Memorandum 72-75

Subject: Study 36.50 - Condemnation (Just Compensation--Compensation for Property Taken or Damaged)

SUMMARY

The policy questions involved in the problem of just compensation and measure of damages in eminent domain are complex and interrelated. Exhibit I is a preliminary draft of the nucleus of a compensation statute. (Existing provisions that would be superseded by this draft appear as Exhibit XII.) The preliminary draft is intended to raise the major policy questions involved in the award of compensation for property taken and for damages to the remainder in the case of a partial taking. The related matters of the so-called additives such as moving expenses, business losses, litigation costs, interest, and the like are reserved for subsequent memoranda. Likewise, the problems of divided interests, evidence, and similar matters bearing on compensation are also deferred. This memorandum is concerned exclusively with the determination of market value of the property taken and damages to the remainder.

ANALYSIS

Measure of Compensation

Existing law compensates the owner of property taken by eminent domain on the basis of the fair market value of the property. This is not the only possible measure of valuation, however, as the attached research study on "The Market Value Concept" indicates. Two possible alternatives are (1) the value to the taker and (2) the value to the owner. The notion of awarding compensation on the basis of the value to the owner is on its face attractive. However, the research consultant concluded--and the staff agrees--that,

despite its weaknesses, the market value standard should be retained as the basic standard in eminent domain cases. Such a standard is probably more objective and ascertainable than either of the alternatives. In addition, if it is combined with additives such as moving expenses and refinancing costs, it will amount roughly to the value of the property to the owner. Thus it must be stressed that adoption of a market value standard does not preclude provision for compensation for incidental losses; indeed, it contemplates that those additives will be provided if possible.

Fair Market Value

Assuming that the market value standard is retained as the basic standard for compensation of property taken, there remains the problem of adequately defining this standard. The California Supreme Court has defined market value as:

> [T]he highest price estimated in terms of money which the land would bring if exposed to sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all the uses and purposes to which it was adapted and for which it was capable. [Sacramento etc. R.R. v. Heilbron, 156 Cal. 408, 409, 104 P. 979, 980 (1909).]

This definition highlights four major problems that have arisen in determining the market value: (1) "highest price," (2) "estimated in terms of money," (3) "the land would bring," (4) "all the uses and purposes . . . . for which it was capable."

(1) Highest price. The "highest price" rule is criticized in California Condemnation Practice (Cal. Cont. Ed. Bar 1960) on pages 42 and 43 as follows:

> One California case has determined that "market value" is the highest price, estimated in terms of money, that the property would sell for on the open market, allowing a reasonable time to find a well-informed buyer familiar with the uses for which the property can be adapted. State v. Ricciardi (1943) 23 C.2d 390, 144 P.2d

799. In _Ricciardi_ the Court stated that actual value is established by market value. Yet, it is doubtful that _fair_ market value is the "highest price" obtainable for the property. _Ricciardi_ followed _Sacramento etc. R. R. Co. v. Heilbron_ (1909) 156 C. 408, 104 P. 979, in adopting the "highest price" rule. _Heilbron_ has been cited many times, but only _Ricciardi_ specifically adopted its rule of the "highest price."

A "highest price" rule raises serious practical problems, for no appraiser can fix with reasonable certainty one single amount as _the_ "market value" of the property. His appraisal necessarily consists of a range between two amounts. "Fair market value" is a value within the range from the "lowest market value" to the "highest market value." The appraiser cannot reasonably testify that a specific amount is the highest or lowest market value, but he can reasonably testify that a specific amount is the "fair market value." The use of the phrase "highest price in terms of money" in jury instructions and appellate court decisions should not be understood as the highest conceivable price in view of all the purposes for which the land is adapted. Undoubtedly, the phrase merely means that the jury should find the highest price that could _reasonably_ be considered as fair market value of the property.

The concept that the highest possible value must be used is also criticized by the Department of Public Works in the first part of a letter written to the Commission in 1965 when it had once before taken up this subject. See Exhibit II--portion labeled 'Fair Market Value. The specific view taken by the Department of Public Works was that the adjective "fair" properly modifies "market value" and means that the value awarded for property must be its reasonable value rather than its highest value.

In view of these difficulties, the draft definition of market value, Section 1245.010, omits the term "highest."

(2) Estimated in terms of money. Whether the value of property should be based upon its value in terms of the current money market or whether that value should be discounted to represent the price the property would bring in a cash sale is a matter of current dispute and substantial concern. In either case, the use of the phrase "estimated in terms of money" is simply confusing and gives little guidance on this problem:

Necessarily, fair market value can be expressed only in terms of money. Yet "cash value"--in the market place, in business, and in the economics of the facts of life--is entirely different from "market value" or from the value of the property "in terms of money."

"In terms of money" is an expression used by experts in fixing an amount in money as a value--i.e., the market value of the property, instead of fixing the value in some other terms, as, for example, its value in beans, wheat, or steel. Thus, "money" does not mean "cash" or the medium of payment, but only the gross amount of money that may be paid by the purchaser, including that part paid in cash and that part paid for over a period of time and secured by an encumbrance.

The principal authority that market value is the cash value of the property is Sacramento etc. R.R. Co. v. Heilbron (1909) 156 C. 408, 104 P. 979. Heilbron approved an instruction by the trial judge to the effect that market value was based upon the ordinary cash value of the property. Heilbron held that the test for fair market value is not the value of the property for a special purpose but is its value in view of all the purposes to which it is naturally adapted. Two cases since Heilbron have referred to "cash value" in dictum. See City of San Rafael v. Wood (1956) 144 C.A.2d 604, 607, 301 P.2d 421, 424; Metropolitan Water Dist. v. Adams (1940) 16 C.2d 676, 680, 107 P.2d 618, 620. But in Pacific Sav. & T. Co. v. Hise (1945) 25 C.2d 822, 155 P.2d 809, the trial court eliminated the words "cash" and "cash feature" in an instruction defining fair market value, and this elimination was approved by the Supreme Court. [California Condemnation Practice 43-44 (Cal. Cont. Ed. Bar 1960).]

The Department of Public Works has argued for a standard of "cash value." See Exhibit II--portion labeled Cash Price in Terms of Money. Mr. William W. Abelmann, President of the Society of Real Estate Appraisers, has also contacted the staff informally, expressing concern over this problem and offering the services of his association in gathering information and experience and helping to work out a solution.

The cash value issue was raised recently in People v. Birnbaum, 14 Cal. App.3d 570 (1971)(certified for nonpublication by the California Supreme Court). See Exhibit III. This opinion, holding that credit sales could be examined to determine their cash equivalent, was read with some consternation at least by attorneys representing property owners; a letter from some of them to the California Supreme Court explaining the difficulties of a cash value test resulted in the nonpublication of the opinion. See Exhibit IV.

The staff believes that cash value is a more realistic measure of compensation than value in terms of money. The difficulties envisaged in the letter to the Supreme Court are probably overstated. Indeed, the Revenue and Taxation Code applies the cash value test in determining the assessment of taxable property. Rev. & Tax. Code § 110 ("the amount of cash or its equivalent").

The draft, Section 1245.010, takes a neutral position, eschewing use of either "cash value" or "price estimated in terms of money." Instead, it simply applies the term "price," leaving it to the courts to give content to the term. Compare Evid. Code § 816:

> 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 . . . .

This is also the approach of the Pennsylvania eminent domain statute, Section 603 ("Fair market value shall be the price which would be agreed to by a willing and informed seller and buyer . . . ."). See also Md. Stats. 1962 Ch. 52, § 6 ("The fair market value of property in a proceeding for condemnation shall be the price as of the valuation date . . . .").

(3) Value of the land. Although the traditional definition of market value is in terms of the price "the land would bring," there may be improvements on the land that affect its value. At this point, we have not yet been able to define those improvements that are deemed part of the realty and, hence, must be taken along with the land--that is a matter that we have deferred pending receipt of some ideas and a draft statute dealing with the problem from Charles Spencer. It would be best also to defer consideration of valuation of improvements until receipt of this material. We do note, however, that the general rule in California appears to be that land and

improvements are valued as a whole rather than separately. See, e.g., City of Los Angeles v. Klinker, 219 Cal. 198, 25 P.2d 826 (1933). We propose no change.

(4) Highest and best use. The market value definition requires valuation in light of "all the uses and purposes to which [the property] was adapted and for which it was capable." However, there are some special purpose properties such as cemeteries, churches, schools, parks, and the like which present difficult problems of valuation and which may require variant approaches to valuation. This problem is reserved for more detailed examination in a subsequent memorandum.

Date of Valuation

The Commission discussed the problem of the date of valuation at the November 1972 meeting in Santa Barbara and let stand its prior decision in this regard. These provisions are continued as Section 1245.050 et seq. of Exhibit I.

Enhancement and Blight

A major problem in determining market value as of the date of valuation is the treatment of prior changes in the value of the property caused by public knowledge of the pendency of the project for which the property is taken. Various jurisdictions treat this problem differently although the tendency is to provide that the property owner need not suffer loss in value caused by the activities of the condemnor, nor may he benefit from increase in value attributable to such activities. For an excellent discussion of the policy questions involved and the law on this matter, please read Comment, Recovery for Enhancement and Blight in California, 20 Hastings L.J. 622 (1969) (Exhibit V).

Since the time of the writing of this article, two major developments in the enhancement and blight area have occurred. The Legislature, following the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, enacted a provision requiring condemnors to make an offer to the property owner that discounts any effects of enhancement and blight. Government Code Section 7267.2 reads in part:

> Any decrease or increase in the fair market value of real property to be acquired prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner or occupant, will be disregarded in determining the compensation for the property. . . .

While this section by its terms applies only to offers for voluntary acquisition of property and not to eminent domain proceedings, it nonetheless is strong evidence of what the Legislature deems to be a fair measure of compensation.

The second significant development is the Supreme Court case of Merced Irr. Dist. v. Woolstenhulme, 4 Cal.3d 478, 483 P.2d 1, 93 Cal. Rptr. 833 (1971) (Exhibit VI). The court stated that, as a matter of constitutional law, just compensation requires that the property owner be allowed any enhancement of his property caused by the public project so long as it was reasonably certain that the property would not be taken for the project.

Combining these two recent decisions--that enhancement and blight should be discounted in the computation of market value, but that enhancement that occurred at a time when it was reasonably certain that the property would not be taken must be allowed--the staff has drafted Section 1245.020. This section--unlike the Government Code provision which contains a reference only to changes caused by the improvement or its likelihood--lists several factors

that must be considered. This listing enables the development of factors that would otherwise be hidden or be the subject of dispute. These factors, and a few other problems that are encountered in discounting enhancement and blight, are listed below.

(1) Highest and best use affected by the proposed project. Section 1245.020(a)(1) codifies the proposition that any increase or decrease in market value resulting from the use which the condemnor is to make of the property must be eliminated in determining compensable market value. If, however, the condemnor's proposed use is one of the highest and best uses of the property, the adaptability of the property for that purpose may be shown by the property owner. See San Diego Land & Town Co. v. Neale, 78 Cal. 63, 20 P. 372 (1888); Merced Irr. Dist. v. Woolstenhulme, supra.

(2) Value of property enhanced by the fact it will be taken by eminent domain. The Woolstenhulme court made clear that increases in value based on conjecture of a favorable eminent domain award is not a proper element of fair market value for just compensation purposes. Nor does the staff see any reason to allow this type of enhancement by statute.

(3) Enhancement due to preliminary actions by the condemnor. California law requires that effects on market value of preliminary actions by the condemnor related to the taking or damaging of property must be discounted in the eminent domain proceeding. Buena Park School Dist. v. Metrim Corp., 176 Cal. App.2d 255, 1 Cal. Rptr. 250 (1959). Section 1245.020(a)(4) codifies this rule.

(4) Scope of the project. Section 1245.020(a)(2) refers to increases and decreases in value attributable to the "project" for which property is taken. Where changes in value are caused by a project other than the one for which the property is taken, even though the two projects may be related, the

owner may enjoy the benefit, or suffer the detriment, caused by the other project. For a recent restatement of this rule, see People v. Cramer, 14 Cal. App.3d 513, 92 Cal. Rptr. 401 (1971); see also Comment, Recovery for Enhancement and Blight in California, 20 Hastings L.J. 622 (1969)(Exhibit V). Likewise, if property is affected by a project, and subsequently the scope of the project is changed and the property is acquired for the changed project, the property should be valued as affected by the original project up to the change in scope. This is the traditional rule and is consistent with Woolstenhulme. For a recent illustration of this situation, see People v. Miller, 21 Cal. App.3d 467, 98 Cal. Rptr. 539 (1971).

(5) Blight within the control of the property owner. Several jurisdictions require that, even though condemnation blight is discounted, the property owner must suffer any depreciation in value that he might have prevented by proper mitigating actions. The Pennsylvania eminent domain statute provides, for example:

> 604. Any change in the fair market value prior to the date of condemnation which the condemnor or condemnee establishes was substantially due to the general knowledge of the imminence of condemnation, other than that due to physical deterioration of the property within the reasonable control of the condemnee, shall be disregarded in determining the fair market value.

The comment to this section points out that physical deterioration of the property that may occur due to the imminence of condemnation may also be disregarded if the condemnee has acted reasonably in maintaining and protecting his property.

The California Government Code provision on enhancement and blight also includes such a provision. However, that rule is limited in terms to the price to be included in the purchase offer, which ordinarily will be made

well before the eminent domain action is commenced, when project-caused deterioration is likely to be relatively minor and readily capable of being isolated from owner-caused deterioration. The use of the same rule for determining market value in litigation as of the "valuation date" is of doubtful soundness. Hence, Section 1245.020 omits any reference to such deterioration.

In principle, of course, physical deterioration of buildings and structures should be considered in determining market value. On the other hand, to charge the owner with project-caused deterioration losses within his reasonable control, but not with those beyond his control, tends to shift the focus of dispute to the standard of care appropriate for an owner under the circumstances and away from the critical issue of the practical impact of the project and imminent taking of the property. Particularly when the taking is imminent and the buildings are expected to be demolished, the owner should not be held to a high duty to take precautions to prevent waste and vandalism; yet the "reasonable control" test might produce that result. On the other hand, if the buildings are not to be destroyed, or have substantial salvage values, their condition (so far as not deteriorated as a direct result of the proposed taking) would properly be a factor in market value determination under the policy issue as stated above. In short, the proposed test of damages attributable to the project and to actions by the condemnor necessarily requires consideration of the reasons for any deterioration, in light of all relevant circumstances (including the reasonableness of conduct or inaction by the owner), but avoids the risk of imposing an undue burden on the property owner in the form of an unrealistic duty of maintenance.

(6) Date from which value changes reckoned. Section 1245.020 omits any reference to a specific date from which the subject enhancement or depreciation is to be calculated. Some cases and statutes, in this connection, explicitly refer only to project-caused changes in value that occur after such specific events as the enactment of legislative authority for the project, the public announcement of the project, or the government's commitment to the project. See, e.g., United States v. Miller, 317 U.S. 369 (1943)("commitment" as shown by Congressional authorization). Section 1245.020 leaves the point of departure flexible depending on the circumstances of particular cases.

Damages for Delay in Improvement

Related to blight, but distinct from it, are damages caused by delays occurring between the time the imminence of condemnation became generally known and the time of taking. The problem here is that, during the period of delay, the condemnee frequently suffers out-of-pocket losses and damages that are not covered by discounting the blight on market value generally. Perhaps the most significant item of damages here is lost rental income. This matter was the subject of the recent Supreme Court case of Klopping v. City of Whittier (Exhibit VII). The Court concluded, and the staff believes correctly, that, apart from whatever rule is adopted as to condemnation blight, the condemnee should receive additionally his actual damages, including rental loss, incurred by the unreasonable delay of the condemnor between the time of announcement of the project and the time the property was actually taken. This matter will be considered in a separate memorandum.

Compensation for Partial Taking

The Commission has previously considered the matter of partial takings in depth and made the following decisions:

(1) The concept of the larger parcel should not be defined but should be left to case by case development.

(2) The before-and-after test for measuring compensation in a partial taking should not be followed. Rather, subject to (3) below, the existing California scheme of awarding compensation for the value of the part taken and damages to the remainder (to the extent not offset by benefits) should be retained.

(3) Any particular deficiencies in the value-plus-damages test should be handled individually.

Section 1245.120 implements the Commission's prior decisions, and this memorandum discusses only particular problems associated with the partial taking scheme.

Shifting a higher zone of value. Suppose a defendant owns a piece of property bordering on a public road. The property frontage is more valuable than the rear of the property. A condemnor takes the frontage for a road widening, moving the frontage rearward on the lot. The defendant claims compensation for the frontage taken at frontage value even though he may be left with a remainder having a value in excess of the value of the original lot since it still has frontage and, in addition, is now on a major thoroughfare.

California law has treated this situation in two different ways--compensating the defendant for the property taken at an averaged value rather than at frontage value (City of Los Angeles v. Allen, 1 Cal.2d 572, 36 P.2d 611 (1934)) and compensating the defendant at frontage value (People v. Silveira, 236 Cal. App.2d 604, 46 Cal. Rptr. 260 (1965)). The holdings of these two cases are reconciled in the recent decision, People v. Corp. etc. of Latter-Day Saints, 13 Cal. App.3d 371, 91 Cal. Rptr. 532 (1970)(Exhibit VIII). The conclusion

reached by the court in that case is that, where the property taken is of a size and shape that is independently saleable as an individual parcel, it is valued at its independent sale value. But, where the property taken is of such size and shape that it is not independently saleable as an individual parcel, it is valued as a part of the larger parcel, i.e., at an average value. This resolution appears reasonable to the staff and, accordingly, this rule is incorporated in Section 1245.120.

Particular items of damage. In the past, the general rule in awarding damages has been that only special, as opposed to general, damages are compensable. This rule is rather ambiguous and has yielded inconsistent results. People v. Volunteers of America, 21 Cal. App.3d 111, 98 Cal. Rptr. 423 (1971) (Exhibit IX) abandoned the general-special distinction and indicated that the proper test for compensability is whether the property owner is being asked to bear more than his fair share of the expense of the public project. The staff is persuaded that the Volunteers of America case indicates the proper rationale for the award of damages. The draft statute states only that "damages" are recoverable, and the staff proposes to place in the Comment a statement that limitations on recovery are imposed by case law, citing Volunteers.

One area of damages that Commissioners expressed concern about at the last meeting where partial takings were discussed was whether an assessment lien on property could properly be considered an item of damages. This issue arose in the case of City of Baldwin Park v. Stoskus, 25 Cal. App.3d 105 (1972) (Exhibit X). A hearing on this case was granted by the Supreme Court but, as of this writing, a decision had not yet been filed. Action on this matter should await the forthcoming decision.

Particular items of benefit. As with damages, the courts have refused to offset benefits to the remainder if they were "general" rather than "special." And, as with damages, general and special benefits have been rather nebulous and difficult to define with any precision. This is because the courts simply place the label "special" on benefits they feel are sufficiently significant to offset and the label "general" on those benefits they feel are not so significant they should be offset. For a recent instance of this procedure, see People v. Giumarra Farms, Inc., 22 Cal. App.3d 98, 99 Cal. Rptr. 272 (1971) (Exhibit XI), holding that a unique combination of traffic access conferred on property remaining after highway construction could be considered a special benefit. This results in the anomalous situation in California that diversion of traffic toward property is chargeable to the owner while diversion away from property is not compensable. As with damages, the staff is reluctant to impose particular limitations upon the type of benefits that may be offset but would rather leave the matter to court development.

Discounting benefits. When damages are assessed and benefits are offset in an eminent domain proceeding, they are computed as if the project that creates them is in existence at the date of valuation. Actually, however, it will be some time before the improvement is constructed and the actual market value will reflect this delay. This can impose a hardship on the property owner who may suffer the damages of the project immediately but does not realize the project benefits until years later. For this reason, the draft of Section 1245.120 provides that the amount of damages and benefits is to reflect any delay in the time when such damages or benefits will actually occur; they are thus assessed in the same manner that they would be assessed by a purchaser considering a purchase of the remainder with knowledge that the public project would be constructed in the future.

Effect of enhancement and blight. Should changes in the market value of the remainder prior to the acquisition caused by knowledge of the public project be discounted before computing damages to the remainder, or should the damages be computed as of the date of valuation without making allowances for enhancement and blight? It is arguable that the remainder should be treated just as any other property in the area of the project is treated--it suffers the diminution and it benefits from the enhancement. On the other hand, the staff believes that decisions in the compensation area should not be made with regard to treatment of persons whose property is not taken; the eminent domain statute should strive to achieve a fair measure of compensation as between condemnor and condemnee. This policy requires that the remainder be valued in its "before" condition discounting changes due to the project, and damages and benefits be assessed in the "after" condition as affected by the project. The existing California law on this point is not clear, but appears to take the approach the staff recommends. Cf. People v. Ricciardi, 23 Cal.2d 390, 114 P.2d 799 (1943)("[D]amages may be shown by proving the market value of the remainder before and after the taking and leaving the computation to the jury, or by competent evidence of severance damages in a lump sum . . . ." 23 Cal.2d at 401). The draft statute makes clear that enhancement and blight are not included in the assessment of damages--i.e., that the remainder is valued in its "before" condition in the same way that the part taken is valued.

Scope of the project. The California Supreme Court in People v. Symons, 54 Cal.2d 855, 357 P.2d 451, 9 Cal. Rptr. 363 (1960), held that consequential damages may not be recovered unless the project causing the damage is located on the portion taken from the defendant. Since that time the court has retrenched--People v. Ramos, 1 Cal.3d 261, 460 P.2d 992, 81 Cal. Rptr. 792 (1969) --and the doctrine now appears to be that damages will be allowed if caused

by the project for which the portion is taken without regard to the precise location of the offending portion of the project. See People v. Volunteers of America, supra. The staff believes that the current rule is the better rule and that it should be codified in the statute in view of the past history of this problem. See draft of Section 1245.120.

