors that the staff does not believe it would be feasible to cover property taxes any time in the near future. Mr. Scolnik (Exhibit 18--white) does not find the reasons stated in the recommendation for excluding property taxation particularly persuasive. The staff plans to add a sentence relating to the real reason--the Commission could find no consensus among the persons affected that such a change would be desirable.

Evidence Code § 811

Judge Horn (Exhibit 16--gold) suggests that, since goodwill is property, it should be specifically mentioned in the recommendation. Section 811, which is not a part of the recommendation, does not permit goodwill to be valued under the property valuation provisions. The section provides that "value of the property" refers only to real property and tangible personal property. The Commission reviewed this point last year and made a specific determination that the rules were inappropriate for intangible personal property. The Comment to Section 811 states:

Section 811 is amended to make clear the limited application of this article. This article applies only where market value of real property, an interest in real property (e.g., a leasehold), or tangible personal property is to be determined, whether for computing damages and benefits or otherwise. This article does not apply to the valuation of intangible personal property that is not an interest in real property, such as goodwill of a business; valuation of such property is governed by the rules of evidence otherwise applicable. However, nothing in this article precludes a

court from using the rules prescribed in this article in valuation proceedings to which the article is not made applicable, where the court determines that the rules prescribed are appropriate. See Comment to Section 810.

Evidence Code § 813

Section 813 is not amended by the tentative recommendation but would be extended to apply to other cases. It limits the evidence of value of property to opinion testimony. Mr. Webster (Exhibit 19--pink) objects strongly to this provision on the basis that the trier of fact should be able to ignore the opinions given and formulate its own opinion based on facts in evidence. This proposal would open up valuation trials to the very type of abuse that Section 813 was enacted to curb--a trier of fact making an uninformed guess on the basis of factors that only an expert is qualified to evaluate and draw conclusions from. The case is well stated by Mr. Atchison (Exhibit 9--green):

A recent Superior Court trial in which I was involved demonstrated to me very clearly the need for a uniform system of valuation of property. The jury was required to determine the value of a parcel of real property to determine the damages arising out of negligent misrepresentation on the sale of the property. Because of the very confusion of the decisions referred to in your tentative recommendation, the Court permitted the jury to determine value based upon evidence of purportedly comparable sales, and other extrinsic evidence, without the benefit of an expert's opinion. Since there was no opportunity to cross-examine the parties to the purported comparable sales, the jury determination based upon this evidence was hardly more than speculation.

Mr. Scolnik (Exhibit 18--white) notes that Section 813 permits a property owner to give an opinion without requiring that the property owner possess any particular qualifications. The staff recognizes that testimony by the property owner is not particularly good and is inherently untrustworthy. However, Mr. Scolnik has made the opposite case quite nicely when he states, "it may be impossible politically to preclude the owner from testifying as to his opinion of the value of the property." Testimony by a property owner, unless the owner has some other qualifications, is not ordinarily given great weight by the trier of fact and is easily rebutted by expert testimony; it does not present any real problems in the opinion of the staff.

Evidence Code § 814

Mr. Whitaker (Exhibit 12--white) notes that Section 814 no longer contains a definition of fair market value (the highest price that would be agreed to by a willing seller and an able buyer dealing with each other in the open market, etc.) and suggests that a general definition of the market value standard be reincorporated in Section 814.

The Commission last session had the standard deleted from Section 814 and incorporated in the Eminent Domain Law in anticipation of the Evidence Code provisions being made applicable to cases other than eminent domain. The Commission felt that a single market value standard would not necessarily be applicable to all types of cases in which market value might be determined. In essence, the Evidence Code provisions are purely procedural and not substantive.

This point is highlighted by the letter from Mr. Bogart (Exhibit 6--white). Mr. Bogart objects strenuously to application of the Evidence Code rules to noncondemnation cases because he is concerned that this will import the "highest price" rule of eminent domain valuation into cases where it is not appropriate. Mr. Bogart's objection is based on a misapprehension of what the Commission has recommended since we are recommending precisely what he suggests. Perhaps the point is not made with sufficient clarity in the tentative recommendation. Mr. Webster (Exhibit 19--pink) believes this to be the case:

The Commission should emphasize that the recommendation does not purport to establish any uniform definition of market value, but rather considers only who may express opinions of value and what they may base their opinions on. This is important because it is conceivable that where the substantive law presents different definitions of market value the procedures needed to establish it may also need to vary in some respects. However, subject to that warning I fully endorse the concept of procedural uniformity.

The relevant discussion in the tentative recommendation appears on pages 4 and 5. The text, minus footnotes, states:

Application of the Evidence Code valuation rules in noncondemnation areas would not transport the substantive law of eminent domain defining "market value," "date of valuation," "larger parcel," and the like, into those areas. These other areas are governed by the valuation standards applicable in the particular case. The Evidence Code valuation rules are strictly procedural--they

state who is qualified to express an opinion of value and the appraisal evidence that may go into formulating such an opinion. The rules do not purport to embody all appraisal practice or to cover every valuation situation that may arise. They do, however, provide a clear and usable body of rules to govern most valuation problems, without rigidifying the law or stifling the development of appropriate appraisal techniques.

The staff does not see how we can be more clear than this. If the Commission decides to submit the recommendation to the Legislature, we will make this point briefly in the letter of transmittal and also in the Comment to Section 810, which is the basic section extending the Evidence Code rules to other cases.

Evidence Code § 815

Section 815 was not proposed to be amended by the tentative recommendation but was the subject of two comments nonetheless. Mr. Scolnik (Exhibit 18--white) observes that Section 815 and the sections following permit use of certain evidence "when relevant." He finds an ambiguity in this phrase and suggests that it may be intended to mean "if relevant." Is this a distinction without a difference? The author of this memorandum believes that "if" is the word of choice, whereas other staff members believe "where" or "when" is preferable. The Legislative Counsel appears to have no fixed position on this point. In any case, it is primarily a matter of drafting style and the ambiguity, if any, appears to the staff too minute to make a difference and not worth an amendment.

Mr. Huxtable (Exhibit 3--green) addresses the question of the admissibility of a sale of the subject property that occurs after a lis pendens has been filed in an eminent domain proceeding. Section 815 makes such evidence inadmissible; Mr. Huxtable suggests that a sale of the subject property be inadmissible in any type of a proceeding if it occurs after a lis pendens has been filed in that proceeding. The reason evidence of a sale of the subject property is inadmissible in eminent domain is that such a sale is made under threat of condemnation and is, therefore, tainted. It will tend to be lower than an open market sale and should not be used against the property owner. It is an exclusionary rule based on the experience that much time and money is spent investigating such sales and much court time is consumed attacking

them, when they will ultimately be given little weight anyway. The depressing effect of a condemnation proceeding on market value is not necessarily present in other cases where a lis pendens is filed in the proceeding. In these cases, evidence of subsequent sales of the subject property would be admissible, but their weight could be affected by a showing that the sale price was affected by the pendency of the proceeding. The staff believes this is sound policy and recommends against the change suggested by Mr. Huxtable.

Evidence Code § 822 (introductory portion)

Section 822 was not proposed to be amended in the tentative recommendation but was the subject of most of the negative comments concerning the recommendation. Section 822 contains a listing of matters that may not be considered in giving an opinion of value. The policy behind these exclusionary rules varies. Some rules are included because the matter is inherently unreliable, others are included because the matter would consume inordinate amounts of investigative and trial time for little probative value.

We have received comments from a number of appraisers and appraisal groups to the effect that Section 822, which makes the excluded matters "not a proper basis for an opinion as to the value of the property", should be revised to delete the reference to a "proper basis". See letters from Mr. Jackson (Exhibit 2--yellow), Mr. Martin (Exhibit 13--pink), California Appraisers' Council (Exhibit 15--green). Their concern appears to be not that these matters should be made admissible, if that is policy of the state, but that the law should not appear to regulate the appraisal profession by introducing concepts of "proper" bases for opinions of value. The earlier correspondence referred to in Mr. Jackson's letter (reviewed by the Commission in September 1978) states:

"[N]ot a proper basis" reflects inadequate knowledge of what is happening in the appraisal profession. The appraisal profession/business could not have been studied prior to the writing of the clause. Investigation of the total scope of appraisal activity in the United States (and California) would have revealed that between 50% and 75% of all appraisals made do, in some way, run counter to the provisions of 822.

If the legislature intends to regulate appraisal practice and procedure by setting forth in the law what is "proper" and "not proper", appropriate investigation, study and inquiry should be made. Further, it is reasonable to obtain input from both practicing appraisers and the nationally recognized testing and certifying professional appraisal societies.

The Evidence Code is not the appropriate place for appraisal regulation. Information concerning other professions, trades, etc., is normally found in the Business and Professions Code or in regulations from boards created in the Business and Professions Code.

However, other parts of Mr. Jackson's earlier correspondence indicate not only that he is concerned with regulation of the appraisal profession, but also that he would like to see no restrictions on the matter that may be relied upon to give an opinion in court. A similar message comes through the letter of Mr. Martin, who states, "This phrase as I understand it enters into the area of the tools of his trade, or thinking aspects, of the appraiser's opinion of value. If he is to be an expert witness his area of background knowledge should have as wide a basis as possible."

The staff sees no problem with revising Section 822 to avoid any implication that regulation of the appraisal profession, outside of opinion testimony in a case, is intended. But the staff would resist strongly any effort to make the matters proscribed by Section 822 a proper basis for opinion testimony in a case because of the important policies the exclusionary rules serve. The staff suggests amendment of the introductory portion of Section 822 to read:

Notwithstanding the provisions of Sections 814 to 821, the following matter is inadmissible as evidence and ~~is not a proper~~ shall not be taken into account as a basis for an opinion as to the value of property in the action :

Comment. The introductory portion of Section 822 is amended to make clear that Section 822 regulates only the bases for an opinion of value admissible in evidence; it does not purport to prescribe rules or regulations governing the practice of the appraisal profession outside of expert testimony in a case.

Evidence Code § 822(b)

Section 822(b) prohibits evidence of offers to buy and sell the property being valued as a basis for an opinion of value. Mr. Fadem

(Exhibit 1--pink), Mr. Huxtable (Exhibit 3--green), and Southern California Chapter No. 5 of the American Institute of Real Estate Appraisers (Exhibit 17--blue), object to the extension of this provision to noncondemnation cases.

The reason that an offer is excluded is that offers are easily fabricated and require an inordinate amount of time to investigate to ascertain their bona fides, whether the conditions in the offer would have been satisfied, and the reasons why the offer was not accepted. Moreover, if offers are admissible, the appraiser must expand his investigation to determine if there were any offers. Even if the offer appears to be a legitimate one, its probative value tends to be small, except where an offer to sell was made by one of the parties to the proceeding; in this case, Section 822(b) allows evidence of the offer as an admission of the party.

The arguments for admissibility are well-stated in the comments we have received. Despite the unreliable character of offers generally, they can be useful. As the appraisers' letter informs the Commission, "occasions do arise when the use of listings, offers, options, and other pending agreements are of some assistance in estimating value and may have a proper place for inclusion as pertinent data within an appraisal report." Mr. Huxtable adds that, "Modern rules of discovery and the requirement that the offer be in writing [is] sufficient assurance that such evidence could not easily be fabricated." Mr. Huxtable suggests, as a fair quid pro quo to the exception permitting evidence of an offer as an admission of a party, that Section 822(b) be amended to permit limited evidence of offers where:

Such offer (i) is an offer to purchase or lease which included the property or property interest to be taken, damaged or benefited, (ii) is a bona fide, open market transaction, not affected by the acquisition or proposed improvement and is made in writing by a person ready, willing and able to buy or lease at the time the offer was made and (iii) is introduced by the owner of the property or property interest for which the offer to purchase or lease was made.

This proposal has merit, in the staff's opinion. In determining the market value of property, a person of ordinary business judgment would certainly want to know about any offers that had been made for the

property. Moreover, a reasonable buyer, knowing that a seller has declined a previous offer from a willing and able purchaser, would not be inclined to believe that the seller would accept less than the previous offer. And it is difficult to persuade a property owner who has declined a well-secured offer because he or she thought it was not high enough, that the property is not worth at least the amount of the offer.

As Mr. Huxtable's letter indicates, however, the evidence of market value provisions had a rocky trip through the legislative process and were twice vetoed by the Governor primarily on the ground that offers should not be made admissible. The main source of opposition is public entities that fear that a property owner will be able to use dubious offers to elevate the value of the property far beyond its worth.

The staff believes that the arguments in favor of making offers admissible are stronger than the arguments opposed and that the Commission should make another effort to permit use of offers in appropriate cases as set out in Mr. Huxtable's proposed amendment.

A related matter is the admissibility of options to purchase the property as evidence of the value of the property. Justice Zelling (Exhibit 20--yellow) states:

It seems to me that an option to buy at a certain figure should be some evidence of value. In other words it should be admissible and the objection should simply go to weight. If a man is prepared to pay good money to buy an option to purchase a property at a given price, that in my opinion must be some evidence of the value of that property. How good or bad it is in the way of evidence should logically go only to its worth and not to its admissibility.

An option, for our purposes, is analytically an offer or listing to sell the property at a certain price for a fixed period or at a fixed time. The option price may have been fixed at a time remote from the time the property is being valued and may have been no more than a guess at what the property might be worth at a later time. An option is less reliable evidence of the value of property than an offer made at or near the time the property is being valued. The fact that the option to buy was not exercised indicates the option holder concluded either that the purchase price was too high or that he or she could not use the property. To permit an owner to introduce evidence of the option price as evidence of

value is self-serving. The staff recommends against amending Section 822(b) to permit evidence of options to show the value of property.

Evidence Code § 822(d)

Section 822(d) precludes an opinion of the value of property other than the property being valued. The purpose of this exclusionary rule is to avoid confusing the main issue by becoming involved in a trial of the value of some other property as a means to estimating the value of the subject property.

Justice Zeller (Exhibit 20--yellow) suggests that it would be useful to permit opinions of the value of other property in order to ascertain the biases of the valuation experts. While the staff agrees this might be useful, the time consumed and the confusion caused by litigating remote collateral matters appears to dictate that the prohibition against valuing other property should be preserved.

Evidence Code § 822(f)

Mr. Fadem (Exhibit 1--pink) objects to the exclusion of capitalization of income based on a hypothetical improvement. Although he refers to Section 822(f), his real concern is Section 819, which permits an opinion to be based on the capitalized value of the reasonable net rental value attributable to the land and existing improvements thereon but is silent as to the value attributable to the land and hypothetical improvements. Mr. Huxtable (Exhibit 3--green) makes the same point. They both feel that capitalization of income from hypothetical improvements is a technique used by buyers in the real world and, hence, should be available for valuation determinations in the courtroom.

The Commission has debated this point at length on many occasions. As recently as 1977, the Commission tentatively recommended permitting capitalization of hypothetical improvements. But, after considering the comments, the Commission withdrew its tentative recommendation, coming to the same conclusion it always has come to--that capitalization of income from hypothetical improvements involves a significant potential for inaccuracy, that the income capitalization technique is often unreliable and may result in speculative values, and that it should not be the basis of an opinion in a valuation trial. See the extract from

Memorandum 77-52, dicusssing the comments on the 1977 tentative recommendation, attached as Exhibit 21 (green).

The staff believes this issue should not be resurrected yet again. The matter is so controversial we would have to again circulate a tentative recommendation on it, and we feel confident we would only come to the same conclusion we came to last time. This issue has been thoroughly aired.

The staff also notes that there is nothing in the Evidence Code market value provisions that actually precludes capitalization of income from hypothetical improvements. Section 819 might do so by implication since it authorizes only capitalization of income from existing improvements. But the general rule of the Evidence Code is that any matter may be a basis of an opinion that is of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property. Section 814. Under this rule, Section 819 makes clear that some types of evidence are admissible but does not preclude admissibility of other types of evidence. This point is made quite clearly in the Comment to Section 814 as well as in the text of the tentative recommendation on pages 11-13. The tentative recommendation states, for example, "the fact that the Evidence Code specifically permits use of capitalization of net rental income does not preclude use of gross rentals or capitalization of nonrental income, where appropriate" (citing cases). The staff believes that this is more than needs to be said on this point.

Evidence Code § 823

Section 823 is a new provision recommended by the Commission to permit direct evidence of value, undigested by opinion testimony, for certain limited types of evidence. Subdivision (b) permits evidence of used car price guides in valuing automobiles. Ms. Underhill (Exhibit 14--yellow) suggests that, if the automobile being valued is not listed in such guides, the fair market value of that type of automobile should be admissible. This suggestion is meaningless; it begs the point in issue.

Mr. Scolnik (Exhibit 18--white) points out that used car price guides are hearsay and are not necessarily accurate indices of the particular automobile being valued, that they represent only a rough

guide to the value of the automobile, and that the opinion of an expert will be a much more accurate and reliable estimate of value. While the staff believes this argument has merit, the staff does not find it persuasive. The value of an automobile is ordinarily relatively low and hardly justifies the requirement of expert testimony. The "blue book" rule enables a quick, inexpensive, and roughly accurate determination of value. In a case where the blue book is wrong, or there is some need for expert testimony, it can also be used. The used car price guides supplement, but do not necessarily replace, expert testimony.

Mr. Bogart (Exhibit 6--white) suggests that Section 823 be broadened to permit direct evidence of real property sales regularly reported:

(c) If the property being valued is real property of a kind which is regularly sold in an established market, reports made to county assessors or reports of recognized trade organizations which are regularly published by such trade organizations. Circumstances of the preparation of such reports may be shown to affect its weight but not its admissibility.

The trouble with this proposal is that real property is not fungible but is unique, and a sale of one property is not necessarily a good indication of the value of another property, just as the sale of property at one time is not necessarily a good indication of the value of the same property at a later time. This is the very reason opinion testimony is required to place a reported transaction in context and make necessary adjustments so the evidence is usable. To permit direct evidence of sales of real property is to destroy the basic reform of requiring opinion evidence, discussed above under Section 813. The staff recommends against Mr. Scolnik's proposal.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

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December 27, 1978

Nathaniel Sterling
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Dear Nat:

I have reviewed your November '78, revised, tentative recommendation relating to application of eminent domain valuation rules to noncondemnation cases.

I have done my best to comply with your request that I review your recommendation with an open mind. Nonetheless I remain unconvinced it makes sense to export condemnation rules to other fields of law.

This chasm between our views results from my awareness that the condemnation rules represent compromises between fairness to the property owner and efforts to minimize government expenditures. Those compromises provided artificial, non real world limitations, which inhibit proving what some properties are worth. Why inflict those semi-successful compromises on areas where no contests exist between such competing values?

More specifically I remain opposed to your treatment of offers as inadmissible (§822(b)) and the preservation of §822(f)'s prohibition on capitalizing the value of the income from a to be built improvement.

When one values property by reference to past sales, one is trying to see the present by turning one's head backwards and viewing the past. In the dynamic, economic circumstances of California today, such a method produces the wrong answer as well as a pain in the neck.

The 822(f) method you denigrate as speculative and unreliable is the method the real world of finance uses. The courtroom should not close its doors (or mind) to what lenders, who are primarily the economically interested people, and entrepreneurs do in the real world.


Nathaniel Sterling
December 27, 1978
Page Two

At the more picky level, your discussion of comparable leases at page 18 I still believe to be erroneous. Notwithstanding what my good friend Jim Whitaker said in his article, leases are accepted into evidence with regularity.

I remain open to further discussion of these or any other items where you feel my views may help you. But in candor, unless you are prepared to recommend modification of Section 822(b) and (f), I am still of the opinion that you are trying to perpetrate on the generality of persons litigating value, an unrealistic compromise hammered out between property owners and government agencies for different sets of circumstances.

Again, reading your as always scholarly research helped educate me for another case.

Sincerely,



Jerrold A. Fadem
Fadem, Berger & Norton

JAF:jt

EXHIBIT 2

**AMERICAN
SOCIETY OF
APPRAISERS**

Robert D. Jackson, FASA
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January 2, 1979

State of California
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Attention: Nathaniel Sterling, Assistant Executive Secretary

Subject: Tentative Recommendation relating to "Application of Evidence Code
Property Valuation Rules in Non-Condemnation Cases"

- Reference #1 - Letter addressed to Robert D. Jackson dated
November 15, 1978 signed by Nathaniel Sterling
- Reference #2 - Letter to California Law Revision Commission,
Attention: Nathaniel Sterling, dated April
21, 1978, signed by Robert D. Jackson

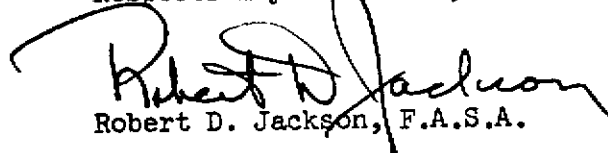
Gentlemen:

I recently received the #K100 mailing dealing with the subject recommendation.

My views concerning the subject are all expressed in Reference #2. I would repeat that the letter expresses strong concurrence with a single exception. The exception appears to have been inadvertently overlooked at the time of the preparation of Reference #1 (last sentence of first paragraph).

My position is strong support for the proposal provided that the clause "and is not a proper basis for an opinion as to the value of property" is deleted from Section #822.

Respectfully submitted,


Robert D. Jackson, F.A.S.A.

RDJ/hj

cc: American Society of Appraisers
California Appraisers' Council

EXHIBIT 3

LAW OFFICES OF

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January 5, 1979

FRANCIS H. O'NEILL
RICHARD L. HUXTABLE
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California Law Revision Commission
Stanford Law School
Stanford, CA 94305

Re: Evidence in Property Valuation Cases

Gentlemen:

I received and reviewed your tentative recommendation relating to application of Evidence Code Property Valuation Rules in non-condemnation cases (Study No. K-100, November, 1978).

My opinions upon this subject are the same now as they were in 1971, when I lobbied to oppose the adoption of 1961 SB 205, until the measure was properly amended. Once the Amendments were made, the Bill was unanimously passed by the Legislature. When it was on the Governor's desk, at the request of the President of the State Bar, I appeared as a Co-Representative of the State Bar at a Veto Conference in the Governor's office. At that Conference, the Chief Counsel for the Division of Highways, and other attorneys representing public agencies, urged the Governor to veto the Bill because they were incompetent to protect the Treasury from the fabricated evidence that was certain to be used by property owners in future valuation proceedings. (If you think my language is unduly harsh, ask Goscoe Farley or Herman Selvin, both of whom were also at that Veto Conference). Governor Brown neglected to sign the measure.

In 1965, the evidence measure "slipped through" without Amendments, on the theory that an imperfect law that would be tolerated by the public agency, was better than allowing the prior state of injustice to continue.

If you go back to 1961 SB 205, you will find that there were two exceptions to the rule excluding offers, the second of which permitted an offer for the subject property where, "Such offer (i) is an offer to purchase or lease which included the property or property interest to be taken, damaged or benefited, (ii) is a bona fide, open market transaction, not affected by the acquisition or proposed improvement and is made in writing by a person ready, willing and able to buy or lease at the time the offer was made and (iii) is introduced by the owner of the property or property interest for which the offer to purchase or lease was made."

This Amendment was made by the Senate Judiciary Committee in recognition of the fact that legitimate offers do, in fact, evidence the current market value of property. Modern rules of discovery and the requirement that the offer be in writing, (assuming the Agency's attorneys are competent) was sufficient assurance that such evidence could not easily be fabricated. An exception permitting such evidence to be introduced by the owner was a fair quid pro quo to the exception permitting the condemning agency to introduce an offer to sell by the owner as an admission against interest.

Also in 1961, the measure prohibiting the capitalization of income from hypothetical improvements had an exception. Where the party offering such evidence laid a sufficient foundation that the property being valued was of a type that was customarily valued by hypothetical income, expense, and capitalization methods by persons actually buying, selling and developing such properties in the open market, the trial Judge would have the discretion to permit such evidence to be received. It was then, and still is, common knowledge that sites being considered for large commercial developments such as shopping centers and office buildings, are bought and sold on the basis of values indicated by pro forma financial analysis. Valuation methods in the Courtroom should coincide, wherever possible, with methods used in the actual market.

It also seems inappropriate that a sale of the subject property after the recording of the Lis Pendens should not be admissible in a condemnation case, but would continue to be admissible in a non-condemnation case. (See Evidence Code Section 815) I have never understood why a sale of the subject property after the recording of the Lis Pendens should be inadmissible except, perhaps, it would make the owner's loss too easily proven and would deny the condemning agency the right to theorize that he really wasn't damaged at all. If the reason is simply that the recording of the Lis Pendens does suppress value, then such would be equally true where the pending litigation is to quiet title, to compel a conveyance under a prior contract, to impose a constructive trust, etc.

In short, the words, "in an Eminent Domain proceeding", should be deleted from the exception contained in the last portion of Evidence Code Section 815.

Conclusion

Most of the Rules excluding specific forms of evidence in real property valuation cases, originated in the old days when there was no procedure by which the opinions, or data being considered by appraisers, could be discovered before trial. Subpoenas re Discovery were regularly quashed because the investigation, data, and preliminary deliberations of the appraiser were protected by the attorney-client privilege. Mack vs. Superior Court, 259 C.A.2d 7. Modern pre-trial conference exchanges and statutory demand for exchange of valuation data had not yet been implemented. The trial lawyer was constantly subject to the element of surprise, fearing that an unreliable sale, offer, or speculative capitalization method could be "sprung" on him at a time when it would be too late to prepare a rebuttal case.

Those days are gone, and so are the reasons for assuming that the Government's lawyers are helpless, and that illogical limitations on evidence are necessary to protect public coffers from pilage by dishonest litigants.

I believe the valuation rules contained in Evidence Code Section 810 - 822, inclusive, should remain in their little cubbyhole until such time as we are prepared to amend those rules to make them fair and realistic. If the Amendments contained in 1961 SB 205 are now made, the distinction contained in the exception to Evidence Code Section 815 is eliminated, and the provisions providing for demand for exchange of valuation data (CCP §§1258.010 - 1258.300, inclusive) are also extended to non-condemnation cases, I would enthusiastically support your recommendation.

Respectfully,



RICHARD L. HUXTABLE

RLH/lar

EXHIBIT 4

CITY OF OAKLAND



CITY HALL • 14TH AND WASHINGTON STREETS • OAKLAND, CALIFORNIA 94612

Office of the City Attorney
David A. Self
City Attorney

January 5, 1979

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Re: Tentative Recommendation (November, 1978)
Relating to Application of Evidence Code
Property Valuation Rules in Noncondemnation Cases

Dear Members of the Commission:

We have reviewed the above-captioned Tentative Recommendation. While we are not convinced that the Evidence Code sections relating to valuation in eminent domain cases are beyond criticism, we support your basic recommendation that the law of valuation be standardized. Thus, we support the Tentative Recommendation and urge that you continue to study ways to improve the existing Evidence Code sections relating to property valuation.

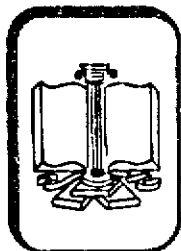
Very truly yours,

DAVID A. SELF
City Attorney

By: *Michael W. Stamp*
Michael W. Stamp
Deputy City Attorney

MWS:am

EXHIBIT 5



McGEORGE SCHOOL OF LAW

UNIVERSITY OF THE PACIFIC 3200 Fifth Avenue, Sacramento, California 95817

January 11, 1979

Mr. John DeMouley
Executive Secretary
California Law Revision Commission
School of Law
Stanford, CA 94305

Dear Mr. DeMouly:

I have reviewed the Tentative Recommendation of the Commission relating to the application of Evidence Code Property Valuation Rules in noncommenda- tion cases. I concur in the view that the provisions of the Evidence Code relating to the valuation of property should be made applicable to any proceeding in which such questions are raised. The need is clear; the property valuation issues should be governed by a uniform set of rules.

It is also my view that the amendments to the existing code (i.e., sections 810, 814 and new 823) as suggested by the Commission are well done.

Very truly yours,

A handwritten signature in cursive script, appearing to read "James R. Adams".

JAMES R. ADAMS
Professor of Law

/ds

Peter D. Bogart

2338 Bronson Hill Drive
LOS ANGELES, CA 90068
(213) 461 - 2273

January 12, 1978

California Law Revision Commission
Stanford Law School
Stanford CA 94305

Re: Application of Evidence Code Property Valuation
Rules in non-condemnation cases.

Gentlemen:

I respectfully dissent from your recommendation to apply the rules for valuation that apply to condemnation cases to many or all other areas of valuation. This is based not on the advantages of simplifying procedural law - an advantage that can hardly be disputed.

The difficulty is not procedural law but substantive law. The statutory definition of "fair market value" (CCP 1263.320) is

"(a) the fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell ... and a buyer, being ready, willing and able to buy...."

Emphasizing the element of "highest price" - as opposed to "average" or "fair" price, the justification is that property is being "taken" - generally involuntarily - which justifies morally payment of the "highest" reasonable price that could be obtained, so as to avoid charges of confiscation and to comply with the Fifth Amendment's requirement of fair compensation.

Yet applying the standard of the "highest" price - as opposed to "fair" or "average" price - to other than forced sales to a condemnor would work manifest injustice in numerous cases. Certainly taxation - whether for inheritance taxes, gift taxes or property taxes, cannot and should not be based on the "highest" possible valuation, especially in times of high inflation. The result would often be confiscatory and contradictory with large discrepancies (and much litigation) where there are differences between, let's say, property tax assessments and the "higher" gift tax valuation for the same property.

Example: Home bought 3 years ago for \$45,000.; assessed now for \$60,000. based on assessment of 2 1/2 years ago. Sold for nominal \$100,000., where seller has total outlay of \$85,000. (commissions, sales expenses, fixup costs) and buyer's total outlay is \$105,000. (inc. escrow, 'points', assumption fees etc). What's the "fair market value"? Even the statutory standard is ambiguous, as both seller and buyer pay and receive the "highest" amount yet there is the common 20% difference between buyer's outlay and seller's net receipts. How unfair would a \$105,000. or even a \$85,000. gift tax valuation be as opposed to a \$60,000. assessment?

Suppose the house is insured for the full assessed value and is totally destroyed - what's the co-insurance liability based on - the highest (\$105 K) or the seller's net proceeds (\$85. K) where there is an 80% co-insurance clause?

How could you reasonably figure fraud damages? How figure values for dissolution or division of property?

Or take valuation for criminal law purposes. Example: Theft of a dress from manufacturer. Manufacturer's cost (material, labor) - \$40.; manufacturer's price to wholesaler - \$50.; wholesaler to jobber \$60.; retail \$250. plus tax - \$265.; sales price at manufacturer's outlet store \$195. plus \$11, 50 tax - \$206. What valuation for purposes of criminal law (grand theft or petty theft?) and for insurance claim?

Thus, I believe the intended simplification of the evidentiary rules would merely compound the valuation problems as long as we have the hard-and-fast rule of applying the "highest" price.

It is, therefore, suggested that a new statutory definition of "fair" or "average" price be established, and the CCP 1263.320 definition be reserved solely for condemnation or eminent domain purposes, where it is justified. Once we have such a new statutory definition of "fair" value, then we can safely use a uniform rule not only for "any action" as suggested by the amendment to Evidence C. §810, but we can also use the same rule for property tax assessments and equalization proceedings.

As to the proposed amendment of Evidence Code § 823, this could be improved by adding reports of established real estate brokers' organizations (such as "Multiple Listings Services"), which are now quite comprehensive and show actual sales, as well as listings. This would cure the gross inaccuracies of the triple hearsay procedures, where the appraiser picks up deeds from county recorders' or assessors' offices, which indicate valuation by DTT stamps within a \$500. range - though these stamps are often quite misleading; then the appraiser attempts to verify the sale with broker, buyer or seller, and testifies as to what he was told by one of the principals as "evidence" of market action. Likewise, reports made to county assessors should be admissible - perhaps as admissions against interest; since assessors' records are supposed to be public, these should also be admissible. This could be accomplished by adding subdivision (c) to Ev. C. § 823 ALONG the following lines:

(c) If the property being valued is real property of a kind which is regularly sold in an established market, reports made to county assessors or reports of recognized trade organizations which are regularly published by such trade organizations. Circumstances of the preparation of such reports may be shown to affect its weight but not its admissibility.

Very truly yours,


P. BOGART

PB:aa

EXHIBIT 7

GEORGE MAGIT
ATTORNEY AT LAW
1801 AVENUE OF THE STARS
SUITE 406
LOS ANGELES, CALIFORNIA 90067
(213) 553-1785

January 12, 1979

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California 94305

Dear Mr. DeMouilly:

I have received the California Law Revision Commission's Tentative Recommendation relating to Application of Evidence Code Property Valuation Rules in Noncondemnation Cases. I find that the adoption of the tentative recommendation is long overdue and I would hope that the Legislature will enact the recommendation promptly.

In my own experience, I have struggled with the proof of valuation problem and could not understand why the statute in question was restricted to condemnation cases. An explanation given in the Commission's discussion explains how this came about. I would hope that the kind of oversight that occurred due to the Commission's reviewing a specific area of the law, would not be repeated in the future relative to other areas of the Commission's work.

I appreciate your forwarding to me the referred-to recommendation.