A related problem occurs where the damage is caused not by the project for which the portion is acquired but by another project being undertaken in connection with the first. As with enhancement and blight, damages and benefits only of the project for which the portion of the defendant's property is taken are considered. United Cal. Bank v. People, 1 Cal. App.3d 1, 81 Cal. Rptr. 405 (1969).

And a final related matter: Where damages and benefits are awarded based on the project as planned, and subsequently the plans change, the defendant may recover any additional damages by way of an inverse condemnation action. Cf. People v. Schultz Co., 123 Cal. App.2d 925, 298 P.2d 117 (1954).

Comparison to statutes of other states. Attached as exhibits to Memorandum 72-76 are the provisions of various other states dealing with compensation. Also attached as exhibits to Memorandum 72-76 are proposed compensation provisions from New Jersey and Vermont. These latter provisions were not enacted. You should examine the various provisions to determine if any appear to offer a better approach than Sections 1245.110 and 1245.120.

Respectfully submitted,

Nathaniel Sterling
Legal Counsel

EXHIBIT I

Portion of Draft of Compensation Chapter

CHAPTER 5. JUST COMPENSATION AND MEASURE OF DAMAGES

Article 1. Fair Market Value

§ 1245.010. Fair market value

1245.010. As used in this chapter, the fair market value of property is the price as of the date of valuation that would be agreed to by a willing purchaser and a willing seller dealing with each other in the open market and with a full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.

Note. Compare Pa. Stat. § 603:

Section 603. Fair Market Value.--Fair market value shall be the price which would be agreed to by a willing and informed seller and buyer, taking into consideration, but not limited to, the following factors:

(1) The present use of the property and its value for such use.

(2) The highest and best reasonably available use of the property and its value for such use.

(3) The machinery, equipment and fixtures forming part of the real estate taken.

(4) Other factors as to which evidence may be offered as provided by Article VII.

The Comment to Section 603 reads as follows:

Comment:

This section is intended to enlarge the traditional definition of fair market value to conform to modern appraisal theory and practice, which differentiates between market *price*, which is the price actually paid for a property under conditions existing at a certain date regardless of pressures, motives or intelligence, and market *value*, which is what a property is actually worth, a theoretical figure which assumes a market among logical buyers under ideal conditions.

This section contemplates first a "willing" seller and buyer. This means that neither is under abnormal pressure or compulsion, and both have a reasonable time within which to act.

Secondly, it contemplates an "informed" seller and buyer, which means that both are in possession of all the facts necessary to make an intelligent judgment.

Clause (1) will permit consideration of any special value the property may have for its existing use, including improvements uniquely related to that use and, in conjunction with the provisions of Section 705(2)(iv), will provide for proper valuation of special use properties, such as churches, which have no normal market, because it presupposes a buyer who would purchase it for its existing use.

Clause (2) permits the traditional consideration of the property's value for the highest and best use to which it is adapted and capable of being used, provided such use is reasonably available. If it is claimed that the property is more valuable for a use other than its existing use, it should be shown that such use is reasonably available after considering the existing improvements, the demand in the market, the supply of competitive property for such use, the zoning and all other reasonably pertinent factors. Existing zoning would ordinarily be controlling, but evidence may be given of a sufficient probability of a change in zoning as to be reflected in market prices of similarly zoned properties. See *Snyder v. Commonwealth*, 412 Pa. 15 (1963).

Clause (3) is in accord with existing law since it assumes that the machinery, equipment and fixtures are part of the real property taken. See *Diamond Mills Emory Co. v. Philadelphia*, 8 Dist. R. 30 (1898), and also *Philadelphia & Reading Railroad Co. v. Getz*, 113 Pa. 214 (1886).

Clause (4) was included in order to make it clear that in ascertaining fair market value, all matters which may properly be introduced into evidence as provided in Article VII of this act may be considered.

It is not intended by this section to repeal statutes providing for the consideration of additional factors or criteria. See, for example, Second Class County Port Authority Act, 1956, April 6, P. L. (1955) 1414, as amended (55 P. S. §551 et seq.).

§ 1245.020. Changes in property value due to anticipation of project

1245.020. (a) The fair market value of property acquired by eminent domain shall be diminished by an amount equal to any increase and augmented by an amount equal to any decrease in value that is attributable to any of the following:

(1) The public use for which the property is taken.

(2) The project for which the property is taken.

(3) The eminent domain proceeding in which the property is taken.

(4) Any preliminary actions of the plaintiff relating to the taking of the property.

(b) Notwithstanding subdivision (a), the fair market value of property acquired by eminent domain shall not be diminished by any increase in value that is attributable to the project for which the property is taken and that reflects a reasonable expectation that the property would not be taken for the project.

Article 2. Date of Valuation

§ 1245.050. Date of valuation fixed by deposit

1245.050. Unless an earlier date of valuation is applicable under Section 1245.060, 1245.070, 1245.080, or 1245.090, if the plaintiff deposits the probable just compensation in accordance with Article 1 (commencing with Section 1255.010) of Chapter 7 or deposits the amount of the judgment in accordance with Article 3 (commencing with Section 1255.310) of Chapter 7, the date of valuation is the date on which the deposit is made.

§ 1245.060. Trial within one year

1245.060. If the issue of compensation is brought to trial within one year after the filing of the complaint, the date of valuation is the date of the filing of the complaint.

§ 1245.070. Trial not within one year

1245.070. If the issue of compensation is not brought to trial within one year after the filing of the complaint, the date of valuation is the date of the commencement of the trial unless the delay is caused by the defendant, in which case the date of valuation is the date of the filing of the complaint.

§ 1245.080. New trial

1245.080. (a) Except as provided in subdivision (b), if a new trial is ordered by the trial or appellate court and the new trial is not commenced within one year after the filing of the complaint, the date of valuation is the date of the commencement of such new trial.

(b) The date of valuation in the new trial shall be the same date as the date of valuation in the previous trial if the plaintiff has deposited the amount of the judgment in accordance with Article 3 (commencing with Section 1255.310) of Chapter 7 within 30 days after the entry of judgment or, if a motion for new trial or to vacate or set aside the judgment has been made, within 30 days after disposition of such motion.

§ 1245.090. Mistrial

1245.090. (a) Except as provided in subdivision (b), in any case in which a mistrial is declared and the retrial of the case is not commenced within one year after the filing of the complaint, the date of valuation is the date of the commencement of the retrial of the case.

(b) The date of valuation in the retrial of the case shall be the same date as the date of valuation in the trial in which the mistrial was declared if the plaintiff deposits the probable just compensation in accordance with Article 1 (commencing with Section 1255.010) of Chapter 7 within 30 days after the declaration of mistrial.

Article 3. Compensation and Measure of Damages

§ 1245.110. Just compensation

1245.110. The owner of property acquired by eminent domain shall be awarded just compensation in the amount of the fair market value of the property taken plus the damages, if any, provided in this chapter.

§ 1245.120. Compensation for partial taking

1245.120. Where property acquired by eminent domain is part of a larger parcel:

(a) The fair market value of the property taken shall be based upon its value as a part of the larger parcel only if it has no distinct value as a separate parcel.

(b) Subject to subdivisions (c) and (d), the owner of the property shall be awarded, in addition to the fair market value of the property taken plus other damages provided in this chapter, compensation for any damage to the remainder proximately caused by its severance from the part taken and the construction and use of the project in the manner proposed by the plaintiff, whether located on the part taken or elsewhere.

(c) Subject to subdivision (d), the amount of any benefit to the remainder proximately caused by the construction and use of the project in the manner proposed by the plaintiff shall be deducted from the compensation for damage to the remainder. If the amount of benefit to the remainder equals or exceeds the compensation for damage to the remainder, the owner shall be awarded no compensation for damage to the remainder; but in no event shall the amount of benefit to the remainder be deducted from the fair market value of the property taken or other damages provided in this chapter.

(d) The compensation for any damage to the remainder provided by this section and the amount of any benefit to be deducted therefrom shall (1) reflect any delay in the time when the damage or benefit will actually be realized and (2) be based on the fair market value of the remainder measured in the same manner as the fair market value of the part taken.

STATE OF CALIFORNIA—HIGHWAY TRANSPORTATION AGENCY EDMUND G. BROWN, Governor

DEPARTMENT OF PUBLIC WORKS
DIVISION OF CONTRACTS AND RIGHTS OF WAY (LEGAL)
1120 N STREET, SACRAMENTO

November 18, 1965

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

Just Compensation and Measure of Damages

At the last regular meeting of the Law Revision Commission in Los Angeles on October 15 and 16, the Commission considered a statutory definition of "fair market value". Two aspects of the definition were discussed by the Commission. The first was the elimination of the word "fair" in the phrase "fair market value". The second was whether or not the definition should include the phrase "cash price in terms of money".

FAIR MARKET VALUE

The California appellate courts have sometimes used the phrases "market value" and "fair market value" interchangeably. The leading case of Sacramento etc. R.R. Co. v. Heilbron, 156 Cal. 408 at page 412, specifically used the term "fair" as a part of the definition of market value. Also in the case of People v. LaMacchia, 41 Cal.2d 738, the Supreme Court at page 751 stated: "'... the test is not the value for a special purpose, but the fair market value of the land ...'". (emphasis added)

The term "fair" as a part of the phrase "fair market value" is comparable in meaning to the word "just" as used in the phrase "just compensation". To delete the term "fair" from the phrase "fair market value" would be tantamount to deleting the term "just" from the phrase "just compensation" as used in Article I, Section 14 of the California Constitution. In fact the term "just" is a synonym for "fair". The term "fair" should not be deleted from the phrase "fair market value" since it would do violence to the constitutional

provision which employs the term "just" as a part of the phrase "just compensation". The new Eminent Domain Evidence Statute in C.C.P. Section 1268.4 (Evidence Code, Section 812) states that it is not intended to change the decisional law interpreting "just compensation" as used in Section 14 of Article I.

The phrase "fair market value" has been so extensively used in the field of eminent domain that any statutory change might lead to the interpretation, by some, that a basic change had been made which apparently is not the intent of the Law Revision Commission.

BAJI Instruction 501-A, in the second paragraph, provides as follows:

> "The term 'just compensation' means just not only to the parties whose property is taken for public use, but also just to the plaintiff condemnor which is to pay for it. So you must be fair and just to both sides." (emphasis added)

It is the Department's position that the term "fair" as used in the phrase "fair market value" must be retained as a part of that phrase.

CASH PRICE IN TERMS OF MONEY

The classic definition of fair market value is found in the Heilbron case. A reading of that opinion shows that the term "money" was considered by the court to be interchangeable with the term "cash". The jury instruction that was given by the trial court in that case and approved by the Supreme Court in its opinion, at page 413, was as follows:

> "'... You are not to consider the price the land would sell for under special or extraordinary circumstances, but its fair, market value, if offered in the market under ordinary circumstances for cash, a reasonable time being given to make the sale. Market value is the amount the strip would sell for if put upon the open market, and sold in the manner in which property is ordinarily sold for cash in the community where it is situated, with a reasonable time being given to find a purchaser and make the sale.'" (emphasis added)

"Cash" is defined in Webster's dictionary as follows:

> "a Money, esp. ready money. b Money or its equivalent paid promptly after purchasing. ..."

"Money" is defined in the same dictionary as:

> "1 something generally accepted as a medium of exchange, a measure of value, or a means of payment. ... 2 wealth reckoned in terms of money. 3 a particular form or denomination of coin or paper money. ..."

Comparable sales and contracts to purchase and sell comparable property are matters which a witness may take into account as a basis for his opinion of fair market value (C.C.P. Section 1271.2 and Evidence Code, Section 815). There are two distinct situations in the use of this evidence that do not have the element of cash. The first is the purchase money mortgage situation or where a seller subordinates to a first deed of trust. The second is contracts to sell and purchase where the payments are made in future installments. In both of these situations the contract to pay the money in the future is not money. It cannot be used to pay debts or make purchases. It is an agreement to make a money payment. The contract can be reduced to money if there is a market for it (normally at a discount). Therefore, money is cash. Thus it can be readily seen that the distinction between cash and money attempted in the case of Buena Park School Dist. v. Metrim Corp., 176 Cal. App.2d 255, cannot logically be made.

There have been a series of cases where the courts have been concerned with the definition of "fair market value" and the effect on the definition of notes or promises to pay as a part of the purchase price. In the case of Riley v. D.C. Redevelopment Land Agency, 246 F.2d 641 (1957), the court states, at pages 643-645:

> "... It has long been recognized that the fair market value may be either what the property would sell for in cash or on terms equivalent to cash. ...
>
> "The terms are equivalent to cash if the deferred purchase money notes are such that under

normal conditions the notes can be turned into cash at their face amount, ...

"... A credit sale is indicative of the fair market value of the property only to the extent to which the notes can be turned into cash, that is, are 'equivalent to cash.'"

In the same case the opinion of Circuit Judge Washington on this same subject was:

"... When notes are given as part of the purchase price in a credit sale, their discounted or estimated value in cash may be deemed equivalent to cash. The way in which the jury should decide what cash value the notes have must depend on what evidence of value is in the record. Thus, if the evidence includes only the terms of the notes, then the jury should consider those terms, including the amount of the down payment and the interest rates, along with all known factors relevant to the sale, in deciding in the light of their own familiarity with prevailing credit conditions in the community, for how much real value the property was actually sold. If there is evidence as to what the notes could in fact be discounted for, then the jury should of course consider such evidence. ..."

The appraisal profession has long been aware of the fact that contract sales are not the equivalent of cash. In an article in Right of Way, Volume 12, #4, August 1965, the author of an article "Are Contract Sales the Equivalent of Cash?" states on page 11:

"A contract, or purchase money mortgage, calling for payments over the next twenty-five years and backed by the promise of a John Doe to make the payments in money, does not even approach what we could reasonably consider to be money or near-money. Therefore, it cannot be used as an indication of price (which may lead to market value) unless it is properly discounted for time, risk and all other factors that clearly separate it from the concept of money.

"It is my opinion that contract sales are not the equivalent of cash sales. The process of adjusting contract sales so as to reflect their equivalent in the form of cash should be done with the greatest care and diligence."

The report of the staff of the select subcommittee on real property acquisition of the House Committee on Public Works made this statement on pages 60 and 61:

"4. Market value means cash or equivalent of cash

It is well established that market value means the price in cash or terms equivalent to cash which the property would bring at a voluntary sale (Kerr v. South Park Commissioners, 117 U.S. 379, 386-387 (1886); Shoemaker v. United States, 147 U.S. 282, 304 (1893); State of Nebraska v. United States, 164 F.2d 866, 868 (C.A. 8, 1947)).

"It has also been held that a prior sale of the same property for a certain amount in cash plus notes secured by trusts on the property could be considered by the jury as evidence of present value if it was instructed to consider whether 'under normal conditions the notes can be turned into cash at their face amount' (Riley v. District of Columbia Redevelop. Land Agency, 246 F.2d 641, 643 (C.A. D.C. 1957))."

In most cases whether this phrase (cash price in terms of money) is in the definition of fair market value will have little bearing on the outcome of the case. It is only in those cases where there is a definite difference between cash price and some other price that this phrase has real meaning and real importance. If all houses in an area are selling for $20,000 but the terms are $2,000 down, a first trust deed of $15,000 and a second to be held by the seller of $3,000, and this second has a discounted value in the market of $2,000, then it is obvious that if the seller wishes to cash out he can only get $19,000 cash for his property. On the other hand, if a seller to a condemnor receives $19,000 in cash he can take $2,000 of that money and buy a second trust deed on a comparable piece of property and have the equivalent of a sale for terms.

Where comparable sales involve third party financing, no adjustments are necessary by the appraiser in the normal case. But where the sales involve a purchase money mortgage or a subordination agreement as well as contracts to sell and purchase, the appraiser must convert the "paper" into money if he is going to make the defendant whole rather than to give him a bonus.

If the phrase "cash price in terms of money" is not included in the definition of "fair market value", the Commission will be encouraging speculators in advance of a taking by a public agency to buy real estate on inflated contract prices with low down payments and with easy terms. When the property is eventually taken the speculators will make an unearned profit by being paid for a future risk that will no longer exist when they receive their award of money for the property.

We believe that the phrase "cash price in terms of money" should be included in the definition of "fair market value". No statutory definition of "cash price" appears to be necessary since the court decisions referred to above have adequately defined that term with respect to the various factual situations to which it is applicable. In all other respects the draft of the definition of fair market value appears to be a codification of existing case law.

Yours very truly,

ROBERT F. CARLSON
Assistant Chief Counsel

Memorandum 72-75

EXHIBIT III

[Civ. No. 36201. Second Dist., Div. Four. Jan. 21, 1971.]

THE PEOPLE ex rel. DEPARTMENT OF PUBLIC WORKS, Plaintiff and Respondent, v.
SAUL BIRNBAUM et al., Defendants and Appellants.

SUMMARY

In an eminent domain action judgment was entered on a jury verdict for the value of property taken and severance damages. The trial judge examined defendants' appraisal witnesses extensively on the subject of term sales of real estate and the cash equivalent of sales prices of comparable properties to which they had testified. In instructing the jury, the judge modified a standard instruction on market value in such a way as to indicate that "money" and "cash" were equivalent. (Superior Court of Ventura County, Roy A. Gustafson, Judge.)

On appeal by defendants, the Court of Appeal affirmed the judgment of the trial court, finding no error in connection with the trial judge's questioning of the appraisal witnesses. Modification of the instruction on "market value" was not regarded as either adding to or detracting from the definition of the term. A contention of prejudicial error in connection with the jury's failure to receive certain exhibits was rejected, as was defendants' claim of entitlement to costs on appeal. (Opinion by Irwin, J.,* with Kingsley, Acting P. J., and Dunn, J., concurring.

HEADNOTES

Classified to McKinney's Digest

(1a, 1b) Eminent Domain § 87 — Compensation — Evidence — Value of Other Land—Sales.—In an eminent domain proceeding, the trial court did not err in connection with its examination of defendants' appraisal witnesses on the subject of term sales and the cash equivalent

*Retired judge of the superior court sitting under assignment by the Chairman of the Judicial Council.

of sales prices of comparable properties; under Evid. Code, § 816, 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, and it was therefore proper to test the knowledge of the witnesses in respect to such term sales; moreover, testimony of one of the witnesses as to the cash value of promissory notes involved in the comparable sales was not elicited by nor required by the court, but was given pursuant to the instructions and inquiry of defendants' counsel, so that error, if any, was invited.

[See **Cal.Jur.2d, Rev.**, Eminent Domain, § 122; **Am.Jur.2d**, Eminent Domain, § 429.]

(2) Trial § 25(5)—Conduct of Trial Judge—Examination of Witnesses.— A judge is not a mere umpire presiding over a contest of wits between professional opponents, but a judicial officer entrusted with the grave task of determining where justice lies under the law and the facts between the parties who have sought the protection of the courts; within reasonable limits, it is not only the right but the duty of a trial judge to clearly bring out the facts so that the important function of his office may be fairly and justly performed.

(3) Eminent Domain § 163—Proceedings—Instructions—Market Value. —In an eminent domain proceeding, the trial court properly instructed the jury on the subject of market value, where the instruction was in the words of BAJI 502-A, revised (now BAJI No. 11.73) except that following the phrase ". . . terms of money," in the standard instruction, the court added the words "that is, cash,"; "cash" and "money" are synonymous and thus the inserted words neither added to nor detracted from the definition of "market value."

(4) Eminent Domain § 182—Proceedings—Appeal—Harmless and Reversible Error.—On appeal in an eminent domain proceeding, no prejudice to defendants appeared from failure of the jury to receive two trust deeds received in evidence in connection with testimony by defense witnesses as to a comparable sale, where such omission was inadvertent and was not discovered until after the jury returned its verdict, where the jury did not request the exhibits during their deliberation, where the contents of the exhibits were not mentioned by counsel in their jury summations, and where the witnesses gave no effect whatsoever to the fact that the sale involving the securities was part cash and part terms.

(5) **Eminent Domain § 175—Appeal—Costs.**—Where a condemnee is an unsuccessful appellant, the awarding of costs on appeal is a matter within the court's discretion.

COUNSEL

Milnor E. Gleaves and Richard Sinsheimer for Defendants and Appellants.

Harry E. Fenton, Joseph A. Montoya, Richard L. Franck, Charles E. Spencer and Ray M. Steele for Plaintiff and Respondent.

OPINION

IRWIN, J.*—This is an appeal by the owners of unimproved land from a judgment in eminent domain in which they claim to have been awarded inadequate damages for approximately 51 acres out of a total of 190 acres sought by the state for freeway purposes. The judgment was for the value of the property taken and for severance damages.

Appellants set the pattern for this appeal by describing the legal issues as follows:

"A. In an eminent domain proceeding, is a valuation witness required by law to form and express an opinion, in connection with any comparable sale considered by him wherein part of the purchase price was paid in cash and the balance by note and deed of trust, as to what the discounted price or 'cash equivalent' would have been had the sale been an all-cash transaction?

"B. Under the facts of this case, did the trial court err in:

"1. Requiring defendants' expert witness to form and express such an opinion as to such sales, including their purchase of the subject property.

"2. Instructing the jury both during the proceedings and at the end thereof, that it was necessary for them to find what the 'cash equivalent' of each such sales price was, and that market value was to be determined by them in 'cash,' rather than in *terms* of money alone.