Very truly yours,


GEORGE MAGIT

GM/lr

Kenneth James Arnold

Attorney at Law

P. O. Box 14218

San Francisco, California 94114

January 13, 1979

Mr. John H. DeMouilly
Executive Secretary
California Law Revis
School of Law
Stanford, CA 94305

Dear Mr. DeMouilly:

Questionnaire re Confession of Judgment enclosed.

With regard to market value of property, I concur in your excellent analysis of the problem of valuation and approve of your proposed amendments to Evid C §§ 810, 814 and enactment of Evid C § 823.

Thank you for allowing me to review this material.

Very truly yours,



Kenneth James Arnold

EXHIBIT 9

LAW OFFICES

RODNEY R. ATCHISON

333 CHURCH STREET

POST OFFICE BOX 1180

SANTA CRUZ, CALIFORNIA 95061

TELEPHONE
(408) 423-8383RODNEY R. ATCHISON
NEAL R. ANDERSON
WILLIAM K. RENTZ
ROBERT F. HOWELL

January 22, 1979

California Law Revision Commission
Stanford Law School
Stanford, CA 94305Re: Tentative Recommendation Relating To:
Application of Evidence Code Property Valuation
Rules in Noncondemnation Cases

Gentlemen:

Thank you for the opportunity to review the tentative recommendations of the Commission pertaining to the above subject matter. A recent Superior Court trial in which I was involved demonstrated to me very clearly the need for a uniform system of valuation of property. The jury was required to determine the value of a parcel of real property to determine the damages arising out of negligent misrepresentation on the sale of the property. Because of the very confusion of the decisions referred to in your tentative recommendation, the Court permitted the jury to determine value based upon evidence of purportedly comparable sales, and other extrinsic evidence, without the benefit of an expert's opinion. Since there was no opportunity to cross-examine the parties to the purported comparable sales, the jury determination based upon this evidence was hardly more than speculation.

The evidentiary rules relating to the determination of value in eminent domain cases have been developed only after many years of trial and error, and are exceedingly workable. I believe that the adoption of your tentative recommendation would be a forward step in the evolution of the law.

Very truly yours,


RODNEY R. ATCHISON

RRA/df

EXHIBIT 10



STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 1799, SACRAMENTO, CALIFORNIA 95808)
(916) 445-3076

GEORGE P. REILLY
First District, San Francisco

IRIS SANKEY
Second District, San Diego

WILLIAM M. BENNETT
Third District, San Rafael

RICHARD NEVINS
Fourth District, Pasadena

KENNETH CORY
Controller, Sacramento

DOUGLAS D. BELL
Executive Secretary

January 25, 1979

California Law Revision Commission
Stanford Law School
Stanford, CA 94305

Gentlemen:

Tentative Recommendation Relating to
Application of Evidence Code Property Valuation
Rules in Noncondemnation Cases

The Board of Equalization has reviewed the proposed change that would have the Evidence Code rules apply in all property valuation cases except property tax cases. We agree with the concept that similar rules should be applicable in most cases of valuation. Moreover, we support the Commission's recommendation that property tax assessment and equalization proceedings should be excluded from the coverage of the statutes. We believe, as does the Commission, that property tax proceedings are governed by a well-developed and adequate set of rules that are comparable to the Evidence Code rules.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Robert D. Milam".

Robert D. Milam
Tax Counsel

RDM:fr

EXHIBIT 11

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW
198 McALLISTER STREET
SAN FRANCISCO, CALIFORNIA 94102

February 20, 1979.

California Law Revision Committee
Stanford Law School
Stanford, California 44305

Dear Sir:

Re: Tentative Recommendations-
Evidence Code - Property Valuations

I have carefully examined the above recommendations.
I concur therein and consider the Commission to have done
well.

Sincerely,


Joe H. Munster, Jr.

JHM:df

EXHIBIT 12

LESLIE K. WHITAKER

ATTORNEY AT LAW

300 LAKESIDE DRIVE · OAKLAND, CALIFORNIA 94666

415/271-2347

February 20, 1979

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Re: Application of Evidence Code Property Valuation
Rules in Noncondemnation Cases

Dear Commissioners:

Thank you for forwarding copy of your Tentative Recommendation on the above subject. I offer the following comments.

I agree that the Evidence Code rules should not be extended to property tax proceedings at this time (Footnote 11). However, large property tax cases are not usually "informal", as stated in footnote 11. I suggest that footnote 11 be made consistent with the Comment to Section 810. Both should refer to the rules of Revenue & Taxation Code Sections 402.1 and 402.5, as well as Sections 1606 and 1609.4.

I recommend that you continue to study the possibility of eventually combining the eminent domain and property tax rules into one set of rules. From an appraisal viewpoint, the standards should be the same.

Your amendment to Section 814 deserves comment. That section was amended in 1975 to delete the general value definition, on grounds that that subject was covered in CCP Section 1263.320. Since you do not now propose to amend CCP Sections 1263.310-1263.330, Section 814 (or some new section) should contain a general statement of the valuation standard. Such a general statement is needed to provide a statutory basis for the appraiser's concept of "highest and best use." Such a statute should also contain provisions similar to Revenue & Taxation Code Sections 402.1 and 402.5. It should therefore provide that enforceable use

California Law Revision Commission
February 20, 1979
Page Two

restrictions must be considered in valuing property, and that comparable properties must be subject to similar use restrictions.

Thank you for reading and citing my article on this subject. Incidentally, the article is incorrectly referred to in footnote 100.

Please call if you have any questions on these comments.

Very truly yours,



L. K. Whitaker
(415) 271-6617

LKW:ks



California Appraisers' Council

Richard G. Martin
13981 Pike Road
Saratoga, CA 95070

California Law
Revision Commission
Stanford Law School
Stanford, Calif. 94305

Re: Application of Evidence
Code Property Valuation
Rules in Condemnation Cases
K-100 Nov. 1978
Appendix E.C. 810-822

Commission Members,

I am an appraiser of some thirty years experience in government and private practise, and am chairman of the Legislative Committee of the California Appraisers' Council.

In 822 (paragraph one) I believe the term "is not a proper basis" is unacceptable.

This phrase as I understand it enters into the area of the tools of his trade, or thinking aspects, of the appraiser's opinion of value. If he is to be an expert witness his area of background knowledge should have as wide a basis as possible.

This term "proper basis" I believe will lead to both legal and appraisal confusion and be harmful to the ends of equity.

We would appreciate hearing your final position on the evidence code revisions.

Sincerely,

Richard G. Martin

13981 Pike Rd.
Saratoga, Ca. 95070

EXHIBIT 14

Feb. 20, 1979

To: California Law Revision Commission
From: Wanda Underhill

Re: Tentative Recommendation relating to
Application of Evidence Code Property
Valuation Rules in Noncondemnation Cases.

Creating statutory standards of evidence for the valuation of property in areas other than eminent domain and inverse condemnation appears to be a sound approach to valuation.

Page 3. P. 1 - Commentator wonders why case law in this area is difficult to locate.

Page 7. 813(a) - Will assure a just valuation, and the reasons given in this recommendation are basic to good judgement.

Page 11. While the Evidence Code outlines three accepted valuation techniques, 1) market data, 2) Replacement Costs, 3) capitalization of income, Section 814 makes it clear that a witness is not limited to these approaches.

Page 13. - The significant limitation which this section imposes on the "matter" on which an opinion is based assures an adequate basis for an opinion.

The provisions outlined in § 822(c) will help to clarify and prevent present inequities based on assessed valuation.

This Commentator concurs with the points outlined in the "Conclusion." Property valuation should be governed by a uniform set of rules.

Suggested addition -

P. 28.

§ 823 (added)

→ (b) ... add on, if not listed in such guides, fair market value for a motor vehicle of that year and model.

See P. 8 - Note 32

Code Civ. Proc. § 690.2 :

Will you please send me a copy of the proposed legislation when it is drafted into bill form.

Most Sincerely,

Wanda Underhill

Miss Wanda Underhill
2079 Market St. #27
San Francisco, Calif. 94114

EXHIBIT 15



CALIFORNIA APPRAISERS' COUNCIL

February 26, 1979

MEMBER ASSOCIATIONS:

American Society of Appraisers
Los Angeles Chapter
Sacramento Chapter
San Francisco Chapter
San Jose Chapter

California Society of Rural
Appraisers and Farm
Managers

National Association of
Independent Fee Appraisers
Los Angeles Chapter

Society of Governmental Appraisers
Central Coast Chapter
Dos Conats Chapter
El Tahoe Chapter
North Bay Chapter

Society of Real Estate Appraisers
Bakersfield Chapter
East Bay Chapter
Long Beach Chapter
Los Angeles Chapter
Mission Chapter
Monterey Bay Chapter

Society of Subdivision Appraisers
Los Angeles District

State of California
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Attention: Nathaniel Sterling, Assistant Executive
Secretary

Subject: California Evidence Code - Sections 810-822 Incl.

Gentlemen:

The #K100 mailing dealing with the subject recommendation was extensively discussed at the regular annual meeting of the California Appraiser's Council in San Francisco on February 23, 1979.

The following resolution was acted upon favorably by the delegates to the council:

Resolved that the California Appraiser's Council concurs with the tentative recommendation (#K100) relating to application of Evidence Code Property Valuation Rules in non-condemnation cases provided that the clause "and is not a proper basis for an opinion as to the value of property" is deleted from Section #822. Further, we strongly recommend that the California Legislature incorporate the total recommendation (sans the clause) into the California code.

We request that we be given notice of any public meeting concerning this subject and that we be afforded an opportunity to speak to the point with which we are particularly concerned.

Very truly yours,

Joan L. Robinson
Joan L. Robinson, S.G.A.
President

Council
Mailing Address: P.O. Box 244
Davis California 95616

EXHIBIT 16

Superior Court of California

San Francisco



CLAYTON W. HORN, JUDGE

2/26/79

RETIRED

Cal. L. R. Com. Re: Property Valuation

I have reviewed the tentative proposal and find it excellent. One comment - Lord Mill is a property and should be included in the proposal, being specifically mentioned.

Sincerely,
Clayton W. Horn

CLAYTON W. HORN
JUDGE SUPERIOR COURT, RETIRED
45 GRAYSTONE TERRACE
SAN FRANCISCO, CA. 94114

EXHIBIT 17

AMERICAN INSTITUTE OF REAL ESTATE
OF THE NATIONAL ASSOCIATION

SOUTHERN CALIFORNIA
CHAPTER NO. 5



APPRAISERS
OF REALTORS

CHAPTER OFFICE
99 E. MAGNOLIA BLVD., SUITE 122
BURBANK, CALIFORNIA 91502
PHONE (213) 849-7331

February 26, 1979

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Attn: Nathaniel Sterling,
Assistant Executive Director

Re: Tentative Recommendation Regarding
"Application of Evidence Code Property
Valuation Rules in Non-Condensation Cases"

Gentlemen:

It has been brought to our attention that the California Law Revision Commission is considering a recommendation to revise Evidence Code Sections 810-822 inclusive, and that the revision of Section 822, as proposed, carries an implication that the use of listings to sell or lease, offers to purchase or lease, options, and pending agreements are "not a proper basis for an opinion of value of property".

Please be informed that on February 21, 1979, the Executive Committee, comprised of the elected officers and directors for 1979, of the Southern California Chapter No. Five of the American Institute of Real Estate Appraisers, approved the forwarding of this letter to the California Law Revision Commission expressing concern and urging that the revision of Section 822 be re-written to avoid this implication.

Further, the Chapter's Executive Committee would like to take this opportunity to inform the Commission that occasions do arise when the use of listings, offers, options, and other pending agreements are of some assistance in estimating value and may have a proper place for inclusion as pertinent data within an appraisal report.

A thorough review of the general effect of this legislation on the profession of real estate appraising should be considered prior to finalizing the Commissions recommendation.

Very truly yours,

Rolland R. Stephens, M.A.I.
President

cc: John N. McLaurin, Chairman of
California Law Revision Commission
445 South Figueroa Street, 34th Floor
Los Angeles, California 90071

ROBERT J. SCOLNIK
ATTORNEY AT LAW
100 BUSH STREET
SUITE 2000
SAN FRANCISCO, CALIFORNIA 94104
GARFIELD 1-2345

February 28, 1979

California Law Revision Commission
Stanford Law School
Stanford, CA 94305

Gentlemen:

I am enclosing my comments concerning your tentative proposals relating to the application of the evidence code property valuation rules in noncondemnation cases.

Since I do not practice law in this field, my comments may be completely worthless.

However, I am interested in the law per se even though my specialty is in labor relations, and since you may be interested in the reaction and comments of lawyers who are not experts in this particular field, I have put forth the time and effort to review your report and submit some comments.

If any of my comments makes any sense, I will be pleased. If not, I apologize.

Very truly yours,


Robert J. Scolnik

encl/

RJS/nj

Comments:

Robert J. Scolnik, Esq.

Re: California Law Revision Commission Tentative Recommendations
Relating to Application of Evidence Code Property Valuation
Rules in Noncondemnation Cases.

(Page references are to Commission's Report dated November, 1978)

1. Section 814 and 823, pages 5, 8, 27, 28.

The exception allowing used car price guides as evidence of value seems questionable and inappropriate in terms of the overall analysis and context of the subject and proposed revisions.

The report explicitly recognizes this to be an exception to the general rule that value may be shown only by opinion testimony.

This exception is proposed on the ground that price guides are available and links this to the category of commodities sold in an established market. (Pages 5 and 7).

However, there would appear to be very clear differences between security and commodity market prices reflected virtually daily in "stock market" price quotations listed in newspapers. Such figures are purely objective, and the fluctuations are constantly reported. The prices or values are the same all over. There is no room for differences of opinion.

Used cars (or new cars) are not in the same category and used car guides (such as Bluebook, etc.) are not even basically similar. They are not daily; they are not based on clear, identifiable standards; they are published by parties who are not clearly objective and who have a private interest at stake. There is no way to cross examine a particular person who prepared the "guide" since it is extremely unlikely that such person can even be identified.

In effect, such "guide" is being allowed (under the proposal) as independent evidence of value where in reality it does not represent any objective or more objective truth but rather an opinion of a substantially inferior order. Concededly, it reflects an opinion and that is the principal and virtually exclusive basis for value (i.e., opinion, per se). But the law only recognizes the opinion of a qualified witness, and there is really no qualified witness to back up or explain or be cross examined concerning the used car price guide.

Moreover, the car guide, unlike the security and commodity market prices, is essentially only a vague "range" which depends on a host of particulars pertaining to the individual vehicle in question. That is completely different from the security and commodity markets. One share of stock of X company is no different from another. Similarly, one bushel of corn is the same as any other - at least so far as the commodity price list is concerned.

Although the Report cites other statutes that permit car guides in evidence, it does not necessarily follow that such other legislation is sound, and there is no compelling reason to allow such exception in these new proposals; and as suggested above, it seems clearly inappropriate. This seems especially true since there is and will be no difficulty whatsoever in obtaining qualified witnesses who can and will give expert opinion testimony, subject to cross examination, about the value of the car, which will obviously be sufficient to make a finding.

It would be objectionable for a used car guide being used, not as independent evidence (or as an independent "opinion"), for the very limited purpose of cross-examining a witness. This might be tempting to counsel for the purpose of impeaching the credibility of the expert witness. But in reality it would not add anything of a more reliable nature and would merely be getting in evidence, indirectly, what is improper based on the foregoing points and arguments. After all, the qualified witnesses will presumably be testifying about sales and prices of similar cars in specific situations which can be described specifically, including condition of various parts, mileage, places of sale, etc., etc. All of these details will be far more particular than any information contained in the used car guide, so that the relevancy of the "guide" even for purposes of cross-examination would seem to be nil.

2. Section 813(a)(2); pages 9-10,

While it may be impossible politically to preclude the owner from testifying as to his opinion of the value of the property, the legal philosophy underlying this report makes it plain that such testimony should not be allowed unless the owner is also a qualified witness.

Indeed, 813(a)(3) expressly imposes this requirement on the official or designee of the company which is the owner, and the Report clearly recognizes that this qualification is apt.

The fact that a small business or individual owner may not be able to afford to hire a qualified expert witness does not seem to be reasonable justification for allowing in evidence the opinion of one who has no knowledge as to the value of the property.

3. The language in sections 815, 816, 817, 819, 820, 821, in which the section starts off with the words "When relevant," does not seem to be precise. The explanatory point made on pages 11-12, including the quotation by the Supreme Court, is clear enough, but exactly what does "when relevant" mean?

It is intended to mean that the standard described in the section is to be accepted as relevant; i.e., that it is a relevant standard, or only that such standard may be relevant depending on the

existence of certain conditions or only in certain fact situations?

In other words, does "when relevant" mean "if relevant?"

Or does it mean that the standard embodied in the section is relevant but cannot be used without a showing of certain other facts?

If the latter is intended, then what is to furnish the guide or standard for the judicial determination of whether the particular standard in question is applicable in a particular case?

It seems that the language should be clarified in order to insure that everyone will know and understand exactly what is intended, and to avoid and eliminate objections and arguments and confusion which will waste a lot of time and detract from the ultimate objective.

4. Section 810(b); pages 3, (fn 11), 26.

The exclusion of ad valorem property tax assessment and equalization solely on the grounds that other, detailed procedures already exist seems questionable as a sound ground for limiting what otherwise would seem be a comprehensive statute dealing with this subject.

If the other detailed rules and procedures are considered suitable and adequate and proper, then why should not those be utilized as the model for this proposed legislation? If the instant proposals are deemed to be the proper method of handling this subject, then why should not this other application be treated in the same manner?

At least, it seems that some further clarification and justification should be presented.

EXHIBIT 19

COMMENT

COMMENT ON CALIFORNIA LAW REVIEW COMMISSION TENTATIVE
RECOMMENDATION RE: APPLICATION OF EVIDENCE CODE PROPERTY
VALUATION RULES IN NONCONDEMNATION CASES

Robert L. Webster
Boalt Hall
3rd year
Feb. 21, 1979
1931 Dwight Way #18
Berkeley, Ca. 94704

COMMENT ON CALIFORNIA LAW REVIEW COMMISSION TENTATIVE
RECOMMENDATION RE: APPLICATION OF EVIDENCE CODE PROPERTY
VALUATION RULES IN NONCONDEMNATION CASES

Introduction

The idea of establishing procedural uniformity in the methodology relating to property valuation is a sound one. Such uniformity would allow courts and counsel to spend more time considering the merits and less time considering procedure. Also, inasmuch as the methodology herein endorsed is supported by a good deal of case law it really represents more of a codification than a modification.

The Commission should emphasize that the recommendation does not purport to establish any uniform definition of market value, but rather considers only who may express opinions of value and what they may base their opinions on. This is important because it is conceivable that where the substantive law presents different definitions of market value the procedures needed to establish it may also need to vary in some respects. However, subject to that warning I fully endorse the concept of procedural uniformity.

I do however, find myself in disagreement with the Commission on certain matters and would therefore like to briefly address myself to those concerns. I will divide my discussion into two sections as follows: (1) the first section will contain what I call procedural comments and (2) the second section which I call substantive comments. The procedural comments go to matters in the report which I feel are

possibly incomplete, but which don't really effect the accuracy of the report itself. The substantive comments go to the heart of the report and present my criticisms of the suggested methodology as embodied in the Evidence Code.

Procedural Comments

On pages 2 and 26 of the recommendation the Commission outlines some of the areas where property value determinations are relevant. In its script list it includes "breach of contract for sale of property," but no reference is made to the statutory real property law on that issue in the footnote that follows. Thus Civil Code sec. 3306 provides that in the case of a bad faith refusal to convey an estate in real property the detriment caused thereby shall include "the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach...."(West's Annotated Civil Code). The value of the estate agreed to be conveyed has been interpreted to mean the "market value" of the estate at the time of the breach. Mercer v. Lemmens 230 Cal.App.2d 167; 40 Cal.Rptr. 803 (1964); Collins v. Marvel Land Co. 13 Cal.App.3d 34, 91 Cal.Rptr. 291 (1970). Thus, the Commission could properly include Civil Code sec. 3306 in its list of areas where market value is important.

Likewise Civil Code sec. 3307, relating to a vendee's breach of a contract to purchase, may also use market value determinations. The statute provides that "The detriment caused by the breach of an agreement to purchase an estate in real property, is deemed to be the excess, if any, of the amount which would have been due to the seller, under the

contract, over the value of the property to him.* (West's Annotated Civil Code sec. 3307). The value of the property to the seller is the "market value" at the time of breach, if the seller is free to use, or dispose of, the property. Shurtleff v. Marcus Land & Inv. Co. 59 Cal. App. 520, 211 P. 244 (1922); Rozer v. Carter 37 Cal.2d 544, 233 P.2d 539 (1951); Abrams v. Motter 3 Cal. App.3d 828, 83 Cal.Rptr. 855 (1970). Therefore the procedure applicable to determine market value is at issue here also.

Civil Code sec. 3307 applies not only to standard real property contract breaches, but also to vendee breaches under land contracts, in some cases. Thus the remedy for vendee breach under a land contract is, if the seller so elects, enforcement of the agreement via a quiet title action. This remedy entitles the vendor to "benefit of the bargain" damages, which in turn are, in part, determined by the excess of the amount to be paid under the contract over the value of the property to the vendor at the time of breach. This value is again determined by reference to the market value of the property at that time. Major-Blakeney Corp. v. Jenkins 121 Cal. App.2d 325, 263 P.2d 655 (1953); Honey v. Henry's Franchise Leasing Corp. 64 Cal.2d 801, 52 Cal.Rptr. 18, 415 P.2d 833 (1966); Kudokas v. Balkus 26 Cal.App. 3d 744, 103 Cal.Rptr. 318 (1972). Thus the procedural rules relating to determination of market value would be relevant here also. (Note: these rules would, of course, be inapplicable should the vendor elect to rescind the agreement thereby relying on rental value to measure damages.)

A final procedural comment relates to the citation of CCP sec. 580(a) in footnote 6 on page 2 of the recommendation and in footnote 4 on page 26 . CCP sec. 580(a) relates to a deficiency allowable after the exercise of a power of sale in a trust deed or mortgage. CCP sec. 580(d) makes unavailable a deficiency judgment after the exercise of a power of sale. Thus sec. 580(a) is of little practical import in California. The more applicable section is CCP sec. 726 which deals with the allowance of a deficiency judgment after judicial foreclosure and speaks in terms of fair value. Thus where a deficiency is allowable at all it would appear that CCP sec. 726 would be the section at issue. However, due to the anti-deficiency protections of CCP sec 580(b) and 580(d) the deficiency problem is not a large one anyway and I call it to the Commission's attention more as a matter of form than substance.

Substantive Comments

In general I support the Commission's effort to codify the market value determination procedure in non-condemnation areas. The Evidence Code's endorsement of the three primary techniques of property appraisal (i.e. market comparison, replacement cost and income capitalization) is good and should be extended to non-condemnation proceedings as the Commission suggests. However, I do have one important objection to the application of the Evidence Code provisions to non-condemnation proceedings and that relates to Evidence Code sec. 813(a). Sec. 813(a) limits the trier of fact, when making a determination of market value, to a consideration of

opinion evidence only. Thus, direct evidence of comparable sales etc., while admissable to buttress or attack an opinion, cannot be used as independent evidence of the value of the property. (See pp. 5-7 of Commission report). I would like to proceed with a criticism of this suggestion, first, by examining the Commission's analysis and then by adding my own.

The Commission apparently supports the extension of sec. 813(a) to non-condemnation areas largely on the basis of policy and the results in two cases where such a rule was not applied. The first case presented is Foreman & Clark v. Fallon 3 Cal.3d 875, 479 P.2d 362, 92 Cal.Rptr. 162 (1971).

Foreman & Clark involved an action for damages for breach of a lease which, as the Commission notes, required a determination of rental value. Testimony was given by a defendant and by experts for both lessor (defendant) and lessee. The lowest opinion evidence, of value, given would have resulted in damages of \$350,000 (not rental value of \$350,000 as the Commission's report says), but the trial court relied on independent evidence such as the lease itself and arrived at damages of \$25,000 (again, not rental value). Therefore, the finding of rental value, and hence damages, was outside of the range of opinion testimony and hence presumably unallowable had sec. 813(a) been applicable.

However, it is apparent from a reading of the case that something is terribly wrong where the lessor would lease the premises, after protracted and sophisticated negotiations, for such a low amount and then present evidence that the fair rental

value was much higher. There are at least a couple of plausible explanations for this occurrence. The first explanation is that the defendants may have entered a high value figure to combat plaintiff's specific performance count by trying to show inadequacy of consideration. A second possibility is that defendant's reliance on Civil Code sec. 3306 as the relevant authority caused them to misconstrue what was involved. The Court, 92 Cal.Rptr.@168, rejects defendant's argument that CC sec. 3306 should apply and uses the correct measurement i.e. the difference between agreed rent and the rental value of the premises during the term of the lease. Therefore, because the defendant misunderstood what was involved or wished to combat a specific performance count he entered a high value figure instead of a lower one.

It seems apparent to me that this case presents a good example of the problems that sec. 813(a) could cause. If, as here suggested, a party makes a mistake or counsel miscalculates which rule will apply it would be grossly unfair to make the issue of property value turn on such mistakes where the court has before it, other, independent evidence of value. The goal is to arrive at the fair value of property, not to penalize a misinformed party. Here the court had before it the rent agreed upon by the parties after lengthly (7 mos.) and sophisticated (lawyers involved) negotiations. The court used this figure in arriving at the damages it finally settled on. This clearly seems to have been the correct course of action in this case. Furthermore, as the Court

points out, the plaintiff did not cite nor could the Court find any reported decisions extending the rule re: opinion evidence exclusivity to non-condemnation cases and thus elected not to extend it to the case at bar. Foreman & Clark 92 Cal.Rptr. @ 172. That was basically how the Court distinguished the case at bar from the condemnation area.

The second case used as an example by the Commission is In Re Marriage of Folb 53 Cal.App.3d 862, 126 Cal.Rptr. 306 (1975). Folb was a marriage dissolution case where the value of real property was at issue. The husband and an expert witness for the husband testified to the value of the property for his side. The wife introduced no valid opinion testimony, but did introduce evidence of prior sales of the subject property via her accountant. The court accepted the value represented by the evidence of prior sales, thus placing its determination outside of the range of opinion testimony.

This is another example of a case where the unyielding application of sec. 813(a) would result in a bad decision. Obviously, the wife could have presented opinion evidence in line with the lower value of prior sales if she had been properly prepared. Under the rules of sec. 813 she herself might have been able to testify as an owner of the property if the property involved was community property, joint-tenancy property etc.. Having failed to present such opinion evidence should the wife be penalized by a rigid application of the opinion value rule? The court wisely held not and instead used the hard evidence before it, prior sales of the subject property, to arrive at its own determination of market value. The court

noted with approval Bagdasarian v. Gragnon 31 Cal.2d 744, 192 P.2d 935 (1948), which held that, in a personal property case, the market value of property may be shown by market prices or actual sales of other similar property and that expert opinion was not the only method of establishing value. The court stated that, "In the absence of statutory compulsion to the contrary, both reason and logic dictate that the rule expressed in Bagdasarian for valuation of personal property should be applicable in noncondemnation proceedings for the determination of market value of real property." (emphasis added) Folb 53 Cal.App.3d 862,871, 126 Cal.Rptr. 306,___.

It is apparent that the court would be reluctant to apply sec. 813(a) and would do so only under compulsion, which compulsion the court would not favor. I fully concur in the court's opinion and would only like to add some general observations of my own. The Evidence Code seems to make a trade-off in sec. 813. It allows only opinion evidence to be used in establishing values, but then liberalizes rules regarding who may express an opinion in secs. 813(a)(1),(2)and (3). Thus an owner of property may express his opinion as to its value, regardless of expertise in the market. This is allowed probably, in part, to meet objections that expert opinion is costly. But, an owner is obviously self-interested in what value is placed on the property and can be expected, if cognizant of the law, to testify accordingly. Furthermore, it is a common criticism of expert testimony that you can get anybody to say anything for a price. Thus, what starts out to be a proceeding to determine the value of property

ends up being a swearing contest with the winner being the one who presents the most opinions.

The code does allow the hard evidence of comparable sales etc. to be used to assess the merit of an opinion given. But, it is unclear to me why, if such evidence can be used in this manner, it can't be used to establish value itself. It would seem that, properly presented, evidence of comparable sales and the like could be evaluated as objectively by a trier of fact as by an expert. Moreover, if both sides are equally well informed then the application of the statute would merely result in a broad range of opinions being expressed, within which range the trier of fact would be able to choose. The only effect that the statute would have would be to prevent the court from remedying anomalies, such as involved in Foreman & Clark and Folb, where the parties are not equally well informed or make a mistake in not presenting opinion evidence.

If a trier of fact errs badly in the determination of value the traditional remedies are still available. A jury verdict can be set aside and judgment N.O.V. entered, or on appeal the jury or court findings can be reversed or set aside as manifestly against the weight of the evidence. It is true that these remedies are rarely invoked, but that is no reason to remove the discretion from the trier in determining value independently, based on real evidence. The rules regulating what evidence is admissible to support an opinion would serve equally well to limit what the trier could consider.

Finally, there may be valid reasons relating to government involvement etc. that would justify sec. 813 rules in condemnation proceedings that aren't valid in non-condemnation areas. Thus, it may be in the public interest to require valuations of property in public takings to fall within the realm of expressed opinion. But, whatever the justification for its application under those circumstances I agree with the court in Folb that logic and reason dictate the opposite conclusion in the non-condemnation area. The only result that the statute accomplishes is to handcuff the court where one of the parties fails to correctly perceive its burden under the law. And as I said earlier the goal is to value property, not to penalize the misinformed.

Therefore, I would urge that the Commission not include sec. 813 in its proposal. It should be omitted and another section similar to proposed section 823 added that would make admissible evidence available to triers of fact as independent evidence of market value. This result is mandated by logic and by non-condemnation case law as manifested in Foreman & Clark, Folb, and Bagdasarian.

Conclusion

I heartily endorse the goal of the Commission and most of its reasoning. Many of my comments relate to procedural points only and are not really important. However, I do feel strongly that the provision limiting value determinations to opinion evidence only is ill-conceived and should be re-considered. It can only serve to tie the trier's hands where freedom is most needed.

EXHIBIT 20



The Honourable Mr. Justice
Zelling, C.B.E.

SUPREME COURT
1 GOUGER STREET, ADELAIDE
SOUTH AUSTRALIA 5000

Chairman of the Law Reform
Committee of South Australia.

12th March, 1979.

The Secretary,
California Law Revision Commission,
Stanford Law School,
STANFORD.
CALIFORNIA. 94305.
United States of America.

Dear Sir,

Thank you for your tentative recommendation relating to the application of evidence code property valuation rules in noncondemnation cases.

You have asked for a reply by March 1, 1979. Regrettably this letter did not reach me until March 9, 1979 so that that part of your request is impossible to comply with.

It is always with some trepidation that I address comments to those in another law reform area as the statutory background differs from one law reform area to another and it is of course impossible for the overseas commentator to know the exact statutory background which the home commentator takes for granted.

I make three comments however for what they are worth and in case they may be of any use to you:

1. On page 17 of your draft you say that offers, options, and listing to buy, sell or lease property are inadmissible to support a valuation opinion. That is also the law in South Australia, but I have never been able to see the logic of part of it.

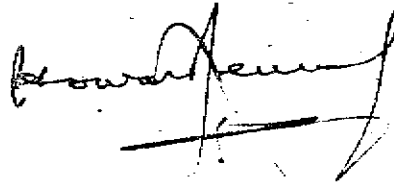
I appeared in a lot of what we call compulsory acquisition cases and what you call eminent domain cases whilst I was at the bar. It seems to me that an option to buy at a certain figure should be some evidence of value. In other words it should be admissible and the objection should simply go to weight. If a man is prepared to pay good money to buy an option to purchase a property at a given price, that in my opinion must be some evidence of the value of that property. How good or bad it is in the way of evidence should logically go only to its worth and not to its admissibility.

2. Your amendment to Section 818 of your Evidence Code is already the law in this State and it causes no problems in its practical application.
3. Your third point is one that did surprise me a little and that is that you will not allow consideration of an opinion of the value of comparable property.

If this did not come out in chief in a case before me, the cross-examiner would very soon bring it out. The great value of the evidence as to comparable property nearby, is that you find out what the valuer's hidden biases are. If you watch him valuing several properties and you see that he always uses the same criteria, or he always makes the discounts the same, or he always dismisses as unimportant the same things, you very quickly know whether he has made a faulty valuation of the subject property. Accordingly provided the crossexaminer has in his possession his own valuator's views on the properties on which he wants to crossexamine, and naturally he would have before he started crossexamination, he uses it as a very valuable tool for exposing the biases and mistakes of the valuer. Accordingly it is more often than not led in chief rather than presenting the appearance of having to be extracted piecemeal by the crossexaminer.

I hope these comments may be of some use to you.

Yours sincerely,



(Chairman).

EXHIBIT 21

[EXTRACT FROM MEMORANDUM 77-52]

§ 819. Capitalization of income

Existing Section 819 permits as a technique for valuing property capitalization of the reasonable net rental value attributable to the land and existing improvements. The tentative recommendation would broaden this provision to permit capitalization of the reasonable net rental value that would be attributable to the land if the property were improved for its highest and best use, provided the highest and best use is one for which the property is reasonably adaptable and available, and provided also that there is inadequate market data on which to base an opinion as to value. This proposal is easily the single most controversial provision in the tentative recommendation.