"C. Under the circumstances of this case, were defendants prejudiced

*Retired judge of the superior court sitting under assignment by the Chairman of the Judicial Council.

by the fact that Exhibits 12 and 13 were never given to the jury for their examination and consideration during the time they were in deliberation?"

We will answer the questions raised in the foregoing statement after summarizing pertinent facts and proceedings during the trial. The valuation and severance damages concerned three parcels of land, each a part of a single larger parcel, sought by the state for construction of a portion of the Simi Freeway in Ventura County. Appellants' contentions are developed from disputes which arose during the progress of the trial concerning the influence of part cash and part term sales of comparable properties upon the opinions of the experts who testified to the prices of these sales in arriving at their respective opinions of value of the properties being acquired and the remainders thereof after the taking.

There were three experts who testified. Robert Beeney was called as a valuation witness by the appellants and George Fisher and James Reid testified as experts for the respondent. The opinions of each of these witnesses and the jury's verdict of the value of the parts taken and severance damages are as follows:[1]

Witness	Par. 1	Par. 2A	Par. 2B	Severance Damage
R. Beeney (for defs.)	$211,378	$411,894	$2,995	$500,193
G. Fisher (for plf.)	169,560	191,902	2,783	5,000
J. Reid (for plf.)	174,900	233,600	3,036	0
Verdict	181,536	241,350	2,783	5,000

Each appraisal witness used sales of comparable properties as the basis for his opinion of value. The principal sale upon which each relied was the sale and purchase of the subject property by the appellants almost two years prior to the date of value. This sale was part cash, with a balance subject to two deeds of trust securing promissory notes due in five years at 6½ percent interest. Each of the trust deeds contained release clauses at the rate of $13,500 per acre. In addition to this sale of the subject property, each of the appraisers relied on a substantial number of other comparable sales, some of which were for all cash, but most of which were for part cash with various terms of time payments for the balance.

[1]Special benefits were in issue at the outset, but were removed from consideration of the jury and this appeal is not concerned with that subject.

At an early stage of the proceedings, the court, outside of the presence of the jury, stated: "I am quite well aware that many times valuation witnesses do not translate the price at which comparable land is sold when it did not sell for cash, into its cash equivalent, and I will be instructing the jury that their market value is the amount of cash, not money." Then referring to *Sacramento etc. R. R. Co. v. Heilbron* (1909) 156 Cal. 408 [104 P. 979], the court added: "I am saying there is nothing wrong with the *Heilbron* instruction at all. It is in terms of money, but the only difficulty with that is that there are people throughout the State who believe that money is something other than cash, and I am going to make it clear that money is what its dictionary definition is, cash. That's all." Thereafter, during the direct testimony of appellants' expert witness, Beeney, the court stated, in the presence of the jury:

"As I said to the jury before, price in dollar signs with a number is not meaningful unless it is either cash, then it is totally meaningful, but if it is something other than cash it depends upon what the terms are because if you had a sale for two million dollars of some given property and it turns out that the terms were one dollar down and a dollar a year for a hundred years and interest at one-half of one per cent, the cash equivalent of that stated sales price wouldn't begin to be one million dollars. . . .

"The important thing is to get at what he [the appraiser] considered to be the cash equivalent of the state sales price."

Later, in response to an explanation by the witness Beeney of his reasons for considering a cash plus terms sale, the reporter's transcript reveals the following:

"THE COURT: Well, I'm sorry to interrupt you, but there may be merit in what you are saying with respect to what the reason is why a buyer or a seller may decide not to pay or not to receive all cash. That is not pertinent to the inquiry I asked. I was asking you what is the cash equivalent of the terms sale which has no reference whatever to any other property nor does it have any reference to what this property could have been sold for in cash. I am trying to get the cash equivalent of the stated sales price.

"MR. ANSON: Your Honor, that was answered at two million dollars and he is giving his reasons.

"THE COURT: But he is giving the reasons now and I am entitled to inquire about this. He has given me reasons which are not pertinent to that determination. That determination is made by—it is very simple. You add the $350,000.00 cash to the fair market value of the note, what

that note could have been sold for in cash on the date of the transaction in 1964.

"Do you know what that note could have been sold for in cash?

"A. I didn't investigate the market or how much they would discount those two notes, the easterly note and the westerly note.

"THE COURT: Do you know what the interest rate was?

"THE WITNESS: Five or five and a half per cent.

"Let me check, sir.
"Six and one-half per cent.

"THE COURT: Six and a half?

"THE WITNESS: And it was interest only for five years with a balloon payment which is all the principal was due and payable at the end of five years.

"If I might question—to investigate this one has to appraise each property as of the date of value because the market—they would have the property appraised to see whether this note they were appraising is adequate and I gather I am not allowed to appraise the comparable.

"THE COURT: You are not allowed to appraise the property as such but you are allowed to appraise the note.

"THE WITNESS: But in appraisal—

"THE COURT: To determine the cash value of the note.

"THE WITNESS: But that would depend on the value of the property too, sir.

"THE COURT: That's correct, that would be incidental to ascertaining the value of the note.

"THE WITNESS: The market would consider it critical to ascertain the value of the note.

"THE COURT: But as far as your expression of opinion of the value of the note, obviously, the value of what the security is for the note is the crucial question and you would have to do that.

"MR. STEELE: Your Honor, may I be heard a moment? I think the injunction of the code is he may not state his opinion of the value of some other property. It does not mean he cannot calculate from it.

"THE COURT: No, nor does it mean he can't talk about the value of

the note which is all that we are concerned with here is what Dr. Birnbaum have been able to receive in cash on the day of the sale had he taken his $350,000.00 and had he been able to sell that note for whatever amount he could sell it for. It is as simple as that. That's what the cash equivalent of the sales price is.

"MR. ANSON: I think you have asked the witness that opinion, your Honor, and he expressed it, two million dollars.

". . . . .

"THE COURT: Do you have an opinion now of the value of that note as of the date it was received by Dr. Birnbaum?

"THE WITNESS: I didn't make an investigation with investment bankers, people of that nature who hold a market in these.

"MR. ANSON: Do you have an opinion?

"THE WITNESS: No, I didn't make an investigation.

"Q. BY MR. ANSON: You stated you had an opinion of the cash equivalent of the transaction of two million dollars.

"A. I stated that I had an opinion that the fair market value and cash equivalent being the same by virtue of my investigation of the market where there were varying terms involved, but that there didn't appear to be any great difference in prices paid based upon these terms.

"THE COURT: Where we are getting off is the witness is saying, 'The fair market value of the property was two million dollars,' which was its sales price which is not the same as saying what the cash equivalent of the sales price is.

"MR. ANSON: I have never heard any case that required the witness to state the cash equivalent of a comparable sale, your Honor, and I would invite your Honor to call my attention to such a case.

"MR. STEELE: I don't think the question has been raised before, your Honor, and that's the reason for that.

"MR. ANSON: I don't think it has and I think we are entitled to put our sales in and at the end of the sales study to express an opinion and give our reasons.

"THE COURT: Yo uare going to be allowed to do that absolutely.

"MR. ANSON: That's what we are trying to do.

"THE COURT: I just was asking the witness some questions which is my privilege to do."

Later, while discussing the subject of term sales with counsel, outside of the presence of the jury, the court stated: ". . . we are not talking about the fair market value of the comparable property. That's the very thing which the code tells us we can't do. You can't put a witness on the stand and say, 'I believe the fair market value of Parcel 3 is so much and the fair market value of Parcel 4 is so much and therefore the fair market value of the subject parcel is so much.'

"The only thing he is allowed to do is to tell what it sold for and price, as I said, is meaningless unless it is translated into cash.

". . . . .

". . . Obviously, there are given times when a given note with given terms may be worth more than its face value in cash. If we had a situation where the prevailing rate of interest was 4 per cent per annum and if the purchaser gave a note secured by a deed of trust on the entire property with no property released and with no release clauses and the purchaser paid half the price in cash and the other half by this note and the note was payable at 10 per cent interest at the end of one year you could have the face value of the note be less than the cash value. The cash value could be more."

(1a) Predicated upon these quotations from the record, appellants argue that defendants' expert was *required* to express an opinion as to what the discounted price or cash equivalent of a comparable sale would have been had the sale been made as an all-cash transaction. We have laboriously searched the record and have been unable to find any express order, instruction or legal direction whereby Mr. Beeney or any other witness was *required* to express any such opinion. Appellants state in their opening brief that "the trial judge ordered the appraiser to do this, that the judge made and studiously enforced a discounted order which Mr. Beeney observed, and that the witness Reid was never required to observe this order."[2] Appellants fail to justify the statement by any showing whatsoever.

Each appraisal witness for both appellants and respondent testified that he took into account the terms and circumstances of each comparable sale that he used as a basis for his valuation of the subject property. In each case, term sales were considered just as if each one had been made for all cash. "When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the

[2]The expert Reid testified that he considered the terms of comparable sales but was never asked if he had any opinion as to the cash equivalent of part cash and term sales.

price and other terms and circumstances of any sale or contract to sell and purchase comparable property . . ." (Evid. Code, § 816.) It is therefore proper to test the knowledge of a witness, as was done in this case, in respect to those term sales.

Even though the trial judge examined the witnesses Beeney and Fisher extensively on the subject of term sales and the cash equivalent of the sales prices of comparable properties, there was no error. "A reading of the entire record satisfies us that the case was fairly tried, and that the trial judge did not exceed the proper bounds either in seeking to elicit the facts or in maintaining the orderly procedure of the trial. **(2)** It apparently cannot be repeated too often for the guidance of a part of the legal profession that a judge is not a mere umpire presiding over a contest of wits between professional opponents, but a judicial officer entrusted with the grave task of determining where justice lies under the law and the facts between the parties who have sought the protection of our courts. Within reasonable limits, it is not only the right but the duty of a trial judge to clearly bring out the facts so that the important functions of his office may be fairly and justly performed. (Citations.)" (*Estate of Dupont* (1943) 60 Cal.App.2d 276, 290 [140 P.2d 866].)

(1b) At the outset it was revealed that the appellants' witness, Beeney, had made no investigation or study of the "cash equivalent" of the term sales nor of the cash value of the promissory notes which were a part of said sales. However, during the course of the trial, he did make an investigation and formed the opinion that the promissory notes in respect to most of the sales had a cash value in the financial market place, approximately 10 percent less than their face value. In at least one instance he believed the note would have to be discounted approximately 20 percent. This testimony was not elicited by nor required by the court, but was given pursuant to the instructions and inquiry of appellants' counsel. Under such circumstances appellants have no rightful complaint, for the error, if any, was invited.

It is common knowledge in the real estate market that a credit transaction in the sale of land is not necessarily the equivalent of a cash sale. Cash plus promissory notes and the security given therefor may or may not be equivalent to the cash price; it may be less or it may be more. This was the expressed opinion of the witnesses and the court in the case at bench. Thus, we find no error in the statements of the trial court in this respect.

(3) The next question as stated by appellant is "Did the trial court err in: instructing the jury both during the proceeding and at the end

thereof?"; that it was necessary for them to find what the "cash equivalent" of each such sales price was and that market value was to be determined by them in "cash" rather than in "terms of money" alone. The manner in which this issue is phrased by appellants presupposes that the court so instructed the jury, which is not quite the case.

All pertinent statements to the jury during the trial in this respect have been fully quoted in this opinion. Nowhere in these excerpts were there any instructions that it was necessary for the jury to find what the "cash equivalent" of any sales price was. As a matter of fact, the jury was not called upon to make any findings concerning comparable properties. The jury was directed to determine the market value only of the property taken and the severance damage. They properly were instructed to determine the fair market value of the subject property and the severance damage, if any, only from the opinions of the witnesses who expressed their opinions of such market value; and to consider evidence as to the reasons for their respective opinions of value and all other evidence concerning the subject property and other properties only for the limited purpose of enabling them to understand and weigh the testimony of the witnesses as to their opinion of such market value. (Evid. Code, § 813, subd. (a)(1).) Thus, it was for the limited purpose of enabling the jury to weigh the testimony of the experts that the sales price and the terms of sale of comparable properties was before the jury for their consideration. (BAJI No. 503, Rev., now BAJI No. 11.80.)

In summary of its comments during the course of the trial, the court instructed the jury formally at the end of the trial on the subject of market value, as follows: "'Fair market value' is defined as the highest price; in terms of money, *that is, cash,* for which each of the subject properties would have sold on the open market on October 28, 1966; . . ." With the exception of the emphasized words, "*that is, cash,*" the instruction was given in the exact language of BAJI 502-A, Revised (now BAJI No. 11.73) as requested by each of the parties. The added words were inserted by the trial judge.

In our judgment, the words "*that is, cash*" neither added to nor detracted from the definition of "market value." As the trial judge indicated during the trial, "cash" and "money" are synonymous. One is the equivalent of the other. This connotation of the terms has been recognized historically in this state. In *Sacramento etc. R. R. Co.* v. *Heilbron* (1909) *supra,* 156 Cal. 408, 412-414, the Supreme Court approved a jury instruction, which stated in part: "You are not to consider the price the land would sell for under special or extraordinary circumstances, but its fair, market value, if offered in the market under ordinary circumstances for cash, . . .

Market value is the amount the strip would sell for if put upon the open market, and sold in the mannner in which property is ordinarily sold *for cash* in the community where it is situated, . . ." (Italics added.) In *Abrams* v. *Motter* (1970) 3 Cal.App.3d 828, 840-841 [83 Cal.Rptr. 855], which arose from an action on a contract to purchase and sell real property, the measure of damages was discussed by the court, as follows: "It is generally accepted that the equivalent of value to the seller is fair market value. (Citations.) Fair market value is reckoned 'in terms of money' (*Sacramento, etc., R. R. Co.* v. *Heilbron*, 156 Cal. 408, 409 [104 P. 979].) The court in *Heilbron* said that a jury instruction which referred to cash was correct. Article XI, section 12 of the California Constitution requires assessment for taxation at cash value. *Kaiser Co.* v. *Reid*, 30 Cal.2d 610, 623 [184 P.2d 879], holds that for purposes of taxation the cash value of property means its fair market value." Also in *Jefferson Ins. Co.* v. *Superior Court* (1970) 3 Cal.3d 398 [90 Cal.Rptr. 608, 475 P.2d 880], involving an insurance loss, the Supreme Court held that the term "actual cash value," as used in section 2071 of the Insurance Code, is synonymous with the term "fair market value." In *Buena Park School Dist.* v. *Metrim Corp.* (1959) 176 Cal.App.2d 255, 264 [1 Cal.Rptr. 250], the court stated: "The classic definition is the 'highest price estimated in terms of money.' This language was carefully chosen. It contemplates a value expressed in terms of money, which means *cash or its equivalent*. The thought conveyed is that it is the amount which would be given by a purchaser either in cash or its equivalent." (Italics added.) In a leading eminent domain decision, arising from California, in the U.S. Supreme Court (*United States* v. *Miller* (1943) 317 U.S. 369 [87 L.Ed. 336, 63 S.Ct. 276, 147 A.L.R. 55]), Justice Frankfurter stated that a short definition of market value is "what a willing buyer would pay in cash to a willing seller." For cases from other jurisdictions, which implement our view that cash is the equivalent of market value, see: *State* v. *Vela* (1958) 213 Ore. 386 [323 P.2d 941 at p. 944]; *State* v. *Holt*, 209 Ore. 697 [308 P.2d 181]; *Pape* v. *Linn County*, 135 Ore. 430 at p. 437 [296 P. 65 at p. 67); *State Highway Commission, State by and through* v. *Superbuilt Mfg. Co.*, 204 Ore. 393 [281 P.2d 707]; *City of Lewiston* v. *Brinton*, 41 Idaho 317 [239 P. 738].

From the foregoing, we conclude that the court properly instructed the jury.

(4) Lastly, appellants complain of prejudicial error in that their Exhibits Nos. 12 and 13, which were received in evidence without objection, were not with the jury during their deliberation. These two documents were trust deeds constituting security for the earlier term sale of the subject property

about which the appraisers testified in arriving at their opinions of value. They had been inadvertently taken from the courtroom by one of plaintiff's counsel, a fact which did not come to light until after the jury had returned its verdict. The jury never requested them during their deliberation. Although they were in evidence for some unexplained purpose, their contents were not mentioned by counsel in their jury summations. Moreover, as heretofore indicated, each of the witnesses gave no effect whatsoever to the fact that the sale involving these securities was part cash and part terms. From our review of the record, no prejudice resulted from the failure of the jury to receive these exhibits.

Appellants claim they are entitled to their costs on appeal, whatever the outcome. **(5)** Where a condemnee is an unsuccessful appellant, the awarding of costs on appeal is a matter within the court's discretion. (*Oakland* v. *Pacific Coast Lumber etc. Co.* (1916) 172 Cal. 332, 334-337 [156 P. 468]; *In re Redevelopment Plan for Bunker Hill* (1964) 61 Cal.2d 21, 68-71 [37 Cal.Rptr. 74, 389 P.2d 538].) Appellants' claim is denied. The parties shall bear their own costs on appeal.

The judgment is affirmed.

Kingsley, Acting P. J., and Dunn, J., concurred.

Memorandum 72-75 EXHIBIT IV

LAW OFFICES
THORPE, SULLIVAN, CLINNIN & WORKMAN
1200 ROWAN BUILDING
458 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90013
TELEPHONE (213) 680-9840

JOHN G. THORPE
ROGER H. SULLIVAN
ROBERT G. CLINNIN
HENRY K. WORKMAN
VINCENT W. THORPE
PHILIP L. SIRACUSE
MICHAEL J. BELCHER
JOHN J. DEE

OF COUNSEL
DAVID A. WORKMAN

PLEASE REFER TO
OUR FILE NO.

March 18, 1971

The Honorable Donald R. Wright, Chief Justice,
and The Honorable Associate Justices
of the Supreme Court of the State of California
350 McAllister Street
San Francisco, California 94102

Dear Chief Justice and Associate Justices:

The undersigned has read in the advance sheets the opinion in People v. Birnbaum, 14 Cal. App. 3d 570, and has further learned with dismay that no petition for hearing in this Court is being sought.

Accordingly, the undersigned, on his own behalf and on behalf of other attorneys whose names appear at the end of this letter, respectfully requests that the Court give its thoughtful consideration to granting a hearing on its own motion, as was done in Dow v. Permanente Medical Group, 12 Cal. App. 3d 488, to cite a recent example.

The counsel who address this letter devote most of their professional time and efforts to eminent domain litigation. It is their considered opinion that the Birnbaum opinion not only constitutes a drastic departure from heretofore settled California law and from unvarying practice, but more importantly, is of a nature which is likely - particularly in the long run - to generate significant time-consumption and complications in the trial of eminent domain cases, impose significant new burdens on appraisers, and indeed, may actually require the importation into eminent domain cases of entirely new species of experts.

The foregoing pessimistic assessment of the impact of Birnbaum is prompted by Birnbaum's unprecedented approval of a practice whereby a real property appraiser may be examined "extensively on the subject of term sales and the cash equivalent of the sales prices." (14 Cal. App. 3d at 578) Thus, in order to respond to that kind of questioning, the

appraiser will now have to become proficient not only in real estate valuation, but also in the valuation of secured commercial paper, i.e. of the notes secured by deeds of trust, which are commonly given in partial payment for land in California. This he will have to do if he is to respond intelligently to such questioning.

We urge the Court to consider that real estate appraisers by and large are not equipped to assess and evaluate the swings in the commercial paper market which is frequently and profoundly influenced by factors such as federal fiscal and monetary policy, Federal Reserve Board actions, economic health of the construction industry, availability of capital funds in the loan market, short-term inflationary pressures, how well "seasoned" the note is, and kindred factors having no direct connection with value of real property.

If Birnbaum is to remain on the books, prudent condemnation counsel will have to at least be prepared for the possibility that their clients' case will be thus scrutinized in light of the doings of the commercial mortgage paper market. That this will significantly increase the already alarming cost and complexity of eminent domain litigation should be all too apparent. It is moreover not at all difficult to foresee situations in which a litigant would want to challenge his adversary's calculations and testimony used in arriving at an asserted cash "equivalency" of a secured "term" sales price. The introduction of commercial paper brokers and dealers into the trial of eminent domain matters thus becomes quite probable.

There is yet another factor which the Court of Appeal opinion overlooks, as it is not even mentioned therein; a factor with an entirely separate potential for disruption and increase in complexity of eminent domain cases. It is at this time a virtually invariable practice in condemnation cases (particularly in those involving a total taking) that the lender (i.e. the beneficiary under the deed of trust) demands and by agreement receives the balance outstanding on his note.

However, if Birnbaum's approval of the novel rule that market value may be converted into "cash value" (see 14 Cal. App. 3d at 579-580) remains on the books, then by

parity of reasoning the owner - the borrower - is also in a position to demand that the lender's share of the condemnation award be converted into its "cash equivalent", i.e., that it be discounted to its present cash value.

Here again, it is predictable that this will cause significant increase in the frequency of second-phase apportionment litigation under CCP §1246.1. Heretofore, second-phase CCP §1246.1 apportionment trials have been rare. As between lenders and owners they are virtually unheard of (with the possible exceptions of partial takings where there is a dispute as to the extent to which the lender's security has been impaired). Birnbaum, however, opens the door to such a litigation in almost every condemnation case.

Nor is that all. The Birnbaum opinion overlooks the role of the lender and of the federal income tax laws in real property transactions. For example, it is a common occurrence that land is sold "on time", i.e., the buyer undertakes to pay off a note secured by a deed of trust in installments, but the seller nonetheless receives 100% payment in cash for his property because that cash is supplied by a lender. Thus, it is possible - and indeed such is the case in many if not most real estate transactions - that a sale of land is "on terms" as far as the buyer is concerned, but is "for cash" as far as the seller is concerned. How such a sale is to be treated under Birnbaum is a puzzle.