The arguments pro and con are too numerous to repeat here, other than to summarize the major and most commonly taken positions. The arguments for adopting the proposal, and in fact broadening it even further, may be found in Exhibits 3 (Hansen--green), 7 (Huxtable--white), and 18 (Betts--buff). The arguments against adoption of the proposal may be found in Exhibits 1 (Chairman McLaurin--pink), 6 (Reach--gold), 8 (County of Los Angeles--pink), 9 (McCormick--yellow), 10 (City of Oakland--green), 11 (Department of Transportation--buff), 13 (Metro. Water Dist. of So. Cal.--gold), 14 (City of Los Angeles--white), and 17 (County of Riverside--green). The proponents believe that the capitalization of income technique for hypothetical improvements is a standard valuation technique used in the ordinary course of valuation in the real world and thus should be available in condemnation proceedings; the decision when to use the technique should be left to the judgment of the appraiser making the valuation rather than to a court determination based on foundational requirements such as lack of adequate market data and availability and adaptability of the property for the hypothetical improvement. The opponents of the proposal believe that capitalization of income from hypothetical improvements is a technique used by appraisers only as a check on other more reliable appraisal techniques, that

even though used by sophisticated appraisers it can only serve to confuse a jury in an eminent domain trial, that the technique itself is highly speculative and unreliable, and that the prerequisites to its use laid out in the tentative recommendation provide inadequate safeguards. This summarizes the major positions; there are a number of other points made, pro and con, which may be gleaned from the letters.

The staff must confess that it is persuaded by the arguments of the opponents of permitting capitalization of hypothetical improvements. The staff found the arguments of the County of Los Angeles (Exhibit 8--pink) and the Department of Transportation (Exhibit 11--buff) particularly forceful on this point. The staff recommends that the change in Section 819 be deleted from the recommendation. Should the Commission decide to keep the change, the staff will prepare a subsequent memorandum discussing particular improvements that might be made in it, suggested in the letters.

STATE OF CALIFORNIA

C A L I F O R N I A L A W
R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

APPLICATION OF EVIDENCE CODE PROPERTY VALUATION
RULES IN NONCONDEMNATION CASES

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you object to the tentative recommendation or that you believe that it needs to be revised. COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN MARCH 1, 1979.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

November 1978

TENTATIVE RECOMMENDATION

relating to

APPLICATION OF EVIDENCE CODE PROPERTY VALUATION
RULES IN NONCONDEMNATION CASES

Introduction

The provisions of the Evidence Code relating to valuation of property apply only to eminent domain and inverse condemnation proceedings.¹ Other actions involving the valuation of property, with a few limited exceptions,² are governed by case law. It has been suggested by several commentators that the eminent domain valuation provisions could be equally well applied to the other actions.³

1. See Evid. Code § 810. (The text of Evidence Code Sections 810-822 appears as an Appendix to this recommendation.) See In re Marriage of Folb, 53 Cal. App.3d 862, 870, 126 Cal. Rptr. 306, ___ (1975) ("Neither statutory nor case law authority has been called to our attention that requires, in other areas where property values must be determined by the courts, adherence to the condemnation law method of determining market value of real property.") See also Senate Committee on Judiciary, Comment to Section 810 (Report of Senate Committee on Judiciary on Assembly Bill 2282, Senate J. (June 8, 1978) at 11580).
2. See, e.g., Com. Code §§ 2723-2724 (proof of market price in cases involving sale of goods); Cal. Admin. Code, Tit. 18, Subch. 1 (State Board of Equalization valuation principles and procedures).
3. In Carlson, Statutory Rules of Evidence for Eminent Domain Proceedings, 18 Hastings L.J. 143, 144 (1966), it was said: "In any event, the Law Revision Commission and the legislature should consider legislation making the Evidence Code provisions applicable to all actions and special proceedings involving the valuation of real property." And in Whitaker, Real Property Valuation in California, 2 U.S.F. L. Rev. 47, 68 (1967), it was said: "But if the standard value for purposes of eminent domain is the same as value for purposes of real property taxation and inheritance taxation, no reason appears why the evidentiary rules for determining value should be limited to eminent domain and inverse condemnation cases."

The valuation provisions were codified before the Evidence Code became operative,⁴ and were limited to eminent domain and inverse condemnation proceedings because that was the area under study by the Law Revision Commission when they were drafted.⁵ When the Evidence Code was enacted, the valuation provisions were simply recodified in the Evidence Code without thought of broadening their application. Other actions were not intentionally excluded from the Evidence Code valuation provisions.

The major areas of litigation, other than eminent domain and inverse condemnation, where the determination of property value is important include property taxation, gift taxation, inheritance taxation, breach of contract for sale of property, fraud in sale of property, damage or injury to property, mortgage deficiency judgments, and marital dissolution and division of property. In each of these areas, the critical determination is the "market value" of the property.⁶ This is

4. The valuation provisions were originally enacted as Title 7.1 of Part 3 of the Code of Civil Procedure (Code Civ. Proc. §§ 1268-1272.4) by 1965 Cal. Stats., Ch. 1151.
5. See Recommendation and Study Relating to Evidence in Eminent Domain Proceedings, 3 Cal. L. Revision Comm'n Reports A-1 (1961).
6. See, e.g., Cal. Const., Art. XIII, § 1, and Rev. & Tax. Code §§ 110, 110.5, 401 (use of "fair market value" or "full value" for taxation purposes); Rev. & Tax. Code §§ 13311, 13951 (inheritance tax based on "market value" of property); Rev. & Tax. Code § 15203 (gift tax computed on "market value" of property); Civil Code § 3343 (measure of damages in fraud based on "actual value" of property); Ins. Code § 2071 (fire insurance covers loss to the extent of "the actual cash value" of the property); Code Civ. Proc. § 580a (mortgage deficiency judgment calculated on "fair market value" of property). The cases have uniformly interpreted these varying standards to mean "market value." See, e.g., *Jefferson Ins. Co. v. Superior Court*, 3 Cal.3d 398, 402, 475 P.2d 880, 882, 90 Cal. Rptr. 608, 610 (1970) (fire insurance); *De Luz Homes, Inc. v. County of San Diego*, 45 Cal.2d 546, 561-62, 290 P.2d 544, 554 (1955) (property tax); *Guild Wineries & Distilleries v. County of Fresno*, 51 Cal. App.3d 182, 187, 124 Cal. Rptr. 96, 99 (1975) (property tax); *Union Oil Co. v. County of Ventura*, 41 Cal. App.3d 432, 436, 116 Cal. Rptr. 13, 16 (1974) (property tax); *Campbell Chain Co. v. County of Alameda*, 12 Cal. App.3d 248, 253, 90 Cal. Rptr. 501, 504 (1970) (property tax); *Estate of Rowell*, 132 Cal. App.2d 421, 429, 282 P.2d 163, 168 (1955) (inheritance tax); *Bagdasarian v. Gragnon*, 31 Cal.2d 744, 752-53, 192 P.2d 935, 940 (1948) (fraud damages); *Pepper v. Underwood*, 48 Cal. App.3d 698, 706 n.7, 122 Cal. Rptr. 343, 349 n.7 (1975) (fraud damages).

also the determination in an eminent domain or inverse condemnation proceeding.⁷

The lack of statutory standards of evidence for the valuation of property in areas other than eminent domain and inverse condemnation has created a number of problems. The same basic factual question--the determination of market value of property--is governed by different rules of evidence depending upon the type of case in which the question arises.⁸ Confusion is generated by the existence of multiple standards.⁹ The case law in this area is sparse and difficult to locate. And the lack of clear statutory standards in cases where the market value issue is not frequently litigated poses real problems.¹⁰

Property valuation issues should be governed by a uniform set of rules. The Law Revision Commission recommends that the Evidence Code rules applicable to eminent domain and inverse condemnation cases be extended to include all cases (other than ad valorem property tax assessment and equalization)¹¹ not now covered by statute where there is an issue of the "market value" (or its equivalent) of real property or tangible personal property.¹² The Commission also recommends a few

7. E.g., Code Civ. Proc. § 1263.310 (measure of compensation in eminent domain is "fair market value" of property).
8. See Carlson, Statutory Rules of Evidence for Eminent Domain Proceedings, 18 Hastings L.J. 143, 144 (1966).
9. See id.
10. See, e.g. In re Marriage of Folb, 53 Cal. App.3d 862, 868, 126 Cal. Rptr. 306, 310 (1975), "Neither the Family Law Act, nor the decisional law of this state relating to community-property division, offers any particular guidance as to how the value of a disputed real property asset should be ascertained."
11. The Commission does not recommend the Evidence Code provisions be extended to ad valorem property tax assessment and equalization cases since proceedings are informal, and cases are already governed by a well-developed and adequate set of rules. See Rev. & Tax. Code § 1609 (informal hearing); Cal. Admin. Code, Tit. 18, Subch. 1 (state Board of Equalization valuation principles and procedures). These rules are comparable to, but more detailed than, the Evidence Code valuation rules.
12. The Evidence Code provisions do not govern valuation of intangible personal property such as stock or goodwill of a business. See Section 811 and Senate Judiciary Committee Comment (Report of Senate Committee on Judiciary on Assembly Bill 2282, Senate J.

changes in the Evidence Code rules to accomodate their expanded application.¹³

Codification will clarify and make more accessible the law in these less frequently litigated areas. Most of the development in the law relating to property valuation has occurred in the eminent domain context. Noncondemnation law will receive the benefit of the interpretation and refinement that has already occurred under the Evidence Code provisions.¹⁴

Application of the Evidence Code valuation rules in noncondemnation areas would not transport the substantive law of eminent domain defining "market value," "date of valuation," "larger parcel," and the like, into those areas.¹⁵ These other areas are governed by the valuation standards applicable in the particular case.¹⁶ The Evidence Code valuation rules are strictly procedural--they state who is qualified to express an opinion of value and the appraisal evidence that may go into formulating such an opinion.¹⁷ The rules do not purport to embody all appraisal

(June 8, 1978) at 11580). See also *South Bay Irr. Dist. v. California-American Water Co.*, 61 Cal. App.3d 944, 979-80, 133 Cal. Rptr. 166, ___ (1976) (Evidence Code provisions limited to valuation of land and improvements, and do not apply to valuation of a business).

13. See discussion, infra, under "Value Shown Only by Opinion Testimony."
14. Cf. Carlson, Statutory Rules of Evidence for Eminent Domain Proceedings, 18 Hastings L.J. 143, 159 (1966) ("As a general proposition, the codification tends to clarify this area of law. It has reduced to 13 sections what has been judicially determined in hundreds of decisions, dating back to the 1850's. For the appraiser and general practitioner who embarks into the specialty of eminent domain practice, it should provide a convenient legal and appraisal tool, easily available for ready reference.").
15. For example, the eminent domain concept of "fair market value" is embodied in Code of Civil Procedure Section 1263.320, and is not incorporated in the Evidence Code valuation rules.
16. See Evidence Code § 812. See also discussion, infra, under "Non-compensable Items."
17. *South Bay Irr. Dist. v. California-American Water Co.*, 61 Cal. App.2d 944, 970, 133 Cal. Rptr. 166, ___ (1976) ("There is a distinction between a measure of just compensation in an eminent domain action and the methods used to determine the amount of that compensation under that measure. Rules of law establishing the

practice or to cover every valuation situation that may arise.¹⁸ They do, however, provide a clear and usable body of rules to govern most valuation problems, without rigidifying the law or stifling the development of appropriate appraisal techniques.

The analysis of the Evidence Code rules in this recommendation demonstrates that those rules are sufficiently general in scope, and sufficiently liberal in their admission of all recognized valuation techniques, to justify their use in all areas identified by the Commission. Broad application of the statutory evidence rules will in a few cases change existing case law.¹⁹ However, the courts have applied many of the basic principles applicable to eminent domain cases in the other areas where valuation is important,²⁰ and the benefit of eliminating the existing uncertainty by having a uniform set of rules of evidence applicable to all real property and tangible personal property valuations outweighs any inconvenience of minor changes in existing case law rules.

Value Shown Only by Opinion Testimony

The value of some types of property, such as listed securities or goods regularly sold on commodity markets, may be easily ascertained by evidence of sales and purchases.²¹ However, the value of most types of

former are substantive, while those fixing the latter are procedural."); *People v. Southern Pac. Transportation Co.*, 84 Cal. App.3d 315, 325, ___ Cal. Rptr. ___, ___ (1978) (not final) ("Plaintiff's argument seems to suggest that methods of establishing just compensation are inflexible and jurisdictional. The contrary is true. They are procedural in nature only").

18. See discussion, infra, under "Matter Upon Which Opinion May Be Based." See also Carlson, Statutory Rules of Evidence for Eminent Domain Proceedings, 18 *Hastings L.J.* 143, 159 (1966):

The science of appraising and appraisal practice, such as it is, cannot all be put into legislation. Only limited areas can be controlled by legislation. This was the approach taken by the Law Revision Commission and the legislature. Its worth has already been proven in assisting appraisers, trial attorneys and judges. . . .

19. The changes are noted, where ascertainable, in the following discussion.
20. See the following discussion. See also Whitaker, Real Property Valuation in California, 2 *U.S.F. L. Rev.* 47, 101 (1967).
21. McBaine, *California Evidence Manual* § 519 (2d ed. 1960). Cf. *Bagdasarian v. Gragnon*, 31 Cal.2d 744, 755, 192 P.2d 935, ___ (1948) ("Market value of personal property may, of course, be

property and particularly of real property, is not so easily determinable. Value ordinarily must be shown by opinion testimony.²²

Evidence Code Section 813(a) codifies the rule that value must be shown by opinion testimony. The effect of the codification is to prevent evidence, otherwise admissible, from being used to support a verdict outside the range of opinion testimony.²³ This rule avoids results such as those in Foreman & Clark Corp. v. Fallon²⁴ and In re Marriage of Folb,²⁵ described below.

Foreman & Clark was an action for damages for breach of a lease which required a determination of the rental value of the premises. Testimony as to the rental value of the premises was given by the lessor and by expert witnesses for both lessee and lessor. The lowest opinion given by any of the witnesses would yield a rental value of \$350,000; the trial court, relying on independent evidence of value such as the agreed rent and prior leases of portions of the premises, arrived at a rental value of \$25,000. The prior leases predated the breach by almost two years. On appeal, the Supreme Court refused to apply the eminent domain rule that the value must be within the range of the expert testimony.²⁶

established by testimony of expert witnesses, but this is not the only method, and it has been generally held that the reasonable value of marketable personal property may be shown by market prices or actual specific sales of other similar property, provided such sales are bona fide and not too remote in time or place. [Citations.]") (Italics in original.)

22. B. Witkin, California Evidence § 441 (2d ed. 1966); McBaine, California Evidence Manual §§ 519-521 (2d ed. 1960); 31 Cal. Jur.3d, Evidence §§ 560-569 (____).
23. State v. Wherity, 275 Cal. App.2d 241, 249, 79 Cal. Rptr. 591, ____ (1969).
24. 3 Cal.3d 875, 479 P.2d 362, 92 Cal. Rptr. 162 (1971).
25. 53 Cal. App.3d 862, 126 Cal. Rptr. 306 (1975).
26. The court distinguished this case from eminent domain on the basis of the "special problems" of eminent domain, without an indication of what those problems might be. 3 Cal.3d at 890, 479 P.2d at _____, 92 Cal. Rptr. at _____.

Folb was a marriage dissolution case in which it became necessary to determine the value of real property. The husband and an expert witness for the husband testified to the value of the property, the lowest opinion of which was \$208,320. The wife introduced no opinion testimony, but did introduce evidence of prior sales of the property, including a nonmarket sale of the property for \$161,065 by the husband to a partnership in which the husband owned a 97% interest. The trial court found the value of the property to be \$161,065. On appeal, the Court of Appeal noted the eminent domain rule that the trier of fact may not base a determination of value on independent evidence, but held that in a noncondemnation case the trier of fact was not required to base a determination of the value of property solely upon opinion testimony of qualified witnesses.²⁷

Results such as the foregoing were precisely the type that Evidence Code Section 813(a) was designed to cure. Section 813(a) precludes the trier of fact from making an independent determination of value upon the basis of prior sales or leases of the property or other raw valuation data. The trier of fact may know little or nothing of property values, may never have seen the property being valued or comparable property introduced in evidence, and is not subject to cross-examination as to the bases for the valuation determination. The assistance of experts qualified to analyze and interpret the facts is necessary to prevent the trier of fact from arriving at a valuation far above or far below what any qualified expert believes the property is worth.²⁸ The rule enables the trier of fact to act intelligently in arriving at a determination of value.²⁹

The rule of Evidence Code Section 813(a) is sound. It should be extended to noncondemnation cases, changing the result in such cases as

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27. 53 Cal. App.3d at 871, 126 Cal. Rptr. at ____.
28. California Law Revision Commission, Recommendation and Study Relating to Evidence in Eminent Domain Proceedings A-5-A-6 (1960); T. Dankert, Condemnation Practice Handbook, 14 California Real Estate Law & Practice § 508.04 (1976).
29. Pollak & Downs, The Antiparalleling Statute: A New Dimension in Public Utility Condemnation, 60 Cal. L. Rev. 1116, 1136 (1972).

Foreman & Clark and Folb.³⁰ It should not, however, preclude a valuation based on independent evidence in situations where this would be appropriate, such as the valuation of commodities regularly sold in an established market,³¹ or the valuation of automobiles for which price guides are available.³² The Evidence Code should be amended accordingly.

Persons Entitled to Give Opinions of Value

Opinion testimony may generally be given only by experts or by the owner of the property.³³ Because of this rule, there has been concern over the litigation cost required by use of professional appraisal testimony.³⁴ The Evidence Code provisions are as liberal as, and in some cases more liberal than, general law in permitting qualified nonappraisal witnesses to give opinions of value.

Qualifications of expert. The expert is usually a professional appraiser or real estate broker, though the expert need not always be so qualified.³⁵ A general knowledge of real estate values is not suf-

30. Use of expert testimony to determine the value of community property in marital dissolution cases is not new. See, e.g., "Court Dissolution Policy Revised in East District," L.A. Daily Journal, July 12, 1978, p.1, col.4-5 (unless there is a stipulation as to value, expert testimony ordinarily required).

31. See, e.g., Commercial Code Section 2724:

2724. Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.

32. See, e.g., Code Civ. Proc. § 690.2:

The value of such motor vehicle shall be established by reference to used car price guides customarily used by California automobile dealers, or, if not listed in such guides, fair market value, for a motor vehicle of that year and model.

33. 31 Cal. Jur.3d Evidence §§ 560-564 (____).

34. See, e.g., _____, 3 Cal. Real Estate Law & Practice § 75.33[3] (____); Peitzman & Smith, The Secured Creditor's Complaint: Relief From the Automatic Stay in Bankruptcy Proceedings, 65 Cal. L. Rev. 1216, 1236 (1977).

35. B. Witkin, California Evidence § 423 (2d ed. 1966).

ficient to qualify a witness as an expert.³⁶ The expert must be familiar with: (1) the property in question, (2) the value of comparable property, (3) the state of the market for the property in question, and (4) sales of comparable property.³⁷

Evidence Code Section 813(a)(1) permits testimony as to the value of property by witnesses "qualified to express such opinions." This provision is broadly construed to include anyone who has special knowledge of the value of the property.³⁸ "A witness who through knowledge and experience possesses the means to form an intelligent judgment as to the value of land beyond that possessed by persons generally is competent to give an opinion on fair market value even though he is not a real estate appraiser or broker."³⁹ The eminent domain qualification provisions are at least as liberal as the general provision for qualification of an expert expressed in Section 801. The eminent domain law provisions as to qualifications of experts have been relied upon to justify liberal qualifications for expert testimony in other areas of market value litigation.⁴⁰

Right of property owner to testify. The owner of real or personal property being valued is permitted to give an opinion as to the value of the property, in all types of market value litigation.⁴¹ This rule was originally "predicated on the theory that the owner who resided on and owned property for a period of years would be presumed to have acquired sufficient knowledge of the property and of the value of the land in

36. 31 Cal. Jur.3d Evidence § 565 (____).

37. McBaine, California Evidence Manual § 519 (2d ed. 1960).

38. T. Dankert, Condemnation Practice Handbook, 14 Cal. Real Estate Law & Practice § 508.40[3] (1976).

39. San Bernardino County Flood Control Dist. v. Sweet, 255 Cal. App.2d 889, 898, 63 Cal. Rptr. 640, ____ (1967) [citations omitted].

40. See, e.g., Naples Restaurant, Inc. v. Coberly Ford, 259 Cal. App.2d 881, 66 Cal. Rptr. 835 (1968) (automobile salesman qualified to give opinion of value of motor vehicle in fraud and breach of contract case).

41. See, e.g., 31 Cal. Jur.3d, Evidence § 564 (____); B. Witkin, California Evidence § 403 (2d ed. 1966); McBaine, California Evidence Manual § 481 (2d ed. 1960).

that neighborhood to be able to give an intelligent estimate as to the value of his own property."⁴² Although the validity of this presumption has been questioned in recent years,⁴³ Section 813(a)(2) codifies the rule that the owner of property may testify as to value,⁴⁴ thus preserving the rule for cases governed by the Evidence Code.

Occasionally persons in a relationship with the owner, such as the managing agent of a corporation, the pastor of a church, an agent, or the son of an owner, attempt to testify as an owner. Attempts to broaden the owner's right to testify to include such persons closely related to the owner have generally met with failure.⁴⁵ Section 813(a)(3) statutorily expands the owner's right to testify to include an officer, regular employee, or partner designated by a corporation, partnership, or unincorporated association that is the owner of the property, provided the designee is knowledgeable as to the value of the property.⁴⁶ This provision enables the small organization to give adequate testimony as to the value of its property in cases where it might not be able to afford the cost of an expert.⁴⁷ Section 813(c) is also more liberal than general law in permitting a person entitled to possession of the

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42. *City of Pleasant Hill v. First Baptist Church*, 1 Cal. App.3d 384, 411, 82 Cal. Rptr. 1, ___ (1969).
43. See, e.g., The Opinion Rule in California and Federal Courts: A Liberal Approach, 9 U.C.D. L. Rev. 233, 240 n.49 (1976); "Court Dissolution Policy Revised in East District," L.A. Daily Journal, July 12, 1978, p.1, col.4-5 (in marriage dissolution cases "it has been the experience of the Court in the past that the testimony of the parties as to values is of little help in making an accurate determination of the true value of the property").
44. B. Witkin, *California Evidence* § 441(b) (2d ed. 1966).
45. T. Dankert, *Condemnation Practice Handbook*, 14 Calif. Real Estate Law & Practice § 508.40[2] (1976).
46. 1978, Cal. Stats., Ch. 294 § 6. The Uniform Eminent Domain Code contains a similar provision. Section 1103(a)(3) (opinion may be given upon proper foundation by "a shareholder, officer, or regular employee designated to testify on behalf of an owner of the property, if the owner is not a natural person").
47. California Law Revision Commission, Recommendation Relating to Evidence of Market Value of Property, 14 Cal. L. Revision Comm'n Reports 105, 113 (1977).

property to testify, even though the person may not be technically an "owner."⁴⁸

Matter Upon Which Opinion May Be Based

Appraisers, in valuing property, normally use three methods or approaches to estimate the market value of real property: market data, replacement cost, and capitalization of income.⁴⁹ The Evidence Code gives statutory recognition to this appraisal "trinity" of generally accepted valuation techniques.⁵⁰

While it has been suggested that the Evidence Code "limits" admissibility by a "strict statutory scheme,"⁵¹ Section 814 makes clear that a witness is not limited to the three approaches specified in the Evidence Code.⁵² Market value can be determined many ways, none of which is exclusive.⁵³ An opinion may be based on any matter that is of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property, including but not limited to matters specifically mentioned in the Evidence Code.⁵⁴ This provision reflects the appraiser's practice of considering any information that might possibly

48. As amended, 1978 Cal. Stats., Ch. 194 § 6.

49. In re Marriage of Folb, 53 Cal. App.3d 862, 868, 126 Cal. Rptr. 306, ___ (1975); State v. Covich, 260 Cal. App.2d 663, 665, 67 Cal. Rptr. 280, ___ (1968); De Luz Homes, Inc. v. County of San Diego, 45 Cal.2d 546, 563, 290 P.2d 544, ___ (1955).

50. Evid. Code §§ 815-820; Carlson, Statutory Rules of Evidence for Eminent Domain Proceedings, 18 Hastings L.J. 143, 146 (1966).

51. Peitzman & Smith, The Secured Creditor's Complaint: Relief From the Automatic Stays in Bankruptcy Proceedings, 65 Cal. L. Rev. 1216, 1236 n.119 (1977).

52. Each of the statutorily recognized appraisal techniques is prefaced by the qualification that it may be used only "when relevant to the determination of the value of property."

53. South Bay Irr. Dist. v. California-American Water Co., 61 Cal. App.3d 944, 972, 133 Cal. Rptr. 166, ___ (1976).

54. Evid. Code § 814. "The Evidence Code does not by this listing of the separate approaches preclude other possible approaches to value. . . . Thus, the opinion of the witness as to value may be based upon other considerations than basic approaches to value unless precluded by some rule of law." T. Dankert, Condemnation Practice Handbook, 14 California Real Estate Law & Practice § 508.11[1] (citation omitted) (1976).

be relevant and evaluating that information in the light of the appraiser's past experience.⁵⁵

Under this provision, for example, the fact that the Evidence Code specifically permits use of capitalization of net rental income does not preclude use of gross rentals or capitalization of nonrental income, where appropriate.⁵⁶ The fact that the Evidence Code permits use of comparable sales does not preclude use of price trend or other data for noncomparable properties, where appropriate.⁵⁷ And the fact that the Evidence Code permits use of replacement cost to determine the value of existing improvements does not preclude use of replacement cost to determine the value of land.⁵⁸ The Supreme Court has emphasized that "Evidence Code Section 814 permits a witness to base his testimony on relevant evidence, 'including but not limited to the matters listed in sections 815 to 821.'"⁵⁹

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55. Whitaker, Real Property Valuation in California, 2 U.S.F. L. Rev. 47, 71 (1967).
56. *Redevelopment Agency v. Del-Camp Investments, Inc.*, 38 Cal. App.3d 836, 113 Cal. Rptr. 762 (1974) (gross rentals); *South Bay Irr. Dist. v. California-American Water Co.*, 61 Cal. App.3d 944, 133 Cal. Rptr. 166 (1976) (nonrental income). See T. Dankert, *Condemnation Practice Handbook*, 14 California Real Estate Law & Practice at § 508.11[4] (1976): "It appears from Evidence Code Sections 813 and 814 that opinion testimony could embrace any type of capitalization study not precluded by some exclusionary rule."
57. *City of Los Angeles v. Retlaw Enterprises, Inc.*, 16 Cal.3d 473, 485, 546 P.2d 1380, ___, 128 Cal. Rptr. 436, ___ (1976) (price trend data): "To deny such discretionary power would be to sanctify a wooden conception of comparability that would unjustifiably shackle the fact-finding process." See also *People v. Home Trust Investment Co.*, 8 Cal. App.3d 1022, 1026, 87 Cal. Rptr. 722, ___ (1970) (discretionary power of court to permit evidence of noncomparable sales used as a basis for opinion where there were no comparable sales).
58. *People v. Southern Pac. Transportation Co.*, 84 Cal. App.3d 315, 325, ___ Cal. Rptr. ___, ___ (1978) (not final) ("The rules for determining value of condemned land are not to be considered inflexible. In each case just compensation is the goal and if rigid application of a rule tends to produce injustice, the court must deviate from that rule. [citation].")
59. *City of Los Angeles v. Retlaw Enterprises, Inc.*, 16 Cal.3d 473, 486 n.8, 546 P.2d 1380, n.8, 128 Cal. Rptr. 436, n.8 (___). See also *South Bay Irr. Dist. v. California-American Water Co.*, 61 Cal. App.3d 944, 980, 133 Cal. Rptr. 762, ___ (___):

By virtue of Evidence Code Section 814, an opinion and determination of the market value of condemned property may be

While the Evidence Code valuation provisions are flexible in their admission of relevant evidence, Section 814 imposes a significant limitation--the matter upon which an opinion is based must be of a type that "reasonably may be relied upon by an expert in forming an opinion as to the value of property." This limitation assures that the witness has an adequate basis for an opinion.⁶⁰

Sales of Subject Property

Generally, prior and subsequent sales of the property being valued are relevant evidence of its value, provided the sales are voluntary, not too remote in point of time, and not otherwise shown to lack probative value.⁶¹ This rule is firmly established in eminent domain law, and is codified by Evidence Code Section 815.⁶² As a matter of trial and appellate court practice in eminent domain, there appears to be a tendency towards liberality in admitting sales of the subject property.⁶³ Thus, recent cases have upheld use of sales of the subject property made from three to six years prior to the date of valuation.⁶⁴

based on matters which the hypothetical buyer and seller described in the general market value rule would consider in determining the price at which to purchase and sell the property under consideration "including but not limited to the matters listed in Sections 815-821" of that code (see also City of Santa Barbara v. Petras, 21 Cal. App.3d 506, 510 [98 Cal. Rptr. 635]); and thus capitalization of the income of a condemned public utility, which is not a matter included in Evidence Code section 819, may be a basis for such an opinion or determination.

60. See, e.g., City of Los Angeles v. Lowensohn, 54 Cal. App.3d 625, 638-39, 127 Cal. Rptr. 417, ___ (1976).
61. Bagdasarian v. Gragnon, 31 Cal.2d 744, 755-58, 192 P.2d 935, ___ - ___ (1948); Eatwell v. Beck, 41 Cal.2d 128, 134, 257 P.2d 643, ___ (1953); 31 Cal. Jur.3d Evidence § 192 (___).
62. B. Witkin, California Evidence § 362 (2d ed. 1966).
63. T. Dankert, Condemnation Practice Handbook, 14 California Real Estate Law & Practice § 509.04 (1976).
64. City of Los Angeles v. Retlaw Enterprises, Inc., 16 Cal.3d 473, 546 P.2d 1380, 128 Cal. Rptr. 436 (1976) (six years); South Bay Irr. Dist. v. California-American Water Co., 61 Cal. App.3d 944, 133 Cal. Rptr. 166 (1976) (three years).

Noncondemnation cases have drawn upon eminent domain law to conclude that evidence of sales of the subject property should be admissible to prove value.⁶⁵

Comparable Sales

Evidence of sales of personal property similar to the property being valued is admissible to prove market value.⁶⁶ Whether sales of comparable real property are likewise admissible is not clear, however. Cases prior to 1957 have held that such sales are not admissible on direct examination.⁶⁷ In 1957 the Supreme Court in County of Los Angeles v. Faus⁶⁸ held that comparable sales were admissible on direct examination in eminent domain proceedings, overruling and disapproving prior eminent domain cases; the court was not, however, called upon to determine the admissibility of comparable sales in noncondemnation cases, and this issue has not since been resolved.

Since 1957, the rule of Faus has been codified in Section 816 of the Evidence Code, which permits a witness in an eminent domain case to base an opinion on comparable sales freely made within a reasonable time before or after the date of valuation.⁶⁹ In order to be considered comparable, the sale must have been made sufficiently near in time to the date of valuation, and the property sold must be located sufficiently near the property being valued, and must be sufficiently alike in respect to character, size, situation, useability, and improvements, to make it clear that the property sold and the property being valued are comparable in value and that the price realized for the property sold

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65. See, e.g., In re Marriage of Folb, 53 Cal. App.3d 862, 867-71, 126 Cal. Rptr. 306, ___-___ (1975) (marriage dissolution); 53 Cal. Ops. Atty. Gen. 97 (1970) (property tax assessment).
66. B. Witkin, California Evidence § 361 (2d ed. 1966); 31 Cal. Jur.3d § 194 (___).
67. See, e.g., Estate of Ross, 171 Cal. 64, 151 P. 1138 (1915) (inheritance taxation); Thompson v. Stoakes, 46 Cal. App.2d 285, ___ (1941) (damages in real estate transaction).
68. 48 Cal.2d 672, 312 P.2d 680 (1957).
69. T. Dankert, Condemnation Practice Handbook 14 California Real Estate Law & Practice §§ 509.01-509.03 (1966); B. Witkin, California Evidence § 363 (2d ed. 1966).

may be fairly considered as "shedding light" on the value of the property being valued.⁷⁰ Under this test, the courts have been given and have utilized broad and liberal discretion in determining comparability.⁷¹ The application of Section 816 is summarized well in City of Ontario v. Kelber:⁷²

But, manifestly, the trial judge, in applying so vague a standard (criteria for comparability), must be granted a wide discretion. (County of Los Angeles v. Faus, 48 Cal.2d 672, 678 [312 P.2d 680].) If the properties are sufficiently similar to have "some bearing" on the value under consideration, or to "shed light" on the proper value, the trial judge's discretion will not be interfered with on appeal. (Merced Irrigation Dist. v. Woolstenhulme, supra, 4 Cal.3d 478, 500). Only where it is clear that the court has abused this discretion by not adequately heeding the safeguards for determining comparability will the appellate court reverse. (People ex rel. State Park Com. v. Johnson, 203 Cal. App.2d 712, 719 [22 Cal. Rptr. 149].)