Equally important is the impact of federal income tax laws which Birnbaum fails to note. To the seller, a sale in which the down payment is less than 30% of the purchase price, results in advantageous income tax consequences [See Title 26 USCA §453(b)(2)(A)(ii)], and therefore many sellers simply refuse to sell for cash. For this reason, highly appreciated properties owned by most active and knowledgeable sellers, are simply not obtainable in the market for cash, in a great many cases. Thus, if such sales are to be reduced to their "cash equivalent", that "cash equivalent" would necessarily have to include the "equivalent" of the tax benefits to the seller, as they figure prominently as a part of the consideration flowing to the seller; they are in the seller's eyes very much a part of the effective "cash equivalent" of the price received by him.

The complexities that this would introduce into the trial of condemnation cases should be self-evident. The many intricate and artificial rules which now hobble this kind of litigation and drag it out in the trial courts are bad enough. If eminent domain litigation is to be further complicated and convoluted, that should happen only after careful considerations of all the factors, something which the Birnbaum opinion does not do. Moreover, that should happen only after this Court has had an opportunity to pass on such potentially far-reaching consequences to the already over-complex field of eminent domain litigation - litigation which has recently been aptly described as ". . . a supercharged psychodrama designed to lure 12 mystified citizens into a technical decision transcending their common denominator of capacity and experience." (State v. Wherity [1969] 275 Cal. App. 2d 241, 252, dissent per Mr. Justice Friedman). We respectfully suggest that eminent domain litigation is a field which has enough complexities of its own, without being required to borrow those of the commercial paper market and of federal income tax law.

Finally, the concluding paragraph of Birnbaum (14 Cal. App. 3d at 581[5]) constitutes clear conflict of authority on the subject of costs. It conflicts not only with recent decisions of other intermediate appellate courts (see City of Oakland v. Nutter, 13 Cal. App. 3d 752, 776[18], and Regents of the University of California v. Morris, 12 Cal. App. 3d 679, 686[5]), but also with the conclusion of this Court in In re Redevelopment Plan for Bunker Hill, 61 Cal 2d 21, 71, holding expressly that condemnees are to be free of costs on appeal even when they do not prevail.

For all of these reasons, and in light of the failure of the appellant to seek review by this Court, we respectfully suggest that the granting of a hearing on the Court's own motion is eminently called for.

Very truly yours,

Roger M. Sullivan

The following attorneys join in requesting the hearing:

Thomas C. Baggott	- 611 West 6th Street Los Angeles, California
James E. Cox	- Court & Mellus Martinez, California
Thomas M. Dankert	- 144 S. California Street Ventura, California
Hodge L. Dolle, Sr.	- 606 S. Olive Street Los Angeles, California
John L. Endicott Gibson, Dunn & Crutcher	- 634 S. Spring Street Los Angeles, California
Fadem & Kanner A Professional Corporation	- 6505 Wilshire Boulevard Los Angeles, California
Irwin M. Friedman	- 1910 Sunset Boulevard Los Angeles, California
Burton J. Goldstein Goldstein, Barceloux & Goldstein	- 650 California Street San Francisco, California
William L. Gordon	- 402 E. Carillo Street Santa Barbara, California
William T. Ivey, Jr.	- 650 W. 19th Street Merced, California
John N. McLaurin William Bitting Hill, Farrer & Burrill	- 445 S. Figueroa Street Los Angeles, California
Frances J. O'Neill	- 1346 Wilshire Boulevard Los Angeles, California
C. Ray Robinson	- 660 W. 19th Street Merced, California

March 23, 1971

The Honorable Donald R. Wright, Chief Justice,
and The Honorable Associate Justices
of the Supreme Court of the State of California
350 McAllister Street
San Francisco, California 94102

Re: People v. Birnbaum, 14 Cal.App.2d 570

Dear Chief Justice and Associate Justices:

I have just been advised that the following attorneys wish to add their names to my letter of March 18, 1971, requesting that the hearing be granted on the Court's own motion with respect to the case of People v. Birnbaum:

John B. Anson - 1910 Sunset Boulevard
Los Angeles, California

Richard F. Desmond - 161 "I" Street
Sacramento, California

Very truly yours,

Roger M. Sullivan

RMS/nn

DEPUTIES
JOSEPH M. ROGERS
KEITH M. HAWKES
REMO C. MATTEOLI
MARK F. THOMPSON
SAN FRANCISCO
DAVID BLOMGREN
ROBERT F. JOHNSON
LOS ANGELES
A. F. BRADOVICH
SACRAMENTO

OFFICE OF THE CLERK

Supreme Court of California

G. E. BISHEL, CLERK

OFFICES
SAN FRANCISCO 94102
4250 STATE BUILDING
LOS ANGELES 90012
1005 STATE BUILDING
SACRAMENTO 95814
108 LIBRARY AND COURTS BUILDING

San Francisco, California
March 23, 1971

RECEIVED
MAR 24 1971
LAW OFFICE
THORPE, SULLIVAN
CLINNIN & WORKMA

Roger M. Sullivan, Esq.
458 South Spring Street
Los Angeles, California 90013

Re: 2 Civ. 36201 - People v. Birnbaum

Dear Mr. Sullivan:

Your letter dated March 18 and addressed to the Chief Justice has been referred to this office for answer.

As you will note by the enclosure herewith, the subject letter is postmarked "Los Angeles, Calif. Mar. 22 '71." The record in the case discloses that the Court of Appeal affirmed the judgment therein on January 21, 1971. Under the rules, the last day on which this court could take any action in the appeal was March 22, 1971, as on that day jurisdiction to act was lost.

However, in light of the contents of your letter, the opinion will be reviewed and if the court be so moved it may order said opinion to be nonpublished in an exercise of its plenary power.

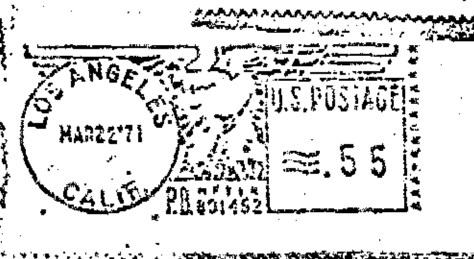
Very truly yours,

G. E. BISHEL
Clerk of the Supreme Court

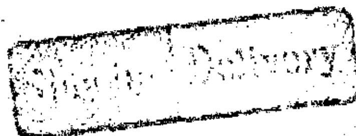
GEB:ct

Enclosure

LAW OFFICES
THORPE, SULLIVAN, CLINNIN & WORKMAN
1100 ROWAN BUILDING
458 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90013



The Honorable Donald R. Wright, Chief Justice,
and the Honorable Associate Justices
of the Supreme Court of the State of California
350 McAllister Street
San Francisco, California 94102



Postage Due 10¢

AIR MAIL

AIR MAIL

Memorandum 72-75

EXHIBIT V

RECOVERY FOR ENHANCEMENT AND BLIGHT IN CALIFORNIA

Benefits or injuries expected to result from a public improvement correspondingly influence the market value of land in the neighborhood of the proposed project, causing either enhancement or blight. The question whether a condemnee may recover for either enhancement or blight is largely a progeny of the 20th century.[1] The relatively recent flood of cases on the subject may be attributed primarily to a general increase in condemnation activities by public entities.[2] Moreover, modern complex procedures often create substantial delays[3] between the planning and the execution of a public project. Accordingly, it is a rare occasion when a planned public work is able to approach execution without drawing the attention of those persons living or owning property in the vicinity of the anticipated improvement.[4] If the project is of a desirable sort it cannot help but foment a general property value rise in the neighborhood.[5] Conversely, if the work possesses undesirable attributes, values will fall.[6] When condemnation proceedings are finally initiated the problem thus focuses into a question of whether the condemnee is to receive the benefit of any increase in the value of his property due to enhancement or, in a proper situation, he is to receive reimbursement for any decrease in its value due to blight.

Since the question is basically a matter of what elements are to be included in compensable value, it is first necessary to give attention to the relevant California constitutional, statutory, and case law regarding the provisions for, and elements of, compensatory value. The California Constitution provides: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner . . . ."[7] Further, the term "just compensation" has been defined in Code of Civil Procedure section 1249 to mean "actual value" at the date of is-

[1] With the exception of San Diego Land & Town Co. v. Neale, 78 Cal. 63, 20 P. 372 (1888), the vast majority of the primary cases were decided from 1955 to the present.

[2] *Cf.* ABA COMM. ON CONDEMNATION AND CONDEMNATION PROCEDURE, REPORT 93 (1962) (separate enhancement section first instituted) [hereinafter cited as ABA REPORT].

[3] *See* B. PALMER, MANUAL OF CONDEMNATION LAW § 154 (1961) [hereinafter cited as PALMER]; Note, *Challenging the Condemnor's Right to Condemn: Avoidance of Peripheral Damages*, 1967 WASH. U.L.Q. 436, 438.

[4] *See* 4 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 12.3151, at 201 (rev. ed. 1962) [hereinafter cited as NICHOLS].

[5] *Id.* at 201-02.

[6] *Id.* at 201 (the project hovers like the "sword of Damocles").

[7] CAL. CONST. art. I, § 14.

suance of summons in the condemnation proceeding.[8] Finally, through judicial construction, "actual value" has been held to mean "market value."[9] The standard of market value, adopted by the courts of most states,[10] is typically defined as follows: Market value is "the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable."[11] Accordingly, any facts that would tend to influence the mind of a reasonable buyer or seller as to the property's value are relevant to the determination of just compensation.[12] Further, the provisions of section 1249 that determine the date of valuation have been held to be merely procedural,[13] thus vesting in the trial judge discretion to determine the admissibility of valuation evidence in various sets of circumstances.[14] Also, in California the condemnee has the burden of persuasion on the issue of market value.[15]

In light of these rather unambiguous standards, it would appear that all questions of enhancement and blight in California should be easily settled. Paradoxically, some are not. The primary reasons for the rather unsettled state of the law in this area are three: the divergence of opinion between condemning agencies and property owners regarding the elements comprising market value; the lack of any clear statement of the law by the California Supreme Court;[16] and the failure of some of the districts of the Court of Appeal to elucidate their applications of law to the facts.[17] The purpose of this comment, there-

---

8 CAL. CODE CIV. PROC. § 1249. However, if there is a delay of one year or more not caused by the condemnee, value is to be assessed as of the date of trial. *Id.*

9 *E.g.*, People v. Ricciardi, 23 Cal. 2d 390, 401, 144 P.2d 799, 805 (1943).

10 *See* NICHOLS § 12.1.

11 Sacramento So. R.R. v. Heilbron, 156 Cal. 408, 409, 104 P. 979, 980 (1909).

12 Spring Valley Water Works v. Drinkhouse, 92 Cal. 528, 533, 28 P. 681, 683 (1891).

13 Los Angeles County v. Hoe, 138 Cal. App. 2d 74, 291 P.2d 98 (1955); Los Angeles v. Tower, 90 Cal. App. 2d 869, 204 P.2d 395 (1949); Los Angeles v. Oliver, 102 Cal. App. 299, 283 P. 298 (1929).

14 Los Angeles County v. Hoe, 138 Cal. App. 2d 74, 80, 291 P.2d 98, 101 (1955).

15 *See, e.g.*, San Francisco v. Tilman Estate Co., 205 Cal. 651, 653-54, 272 P. 585, 586 (1928).

16 People v. La Macchia, 41 Cal. 2d 738, 264 P.2d 15 (1953), deals with a problem not involved in the more controversial issues.

17 The statement by Justice McFarland in his dissenting opinion in Spring Valley Water Works v. Drinkhouse, 92 Cal. 528, 28 P. 681 (1891), is still relevant. He said that "[t]here has been a good deal written upon the subject of value in condemnation proceedings and a good deal of loose language has been . . . used . . . ." *Id.* at 542, 28 P. at 685. This failure to enunciate, however, is not confined to California courts. *See* 1 L. ORGEL, VALUATION UNDER EMINENT DOMAIN §§ 99, 106 (2d ed. 1953) [hereinafter cited as ORGEL]; 27

fore, is to attempt to classify the existing California cases regarding enhancement and blight according to their important factual differences, and to clarify any decisions that are ambiguous. Throughout the comment it will be necessary, as a point of departure, to survey the general trend of authority in the United States.

Enhancement of Values Caused by the Public Improvement

Probable or Certain Inclusion[18]

One factual situation that presents few controversies is that in which the condemned land was certain or likely to be within the scope of the proposed project during the entire period the enhancement occurred. Here, the enhancement has arisen solely because of the prospect of the improvement's future erection on the property taken, with no prior taking of adjacent land being involved. Under these circumstances, the rule adopted by the vast majority of American courts is that the condemnee is not entitled to recover for the enhancement in the value of his property.[19] The Supreme Court of Florida, for example, after a brief but incisive analysis of the problem, summarized the general rule as follows: "[W]hen land is definitely marked for condemnation . . . it shares none of the beneficial effects which could flow from anticipation of the proposed improvement for it will not be available for private use when the project is completed."[20] Support for this position may also be marshalled from the texts of legal writers that have considered the question.[21]

AM. JUR. 2D *Eminent Domain* § 283 (1966) (citing cases); Annot., 147 A.L.R. 66, 72 (1943).

[18] The cases seem by nature to resolve themselves into the general classification used in the text. Accordingly, a similar scheme has been used by others. *See, e.g.*, NICHOLS § 12.3151.

[19] *E.g.*, United States v. Virginia Elec. & Power Co., 365 U.S. 624, 636 (1961); United States v. Miller, 317 U.S. 369, 376 (1943); J.A. Tobin Constr. Co. v. United States, 343 F.2d 422, 423 (10th Cir. 1965); Congressional School of Aeronautics v. State Rds. Comm'n, 218 Md. 236, 249-50, 146 A.2d 558, 566 (1958); Cleveland v. Carcione, 118 Ohio App. 525, 531, 190 N.E.2d 52, 56 (1963); *see* Kerr v. South Park Comm'rs, 117 U.S. 379, 385 (1886); State Rd. Dep't v. Chicone, 158 So. 2d 753, 754-55 (Fla. 1963); Chicago v. Blanton, 15 Ill. 2d 198, 203, 154 N.E.2d 242, 245 (1958); Alden v. Commonwealth, 351 Mass. 83, 85-86, 217 N.E.2d 743, 745-46 (1966) (statutory interpretation); Nichols v. Cleveland, 104 Ohio St. 19, 29, 135 N.E. 291, 294 (1922). *Contra*, Calhoun v. State H'way Dep't, 223 Ga. 65, 67, 153 S.E.2d 418, 420-21 (1967) (statute disallowing enhancement held unconstitutional); Hard v. Housing Authority, 219 Ga. 74, 80, 132 S.E.2d 25, 29-30 (1963), *rev'g*, 106 Ga. App. 854, 128 S.E.2d 533 (1962); Gate City Terminal Co. v. Thrower, 136 Ga. 456, 466-67, 71 S.E. 903, 908 (1911); Housing Authority v. Tork, 106 Ga. App. 41, 41-42, 126 S.E.2d 246, 247 (1962).

[20] State Rd. Dep't v. Chicone, 158 So. 2d 753, 754-55 (Fla. 1963); *accord*, Nichols v. Cleveland, 104 Ohio St. 19, 29, 135 N.E. 291, 294 (1922).

[21] *See, e.g.*, ABA REPORT 123 & n.1 (1967); ABA REPORT 114 & n.1 (1966); NICHOLS § 12.3151(1), at 206 n.8 (1962, Supp. 1968) (citing cases); ORGEL §§ 99, 100; PALMER § 154.

A substantial majority of the California decisions dealing with enhancement fall into this category of probable or certain inclusion. The California courts have uniformly expressed approval of the rule adopted elsewhere in the United States.[22] The fountainhead of the California position is *San Diego Land and Town Company v. Neale.*[23] In *Neale* the condemnor had commenced a reservoir project that was originally designed to inundate only its own land. It was soon discovered, however, that inundation of the condemnee's upper riparian lands would be required to store sufficient water for domestic and agricultural purposes downstream. In the valuation trial, the condemnee was allowed to ask its expert witness what the value of the property would be in light of the many benefits it would provide to water consumers downstream. In essence, the witness was asked to place a value on the property as though the proposed improvement had already been completed. The trial court refused to exclude the answer of the condemnee's witness, and judgment for a substantial amount was rendered.

On appeal the Supreme Court of California held the trial court's admission of evidence of enhanced value to be reversible error. The court, referring to the witness' testimony, stated that "[t]his seems to us inadmissible as a direct element of value."[24] Continuing, the

[22] San Diego Land & Town Co. v. Neale, 88 Cal. 50, 62, 25 P. 977, 980 (1891) (appeal from decision on remand); San Diego Land & Town Co. v. Neale, 78 Cal. 63, 74-75, 20 P. 372, 377 (1888); People *ex rel.* Department of Natural Resources v. Brown, 265 A.C.A. 697, 699, 63 Cal. Rptr. 363, 364 (1967); Community Redevelopment Agency v. Henderson, 251 Cal. App. 2d 336, 343, 59 Cal. Rptr. 311, 315 (1967); People *ex rel.* Department of Pub. Works v. Di Tomaso, 248 Cal. App. 2d 741, 767, 57 Cal. Rptr. 293, 310 (1967); People *ex rel.* Department of Pub. Works v. Arthofer, 245 Cal. App. 2d 454, 465, 54 Cal. Rptr. 878, 885 (1966); People *ex rel.* Department of Pub. Works v. Pera, 190 Cal. App. 2d 497, 500-01, 12 Cal. Rptr. 129, 130-31 (1961); San Diego v. Boggeln, 164 Cal. App. 2d 1, 5, 330 P.2d 74, 76 (1958); Los Angeles County v. Hoe, 138 Cal. App. 2d 74, 78, 291 P.2d 98, 100 (1955); Pasadena v. Union Trust Co., 138 Cal. App. 21, 26, 31 P.2d 463, 466 (1934); *see* People v. La Macchia, 41 Cal. 2d 738, 754, 264 P.2d 15, 26 (1953) (overruled on other grounds); Spring Valley Water Works v. Drinkhouse, 92 Cal. 528, 536, 28 P. 681, 682-83 (1891) (concurring opinion); Redevelopment Agency v. Zwerman, 240 Cal. App. 2d 70, 76, 49 Cal. Rptr. 443, 447 (1966); Stockton v. Vote, 76 Cal. App. 369, 400, 244 P. 609, 621 (1926); Oakland v. Adams, 37 Cal. App. 614, 622, 174 P. 947, 950 (1918).

[23] 78 Cal. 63, 20 P. 372 (1888). In *Neale* the condemnees claimed enhanced value primarily from two sources: the prior commencement of the reservoir project on *adjacent* property; and the fact that a reservoir was to inundate *their* property. The former involved a supplementary taking wherein enhancement was claimed to have arisen from the fact of adjacency to an established project. For a discussion of this particular situation, see text accompanying notes 117-19 *infra*. The present discussion is confined to enhancement claimed to have arisen from the fact that the reservoir project was to cover the condemnee's land.

[24] San Diego Land & Town Co. v. Neale, 78 Cal. 63, 74, 20 P. 372, 377 (1888).

court drew a significant distinction between *direct* and *indirect* elements of value, recognizing that the condemnee

> might get some benefit from [the project] indirectly. That is to say, the public knowledge of a proposed improvement might cause an actual demand in the market and a subsequent advance in the current rate of price. . . . But aside from this indirect benefit . . . it seems monstrous to say that the benefit arising from the proposed improvement is to be taken into consideration as an element of the value of the land.[25]

Apart from its discussion of "indirect benefits," the court thus established the rule that compensable value of condemned property may not include an increment resulting from a *direct benefit* to the land by reason of the very project for which it is condemned. More concretely, the court is saying that once the site is determined, the attributes of the project for which the land was requisitioned are wholly irrelevant to the determination of the land's market value.[26]

The decisions of the courts of the State of Georgia, representing the minority position in the United States,[27] are directly contrary to the California position. Mere numerical strength, however, does not determine the "better rule." Accordingly, an in-depth analysis of both the California and the Georgia positions is appropriate to probe the soundness of the California doctrine.

The Georgia Constitution commands that private property shall not be taken for public use without "just and adequate compensation."[28] Although this provision is similar to that of the California Constitution, there is a substantial policy divergence between the two states. Illustrative of Georgia's policy approach is the rather literal interpretation given by the Georgia courts to the language of that state's "just compensation" provision.

In *Hard v. Housing Authority*[29] the site for an urban redevelopment project had included the condemnee's land throughout the pe-

[25] *Id.* at 74-75, 20 P. at 377. The significance of this distinction to California law will be discussed subsequently in text accompanying notes 74-77 *infra*.

[26] *See* NICHOLS § 12.3151(1), at 206 n.5. The treatise cites *Neale* to support the proposition "that in valuing the land, the effect of the proposed improvement must be ignored." *Id.*

[27] *See, e.g.*, cases cited note 19 *supra*.

[28] GA. CONST. art. I, § 3.