Sales to Public Agencies

Comparable sales, and sales of the subject property, may be used as a basis for an opinion of value only if "freely made."⁷³ A forced sale or other involuntary sale is not an accurate gauge of market value;

70. Evid. Code § 816; Condemnation Practice Handbook §§ 4.26-4.27, 4.30-4.31 (Cal. Cont. Ed. Bar 1973).

71. See, e.g., Community Redevelopment Agency v. Henderson, 251 Cal. App.2d 336, 59 Cal. Rptr. 311 (1967) (properties much larger, in different areas with different zoning and uses; rejected); San Bernardino County Flood Control District v. Sweet, 255 Cal. App.2d 889, 63 Cal. Rptr. 640 (1967) (properties three to five miles distant; admitted); County of Los Angeles v. Union Distributing Co., 260 Cal. App.2d 125, 67 Cal. Rptr. 107 (1968) (property across the street, improved, rented and used, excluded; condemned property was unimproved and vacant for over 40 years); Pleasant Hill v. First Baptist Church, 1 Cal. App.3d 384, 82 Cal. Rptr. 1 (1969) (properties less than one mile apart but in different cities; admitted); County of San Luis Obispo v. Bailey, 4 Cal.3d 518, 93 Cal. Rptr. 859, 483 P.2d 27 (1971) (comparable sales 30 to 50 miles away from condemned land; admitted).

72. 24 Cal. App.3d 959, 970, 101 Cal. Rptr. 428, ____ (1972).

73. Evid. Code §§ 815 (subject property), 816 (comparable sales).

foreclosure, execution, and possibly probate sales are examples of sales that may be inadmissible for this reason.⁷⁴

Sales to persons having eminent domain power may or may not be voluntary, but are inherently suspect. Prices paid by a condemnor may be more or less than the market value of the property because of either party's desire to avoid litigation. When the litigation avoidance motive is prominent, the sale price is not a reasonable or fair index of value.⁷⁵

In noncondemnation cases, evidence of sales to public agencies is apparently admissible if it can be shown that the sales were "voluntarily" made.⁷⁶ Section 822(a) of the Evidence Code, as a matter of policy, excludes from consideration all sales to potential condemnors.⁷⁷ Such transactions are considered settlements in compromise of litigation or tend to exhibit the characteristics of forced sales.⁷⁸ They are not

74. B. Witkin, California Evidence § 446 (1966); T. Dankert, Condemnation Practice Handbook, 14 California Real Estate Law & Practice § 509.07 (1976).

75. South Bay Irr. Dist. v. California-American Water Co., 61 Cal. App.3d 944, 983, 133 Cal. Rptr. 166, ___ (1976); Note, Valuation Evidence in California Condemnation Cases, 12 Stan. L. Rev. 766, 784-85 (1960).

76. County of Los Angeles v. Faus, 48 Cal.2d 672, 679, 312 P.2d 680, 682-83 (1957); Carlson, Statutory Rules of Evidence for Eminent Domain Proceedings, 18 Hastings L.J. 143, 155 (1966).

77. Recommendation and Study Relating to Evidence in Eminent Domain Proceedings, 3 Cal. L. Revision Comm'n Reports A-1, A-7:

Sales to persons that could have acquired the property by condemnation for the use for which it was acquired should be excluded from consideration on the issue of value. Such a sale does not involve a willing buyer and a willing seller. The costs, risks and delays of litigation are factors that often affect the ultimate price. Moreover, sales to condemnors often involve partial takings. In such cases valid comparisons are made more difficult because of the difficulty in allocating the compensation between the value of the part taken and the severance damage or benefit to the remainder. These sales, therefore, are not sales in the "open market" and should not be considered in a determination of market value.

78. California Condemnation Practice § 9.49 (Cal. Cont. Ed. Bar 1973); Uniform Eminent Domain Code § 1113(1) (1974) (Comment).

sufficiently voluntary as a general rule to justify the investigation and trial time and the collateral inquiry required to admit them or to risk the substantial possibility of error or prejudice from their admission.

Offers to Buy or Sell

General noncondemnation law is unclear as to the admissibility of offers to buy or sell property as evidence of market value.⁷⁹ Until 1958, the general rule was that evidence as to what the owner was offered for the property or what other persons seeking the purchase of similar property were willing to give for it, or as to offers of the owner to sell the property at a specified price, was not admissible.⁸⁰ A 1958 Supreme Court Case, Pao Ch'en Lee v. Gregoriou,⁸¹ permitted an oral offer to purchase the property as evidence of the value of the property.

Evidence Code Section 822(b) makes clear that offers, options, and listings to buy, sell, or lease property are inadmissible to support a valuation opinion. This rule is consistent with the majority view in the United States, which regards such evidence as inherently unreliable, easily susceptible to abusive manipulation, and at best merely a representation of the opinion of one party to a hypothetical transaction that was never confirmed by the opinion of another.⁸² Moreover, offers require collateral inquiry to determine if they are an accurate indication of market value or if they are influenced by personal reasons unrelated to market value, and the offeror may not be before the court and subject to cross-examination.⁸³ For these reasons, and because the value of evidence of offers is slight, they are excluded entirely from consideration except as admissions.⁸⁴

79. Carlson, Statutory Rules of Evidence for Eminent Domain Proceedings, 18 Hastings L.J. 143, 156 (1966); T. Dankert, Condemnation Practice Handbook, 14 California Real Estate Law & Practice, § 509.21 (1976).

80. 31 Cal. Jur.3d Evidence § 193 (____).

81. 50 Cal.2d 502, 326 P.2d 135 (1958).

82. Uniform Eminent Domain Code § 1113(2) (1974) (Comment).

83. Note, Valuation Evidence in California Condemnation Cases, 12 Stan. L. Rev. 766, 785-88 (1960).

84. Recommendation and Study Relating to Evidence in Eminent Domain Proceedings, 3 Cal. L. Revision Comm'n Reports A-1, A-7-A-8 (1960).

Leases of Subject Property

Theoretically, the reasonable rental value of the property is an accurate guide to the value of the property at any particular time, and an existing lease is relevant evidence of the reasonable rental value.⁸⁵ Section 817 of the Evidence Code codifies the rule that a lease of the subject property may be used as a basis for an opinion as to the value of the property.⁸⁶ Extension of the Evidence Code to noncondemnation cases would not change this general principle of law.⁸⁷

Comparable Leases

As a general rule, leases of comparable property, unlike sales of comparable property, have been inadmissible to show the value of property being valued.⁸⁸ A major problem in the comparison of lease data as opposed to sales data is that, in addition to land size, shape, location, and utility, the terms, circumstances, and conditions of the lease must also be taken into account.⁸⁹

Evidence Code Section 818 permits use of comparable leases for the limited purposes of determining the value of a leasehold interest in the subject property and for deriving a reasonable rental value for the subject property for purposes of capitalization. The safeguards defining criteria for comparability of sales in Section 816 are incorporated in Section 818; for leased property to be considered comparable for purposes of basing an opinion on it, it must meet the criteria specifically set forth in Section 816.⁹⁰

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85. *San Bernardino County Flood Control District v. Sweet*, 255 Cal. App.2d 889, 63 Cal. Rptr. 640 (1967); *California Condemnation Practice* § 4.56 (Cal. Cont. Ed. Bar 1973).
86. *People v. Lynbar, Inc.*, 253 Cal. App.2d 870, 876, 62 Cal. Rptr. 320, ___ (1967); *People v. Dunn*, 46 Cal.2d 639, 297 P.2d 964 (1956); *People v. Pera*, 190 Cal. App.2d 497, 12 Cal. Rptr. 720 (1963).
87. See, e.g., *Foreman & Clark Corp. v. Fallon*, 3 Cal.3d 875, 479 P.2d 362, 92 Cal. Rptr. 162 (1971); 31 Cal. Jur.3d, Evidence § 195 (___).
88. Whitaker, *California Property Valuation*, 2 U.S.F. L. Rev. 47, 76 (1967).
89. T. Dankert, *Condemnation Practice Handbook*, 14 California Real Estate Law and Practice § 509.25 (1976).
90. *City of Ontario v. Kelber*, 24 Cal. App.3d 959, 101 Cal. Rptr. 428 (1972).

Evidence Code Section 818 thus represents a modest but reasonable expansion of the general law relating to admissibility of evidence to prove value of property.

Value of Other Property

Although sales and leases of comparable property are a proper basis for an opinion as to value, an opinion of the value of the comparable property is not a proper basis.⁹¹ Consideration of an opinion of the value of property other than that being valued is remote and would require the determination of many other collateral questions involving the weight to be given the opinion, which would unduly prolong the trial.⁹² By the same reasoning, an opinion as to value may not be based on the capitalized value of rental or other income from comparable property.⁹³ This would involve irrelevant collateral matters that would tend to confuse the jury and consume undue amounts of trial time.⁹⁴

These rules are specific applications of the general principle that evidence may be excluded if its probative value is substantially outweighed by the probability that its admission will necessitate undue

91. Evid. Code §§ 816, 818, 822(d). While it has been suggested that this rule might have the effect of precluding a witness from testifying to adjustments in sales of comparable property used as a basis for an opinion, Section 822(d) is not so intended and has not been so applied. See, e.g., *Merced Irrigation Dist. v. Woolstenhulme*, 4 Cal.3d 478, 501-03, 483 P.2d 1, 16-17, 93 Cal. Rptr. 833, 848-49 (1971); Recommendation Relating to Evidence of Market Value of Property, 14 Cal. L. Revision Comm'n Reports 105, 122 (1977) (Comment to Section 822(d)); T. Dankert, *Condemnation Practice Handbook*, 14 Calif. Real Estate Law & Practice § 509.05 (1976); *California Condemnation Practice* § 9.49 (Cal. Cont. Ed. Bar 1973). See also *People v. Southern Pac. Transportation Co.*, 84 Cal. App.3d 315, 326-327, ___ Cal. Rptr. ___, ___-___ (1978) (cost of acquisition of other property admissible to derive replacement cost of subject property) (not final).

92. Recommendation and Study Relating to Evidence in Eminent Domain Proceedings, 3 Cal. L. Revision Comm'n Reports A-1, A-8 (1960); B. Witkin, *California Evidence* § 447(3) (1966).

93. Evid. Code § 822(f).

94. Whitaker, Real Property Valuation in California, 2 U.S.F. L. Rev. 47, 84 (1967); Carlson, Statutory Rules of Evidence for Eminent Domain Proceedings, 18 *Hastings L.J.* 143, 158 (1966).

consumption of time or create substantial danger of confusing the issues or of misleading the jury.⁹⁵ The specific application is appropriate in any case in which the value of property is in issue.

Capitalization of Income

Although commonly used in inheritance taxation cases, California law generally precluded capitalization of income to value real property until the enactment of the Evidence Code valuation provisions.⁹⁶ The reason for this position was that the capitalization technique involves a significant potential for inaccuracy. It requires an estimate of the expected annual income from the property, and selection of an appropriate capitalization rate. A small difference in capitalization rate will substantially affect the resulting value.⁹⁷ Because of the multitude of data required for accurate analysis, the income capitalization technique is often unreliable and may result in speculative values.⁹⁸

There are situations where the technique can yield accurate results which may be objectively tested. The clearest example is where rental is the highest use of the property and it has been committed to that use, since rent income is often stable and largely attributable to the property, and information as to similar investments is frequently available to indicate accurately the capitalization rate.⁹⁹ It is in this

95. Evid. Code § 352.

96. California Condemnation Practice § 4.49 (Cal. Cont. Ed. Bar 1973); Whitaker, Real Property Valuation in California, 2 U.S.F. L. Rev. 47, 76-78, 103-05 (1967).

97. T. Dankert, Condemnation Practice Handbook, 14 California Real Estate Law & Practice § 508.11[4] (1976).

98. Note, Valuation Evidence in California Condemnation Cases, 12 Stan. L. Rev. 766, 791-800 (1960); Whitaker, Real Property Valuation in California, 2 U.S.F. L. Rev. 47, 77 (1967). See also Decision No. 80480, 74 Cal. P.U.C. Opinions 232 (1972) (capitalization approach "uncertain," other approaches have "greater reliability").

99. Note, Valuation Evidence in California Condemnation Cases, 12 Stan. L. Rev. 766, 794 (1960).

situation that Evidence Code Section 819 liberalizes case law by permitting use of the capitalization of income technique.¹⁰⁰

Section 819 provides safeguards against speculative values by imposing a number of limitations on use of the capitalization technique:¹⁰¹

(1) Only rental income, as opposed to income or profits from a business conducted on the property, may be capitalized. This preserves the general rule that business income may not be used to show the value of property.¹⁰² Profits from a business may not be capitalized because this would introduce unduly speculative and uncertain elements depending upon managerial skills or other factors that are remote from the issue of property value.¹⁰³

100. Whitaker, Real Property Valuation in California Condemnation Cases, 2 U.S.F. L. Rev. 47, 78 (1967):

Section 819 allows a witness to consider the capitalized net rental value of the property as a basis for his opinion of the value of that property. This change accords with the appraiser's use of this method to value income-producing properties, especially those subject to long term leases; and in fact, many appraisers argue that capitalization is theoretically the most accurate valuation method. [footnote omitted] The usual problems with the capitalization method are lessened by restricting the use of the method to capitalization of rental value, not income from the property or profits of a business conducted on the property.

101. Carlson, Statutory Rules of Evidence for Eminent Domain Proceedings, 18 Hastings L.J. 143, 151-52 (1966).

102. *People v. Dunn*, 46 Cal.2d 639, 297 P.2d 964 (1956); *de Freitas v. Town of Suisun City*, 170 Cal. 263, 149 P. 553 (1915).

103. Cf. Uniform Eminent Domain Code § 1110 (1974) (valuation witness may not capitalize income or profits of a business conducted on the property). Where the property being taken is the business itself, however, capitalization of the business income or profits is permissible. *South Bay Irr. Dist. v. California-American Water Co.*, 61 Cal. App.3d 944, 133 Cal. Rptr. 166 (1976); Pollak & Downs, The Antiparalleling Statute: A New Dimension in Public Utility Condemnation, 60 Cal. L. Rev. 1116, 1133-34 (1972).

(2) Only the reasonable, as opposed to the actual, net rental value may be capitalized. The actual rental may be above or below market, which when capitalized results in a distorted value.¹⁰⁴

(3) In deriving a reasonable net rental value, only leases that satisfy safeguards of comparability may be used.¹⁰⁵

(4) Only rental from existing, as opposed to hypothetical, improvements may be capitalized. This rule prevents undue speculation; it preserves existing law.¹⁰⁶

Section 819 is a carefully circumscribed expansion of the general law relating to evidence of market value. It is consistent with the practice in inheritance tax valuation cases.¹⁰⁷ Since its enactment, one noncondemnation appellate case, City Bank of San Diego v. Ramage,¹⁰⁸ has enunciated similar rules:

In the case of property actually yielding an established regular income, the capitalization of the net income, taking into account the replacement cost of improvements as of the relevant date, is a highly significant index of market value as of that date.

The question of the adaptability of the subject property for a specific use is one of the matters to be considered in arriving at an opinion as to its highest and best use. The profitability of such use measured in terms of specific amounts, and dependent upon the nature and cost of specific improvements yet to be made, is not admissible evidence on the subject of fair market value.

104. California Condemnation Practice § 4.44 (Cal. Cont. Ed. Bar 1973).

105. Evid. Code § 818; City of Rosemead v. Anderson, 270 Cal. App.2d 260, 266, 75 Cal. Rptr. 575, ___ (1969) ("Similar safeguards [to comparability] are provided with respect to the terms of leases where the capitalization of income approach is used by the expert in supporting his opinion of value.") In Parker v. City of Los Angeles, 44 Cal. App.3d 556, 118 Cal. Rptr. 687 (1974), an appraisal witness derived a capitalization rate from comparably sized properties which by reason of their location were not particularly comparable to the subject property. The court noted that because of the comparability problem, apparently, the trial court discounted the opinion of the witness. 44 Cal. App.3d at 562, 118 Cal. Rptr. at ___.

106. People v. Johnson, 203 Cal. App.2d 712, 22 Cal. Rptr. 149 (1962).

107. See Whitaker, Real Property Valuation in California, 2 U.S.F. L. Rev. 47, 103-05 (1967).

108. 266 Cal. App.2d 570, 586, 72 Cal. Rptr. 273, ___ (1968) (foreclosure and fraud).

Replacement Cost

The extent to which replacement cost may be used to value land and structures is not clear. There is case law to the effect that depreciated replacement cost is a proper means of valuing structures.¹⁰⁹ The technique is also commonly used in property tax assessment cases.¹¹⁰

Evidence Code Section 820 makes clear for eminent domain and inverse condemnation cases that depreciated reproduction or replacement cost may be used to value property. This represents a significant change from prior law, and aligns California with the majority of other jurisdictions.¹¹¹

Section 820 includes a number of limitations to ensure that the replacement cost technique will be used only where appropriate. The technique may not be used unless the improvements enhance the value of the property for its highest and best use; otherwise application of the replacement cost technique would result in an improperly low value.¹¹² In applying the technique, only matters that reasonably may be relied upon by an expert may be used.¹¹³ And replacement cost may only be used when relevant to the particular property being valued,¹¹⁴ and not speculative.¹¹⁵

109. Cleland v. Thornton, 43 Cal. 437 (1872); Williams v. Faria, 112 Cal. App. 455, ___ P. ___ (1931); 31 Cal. Jur.3d Evidence § 192 (___).

110. Whitaker, Real Property Valuation in California, 2 U.S.F. L. Rev. 47, 89-91 (1967).

111. Note, Valuation Evidence in California Condemnation Cases, 12 Stan. L. Rev. 766, 803-07 (1960); Carlson, Statutory Rules of Evidence for Eminent Domain Proceedings, 18 Hastings L.J. 143, 150-51 (1966); Whitaker, Real Property Valuation in California, 2 U.S.F. L. Rev. 47, 78-81 (1967). See also Uniform Eminent Domain Code § 1111 (1974) (adopting a provision comparable to Section 820).

112. T. Dankert, Condemnation Practice Handbook, 14 California Real Estate Law and Practice § 508.11[3] (1976).

113. Evid. Code § 814; People v. Southern Pac. Transportation Co., 84 Cal. App.3d 315, 327, ___ Cal. Rptr. ___, ___ (1978) (not final); cf. People v. Leadership Housing Systems, Inc., 24 Cal. App.3d 164, 100 Cal. Rptr. 747 (1972) (only factors that would be taken into consideration in open market may be considered).

114. Redevelopment Agency v. Del-Camp Investments, Inc., 38 Cal. App.3d 836, 842, 113 Cal. Rptr. 762, ___ (1974).

115. People v. Southern Pac. Transportation Co., 84 Cal. App.3d 315, 326, ___ Cal. Rptr. ___, ___ (1978) (not final).

The effect of Section 820 is to bring the standards for judicial valuations and appraiser valuations closer together, and to resolve previous uncertainty in the law.¹¹⁶ It should apply to noncondemnation cases generally.

Conditions in Vicinity

Market value of property is based on the highest and best use to which the property can be put.¹¹⁷ In determining the value of property, it is desirable not only to determine its adaptability for a particular use by virtue of intrinsic characteristics such as size, shape, and topographical conditions,¹¹⁸ but also to determine the character of the neighborhood and trends in development of other property in the general vicinity.¹¹⁹

Evidence Code Section 821 codifies the rule that a valuation witness may take into account as a basis for an opinion the nature of the improvements on properties in the general vicinity and the character of the existing uses being made of such properties. This codifies prior eminent domain case law.¹²⁰ Noncondemnation law on this point is not clear, but should be made clear.

Assessed Value

Evidence Code Section 822(c) precludes use of the assessed valuation for taxation purposes to determine the value of property. It is well recognized that assessed values of property cannot be relied upon as an indication of its market value since they are generally applied with an eye to equalization of tax loads rather than an ascertainment of

116. Whitaker, Real Property Valuation in California, 2. U.S.F. L. Rev. 47, 81 (1967).

117. Sacramento S.R.R. v. Heilbron, 156 Cal. 408, 104 P. 979 (1909).

118. Hayward Union High School Dist. v. Lemos, 187 Cal. App.2d 348, 9 Cal. Rptr. 750 (1960).

119. California Condemnation Practice § 4.8 (Cal. Cont. Ed. Bar 1973).

120. Note, Valuation Evidence in California Condemnation Cases, 12 Stan. L. Rev. 766, 774 n.51 (1960). Section 1112 of the Uniform Eminent Domain Code is modeled after Section 821 of the Evidence Code. See Comment to Uniform Eminent Domain Code § 1112 (1974).

market value, and are seldom determined in a consistent and systematic manner.¹²¹ Application of this provision in noncondemnation cases would codify existing law,¹²² and would be consistent with the rule in the majority of other jurisdictions.¹²³

Noncompensable Items

Evidence Code Section 822(e) requires that a valuation witness exclude from consideration in forming an opinion the influence of non-compensable items of value. This provision has greatest application in eminent domain and inverse condemnation proceedings, where such matters as the effect of an exercise of the police power are excluded.¹²⁴ Such matters are peculiar to the substantive law of eminent domain and inverse condemnation, and application of Section 822(e) to noncondemnation cases would not change the substantive law of those cases. Section 822(e) reiterates a general rule applicable in any case in which opinion testimony is given--a witness may not base an opinion on any matter that the witness "is precluded by law from using."¹²⁵

Conclusion

Property valuation issues should be governed by a uniform set of rules. The foregoing discussion demonstrates that the Evidence Code valuation provisions have crystallized an extensive, liberal, and well-developed body of law relating to the determination of market value of property. Its application to noncondemnation cases is appropriate for both real and personal property value determinations. It will largely codify existing law, and will favorably resolve a number of uncertainties in and unduly restrictive rules applicable in noncondemnation cases. The Law Revision Commission recommends that the Evidence Code property valuation rules be applied in noncondemnation cases.

121. Recommendation and Study Relating to Evidence in Eminent Domain Proceedings, 3 Cal. L. Revision Comm'n Reports A-1, A-8 (1960); Uniform Eminent Domain Code § 1113(3) (1974) (Comment).

122. 31 Cal. Jur.3d, Evidence § 196 (____).

123. Whitaker, Real Property Valuation in California, 2 U.S.F. L. Rev. 47, 83 (1967).

124. See Uniform Eminent Domain Code § 1113(6) (1974) (Comment).

125. Evid. Code §§ 801, 802; see also Evid. Code § 803.

Proposed Legislation

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Sections 810 and 814 of and to add Section 823 to the Evidence Code, relating to evidence in the valuation of property.

The people of the State of California do enact as follows:

40312

Evidence Code § 810 (amended)

SECTION 1. Section 810 of the Evidence Code is amended to read:

810. ~~This~~ (a) Except where another rule is provided by statute, this article provides special rules of evidence applicable only to eminent domain and inverse condemnation proceedings to any action in which the value of property is to be ascertained .

(b) This article does not govern ad valorem property tax assessment or equalization proceedings.

Comment. Section 810 is amended to remove the limitation on application of this article to eminent domain and inverse condemnation proceedings. This article applies to any action or proceeding in which the "value of property" is to be determined. See Section 811 and Comment thereto ("value of property" defined). See also Sections 105 and 120 ("action" includes action or proceeding). These cases include, but are not limited to, the following:

(1) Eminent domain proceedings. See, e.g., Code Civ. Proc. § 1263.310 (measure of compensation is fair market value of property taken).

(2) Inheritance taxation. See, e.g., Rev. & Tax. Code §§ 13311, 13951 (property taxed on basis of market value).

(3) Breach of contract of sale. See, e.g., Com. Code §§ 2708, 2713 (measure of damages for nonacceptance, nondelivery, or repudiation is based on market price).

(4) Mortgage deficiency judgments. See, e.g., Code Civ. Proc. § 580a (judgment calculated on fair market value of property).

(5) Gift taxation. See, e.g., Rev. & Tax. Code § 15203 (gift tax computed on market value of property).

(6) Fraud in the purchase, sale, or exchange of property. See, e.g., Civil Code § 3343 (measure of damages based on actual value of property).

(7) Other cases in which no statutory standard of market value or its equivalent is prescribed but in which the court is required to make a determination of market value, such as marriage dissolution. See, e.g., In re Marriage of Folb, 53 Cal. App.3d 862, 126 Cal. Rptr. 306 (1975).

This article applies only where market value is to be determined, whether for computing damages and benefits or for any other purpose. In cases involving some other standard of value, the rules provided in this article are not made applicable by statute.

The introductory proviso of subdivision (a) ensures that, where a particular provision requires a special rule relating to value, the special rule prevails over this article. See, e.g., Com. Code §§ 2723-2724. By virtue of subdivision (b), property tax assessment and equalization proceedings, whether judicial or administrative, are not subject to this article, since they are governed by a well-developed and adequate set of rules that are comparable to the Evidence Code rules. See, e.g., Rev. & Tax. Code §§ 1609, 1636-1641 (equalization proceedings); Cal. Admin. Code, Tit. 18 (public revenues regulations).

Nothing in this section is intended to require a hearing to ascertain the value of property where a hearing is not required by statute. See, e.g., Rev. & Tax. Code §§ 14501-14505 (Inheritance Tax Referee permitted but not required to conduct hearing to ascertain value of property).

31787

Evidence Code § 814 (technical amendment)

SEC. 2. Section 814 of the Evidence Code is amended to read:

814. The opinion of a witness as to the value of property is limited to such an opinion as is based on matter perceived by or personally known to the witness or made known to ~~him~~ the witness at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property, including but not limited to the matters listed in Sections 815 to 821, inclusive, and Section 823, unless a witness is precluded by law from using such matter as a basis for ~~his~~ an opinion.

Comment. Section 814 is amended to reflect the enactment of Section 823, listing commodity market reports and used car price guides as proper bases for opinions. While the value of property may be determined by reference to matters listed in Sections 815 to 821 and 823 where appropriate, an opinion as to value may also be based on any other matter that satisfies the general requirements of Section 814. See, e.g., *City of Los Angeles v. Retlaw Enterprises, Inc.*, 16 Cal.3d 473, 486 n.8, 546 P.2d 1380, ___ n.8, 128 Cal. Rptr. 436, ___ n.8 (1976) (price trend data admissible); *People v. Southern Pac. Transportation Co.*, 84 Cal. App.3d 315, 325, ___ Cal. Rptr. ___, ___ (1978) (not final) (replacement cost of land as opposed to improvements admissible); *South Bay Irr. Dist. v. California-American Water Co.*, 61 Cal. App.3d 944, 980, 133 Cal. Rptr. 166, ___ (1976) (capitalization based on nonrental income admissible); *Redevelopment Agency v. Del-Camp Investments, Inc.*, 38 Cal. App.3d 836, 842, 113 Cal. Rptr. 762, ___ (1974) (capitalization based on gross rentals admissible); *People v. Home Trust Investment Co.*, 8 Cal. App.3d 1022, 1026, 87 Cal. Rptr. 722, ___ (1970) (noncomparable sales admissible in appropriate circumstances).

Evidence Code § 823 (added)

SEC. 3. Section 823 is added to the Evidence Code to read:

823. Notwithstanding any other provision of this article, when relevant to the determination of the value of property, the following matter is admissible as independent evidence and is a proper basis for an opinion as to the value of property:

(a) If the property being valued is regularly bought and sold in an established commodity market, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of the market. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.

(b) If the property being valued is a motor vehicle, used car price guides customarily used by California automobile dealers for a motor vehicle of that year and model.

Comment. Section 823 is an exception to the general rules that value may be shown only by opinion testimony (Section 813(a)) and that value may not be based on an opinion of the value of other property (Section 822(d)). Subdivision (a) is derived from Commercial Code Section 2274 (prevailing price of goods). Subdivision (b) is derived from Code of Civil Procedure Section 690.2 (exemption of motor vehicle from execution).

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APPENDIX (EVIDENCE CODE §§ 810-822, AS
AMENDED 1978 CAL. STATS., CH. 294)

EVIDENCE OF MARKET VALUE OF PROPERTY

810. This article provides special rules of evidence applicable only to eminent domain and inverse condemnation proceedings.

811. As used in this article, "value of property" means market value of any of the following:

- (a) Real property or any interest therein.
- (b) Tangible personal property.

812. This article is not intended to alter or change the existing substantive law, whether statutory or decisional, interpreting the meaning of "market value," whether denominated "fair market value" or otherwise.

813. (a) The value of property may be shown only by the opinions of:

- (1) Witnesses qualified to express such opinions;
- (2) The owner of the property or property interest being valued;

and

(3) An officer, regular employee, or partner designated by a corporation, partnership, or unincorporated association that is the owner of the property or property interest being valued, if the designee is knowledgeable as to the value of the property or property interest.

(b) Nothing in this section prohibits a view of the property being valued or the admission of any other admissible evidence (including but not limited to evidence as to the nature and condition of the property and, in an eminent domain proceeding, the character of the improvement proposed to be constructed by the plaintiff) for the limited purpose of enabling the court, jury, or referee to understand and weigh the testimony given under subdivision (a); and such evidence, except evidence of the character of the improvement proposed to be constructed by the plaintiff in an eminent domain proceeding, is subject to impeachment and rebuttal.

(c) For the purposes of subdivision (a), "owner of the property or property interest being valued" includes, but is not limited to, a person entitled to possession of the property.

814. The opinion of a witness as to the value of property is limited to such an opinion as is based on matter perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property, including but not limited to the matters listed in Sections 815 to 821, inclusive, unless a witness is precluded by law from using such matter as a basis for his opinion.

815. When relevant to the determination of the value of property, a witness may take into account as a basis for an opinion the price and other terms and circumstances of any sale or contract to sell and purchase which included the property or property interest being valued or any part thereof if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation, except that in an eminent domain proceeding where the sale or contract to sell and purchase includes only the property or property interest being taken or a part thereof, such sale or contract to sell and purchase may not be taken into account if it occurs after the filing of the lis pendens.

816. When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the price and other terms and circumstances of any sale or contract to sell and purchase comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation. In order to be considered comparable, the sale or contract must have been made sufficiently near in time to the date of valuation, and the property sold must be located sufficiently near the property being valued, and must be sufficiently alike in respect to character, size, situation, usability, and improvements, to make it clear that the prop-

erty sold and the property being valued are comparable in value and that the price realized for the property sold may fairly be considered as shedding light on the value of the property being valued.

817. (a) Subject to subdivision (b), when relevant to the determination of the value of property, a witness may take into account as a basis for an opinion the rent reserved and other terms and circumstances of any lease which included the property or property interest being valued or any part thereof which was in effect within a reasonable time before or after the date of valuation, except that in an eminent domain proceeding where the lease includes only the property or property interest being taken or a part thereof, such lease may not be taken into account in the determination of the value of property if it is entered into after the filing of the lis pendens.

(b) A witness may take into account a lease providing for a rental fixed by a percentage or other measurable portion of gross sales or gross income from a business conducted on the leased property only for the purpose of arriving at an opinion as to the reasonable net rental value attributable to the property or property interest being valued as provided in Section 819 or determining the value of the leasehold interest.

818. For the purpose of determining the capitalized value of the reasonable net rental value attributable to the property or property interest being valued as provided in Section 819 or determining the value of a leasehold interest, a witness may take into account as a basis for his opinion the rent reserved and other terms and circumstances of any lease of comparable property if the lease was freely made in good faith within a reasonable time before or after the date of valuation.

819. When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the capitalized value of the reasonable net rental value attributable to the land

and existing improvements thereon (as distinguished from the capitalized value of the income or profits attributable to the business conducted thereon).

820. When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the value of the property or property interest being valued as indicated by the value of the land together with the cost of replacing or reproducing the existing improvements thereon, if the improvements enhance the value of the property or property interest for its highest and best use, less whatever depreciation or obsolescence the improvements have suffered.

821. When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the nature of the improvements on properties in the general vicinity of the property or property interest being valued and the character of the existing uses being made of such properties.

822. Notwithstanding the provisions of Sections 814 to 821, the following matter is inadmissible as evidence and is not a proper basis for an opinion as to the value of property:

(a) The price or other terms and circumstances of an acquisition of property or a property interest if the acquisition was for a public use for which the property could have been taken by eminent domain.

(b) The price at which an offer or option to purchase or lease the property or property interest being valued or any other property was made, or the price at which such property or interest was optioned, offered, or listed for sale or lease, except that an option, offer, or listing may be introduced by a party as an admission of another party to the proceeding; but nothing in this subdivision permits an admission to be used as direct evidence upon any matter that may be shown only by opinion evidence under Section 813.

(c) The value of any property or property interest as assessed for taxation purposes or the amount of taxes which may be due on the property, but nothing in this subdivision prohibits the consideration of

actual or estimated taxes for the purpose of determining the reasonable net rental value attributable to the property or property interest being valued.

(d) An opinion as to the value of any property or property interest other than that being valued.

(e) The influence upon the value of the property or property interest being valued of any noncompensable items of value, damage, or injury.

(f) The capitalized value of the income or rental from any property or property interest other than that being valued.