[29] 219 Ga. 74, 80, 132 S.E.2d 25, 29-30 (1963). Georgia's present position on this issue was not crystallized without some recalcitrance from one of its appellate courts. In Housing Authority v. Hard, 106 Ga. App. 854, 128 S.E.2d 533 (1962), the appellate court, in interpreting an earlier decision, Gate City Terminal Co. v. Thrower, 136 Ga. 456, 71 S.E. 903 (1911), held that the court in *Gate City* was faced with a situation quite different from that in *Hard*. The court said *Gate City* involved enhancement arising prior to the designation of a project site, and, as such, it was properly allowed. But the court refused to allow recovery of the enhancement in *Hard* because the project site was certain during the period in which enhancement arose. This decision was reversed by the Supreme Court of Georgia, the court holding that *Gate*

riod in which enhancement allegedly arose. Nevertheless, the condemnee claimed that he was entitled to the market value of the property as of the date it was actually taken by court proceedings. In sustaining this contention as being within the intent and purpose of the "just and adequate" provision of the Georgia Constitution, the supreme court held that "[a]nything that actually enhances the value must be considered in order to meet the demands of the Constitution that the owner be paid before the taking, adequate and just compensation."[30] It is clear from this decision and from its aftermath[31] that to the Georgia court "just and adequate" means just and adequate *solely to the condemnee*. The policy implicit in such an approach is the protection of the condemnee from a discrimination that would disallow him the enhancement while allowing adjacent owners to reap such benefits merely because they were fortunate enough not to have their land condemned.[32] The principle underlying this policy is defeated, however, to the extent that the property owners nearby are specially assessed for the improvement.[33]

By contrast, the California case of *People ex rel. Department of Public Works v. Pera*[34] explicitly held that "[t]he term 'just compensation' means 'just' not only to the party whose property is taken for public use but also 'just' to the public which is to pay for it."[35] In accordance with this interpretation of Article I, section 14 of the California Constitution, the California courts have uniformly denied compensation for enhancement accruing after the project site has been definitely determined.[36] This is proper. Using as a "cutoff point" the date on which the site is clearly established draws a proper balance between the private right and the public good. Moreover, such exclusion of enhancement evidence does not subvert section 1249 of the California Code of Civil Procedure because, as previously indicated, section 1249 has been termed a procedural statute that creates no vested rights.[37] If such evidence of enhancement arising subsequent to the definite plotting of the project were admitted by the trial

---

City's facts were identical to those in *Hard*. Subsequently, the Georgia Legislature, in defiance of the decision by the supreme court, passed a statute denying recovery by the condemnee of any enhancement caused by the project for which the property was condemned. The law was held unconstitutional in Calhoun v. State H'way Dep't, 223 Ga. 65, 67, 153 S.E.2d 418, 420-21 (1967), as contrary to the "just and adequate" provision of the Georgia Constitution. *See* GA. CONST. art. I, § 3.

[30] Housing Authority v. Hard, 219 Ga. 74, 80, 132 S.E.2d 25, 29-30 (1963).

[31] The holding in this case precipitated some adverse legislative activity. *See* note 29 *supra*.

[32] *See* ORGEL § 98.

[33] *See id.*

[34] 190 Cal. App. 2d 497, 12 Cal. Rptr. 129 (1961).

[35] *Id.* at 499, 12 Cal. Rptr. at 130.

[36] *See* cases cited note 22 *supra*.

[37] *See* cases cited note 13 *supra*.

judge, it might well be held to be an abuse of discretion.[38] By determining market value as of the day before the property was certain or likely to be requisitioned the condemnor is not penalized, as it would be in Georgia, for implementing the desirable practice of apprising the public of a specific site. This is not to say that a public authority should be given a license to condemn a definite site and then, in typical bureaucratic fashion, unreasonably delay the official proceedings.[39] The provision in the Code of Civil Procedure setting valuation as of the date of trial was not designed to protect against this type of delay.[40]

While market value is utilized by both states as the indicia of just compensation,[41] it is plain that the Georgia court, applying the minority rule, will encounter difficulty in arriving at the amount of the award. It is questionable whether there is, in the first place, any true market for property that has been labeled as a site for a public work.[42] Nevertheless, there are several methods by which the Georgia court could arrive at a figure. One method would be to construct, through the use of sales evidence of "similar" nearby property, a hypothetical sale of the property condemned so as to compute its "quasi-market value" as of the time of the taking. Since this is patently a fictional approach, imputing to the property benefits that it would never possess, this quasi-market value approach has not been accepted by the Georgia Supreme Court,[43] and the procedure is disapproved of by authorities generally.[44]

Another alternative would be to "allow proof of any element . . . that entered into fixing its value right up to the time it was taken."[45] While this approach was approved by the court in *Hard*, it does not reflect true market value and, moreover, is based on unsound policy.

---

[38] *But see* Los Angeles v. Tower, 90 Cal. App. 2d 869, 204 P.2d 395 (1949).

[39] Official proceedings ordinarily commence with the service of summons. *See* CAL. CODE CIV. PROC. § 1249.

[40] *Id.* It is interesting to note that the Court of Civil Appeals of Texas, in an analogous situation, has provided a remedy for this problem by holding that, if the public agency unnecessarily delays, the condemnee shall be entitled to the market value of the property at the time it was taken *including* any enhancement. Uehlinger v. State, 387 S.W.2d 427, 432 (Tex. Civ. App. 1965). The facts in *Uehlinger*, however, are distinguishable from those in cases presently discussed to the extent that the site was designated and then condemned in a piecemeal fashion. In *Hard* and other cases considered in this section the entire site was taken in one action.

[41] *See, e.g.*, People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943); Hard v. Housing Authority, 219 Ga. 74, 132 S.E.2d 25 (1963).

[42] *See* State Rd. Dep't v. Chicone, 158 So. 2d 753 (Fla. 1963). "Once selected for condemnation the marketability, both sale and rental, and to some extent the use, of property is sterilized . . . ." *Id.* at 755.

[43] Hard v. Housing Authority, 219 Ga. 74, 80, 132 S.E.2d 25, 30 (1963).

[44] *See, e.g.*, 2 J. LEWIS, EMINENT DOMAIN § 745 (3d ed. 1909); 27 AM. JUR. 2D *Eminent Domain* § 283, at 80 n.17 (1966) (citing cases).

[45] Hard v. Housing Authority, 219 Ga. 74, 80, 132 S.E.2d 25, 30 (1963).

True market value of property, as defined above, includes consideration of a purchaser who is willing to buy the property "with knowledge of all the *uses*" to which the property could be put.[46] These uses referred to are "ordinary" uses, for if the property is destined for condemnation the only long-term "use" for which it is available is as a medium through which to speculate upon a large condemnation award.[47] Once it is known that the property is to be included in the improvement, its actual marketable attribute—that of adjacency to the project—has been extinguished, thus denying the property's participation in the general rise in land values in the area. As one author has stated:

> The owner [and a fortiori a purchaser] of land taken for improvement cannot put it to any use or enjoy its benefits, and any increase in its value is due, *not to its increased use* by the owner or any benefits he may get, but merely to speculation as to what the condemnor might be willing or forced to pay for the property.[48]

To call this speculative subterfuge a "use" runs counter to the generally accepted definition of market value.[49] It forces the court to engage in one of the practices against which the market value definition was intended to protect—the "vicious circle" of attempting to estimate compensatory value in terms of expectation of the award finally to be granted by the court.[50]

A final method that could be used to measure enhancement to property definitely within the ambit of a proposed project would be to value the property based upon either the need of the condemnor or the beneficial aspects of the intended use by the condemnor. This, clearly, would not reflect "true" market value because that value contemplates *private*, not public use. Further, this approach mirrors the *direct* element of value that was excluded by the California Supreme Court in *Neale* and its successors.[51] Consider, for example, the following cases. In *People ex rel. Department of Natural Resources v. Brown*,[52] a case involving condemnation for an earthfill dam, the condemnee's claim for a valuation based upon the condemnor's need for his land in the project was rejected. In *Pasadena v. Union Trust Co.*[53] the appellate court affirmed the exclusion of the

---

[46] Sacramento So. R.R. v. Heilbron, 156 Cal. 408, 409, 104 P. 979, 980 (1909) (emphasis added).

[47] *See* ORGEL § 106; PALMER § 154.

[48] PALMER § 154 (emphasis added).

[49] *See* text accompanying note 46 *supra*.

[50] *Cf.* ORGEL § 106.

[51] *See* cases cited note 22 *supra*.

[52] 255 A.C.A. 697, 63 Cal. Rptr. 363 (1967). The facts as stated by the court are sketchy. However, in the respondent's reply brief to a petition for rehearing it is revealed that the land was within the scope of the project at all times. *See* Reply Brief for Respondent for Petition for Rehearing at 14, People *ex rel.* Department of Natural Resources v. Brown, 255 A.C.A. 697, 63 Cal. Rptr. 363 (1967).

[53] 138 Cal. App. 21, 31 P.2d 463 (1934).

condemnee's evidence of his land's potential as a dam site[54] where joinder of his parcel with neighboring ones for this purpose would not have been practical except for the imminence of the plaintiff's reservoir project. Finally, as the court in *Oakland v. Adams*[55] stated:

> the fact that the city intended to acquire [the] property and use it for park purposes should not cause it to be penalized, or that the increment in value which might attach to it because of the fact that the city desired to acquire it to convert it into a city park should raise its value to the city for that purpose.[56]

As the above cases indicate, it is repugnant to one's sense of justice that a condemnor must include in its award an increment of value stemming from the property being enhanced *directly* by the improvement to be placed thereon;[57] to attempt to value property in this manner has also been considered to be quite speculative.[58] Thus, if the condemnor has not unreasonably delayed proceedings and if, from the beginning of the project it was certain or highly probable that the condemnee's property was to be included in the improvement, the better rule, and that adhered to in California, is that the property is to be valued as of the date that this certainty or probability arose.

Uncertain Inclusion

General Principles

On many occasions prior to the determination of a definite site for the proposed public work, property values will rise in a broad area, reflecting the anticipation of continued private ownership adjacent, or at least proximate, to the improvement.[59] The instant problem arises when, within that broad area, a specific site is finally chosen upon which to construct the improvement. The question is whether the condemnee's award should include the increment stemming from the anticipatory rise in values before the exact site is determined. Unfortunately, many courts[60] have failed to distinguish between this situation where the enhancement arose *before* a definite site for the improvement was selected and the situation discussed previously where the enhancement arose *after* a definite site had been established. As a consequence, the bulk of the American decisions seems buried in a morass of irreconcilable conflict. This confusion could have been avoided by means of detailed statements of facts coupled with incisive applications of law. As put by one writer:

> As to the enhancement in value resulting from the anticipated bene-

[54] *Id.* at 26, 31 P.2d at 466.

[55] 37 Cal. App. 614, 174 P. 947 (1918).

[56] *Id.* at 622, 174 P. at 950.

[57] *See* ORGEL § 106. "'Market value at the time of taking' is the verbal standard of compensation, but . . . the courts do not rigidly adhere to this standard when . . . the dictates of justice require a different rule." *Id.*

[58] *See* PALMER § 154.

[59] 2 J. LEWIS, EMINENT DOMAIN § 745 (3d ed. 1909).

[60] *See* note 17 *supra*.

> fits from the public project, the judicial decisions are at variance, and the *failure of most courts to distinguish sharply* between the enhancement arising *before* the definite choice of a site for the project and the increment accruing *thereafter* leaves it uncertain whether the different holdings are the result of different rules or whether they are applications of the same rule to varying states of fact.[61]

Enough courts, however, have made such a distinction to indicate that there is a definite split of authority on this issue in the United States.[62]

Jurisdictions allowing recovery of the enhancement base their decisions on the reasoning that such an increment is a bona fide component of market value. For example, in *Kerr v. South Park Commissioners*,[63] the United States Supreme Court approved the following instructions:

> A number of witnesses testified that the agitation of the park project, the anticipation that the legislature would authorize the appropriation of lands to establish a park in the vicinity of the present South Park, and the introduction of the bill into the legislature . . . materially enhanced the value of lands embraced in the present park lines, as well as the lands adjacent thereto and in that vicinity. Any resulting benefit to the lands within the proposed park from this . . . you should take in account in determining the amount that will fairly compensate the owner.[64]

The instructions went on to deny compensation for any "special

---

[61] ORGEL § 106, at 449-50 (emphasis added).

[62] *E.g.*, Kerr v. South Park Comm'rs, 117 U.S. 379, 387 (1886) (approved instructions allowing recovery for this type of enhancement); State Rd. Dep't v. Chicone, 158 So. 2d 753, 754 (Fla. 1963) (dictum); Sunday v. Louisville & N.R.R., 62 Fla. 395, 397, 57 So. 351, 351 (1912); Housing Authority v. Hard, 106 Ga. App. 854, 857, 128 S.E.2d 533, 535 (1962), *rev'd*, 219 Ga. 74, 132 S.E.2d 25 (1963); Sanitary Dist. v. Loughran, 160 Ill. 362, 370, 43 N.E. 359, 361 (1896); Snouffer v. Chicago & N.W. Ry., 105 Iowa 681, 683, 75 N.W. 501, 502 (1898); Guyandotte Valley Ry. v. Buskirk, 57 W. Va. 417, 423, 50 S.E. 521, 523 (1905); *see* NICHOLS § 12.3151(2), at 210 n.9. *Contra*, Tharp v. Urban Renewal & Community Dev. Agency, 389 S.W.2d 453, 456 (Ky. 1965); Congressional School of Aeronautics v. State Rds. Comm'n, 218 Md. 236, 249-50, 146 A.2d 558, 565 (1958); Alden v. Commonwealth, 351 Mass. 83, 85-86, 217 N.E.2d 743, 745-46 (1966) (statutory interpretation); Cole v. Boston Edison Co., 338 Mass. 661, 665, 157 N.E.2d 209, 212 (1959) (statutory interpretation); NICHOLS § 12.3151 (4), at 212 n.14 (citing cases). The relative scarcity of cases allowing or disallowing recovery for this "anticipatory enhancement" may be attributed, primarily, to the failure of most courts to distinguish between enhancement before and after designation of the improvement site. *Cf.* text accompanying note 61 *supra*. Unquestionably, many cases have involved "anticipatory enhancement," and it is not unlikely that recovery has been allowed for such in some instances. However, the disposition of a court to allow this recovery is often camouflaged by broad statements seemingly intended to deny any type of project-caused enhancement. *Id.* To elucidate this significant distinction requires a substantial effort by the court, and, in this light, it would not be unfair to conclude that many courts are at times rather indolent.

[63] 117 U.S. 379 (1886).

[64] *Id.* at 385.

benefit" to the property, such benefit arising from the specific earmarking of the property for the improvement.[65] The court thus distinguished between enhancement accruing before the site was determined and enhancement accruing thereafter, allowing recovery for the former but not the latter. This case emphasizes the fundamental proposition that during the period of uncertainty the true market value of all property in the area rises because of bona fide expectations of adjacency, whereas once a site has been chosen,[66] enhancement to property lying therein occurs only because of speculation concerning the amount the condemnor will pay.[67]

Some courts in denying this "anticipatory enhancement" have argued that the condemnor should not be forced to pay for *any* increment stemming from the project,[68] while others have reasoned that since "the landowner is not to be penalized for any depreciation in value attributable [to the project] the condemnor [is not] to be required to pay for any enhancement . . . ."[69] The Supreme Judicial Court of Massachusetts in *Cole v. Boston Edison Company*[70] indicated that if the original scheme raised even a *possibility* that the subject parcel would be taken, there was to be no allowance for an increment attributable to the indefinite plan.[71] In *Tharp v. Urban Renewal and Community Development Agency*,[72] the Kentucky court, reaching the same result, stated that the property was to be valued "at the time just before it was generally known that the public project would be performed."[73]

---

[65] *Id.*

[66] *See* NICHOLS § 12.3151(2), at 77 (Supp. 68).

[67] *Cf.* State Rd. Dep't v. Chicone, 158 So. 2d 753, 754-55 (Fla. 1963); Housing Authority v. Hard, 106 Ga. App. 854, 857, 128 S.E.2d 533, 535 (1962), *rev'd*, 219 Ga. 74, 132 S.E.2d 25 (1963) (although reversed, case makes graphic distinctions).

[68] *Cf.* Cole v. Boston Edison Co., 338 Mass. 661, 665-66, 157 N.E.2d 209, 212 (1959).

[69] Tharp v. Urban Renewal & Community Dev. Agency, 389 S.W.2d 453, 456 (Ky. 1965); *see* Congressional School of Aeronautics v. State Rds. Comm'n, 218 Md. 236, 249-50, 146 A.2d 558, 565 (1958).

[70] 338 Mass. 661, 157 N.E.2d 209 (1959). The court interpreted statutory language which said that value was to be fixed "before the taking" to mean "before the beginning of the entire public work which necessitates the taking." *Id.* at 665, 157 N.E.2d at 212.

[71] *Id.* at 666, 157 N.E.2d at 212. The court cited May v. Boston, 158 Mass. 21, 31, 32 N.E. 902, 904 (1893), as support for this proposition. Subsequently, United States v. Miller, 317 U.S. 369, 379 (1943), was cited as a better statement of the rule the court was applying. The relevant passage in *Miller*, however, spoke in terms of "probability" of being taken and not mere "possibility." Accordingly, the test set down by the court was somewhat ambiguous.

[72] 389 S.W.2d 453 (Ky. 1965).

[73] *Id.* at 456.

The California Position

Unfortunately, the California courts, with one exception, have not clearly indicated their position on this controversy. The one exception is *San Diego Land and Town Company v. Neale*,[74] an 1888 decision of the California Supreme Court that drew a sharp distinction between "direct" and "indirect" benefits to the condemned property.[75] Of the latter the court stated that "the public knowledge of a proposed improvement might cause an actual demand in the market and a subsequent advance in the current rate of price."[76] Unmistakable in this excerpt is the notion that, prior to the designation of the improvement site, property values in a wide area will rise because of the expected benefits to be derived from owning property proximate to the improvement. This interpretation of the passage in *Neale* is substantiated by reference to a jury instruction recommended as proper for California condemnation cases:

> You are instructed that it is improper for you to base your award in this case, for the value of the part taken, on any *direct* increase . . . in value arising from the construction of [the proposed project].
>
> On the other hand, advance public knowledge of the proposed project may or may not have had some effect upon the general market in the area, and therefore, an *indirect* effect upon the value of the property being taken. You may not speculate what that effect may or may not have been, but you are to consider the general market as you find it, and if there has been such an *indirect* effect upon the market, the property owner is still entitled to the full and fair market value of his property upon such market.
>
> You are to determine the value the land being taken would have had, if no action had been taken toward acquisition of this particular property for the project.[77]

The *Neale* case is cited as authority for this instruction. However, *Neale* was decided in 1888 and Richard L. Huxtable, the author of this proposed instruction, noted the following:

> The second paragraph of the above instruction is believed by the author to be a proper statement of the present law under the cases cited . . . . But more recent cases dealing with resulting *increase* in market value might be construed as requiring exclusion of both direct and indirect effect upon the market.[78]

This is indeed a hint, if not more, of the rather murky and unsettled state of California law on this subject.

As mentioned in the above comment, some cases might be construed as excluding evidence of both indirect and direct effects on the value of the property; but in several cases the language relating to

---

74 78 Cal. 63, 20 P. 372 (1888).

75 *Id.* at 74-75, 20 P. at 377; *see* text accompanying notes 24-26 *supra*.

76 San Diego Land & Town Co. v. Neale, 78 Cal. 63, 74-75, 20 P. 372, 377 (1888).

77 Huxtable, *Trial Preparation, Discovery, Pretrial, and Jury Instructions*, in CALIFORNIA CONDEMNATION PRACTICE 223, 260-61 (Cal. Cont. Educ. Bar ed. 1960) (emphasis added).

78 *Id.* at 261-62 (emphasis in the original) (citing no cases).

such exclusions could be construed either as dictum, or as a very unclear statement of the applicable law. For example, in *Pasadena v. Union Trust Co.*[79] the condemnee offered evidence of his land's suitability for a dam site. The proffered evidence was excluded by the trial court and this result was affirmed on appeal. The issue was one of *direct* valuation, *i.e.*, whether or not it was proper to value the land as a dam site merely because the plaintiff had determined to build a dam there. Nevertheless, the Court of Appeal went on to say: "Any rise in value before the taking, *not caused by the expectation of that event*, is to be allowed, but . . . it must be a rise in what a purchaser might be expected to give."[80] If the court here was referring, by use of the phrase "[a]ny rise in value . . . not caused by the expectation of that event", to an indirect increase of the property value before a definite site is determined because of advance public knowledge of the improvement, the statement is indeed dictum. This must be so because the issue on appeal was not alleged error in denying evidence of *indirect* enhancement. The more plausible conclusion, however, is that the court was merely rejecting evidence of direct enhancement with an ambiguous application of the *Neale* rule. Support for this conclusion is found in the last clause in the above-quoted statement of the court: "but . . . it must be a rise in what a purchaser might be expected to give."[81] This phrase implies that, although direct elements of enhancement must be excluded, it is proper to admit elements of value that a purchaser in the open market would consider, which would certainly include a purchaser's anticipation or hope of eventually owning land next to a public improvement, the exact site of which is still unknown. Whereas *Union Trust*, therefore, is basically consistent with *Neale*, the ambiguity of the language used could erroneously cause one to conclude otherwise. Nor is *Union Trust* alone. There are other decisions, more recent than *Union Trust*, that also might be construed as requiring the exclusion of both direct and indirect benefits.

In *Los Angeles County v. Hoe*[82] the condemnor was endeavoring to acquire property for a civic center governmental office site. The condemnee's expert witness testified over the condemnor's objection that the City of El Monte had selected the lot adjacent to that of the condemnee for its city hall. On appeal the condemnor contended that it was error to admit the testimony because it allowed the condemned property to be valued in light of the project to be built thereon. The basis of this contention was the alleged fact that Los Angeles County had joined with the City of El Monte to construct a complete governmental center, which would include the adjacent parcel designated for the El Monte City Hall. The condemnee's witness testified, however, that he had no knowledge of such a joint effort. In addition he stated

[79] 138 Cal. App. 21, 31 P.2d 463 (1934).
[80] *Id.* at 26, 31 P.2d at 466 (emphasis added).
[81] *Id.*
[82] 138 Cal. App. 2d 74, 291 P.2d 98 (1955).

that he did not consider the county project in valuing the land, recognizing that it would be improper to do so. The court affirmed the decision, finding that there was only a prospective or contingent joint effort between Los Angeles County and the City of El Monte, and further stated, "It is the law, as stated by appellant, that in arriving at a determination of the market value of [the] land . . . it is not proper to consider the increase, if any, in the value of such land by reason of the proposed improvement which is to be made on the land by the condemnor."[83]

Does this rather broad statement disallow any recovery for "indirect enhancement" as defined by *Neale*? One reason for concluding that it does not is supplied by a close scrutiny of the facts. The condemnor was arguing that there was only one large project, encompassing both the condemnee's property and the adjacent property, so that any consideration of the condemnee's property as enhanced by the city hall project would be improper as allowing evidence of *direct* enhancement. This the court rejected, finding that there was no joint undertaking. The court, therefore, in making the above statement was merely informing the appellant that, although it stated the law correctly, the proposition was not applicable to the present case because there was no question of direct enhancement.[84] Further, the court in *Hoe* cited *Neale* as authority for its ruling. It is quite doubtful that the court intended to state a proposition that was contrary to the very case cited to support it, and in this light *Neale* and *Hoe* are reconcilable.

In *San Diego v. Boggeln*[85] the situation was analogous to that in *Hoe*. *Boggeln* involved condemnation efforts by the City of San Diego for a park and recreation area. Proceedings began in 1945 but were dismissed in 1952. In the interim a new project was begun in conjunction with the federal government. At trial, the city offered evidence to show that the land in question had been encompassed in the project since 1945. If admitted, such evidence would have denied the condemnee any compensation for enhancement that arose prior to the official commencement of the joint project. The appellate court affirmed the decision excluding the evidence, holding that the evidence was unnecessary because the parties had stipulated that the property was within the project's ambit since 1945, and the instructions of the trial court effectively charged the jury to ignore any enhancement resulting from its definite inclusion. The appellant cited *Hoe*,[86] but

[83] Los Angeles County v. Hoe, 138 Cal. App. 2d 74, 78, 291 P.2d 98, 100 (1955).

[84] The question involved, although not made perfectly clear by the court, was one of supplementary taking by an established project. *See* text accompanying notes 114-16 *infra*. This is substantiated by reference to respondent's reply brief. Reply Brief for Respondent at 7, Los Angeles County v. Hoe, 138 Cal. App. 2d 74, 291 P.2d 98 (1955).

[85] 164 Cal. App. 2d 1, 330 P.2d 74 (1958).

[86] *See* text accompanying note 83 *supra*.

the court, while agreeing with its statement of law, held that it was not applicable because both the stipulation and the trial court instructions effectively excluded any danger of direct enhancement.[87] The court, therefore, although approving the sweeping language of *Hoe*, was doing so only to the extent that it was the correct rule as stated in *Neale* for the exclusion of *direct* enhancement evidence.

A final case in which the broad language of *Hoe*[88] is indiscriminately cited is *Community Redevelopment Agency v. Henderson*.[89] The condemned property had been included in the scope of a redevelopment project from its inception. Accordingly, the court adhered to the general rule and held it was proper for the trial court to prohibit the cross-examination of the condemnor's expert witness when "[s]uch inquiry would have elicited evidence bearing upon the . . . enhancement of defendant's property as a result of the redevelopment."[90] Again, this broad language although intended to state only the rule disallowing direct enhancement, casts doubt upon the "direct-indirect" distinction drawn in *Neale*.[91]

Two quite recent cases pose even greater barriers to any attempt to synthesize California law on this subject. In *Redevelopment Agency v. Ziverman*[92] instructions proffered by the condemnee distinguishing between direct and indirect benefits were rejected by the trial court. The instructions were substantially the same as those set out in Huxtable's article,[93] and believed by him to be a correct statement of the law of California according to the *Neale* case. In affirming the decision of the trial court, the appellate court stated the "general rule" that the condemnation project was not to be a factor in determining the market value of the condemned property[94] and to support this conclusion cited *Pasadena v. Union Trust Co.*[95] As was

87 San Diego v. Boggeln, 164 Cal. App. 2d 1, 6, 330 P.2d 74, 77 (1958).

88 *See* text accompanying note 83 *supra*.

89 251 Cal. App. 2d 336, 59 Cal. Rptr. 311 (1967). The *Hoe* quotation was also used in People *ex rel.* Department of Pub. Works v. Di Tomaso, 248 Cal. App. 2d 741, 57 Cal. Rptr. 293 (1967). The court made it clear, however, that the quotation's applicability was limited to the exclusion of direct enhancement. In the opinion, the quotation was prefaced by the following: "Condemnor equates . . . [its contention] with an attempt to increase the value of the property being taken by considering its value as though the improvement was made." *Id.* at 767, 57 Cal. Rptr. at 310.

90 Community Redevelopment Agency v. Henderson, 251 Cal. App. 2d 336, 343, 59 Cal. Rptr. 311, 316 (1967).

91 The case of People *ex rel.* Department of Pub. Works v. Pera, 190 Cal. App 2d 497, 12 Cal. Rptr. 129 (1961), using language comparable to that in *Neale*, held that the trial court properly instructed that "enhancement in value arising *solely* and *directly* from the proposed public improvement" is not to be considered. *Id.* at 500, 12 Cal. Rptr. at 130-31 (emphasis added).

92 240 Cal. App. 2d 70, 49 Cal. Rptr. 443 (1966).

93 *See* text accompanying note 77 *supra*.

94 Redevelopment Agency v. Ziverman, 240 Cal. App. 2d 70, 76, 49 Cal. Rptr. 443, 447 (1966).

95 138 Cal. App. 21, 31 P.2d 463 (1934).

previously demonstrated, *Union Trust* was a case in which the court approved the trial court's exclusion of evidence of direct enhancement. The proffered instructions in *Ziverman* purported to do just that, namely, to exclude evidence of direct enhancement. In addition to this, however, the proferred instructions would have allowed the jury to compensate for indirect enhancement. Nevertheless, if the court relied on *Union Trust* as authority for the proposition that an *indirect* enhancement in value could not be considered, *Union Trust* was improperly cited. The court equivocated, however, and nullified its citation of *Union Trust* by stating that since there was no evidence introduced at trial as to any effect of the prospect of condemnation, the instruction was not pertinent to any issue in the case. Its exclusion, therefore, was not prejudicial and the court did not have to decide whether the proffered instruction was correct. It is doubtful, therefore, that the court in *Ziverman* was attempting to destroy the distinction in *Neale*.

In the case of *People ex rel. Department of Public Works v. Arthofer*,[96] a rather anomalous situation was presented wherein the court stated a rule, yet purported to rely on authority directly contrary to the rule stated. The case involved condemnation for freeway purposes. The condemnee purchased property near a major boulevard three months prior to the commencement of the condemnation. Although the parcel was zoned R-1 (single family dwellings) the condemnee intended to use it for R-3 purposes (apartments, etc.), hoping to obtain a zone change. While such changes had been allowed in the general area, the purchaser was unable to obtain any such variance. The State's witness testified that any zone changes in the area since 1956 were due to knowledge of the contemplated freeway and that, without the freeway, there would have been no such changes. The opinion noted that the subject property had been within the scope of the freeway project since 1960. The appellate court held that the trial judge did not abuse his discretion in not permitting the condemnee's witness to express an opinion regarding the reasonable probability of a zone change.[97] One of the reasons given for affirming the ruling was the witness' "inability to establish that . . . [zoning changes in nearby property] had occurred *prior to knowledge* of the construction of the freeway . . . ."[98] Continuing, the court stated:

> The law is likewise clear that in forming an opinion as to reasonable probability of a zone change, a witness must exclude *all* consideration of the effect of the proposed improvement, and *knowledge* of the impending improvement *may not be considered* as a factor in determining the fair market value [citing *Neale*] . . . . [A]ny testimony of reasonable probability of zone change may not take into account the proposed freeway or *any* influence arising therefrom.[99]

There was no dispute at trial that the property in question was not

[96] 245 Cal. App. 2d 454, 54 Cal. Rptr. 878 (1966).

[97] *Id.* at 464, 54 Cal. Rptr. at 885.

[98] *Id.* (emphasis added).

[99] *Id.* at 465, 54 Cal. Rptr. at 885 (emphasis added).

likely to be within the scope of the project until 1960 and that zoning changes had occurred, in anticipation of the freeway, since 1956. In light of these facts a comparison is warranted between the above quotation from *Arthofer* and the statement in *Neale* that a condemnee could derive an indirect benefit from the fact that "the public *knowledge* of a proposed improvement might cause an actual demand in the market and a subsequent advance in the current rate of price."[100]

The apparent conflict between these two statements might be dispelled by interpreting "knowledge" in the *Arthofer* quotation to mean the "knowledge of the witness," thus applying the *Neale* rule excluding evidence of direct enhancement, *i.e.*, the witness may not value the property by reference to *his* knowledge of the condemnor's project to be erected thereon. This position, however, is untenable for two reasons. First, the *Arthofer* quotation goes on to say that testimony of enhanced value because of a reasonable probability of a zone change "may not take into account the proposed freeway or *any* influence arising therefrom,"[101] which would include both the knowledge of the valuation witness (direct enhancement) and the knowledge by the general public of the advent of the freeway before its boundaries had been determined (indirect enhancement). Yet, indirect enhancement is precisely the element that *Neale* held may be considered.

Secondly, the appellate court approved the trial judge's ruling that not only was the condemnee's witness precluded from expressing an opinion on project-influenced zone changes causing a rise in property values occurring *subsequent* to 1960, when the property was certain to be taken, but he was precluded from expressing any opinion on those zone changes occurring *prior* to 1960 as well. Since the zone changes in the area began in 1956, it would have been proper, under *Neale*, for the witness to consider the effect of the project on land values in the area as enhanced by project-caused zone changes occurring prior to 1960, the date that a definite site was established. To allow this consideration would be merely to take into account a rise in property values in a general area due to the anticipation of an improvement, the boundaries of which had yet to be designated.

Is *Arthofer* contrary to *Neale*? Although the *Arthofer* court mentioned the fact that the condemnee's offer of proof failed to demonstrate that the exclusion of evidence was prejudicial, it would be erroneous to conclude that the decision rested on this minor procedural ground in light of the unmistakable and forceful language used in the opinion.[102] Moreover, the court, although citing *Neale*, could not have been merely vaguely applying the *Neale* rule disallowing "direct" enhancement because the situation in *Arthofer* involved enhancement that was claimed to have arisen *prior* to the property's

[100] San Diego Land & Town Co. v. Neale, 78 Cal. 63, 74, 20 P. 372, 377 (1888) (emphasis added).

[101] People *ex rel.* Department of Pub. Works v. Arthofer, 245 Cal. App. 2d 456, 465, 54 Cal. Rptr. 876, 885 (1966) (emphasis added).

[102] *Id.* at 464-65, 54 Cal. Rptr. at 885.

inclusion in the project. Accordingly, the conclusion must be that the court misinterpreted the "direct" enhancement rule in *Neale* and indiscriminately applied it to a situation proper for the "indirect" enhancement rule. To the extent of this misinterpretation the cases are indeed contrary.

Thus, the question is raised as to which is the better rule to be followed in California. It is suggested that the distinction drawn in *San Diego Land and Town Company v. Neale* between "direct" and "indirect" enhancement be preserved, notwithstanding the age of the case. It is a workable distinction designed to assure that justice be done to both condemnor and condemnee[103] and, in doing so, achieves a proper balance between the private right and the public good.

The *Neale* distinction, in addition, is one that best reflects the rule that market value is to be the index for just compensation.[104] As previously discussed, land that is certain to be enclosed within a public improvement cannot increase in *true* market value, *i.e.*, there is no potential for adjacency coupled with private ownership.[105] Conversely, knowledge that a public improvement is likely to be constructed at some location within a vague general area cannot help but stimulate a rise in property values within that area.[106] This increase in value, although caused by anticipation of the improvement, is an increase in *true* market value since property owners and those who would purchase from them consider property owned near a public improvement capable of being used in many more beneficial ways than it would be in absence of the improvement. Therefore, bearing in mind the definition of market value,[107] an increment attaching to the property prior to its certain or highly probable inclusion in the project should be compensated for by the condemning agency. As stated by one writer,

> When . . . the preliminary discussion has enhanced the value of the land in the neighborhood, the courts have not been inclined to create an exception to the general rule that market value at the time of the taking is the conclusive test and it is usually held that the owner is entitled to the benefit of the appreciation in value from the general expectation that the improvement for which it was taken would soon be constructed.[108]

Accordingly, to exclude evidence of this enhancement would be an abuse of discretion by the trial judge sufficient to deny the condemnee the "just compensation" that is guaranteed him in California Constitution.[109] In more practical terms, valuation is to be made as of the day before the date it became certain or probable that the property was to be condemned for the project.

---

[103] *See* text accompanying notes 34-35 *supra*.

[104] *See* text accompanying note 9 *supra*.

[105] *See* PALMER § 154; text accompanying note 48 *supra*.

[106] *See* text accompanying note 59 *supra*.

[107] *See* text accompanying note 11 *supra*.

[108] NICHOLS § 12.3151(2), at 209-10.

[109] *See* CAL. CONST. art. I, § 14.

Property Condemned to Supplement a Previously Existing Project

Not infrequently an established public improvement must be expanded to meet greater demands. When adjacent land is condemned for this purpose, the condemnee usually requests compensation for the increment of value that has accrued to his property by reason of its past adjacency to the improvement. This situation differs from the two previously discussed situations where enhancement was claimed to have arisen from the *anticipation* of the project and not, as here, from its prior *establishment*. This situation, however, must be considered in light of two possible factual variations: (1) where it was not probable, upon original establishment of the project, that the subject parcel would be included in an expansion; and (2) where it was definite or at least probable that the condemnee's parcel would subsequently be enveloped. The great weight of authority allows recovery for the added value in the first instance,[110] but denies it in the second.[111]

Lack of Probable Inclusion

Speaking for the United States Supreme Court in *United States v. Miller*,[112] Mr. Justice Roberts clearly stated the applicable rule where it is not probable at the time the project is initiated that the condemned parcel would be later included:

> If a distinct tract is condemned, in whole or part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the government at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity.[113]

Two California decisions have dealt directly with this matter. In the more recent, *Los Angeles County v. Hoe*,[114] the plaintiff sought to condemn land for a civic center. The City of El Monte had previously acquired the property adjacent to the land in question for a city hall

---

[110] *See, e.g.*, United States v. Miller, 317 U.S. 369, 376 (1943); J.A. Tobin Constr. Co. v. United States, 343 F.2d 422, 424 (10th Cir. 1965); Blas v. United States, 261 F.2d 636, 638 (9th Cir. 1958); Tigertail Quarries, Inc. v. United States, 143 F.2d 110, 111 (5th Cir. 1944); Playa De Flor Land & Improvement Co. v. United States, 70 F. Supp. 281, 374-75 (D.C.C.Z. 1945); Andrews v. State, 9 N.Y.2d 606, 606, 176 N.E.2d 42, 42-43, 217 N.Y.S.2d 9, 10 (1961) (mem.); Dallas v. Rash, 375 S.W.2d 502, 508 (Tex. Civ. App. 1964); ORGEL § 99; *cf.* ABA REPORT 126 & nn.1 & 4 (1967); ABA REPORT 115 & n.1 (1966); NICHOLS § 12.1351 (3), at 211 n.10 (Supp. 1968); Address by Mendes Hershman, Esq., New York City Bar Association, Committee on Real Property, Feb. 18, 1965.

[111] *See, e.g.*, United States v. Miller, 317 U.S. 369, 376-77 (1943); Tigertail Quarries, Inc. v. United States, 143 F.2d 110, 111 (5th Cir. 1944); United States v. 85.11 Acres of Land, 243 F. Supp. 423, 425 (N.D. Okla. 1965); ABA REPORT 113 (1966); NICHOLS § 12.3151(3); ORGEL § 100.

[112] 317 U.S. 369 (1943).

[113] *Id.* at 376.

[114] 138 Cal. App. 2d 74, 291 P.2d 98 (1955). For a detailed statement of the facts, see text accompanying note 83 *supra*.

site. The court held[115] that, since there was no evidence that Los Angeles County and the City of El Monte had originally intended to purchase jointly all the property involved, it was not improper for the condemnee's valuation witness to consider that the El Monte City Hall was to be constructed next door.[116]

In the case of *San Diego Land & Town Company v. Neale*,[117] one of the questions involved was the valuation of property in light of its adjacency to a reservoir project that later had to be expanded. The court stated, "So far as the value of the land in controversy may have been increased to purchasers generally by the construction and use of the plaintiff's dam and reservoir . . . such fact should be considered . . . ."[118] The court also noted that

> [t]he jury had a right to consider the fact, in determining the market value, that the land in controversy was in proximity to a dam site, and to consider its adaptability for reservoir purposes, and to determine whether or not its market value had been enhanced by improvements put upon adjoining property . . . .[119]

Although the California authority on this matter is sparse, it is sound, and in accord with the majority position in the United States as postulated in *United States v. Miller*.[120] Assuming that the project's expansion was not probable, inclusion of the enhancement is inescapable. By analogy to anticipatory enhancement of property values as the result of an undetermined project site, the market value of property adjacent to an already established project is doubtlessly increased by such adjacency.[121] This increase is thus a proper element of true market value, for which compensation must be made.

Probable or Definite Inclusion

If it is certain or probable that the condemnee's land will be included in the original project by a future proceeding, the authorities are united in disallowing any increase in compensation by reason of the condemned parcel's adjacency to the improvement.[122] The clearest exposition of the rule followed by virtually all courts[123] is again

115 The holding of the court was somewhat ambiguous. However, a close analysis of the case coupled with a reference to the respondent's reply brief will indicate that the court did indeed allow the condemnee to recover for enhancement due to the adjacent city hall project. *See* Reply Brief for Respondent at 7, Los Angeles County v. Hoe, 138 Cal. App. 2d 74, 291 P.2d 98 (1955) (cites *Miller* and clarifies the holding in *Hoe*).

116 *Accord*, Dallas v. Rash, 375 S.W.2d 502, 508 (Tex. Civ. App. 1964).

117 88 Cal. 50, 25 P. 977 (1891). Anticipatory enhancement was also claimed. *See* text accompanying notes 74-77 *supra*.

118 San Diego Land & Town Co. v. Neale, 88 Cal. 50, 65-66, 25 P. 977, 981 (1891).

119 *Id.* at 66, 25 P. at 981.

120 317 U.S. 369 (1943).

121 *See* text accompanying note 59 *supra*.

122 *See* authorities cited note 111 *supra*.

123 *But see* cases cited note 29 *supra*.

found in *United States v. Miller*,[124] where the court stated, "If . . . the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken . . . ."[125] The court here was referring to an instance in which the condemnee's land was definitely determined to be within the confines of the project from the outset. The court was careful to point out, however, that *definiteness* of inclusion is not always necessary to deny the owner's claim for enhancement.

> If . . . [the parcels] were within the area where they were *likely* to be taken for the project, but *might* not be, the owners were not entitled . . . to an increment of value calculated on the theory that if they had not been taken they would have been more valuable by reason of their proximity to the land taken.[126]

Thus, the condemning agency can avoid payment of any claimed enhancement by producing evidence showing that it was probable, from the beginning of the original work, that the condemnee's lands would be eventually included within the geographical scope of the project.[127] In supplementary takings, logical considerations require the conclusion that, once it is determined that the land was probably or definitely within the initial ambit of the overall project, its genuine market value, under the rule of *Miller* must include no consideration of enhancement by reason of the project. While the California appellate courts have yet directly to accept or reject the rule as stated in *Miller*, it is submitted that *Miller* is sound and should be followed.

However, even though expansion of the original project to encompass the condemnee's property is certain, if the condemnor unreasonably delays acquisition of the property the owner might be able to recover for adjacency enhancement. In a recent Texas case,[128] the condemnor had designated a specific area but embarked upon a piecemeal approach to acquire the necessary land, and unnecessarily delayed acquisition of certain tracts. The owner of later taken property was allowed to recover the value of the property at the date of taking, *including* claimed enhancement.[129] While this recovery unquestionably included enhancement elements that would not be reflected in true market value, the Texas court chose to stress the unjustifiable procrastination of the condemnor. In effect, the Texas court, in construing its pertinent constitutional provision,[130] modified the rule of *Miller* with equitable considerations. The California courts ought to take cognizance of the rule of this case in interpreting the condemna-

124 317 U.S. 369 (1943).
125 *Id.* at 376-77.
126 *Id.* at 379 (emphasis added).
127 *See id.*
128 387 S.W.2d 427 (Tex. Civ. App. 1965).
129 *Id.* at 432.
130 TEX. CONST. art. 1, § 17.

tion section of the California Constitution.[131]

Depression of Values Caused by the Public Improvement—Planning Blight

The problem examined here is distinguishable from those discussed previously in that here the proposed public project, instead of enhancing property values, depresses them. Depreciation of property values by a proposed public improvement can occur in cases in which the site of the improvement is either definite or indefinite, or where the condemnee's property is the object of a supplementary taking for an already established improvement. Frequently, long-range planning, especially in urban renewal projects, dampens any incentive to keep property within the proposed area in good repair. Owners and tenants move away, thereby inviting further deterioration through vandalism.[132] The same results may occur even though the boundaries of the project have not been defined, but only an announcement of a proposed project has been made.[133] The question thus arises whether the condemnee may recoup, as part of the fair market value of his property, the amount of depreciation that has occurred by reason of the project for which his land is condemned.

There is no general consensus on this issue. Indeed, the courts in the United States are sharply divided. Those disallowing the condemnee any recoupment for blight do so for a variety of reasons. For example, one court, interpreting literally a statute requiring damages to be assessed as of the date of the taking, held that any depreciation prior to the land's official requisition simply could not be recovered.[134] Other courts have either completely ignored any loss of value caused by the undesirable nature of the prospective improvement,[135] or, while recognizing the existence of an injury, have held such injury to be *damnum absque injuria* due to the lack of a "taking."[136] A few cases within this group classify such damages as noncompensable "incidents of ownership."[137] Another approach used to deny recovery is to argue that computation of such damages would be too speculative, and deny the existence of any "method of compensating an owner for

---

[131] CAL. CONST. art. I, § 14.

[132] Note, *Challenging the Condemnor's Right to Condemn: Avoidance of Peripheral Damages*, 1967 WASH. U.L.Q. 436, 438 & nn.8-10 (1967).

[133] *Id.* at 439 & n.15; *see* NICHOLS § 12.3151.

[134] *See* Saint Louis Housing Authority v. Barnes, 375 S.W.2d 144, 147-48 (Mo. 1965). *Contra*, Cole v. Boston Edison Co., 338 Mass. 661, 665, 157 N.E.2d 209, 212 (1959).

[135] Note, *Challenging the Condemnor's Right to Condemn: Avoidance of Peripheral Damages*, 1967 WASH. U.L.Q. 436, 439 & n.14.

[136] *Id.* at 440 & n.18 (citing cases). The same has been held regarding plotting the project on a formal map. *Id.* at 441 & n.22.

[137] *See, e.g.*, Sorbino v. New Brunswick, 43 N.J. Super. 554, 129 A.2d 473 (Super. Ct. 1957).

such consequences of congressional action."[138]

Although the above authorities are still considered "good law," there has been a significant and swelling movement toward the contrary position. Illustrative of this trend is the decision by the United States Supreme Court in *United States v. Virginia Electric & Power Company*,[139] involving condemnation of a flowage easement for reservoir purposes. Mr. Justice Stewart made it clear in his opinion that "[t]he value of the easement must . . . [not be] diminished by the special need which the government had for it. . . . The court must exclude any depreciation in value caused by the prospective taking once the government was committed to the project. . . ."[140]

The attack waged by the authorities for this position is derived from two basic premises. The first of these is that it would be unjust, and, therefore, against public policy, to allow a public authority to depress property values in an area and then, by finally designating a site, gain an undeserved windfall through having the condemned parcel valued as of the date it is officially taken.[141] Accordingly, while "market value at the time of taking" is the standard to which lip service is given, a different rule is oftentimes used for the sake of justice.[142] The result is that various rules have been formulated by the courts to avoid the harsh effects of a literal statutory interpretation.[143]

---

[138] United States v. Certain Lands, 47 F. Supp. 934, 937 (S.D.N.Y. 1942), noted in ORGEL § 105, at 449 n.52.

[139] 365 U.S. 624 (1961).

[140] *Id.* at 636; accord, Playa De Flor Land & Improvement Co. v. United States, 70 F. Supp. 281, 357 (D.C.C.Z. 1945). Mendes Hershman cited *Virginia Electric* in his address of February 18, 1965 to the New York City Bar Association, Committee on Real Property, and stated that the property owner should be protected against decrease in value caused by the project, not only when the project goes through, but if withdrawn. Nichol's treatise takes substantially the same position. *See* NICHOLS § 12.3151(2) (Supp. 1968).

[141] *See* 2 J. LEWIS, EMINENT DOMAIN § 745 (3d ed. 1909); ORGEL § 105. "To allow a public agency to depress market values in a particular neighborhood by threatening to erect an offensive structure in its midst, and then to take advantage of this depression in paying for the land required for the structure would be so abhorrent to the public sense of justice that it has never been seriously argued that it could be done." NICHOLS § 12.3151(2), at 209. Although this statement refers only to an "offensive structure," the same conclusions should be drawn regarding an "unoffensive structure" the advent of which caused a depreciation in property values.

[142] ORGEL § 106.

[143] *See, e.g.*, State Rd. Dep't v. Chicone, 158 So. 2d 753, 756-57 (Fla. 1963) (property valued as though no threat of condemnation); Tharp v. Urban Renewal & Community Dev. Agency, 389 S.W.2d 453, 456 (Ky. 1965) (property valued at time prior to public knowledge of project); Congressional School of Aeronautics v. State Rds. Comm'n, 218 Md. 236, 250, 146 A.2d 558, 565 (1958); Cole v. Boston Edison Co., 338 Mass. 661, 665, 157 N.E.2d 209, 212 (1959) (property valued before beginning of "entire public work"); Cleveland v. Carcione, 118 Ohio App. 525, 532-33, 190 N.E.2d 52, 57 (1963) (property valued before city "took active steps"); Hermann v. North P.R.R., 270 Pa. 551, 554, 113 A. 828, 829 (1921) (incohate right for which condemnor must pay).

The second premise, exemplified by *Foster v. Detroit*,[144] takes a position directly contrary to many authorities[145] and holds that

> the actions of the [condemnor] which substantially contributed to and accelerated the decline in value of plaintiff's property constituted a 'taking' of plaintiff's property within the meaning of the Fifth Amendment [to the United States Constitution], for which compensation must be paid.[146]

Cases have arisen wherein the mere long-range planning and mapping of a project have caused a substantial decrease in property values.[147] Taken literally, the above quotation could be construed to hold that the mere mapping of a project constitutes a "taking" for which compensation must be paid if values fall. This conclusion, however, would be erroneous. A survey of the facts of the *Foster* case indicates that the actions taken by the condemnor went far beyond a mere mapping and were so extreme as to justify the holding that there had been a "taking" even before official condemnation had been instituted.

The City of Detroit began to plan for urban redevelopment well in advance of initiating condemnation proceedings. The plan was carried just short of the point of final execution (physical taking) and then abandoned. A second plan was later begun, and nearly all the property surrounding the condemnee's parcel was condemned and buildings destroyed. The condemnee's property, never officially taken before the second plan was begun, was vandalized almost to the extent of total destruction. The property was finally condemned officially and taken for a meager sum under a "value at the time of taking" statute. The condemnee then sued to recover the alleged deficit. The extreme circumstances of this case seem to align it with others that have held, under similar facts, that justice demanded recognition of a compensable "taking."[148] Thus, *Foster* is somewhat questionable authority for the sweeping proposition that the planning or mapping of a project is a "taking" for which compensation must be paid in the event of a fall in property values.

In California, certain districts of the Court of Appeal are embroiled in the conflict of whether a condemnee should be allowed to recover for blight. The First and Second Appellate Districts hold that the condemnee may not recoup depreciation resulting from the planned project,[149] while the Third and Fourth hold such depreciation

---

[144] 254 F. Supp. 655 (E.D. Mich. 1966).

[145] *See* text accompanying note 135 *supra*.

[146] Foster v. Detroit, 254 F. Supp. 655, 665-66 (E.D. Mich. 1966); *accord*, Detroit v. Cassese, 376 Mich. 311, 318, 136 N.W.2d 896, 900 (1965).

[147] *See* note 132 *supra*.

[148] *E.g.*, *In re* Philadelphia Parkway, 250 Pa. 257, 95 A. 429 (1915); *see* Annot., 64 A.L.R. 546, 551-52 (1928).

[149] Community Redevelopment Agency v. Henderson, 251 Cal. App. 2d 336, 343, 59 Cal. Rptr. 311, 315 (1967) (2d District); Oakland v. Partridge, 214 Cal. App. 2d 196, 203, 29 Cal. Rptr. 388, 392 (1963) (1st District); People v. Lucas, 155 Cal. App. 2d 1, 6, 317 P.2d 104, 107 (1957) (1st District); Atchison, T. & S.F.R.R. v. Southern Pac. Co., 13 Cal. App. 2d 505, 518, 57 P.2d 575, 581

compensable.[150] The position taken by these latter courts was summarized in the case of *Buena Park School District v. Metrim Corporation*,[151] in which the court stated:

> It is a matter of common knowledge that a purchaser would not buy property in the process of being condemned except at a figure much below its actual value. It follows, therefore, that in arriving at the fair market value it is necessary that the jury disregard not only the fact of the filing of the case but should also disregard the effect of steps taken by the condemning authority toward that acquisition. To hold otherwise would permit a public body to depress the market value of the property for the purpose of acquiring it at less than market value.[152]

This position is substantially the same as that taken by the courts of other states in denying the condemnor's claim that the property should be valued at the date of actual taking.[153] However, neither *Buena Park* nor *People ex rel. Department of Public Works v. Lillard*[154] argued that the depreciation in property values constituted a "taking" or a "damaging" under the condemnation section of the California Constitution;[155] both founded their position on the idea that it is against public policy to allow a condemnor to announce a proposed improvement that causes land values to fall, then later step in and purchase the property at this depressed price.

Several California cases have expressed a view contrary to *Buena Park* and *Lillard*, the most significant of these being *Atchison, Topeka & Santa Fe Railway v. Southern Pacific Company*.[156] In this case, the State Railroad Commissioner in 1927 issued an order for construction of a depot upon the condemnee's property. The condemnation proceeding was not filed until December, 1933. At trial the condemnee claimed that the order of 1927 so "stigmatized" the land that when it was finally condemned in 1933 its value was materially lower than it would have been in the absence of such order. The trial court disallowed any testimony to this effect. The appellate court affirmed the decision, stating that although the order caused a decline in appellant's property value, "[t]he law does not . . . lend a willing ear to speculation. . . . The market value is an effect and we are not

(1936) (2d District); *cf.* Redevelopment Agency v. Maynard, 244 Cal. App. 2d 260, 265, 53 Cal. Rptr. 42, 46 (1966) (1st District).

[150] People *ex rel.* Department of Pub. Works v. Lillard, 219 Cal. App. 2d 368, 377, 33 Cal. Rptr. 189, 194 (1963) (3d District); Buena Park School Dist. v. Metrim Corp., 176 Cal. App. 2d 255, 258-59, 1 Cal. Rptr. 250, 253 (1959) (4th District). *See also* Anderson, *Consequences of Anticipated Eminent Domain Proceedings—Is Loss of Value A Factor?*, 5 SANTA CLARA LAW. 35 (1964) (incisive comparison of *Lillard* and *Buena Park* with *Atchison*, *Lucas* and *Partridge*).

[151] 176 Cal. App. 2d 255, 1 Cal. Rptr. 250 (1959).

[152] *Id.* at 258-59, 1 Cal. Rptr. at 253.

[153] *See* cases cited note 143 *supra*.

[154] 219 Cal. App. 2d 368, 33 Cal. Rptr. 189 (1963).

[155] CAL. CONST. art. I, § 14.

[156] 13 Cal. App. 2d 505, 57 P.2d 575 (1936).

governed by the cause that brings it about in order to determine it."[157]

The court quoted from *San Diego Land and Town Company v. Neale* to the effect that the "benefits" arising from the proposed improvement may not be considered as an element of value,[158] and went on to ask, "If the benefits may not be considered, why consider the detriment? A value so derived is too remote and speculative."[159] *Atchison's* reliance upon *Neale* in this context has been severely criticized.[160] Moreover, the court's argument that to compensate the condemnee for depressed value is to engage in speculation is open to serious question.

Concededly, it would be difficult to argue that the Commissioner's order in 1927 constituted a "taking" or a "damaging" under Article I, section 14 of the California Constitution, since the overwhelming weight of California authority is against it.[161] However, it is difficult to see how the condemnee is engaging in "speculation" by endeavoring to prove the amount of his property's depreciation due to the impending project. The most plausible explanation for this argument of the court is that at the time of the *Atchison* decision, evidence of sales of nearby property to prove the market value of the condemned parcel was improper on direct examination. But this rule was subsequently changed by *Los Angeles County v. Faus*,[162] where it was held that evidence of sales of "similar" property could be elicited on direct examination.[163] In light of the *Faus* decision, therefore, it appears that the condemnee, in conjunction with satisfying his burden of persuasion on the issue of fair market value,[164] could easily introduce sales evidence showing the value of his property just prior to the instigation of the project as compared to its value when official condemnation took place. Through this method he not only would avoid the speculation argument, but would receive truly "just compensation" by being recompensed for depreciation due to the condemnor's project.

---

157 *Id.* at 517, 57 P.2d at 581.

158 San Diego Land & Town Co. v. Neale, 78 Cal. 63, 74-75, 20 P. 372, 377 (1888).

159 Atchison, T. & S.F.R.R. v. Southern Pac. Co., 13 Cal. App. 2d 505, 518, 57 P.2d 575, 581 (1936).

160 *See* Anderson, *Consequence of Anticipated Eminent Domain Proceedings—Is Loss of Value A Factor?*, 5 SANTA CLARA LAW. 35 (1964).

161 *See* Heimann v. Los Angeles, 30 Cal. 2d 746, 754, 185 P.2d 597, 602 (1947); Eachus v. Los Angeles Ry., 130 Cal. 614, 621, 37 P. 750, 753 (1894); Santa Clara County v. Curtner, 245 Cal. App. 2d 730, 746, 54 Cal. Rptr. 257, 267 (1966); Hilltop Properties v. State, 233 Cal. App. 2d 349, 356, 43 Cal. Rptr. 605, 609 (1965); Gianni v. San Diego, 194 Cal. App. 2d 56, 61, 14 Cal. Rptr. 783, 786 (1961); Stafford v. People *ex rel.* Department of Pub. Works, 144 Cal. App. 2d 79, 82, 300 P.2d 231, 233 (1956); Silva v. San Francisco, 87 Cal. App. 2d 784, 787, 198 P.2d 78, 80 (1948).

162 48 Cal. 2d 672, 312 P.2d 680 (1957).

163 *Id.* at 676, 312 P.2d at 683; *see* CAL. EVID. CODE §§ 812, 816.

164 *See* text accompanying note 15 *supra*.

Under these circumstances it is irrelevant to distinguish the situation in which the property is at all times certain to be included in the project from that in which the project site is indefinite. Nor does it matter that a supplementary taking is involved. If the property is definitely included, its market value is "frozen," or as one court put it, "sterilized,"[165] due to the fact that there can be no further expectation of private use and ownership. Accordingly, the market value of the property cannot decrease subsequent to the time of its designation for the project. Moreover, if the site of the value-depressing public work is uncertain for a period, causing market values in a general area to plummet, this should not be charged against the condemnee. Although he does perhaps gain a windfall at the expense of adjacent owners, the fact remains that it is *his* land that is being *taken*. The statement in *Atchison* that the court cannot concern itself with the causes of market value[166] ignores that the cause of depression of market values is the condemnor, who will reap the benefit of the property owner's loss. To vest in a condemning agency, which is the moving party, even the potential power to depress values for its own windfall would create a serious impediment to justice.[167] In such circumstances, the scales must be weighted in favor of the condemnee. In light of this, there is clearly no merit to the illogical reasoning followed by many courts, and quoted in *Atchison*, that "[i]f the benefits [of the project] may not be considered, why consider the detriment . . . ?"[168]

Conclusion

The ultimate question in determining recovery for enhancement or blight is whether or not the amount given is truly "just compensation," *i.e.*, "just" to both condemnor and condemnee.[169] As to enhancement, there should be no recovery for enhancement claimed to have arisen *after* the designation of a site. The scales must balance in favor of the condemnor in such a case, for, barring any unreasonable delay, too great a financial burden would be otherwise imposed. However, if enhancement arises *prior* to the determination of the site,

[165] *See* note 42 *supra*.

[166] Atchison, T. & S.F.R.R. v. Southern Pac. Co., 13 Cal. App. 2d 505, 517, 57 P.2d 575, 581 (1936). That the Supreme Court of Florida is indeed concerned with the causes of market value is evidenced by its statement that "compensation shall be based on value of the property as it would be at the time of the taking if it had not been subjected to the debilitating threat of condemnation and was not being taken." State Rd. Dep't v. Chicone, 158 So. 2d 753, 758 (Fla. 1963).

[167] *See* NICHOLLS § 12.3151(2); Anderson, *Consequence of Anticipated Eminent Domain Proceedings—Is Loss of Value A Factor?*, 5 SANTA CLARA LAW. 35, 41 n.32 (1964); *cf.* ORGEL §§ 105-06.

[168] Atchison, T. & S.F.R.R. v. Southern Pac. Co., 13 Cal. App. 2d 505, 517, 518, 57 P.2d 575, 581 (1936); *see* text accompanying notes 156-59 *supra*.

[169] People *ex rel.* Department of Pub. Works v. Pera, 190 Cal. App. 2d 497, 499, 12 Cal. Rptr. 129, 130 (1961).

it should be included in compensation as a genuine element of true market value. Similar considerations are involved in the case of a supplementary taking, the result depending upon whether the land subsequently enveloped was or was not likely to be needed from the *inception* of the overall project. Thus, with enhancement, "just compensation" is measured by the property's market value as of the day before it became certain or likely the land would be taken for the project. In the case of blight, whether or not a particular site has been determined is irrelevant. "Just compensation" here is achieved when market value in all cases is determined as of the day before news of the proposed project in general first reached the public.

*Gary A. Owen**

---

*Member, Third Year Class.

[Sac. No. 7872. In Bank. Mar. 31, 1971.]

MERCED IRRIGATION DISTRICT, Plaintiff and Appellant, v.
MAZIE WOOLSTENHULME, Defendant and Respondent.

SUMMARY

In eminent domain proceedings initiated by an irigation district, defendant was awarded a specified sum per acre for her lands that were condemned, and was also awarded attorney fees under Code Civ. Proc., § 1255a, based on the district's purported abandonment of part of its demands. (Superior Court of Mariposa County, Thomas Coakley, Judge.)

The district, on its appeal, attacked the valuation established by the jury on the ground, among others, that the jury improperly considered the "project enhanced" value which accrued to defendant's property prior to the time that it was reasonably probable that the property would be taken for the improvement. In affirming the judgment with respect to valuation, the Supreme Court distinguished among three different types of "project enhanced" values and noted that two of these are not properly considered in determining "just compensation" in condemnation cases, but pointed out that the instant proceeding involved the third type, in which the increase, although attributable to the project, reflected a reasonable expectation that the property would not be taken for the improvement, and was, therefore, properly considered in eminent domain proceedings pursuant to which the land was ultimately taken. The court vacated the cost order and remanded defendant's motion for costs and disbursements for recomputation in accordance with its opinion, but affirmed the judgment in all other respects. (Opinion by Tobriner, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to McKinney's Digest

(1) **Eminent Domain § 87—Compensation—Evidence as to Damages—Value of Land Taken—Value of Other Land—Sales.**—The mere fact that certain sales of property alluded to in condemnation proceedings reflect substantial "project enhancement" does not necessarily make them noncomparable with respect to Evid. Code, § 816, permitting evidence of comparable sales in determining the value of property.

(2) **Eminent Domain § 69(0.5)—Compensation—Estimation of Damages—Value of Property Taken—Elements Considered in Ascertainment of Value.**—A legitimate element of "just compensation" as related to condemnation proceedings lies in the increase in value resulting from a reasonable expectation that a particular piece of property will be outside a proposed public improvement, and, thus, will reap the benefits of the improvement.

(3) **Eminent Domain § 69(0.5)—Compensation—Estimation of Damages—Value of Property Taken—Elements Considered in Ascertainment of Value.**—Where property which has increased in value out of an initial anticipation that the property would be outside of a public improvement must, itself, be taken for the construction or creation of that improvement, the owner of the land to be taken should be compensated for the loss of this increase in value that occurred prior to the time that it was known that the particular piece of property would be included in the project.

(4) **Eminent Domain § 69(0.5)—Compensation—Estimation of Damages—Value of Property Taken—Elements Considered in Ascertainment of Value.**—In determining "just compensation," under the market value standard applicable to eminent domain proceedings, the increase that the condemned tract gains when valued as part of the proposed project may not be considered.

[See **Cal.Jur.2d,** Eminent Domain, § 129.]

(5) **Eminent Domain § 69(0.5)—Compensation—Estimation of Damages—Value of Property Taken—Elements Considered in Ascertainment of Value.**—Increase in value of land due to speculation based on the imminence of a taking of that land through condemnation is not to be considered in determining the fair market value for condemnation

purposes, contemplated by the "just compensation" requirement of Cal. Const., art. I, § 14.

(6) **Eminent Domain § 69(0.5)—Compensation—Estimation of Damages—Value of Property Taken—Elements Considered in Ascertainment of Value.**—Increase in value of land in anticipation that it will reap benefits resulting from proximity to a contemplated project involving the condemnation of other lands may be considered in measuring the market value contemplated by the "just compensation" requirement of Cal. Const., art. I, § 14.

(7) **Eminent Domain § 43(1)—Necessity for and Right to Compensation—State Constitutional Guaranty.**—Although "just compensation," as the term is used in Cal. Const., art. I, § 14, and as applied to the condemnation of property, contemplates compensation measured by what the landowner has lost, rather than by what the condemner has gained, nevertheless, the state bears the responsibility of meeting the reasonable market evaluation of potential sellers or purchasers.

(8) **Eminent Domain § 43(1)—Necessity for and Right to Compensation—State Constitutional Guaranty.**—Where the government decides, some time after the initial completion of a project, that expansion of the project is necessary, the constitutional requirement of "just compensation" entitles a condemnee, who had previously purchased his property at an increased price in expectation that he would be near the improvement, to compensation for full market value, including the increment paid for "project enhancement."

(9) **Eminent Domain § 69(0.5)—Compensation—Estimation of Damages—Value of Property Taken—Elements Considered in Ascertainment of Value.**—Increases in value of property attributable to a project but reflecting a reasonable expectation that the particular property will not be taken for the improvement pursuant to proceedings in eminent domain are properly considered in determining "just compensation." (Disapproving, to the extent that they contain broad statements inconsistent with this conclusion, *People* ex rel. *Dept. Pub. Wks.* v. *Shasta Pipe etc. Co.*, 264 Cal.App.2d 520, 539 [70 Cal. Rptr. 618]; *People* ex rel. *Dept. Water Resources* v. *Brown*, 255 Cal.App.2d 597, 599 [63 Cal.Rptr. 363]; *Community Rede-*

velopment Agency v. *Henderson*, 251 Cal.App.2d 336, 343 [59 Cal. Rptr. 311]; *City of San Diego* v. *Boggeln*, 164 Cal.App.2d 1, 5 [330 P.2d 74]; *County of Los Angeles* v. *Hoe*, 138 Cal.App.2d 74, 78 [291 P.2d 98]; *City of Pasadena* v. *Union Trust Co.*, 138 Cal.App. 21, 26 [31 P.2d 463].)

(10) Eminent Domain § 69(0.5)—Compensation—Estimation of Damages —Value of Property Taken—Elements Considered in Ascertainment of Value.—Enhancement value should not be includable in "just compensation," as the term is applied in condemnation proceedings, where the condemned lands were probably within the scope of the project from the time the government was committed to it.

(11) Eminent Domain § 69(0.5)—Compensation—Estimation of Damages —Value of Property Taken—Elements Considered in Ascertainment of Value.—If at the time that planning for a proposed project first became public and the consequent enhancement of land values began, the probability was that the land in question would not be taken for the project, the landowner would be entitled to compensation for some project enhancement, but once it becomes reasonably foreseeable that the land is likely to be condemned for the improvement, project enhancement, for all practical purposes, ceases, and thus, in computing "just compensation" in such a case, the jury should consider only the increase in value attributable to the project up to the time when it became probable that the land would be needed for the improvement.

(12a, 12b) Eminent Domain § 87—Compensation—Evidence as to Damages—Value of Land Taken—Value of Other Land—Sales.—In condemnation proceedings, it was not an abuse of discretion to admit evidence of certain sales as "comparable" sales, within the meaning of Evid. Code, § 816, relating to the evaluation of property, despite the fact that they reflected "substantial project enhancement," where the court could reasonably conclude that such sales were capable of "shedding light," as the expression is used in that code section, on the effect of inflation, population growth, and the construction of freeways, to which factors considerable testimony had attributed an increase in value.

(13) Eminent Domain § 87—Compensation—Evidence as to Damages—Value of Land Taken—Value of Other Land—Sales.—Evid. Code,

§ 822, subd. (d), prohibiting the admission of certain opinion evidence on the issue of the value of property, does not preclude an appraiser, when referring to "comparable sales," from explaining any adjustments that must be made in the "comparable sale" price, in utilizing that sale as an indicant of the value of the property to be taken in condemnation proceedings.

(14) **Eminent Domain § 189—Proceedings—Costs and Fees—Items Taxable—On Dismissal or Abandonment.**—Assuming, without deciding, that an award of attorney fees under Code Civ. Proc., § 1255a, entitling a condemnee to attorney fees incurred in preparing to defend a condemnation action which is later abandoned, is precluded in the case of a contingent fee contract, nevertheless, such an award was proper, where the evidence sustained the court's finding that the fee contract, originally calling for a contingent fee, had been modified so as to no longer be purely contingent in the case of abandonment, and where the attorney had, in fact, performed services in preparing to defend against demands that were subsequently abandoned.

(15a, 15b) **Eminent Domain § 189—Proceedings—Costs and Fees—Items Taxable—On Dismissal or Abandonment.**—In a condemnation proceeding, it was error to award attorney fees under Code Civ. Proc., § 1255a, on the ground that the plaintiff had, by amending its complaint, abandoned its demand for grazing and water rights as to a particular parcel of land, where the amendment actually constituted an enlargement of the original demand, in that it sought, in addition to the grazing and water rights, all other interests in the parcel, so as to acquire the fee simple estate.

(16) **Eminent Domain § 189—Proceedings—Costs and Fees—Items Taxable—On Dismissal or Abandonment.**—Code Civ. Proc., § 1255a, is designed to compensate a defendant for expenses incurred in anticipation of an eminent domain proceeding, where the condemner declines to carry the proceeding through to its conclusion.

COUNSEL

Ross, Webber & Hackett, Robert S. Webber and Adams & Quigley for Plaintiff and Appellant.

Harry S. Fenton, John P. Horgan, William R. Edgar, Robert R. Buell, John D. Maharg, County Counsel (Los Angeles), A. R. Early, Assistant County

Counsel, John H. Lauten, Adrian Kuyper, County Counsel (Orange), and Robert F. Nuttman, Assistant County Counsel, as Amici Curiae on behalf of Plaintiff and Appellant.

Ben Curry for Defendant and Respondent.

Thorpe, Sullivan, Clinnin & Workman, Otto A. Jacobs, Robert H. Jacobs, Kilpatrick, Peterson & Ely, Desmond, Miller & Desmond, Richard F. Desmond, Fadem & Kanner and Gideon Kanner as Amici Curiae on behalf of Defendant and Respondent.

OPINION

TOBRINER, J.—In response to the mounting social, environmental and health crises of recent years, governmental authorities have considerably expanded the planning and construction of "public improvements." Because the definite commencement of a public project is almost invariably preceded by significant publicity and public interest, land values in the vicinity of the potential project often will increase in response to this foreknowledge. A recurring issue in eminent domain litigation is whether, and to what extent, such increases[1] in land values attributable to the proposed project comprise a proper element of the "just compensation" to be paid to a land-

[1]Several of the amici curiae in this matter have urged the court to address the issue of whether the *depreciation* of land values, resulting from the announcement of a public improvement is to be taken into consideration in computing just compensation. Although, of course, that issue and the enhancement issue presented by the facts of the three cases before us do show some correlations, we do not believe we should attempt to resolve the question of "project depreciation" ("project blight") in the abstract.

Most jurisdictions which have probed the problem do not follow identical rules with respect to project enhancement and project blight (4 Nichols on Eminent Domain (3d ed. 1962) § 12.3151[2], pp. 209-210), and several commentators have suggested that differential treatment may be the proper approach (see, e.g., Anderson, *Consequences of Anticipated Eminent Domain Proceedings—Is Loss of Value a Factor?* (1964) 5 Santa Clara Law. 35; Note, *Recovery for Enhancement and Blight in California* (1969) 20 Hastings L.J. 622, 643-648). A major reason for a distinction between the two is that in the case of project blight, unlike enhancement, there is a danger that the government will announce the project in order to drive down neighborhood land values, and then attempt to take advantage of the depressed values when paying compensation for property it condemns. (See *Uvodich* v. *Arizona Board of Regents* (1969) 9 Ariz.App. 400 [453 P.2d 229, 234-235]; cf. *United States* v. *Virginia Elec. & Power Co.* (1961) 365 U.S. 624, 635-636 [5 L.Ed.2d 838, 848-849, 81 S.Ct. 784].)

In view of the additional complexities involved in the "blight" situation, we have concluded that before attempting to devise a general rule we should await a case presenting that matter directly.

owner if his land is ultimately taken for a project. This question has not been definitely resolved by California decisions to date;[2] three cases before our court today require us to confront this issue of the proper interpretation of our constitutional "just compensation" clause directly, and additionally require us to probe the practical problems of application attending our constitutional conclusions.

For the reasons discussed hereafter, we have concluded that the few appellate decisions which have intimated that any increase in value arising from the expectation of the coming project should be excluded from just compensation must be reexamined in light of the realities of a landowner's position. In the early stages of a desirable project's development, land which is expected to be within the vicinity of the project, but is not expected to be taken for the project, will naturally increase in value, and a landowner who chooses to sell such land at this time will gain the benefit of this incremental value; similarly, one who buys such land at this time must pay this incremental amount for his purchase. It is not until a particular piece of property is reasonably expected to be condemned for the project that this enhanced market value, attributable to the land's anticipated proximity to the improvement, disappears. We have determined that it would be unfair, in computing just compensation, to eliminate the appreciation in market value which a specific piece of property in fact enjoyed before it was designated for condemnation, since that would in effect deny to the owner the market value of his property prior to the time it was pinpointed for taking.

1. *The facts of the instant case.*

Mrs. Mazie Woolstenhulme, defendant-landowner in the instant eminent domain action, owns a ranch of approximately 13,150 acres in a remote portion of Mariposa County. One end of the ranch borders Lake McClure, an artificial lake created in 1927 and owned by Merced Irrigation District, the condemner in this proceeding. In the present action, the district condemned 189 acres of defendant's land for use in connection with a new, multipurpose water project planned for the region. The jury awarded defendant $250 per acre for this land, and the district attacks this valuation on appeal.

Prior to the commencement of the district's new water project, little domestic water and no power was available in the Lake McClure region; land in the area was largely uninhabited and devoted primarily to cattle grazing. Lake McClure was subject to wide seasonal fluctuation, covering

[2]See generally, Note, *Recovery for Enhancement and Blight in California* (1969) 20 Hastings L.J. 622.

a maximum of 2,700 acres during the winter months, but contracting to merely 30 acres, surrounded by mudflats, in summer. The district owned a buffer strip of 200 feet around the lake, presumably adjacent to the lake's border in its high water stage. Evidence introduced at trial revealed that, during this pre-improvement stage, land in the area had not sold for higher than $125 an acre.

In the late 1950's the district began evolving plans for a new Lake McClure project that was considerably to alter the nature of the area. The new project was to increase the size of the lake, and eliminate most of the fluctuation in its coverage and depth; it was to provide the neighboring lands with power and domestic water not available from the old dam and lake. By 1962 the district had begun a quest for federal funds to assist in the financing of the project, and early in 1963 several newspaper articles informed the public that the completed Lake McClure project would include recreational facilities, such as camping, boating and fishing. The trial court found that about January 1, 1963 the public, while unaware of "exactly what area, what spots were to be recreation," did know of the general recreation plans, and that, as a result, property values in the area began to increase within a short time thereafter. The court also found that by January 1, 1965 the plans for the project had progressed to a point where it became "reasonably probable"[3] that the present parcel of defendant's land would be taken for the project.[4] During 1965 and 1966, a flurry of land sales occurred in the area at prices ranging from $250 to $600 an acre. The district filed the amended complaint on which this action is based in August 1967.

At trial plaintiff condemner's appraisal witness testified that, omitting

[3]Some dispute has arisen over whether January 1, 1965 was the date at which the inclusion of defendant's land became "definite" or just "reasonably probable." At one point in the record the trial judge stated that "I am not going to apply a rule of certainty. I am going to use probability, apply the rule of probability." Thereafter, when the judge set the date as January 1, 1965, he stated: "[T]his was a very fluid thing, but somewhere between the 29th of November, '63 and December of 1965, this became pretty definite, that the Barrett Cove area and this property, or much of it, was going to be taken. And of necessity I must be a little bit arbitrary and I will make it January 1, 1965." We believe the most reasonable interpretation of the record is that the January 1, 1965 date was reached by application of the "probability" standard.

[4]Actually 117 of the 189 acres involved in this action were known to be included in the project long before 1965, because those acres were to be actually flooded by the expansion of the lake; the recreation aspect concerned only 72 acres of the present parcel. Recognizing the difficulty the jury would have in understanding an extremely complex instruction submitted by defendant which drew this distinction, the district's counsel agreed that the instruction could be modified to relate to the entire 189 acres. On this appeal both parties have treated the trial court's finding as going to the inclusion of all of defendant's property and, consequently, we adopt the same approach.

consideration of the new Lake McClure project, cattle grazing was the highest and best use of the 189 acres in question, and he valued the land, on the basis of the normal market value of such land in the past, at $125 an acre. Mrs. Woolstenhulme, the defendant-landowner, stated that in her opinion the property had a value of $600 an acre; she admitted, however, that in February 1966 she had sold a similar parcel of her ranch for $250 an acre. Defendant's expert appraisal witness, Richard Leuschner, testified that when used for grazing purposes as part of defendant's ranch, the land would have a value of $200 an acre. Leuschner declared, however, that viewing the 189 acres as a separate tract, "development," rather than cattle grazing, was the highest and best use of the property and he stated that, on the basis of his examination of sales of comparable properties, he would evaluate defendant's land at $600 an acre, after deducting $50 an acre of "enhanced value" arising from the Lake McClure project.

In attempting to explain this surprisingly small increment of value which he attributed to the pending improvement, Leuschner testified that he believed that the new Lake McClure project was only one of a considerable number of factors resulting in the rapid increase in land value in the region, and was not an overwhelming factor at that. The appraiser described a growing statewide trend, stretching over almost a decade, of sales of agricultural foothill property to city residents seeking a country "home away from home"; he attributed the trend, in large part, to the tremendous population increase in California's urban centers in recent years. Leuschner also testified that although Mariposa County is relatively far removed from the heavily populated areas of Los Angeles and the Bay region, newly constructed freeways had reduced the traveling time considerably and had made the region accessible for "recreational development" purposes. The appraiser concluded that even without the new water project, the area would have been an attractive "development" site, for he considered the old lake adequate for swimming and fishing.

In support of Leuschner's valuation, defendants offered evidence of some of the 1965 and 1966 sales of neighboring parcels as "comparable sales" under section 816 of the Evidence Code. The district objected to the introduction of these sales on the grounds that the sale prices reflected an increase or enhancement in value attributable to benefits created by the very project for which condemnation was sought, an enhancement which the district contended was not a proper element of "just compensation." The condemner strongly disputed Leuschner's analysis of the increase in land values in the area, and argued that it was the new project which had transformed land, previously useful only for grazing, into valuable lakefront sites. The trial judge, although finding that the proffered sales reflected "substantial enhancement" due to the recreational potential

of the project, nevertheless admitted the evidence, indicating that he would instruct the jury to eliminate any post-January 1, 1965 enhancement attributable to the project from the determination of just compensation. The jury was so instructed,[5] and, as stated above, awarded defendant $250 an acre.

On this appeal the district raises two principal objections to the trial court's valuation rulings. First, the district contends that the court erred in instructing the jury to exclude *only* that "enhancement value" which arose after January 1, 1965. The district asserts that the general rule in this state is that, in determining just compensation, *all* "enhanced value" attributable to the condemner's proposed improvement must be excluded and that the court erred in permitting defendant to recover the pre-1965 increment in value which resulted from public knowledge and expectation of the Lake McClure project. Second, the district contends that, even assuming that pre-1965 enhancement was a proper element of compensation, the trial judge erred in admitting evidence of sales which were found to reflect "substantial" post-January 1, 1965 enhancement. Plaintiff asserts that such sales are not "comparable sales" within the meaning of section 816 of the Evidence Code, and thus are inadmissible.

As explained below, we have concluded that neither of plaintiff's objections should be sustained. We shall initially point out that, under our just compensation clause, an owner of the condemned property should be compensated for the increase in value which his land has experienced in anticipation of the benefits of a proposed improvement, so long as it is not reasonably probable that the specific piece of property being evaluated is to be taken for the improvement. (1) Secondly, we shall explain that under Evidence Code section 816, sales are not necessarily "non-comparable" simply because they reflect "substantial" project enhancement, and thus a trial court, in exercising the discretion granted by the statutory provision, may properly admit such sales in evidence.

We turn first to the proper measure of just compensation in these circumstances.

[5]The judge instructed the jury that: "You are not to take, to consider any increase in value after January 1, 1965—that is, related solely to the recreation. You may take enhancement into consideration—for example, what the experts have talked about, the natural increase in value of farm land, six or seven percent; any other factor of enhancement that may be in this case that you believe is applicable. . . . But you can't consider any enhancement that came about by virtue of public knowledge of this project for recreational purposes after [January] 1, 1965. . . ."

2. *The trial court did not err in permitting the jury, in determining just compensation, to consider the "project enhanced" value which accrued to defendant's property prior to the time that it was reasonably probable that the property would be taken for the improvement.*

(2) (a) *A legitimate element of just compensation lies in the increase in value resulting from a reasonable expectation that a particular piece of property will be outside a proposed public improvement, and thus will reap the benefits of that improvement.*

Article I, section 14 of the California Constitution provides that "Private property shall not be taken or damaged for public use without just compensation having first been made to . . . the owner . . ." and although the constitutional provision does not explicitly define the measure of "just compensation," it has long been established that in general "the compensation required is to be measured by the market value of the property . . ." at the time of the taking. (*Rose* v. *State of California* (1942) 19 Cal.2d 713, 737 [123 P.2d 505]; see, e.g., *Muller* v. *Southern Pacific Branch Ry. Co.* (1890) 83 Cal. 240, 243, 245 [23 P. 265]; *Spring Valley Water Works* v. *Drinkhouse* (1891) 92 Cal. 528, 533 [28 P. 681]. See also Code Civ. Proc., § 1249.) "Market value," in turn, has been defined as "the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable." (*Sacramento So. R.R. Co.* v. *Heilbron* (1909) 156 Cal. 408, 409 [104 P. 979].)

The "market value" of a given piece of property, of course, reflects a great variety of factors independent of the size, nature, or condition of the property itself. The general character of the neighborhood, the quality of the public and private services, and the availability of public facilities all play important roles in establishing market value. Thus, widespread knowledge of a proposed public improvement, planned for an indefinite location within a given region or neighborhood, will frequently cause the market value of land in the region or neighborhood to rise. Such an increase in market value results from the expectation that a given parcel of property will be outside of the project and will soon enjoy the benefits of the proposed improvement. If, for example, the planned project is a public park, land in the vicinity will be expected to gain the advantages of a nearby recreational area, and will consequently become more desirable and more valuable.

(3) Sometimes, however, property which has increased in value, out of an initial anticipation that the land would be *outside* of a public improve-

ment, must *itself* be taken for the construction or creation of that public improvement. Since the instant case presents that situation, our first issue must be to determine whether, in such a case, the owner of the land to be taken should be compensated for the loss of this increase in value—an increase that occurs prior to the time that it is known the particular piece of property will be included in the project.

We note at the outset that, although this court has not spoken directly to the issue in the past, the majority rule in other jurisdictions is that such "project enhanced" value does constitute a proper element of value for which the landowner is entitled to be compensated. (See 4 Nichols on Eminent Domain (3d ed. 1962) § 12.3151[2], pp. 209-210.) Most notably, the United States Supreme Court has consistently construed the "just compensation" clause of the Fifth Amendment of the federal Constitution to countenance the landowner's recovery of this "project enhanced value" unless his property was itself "probably within the scope of the project from the time the Government was committed to it." (*United States* v. *Miller* (1943) 317 U.S. 369, 377 [87 L.Ed. 336, 344, 63 S.Ct. 276, 147 A.L.R. 55]; see *Kerr* v. *South Park Comrs.* (1886) 117 U.S. 379, 384-386 [29 L.Ed. 924, 926-927, 6 S.Ct. 801]; *Shoemaker* v. *United States* (1893) 147 U.S. 282, 303-305 [37 L.Ed. 170, 186-187, 13 S.Ct. 361]; *United States* v. *Reynolds* (1970) 397 U.S. 14, 16-18 [25 L.Ed.2d 12, 15-17, 90 S.Ct. 803].) The courts of our sister states have generally embraced a like position. (See, e.g., *Williams* v. *City & County of Denver* (1961) 147 Colo. 195, 200 [363 P.2d 171, 174]; *Cole* v. *Boston Edison Company* (1959) 338 Mass. 661, 666 [157 N.E.2d 209, 212]; *Andrews* v. *State of New York* (1961) 9 N.Y.2d 606 [217 N.Y.S.2d 9, 176 N.E.2d 42]; *Rowan* v. *Commonwealth* (1918) 261 Pa. 88, 94-95 [104 A. 502, 504-505]; *Stafford* v. *City of Providence* (1873) 10 R.I. 567, 571-572; *State* v. *Wood* (1969) 22 Utah 2d 317, 318-320 [452 P.2d 872, 873-874].)

In our view, the widespread agreement on this point finds firm support in the principle that "market value" is the proper measure of just compensation, and, for the reasons explained more fully below, we now join these sister states in holding that this kind of "enhancement value" is a proper element of just compensation.

On this appeal the district, although not contesting the general validity of the market value standard of "just compensation," contends that California precedent has long established "that in arriving at a determination of . . . market value . . . it is not proper to consider the increase, if any, in the value of such land by reason of the proposed improvement which is to be made on the land by the condemner." (*County of Los*

Angeles v. *Hoe* (1955) 138 Cal.App.2d 74, 78 [291 P.2d 98].) The district claims that this doctrine, derived from a statement by this court in *San Diego Land etc. Co.* v. *Neale* (1888) 78 Cal. 63, 74-75 [20 P. 372], precludes a jury from including in an eminent domain award *any* increase in value "attributable to" the proposed project (or, as it is often referred to, "project enhanced value"). In support of its position the condemner relies on a series of Court of Appeal decisions, which contain dicta to the effect that "[a]ny rise in value before the taking . . . caused by the expectation of that event" is to be disallowed in computing just compensation. (*City of Pasadena* v. *Union Trust Co.* (1934) 138 Cal.App. 21, 26 [31 P.2d 463]; *People* ex rel. *Dept. Pub. Wks.* v. *Shasta Pipe etc. Co.* (1968) 264 Cal.App.2d 520, 539 [70 Cal.Rptr. 618]; *People* ex rel. *Dept. Water Resources* v. *Brown* (1967) 255 Cal.App.2d 597, 599 [63 Cal.Rptr. 363]; *Community Redevelopment Agency* v. *Henderson* (1967) 251 Cal.App.2d 336, 343 [59 Cal.Rptr. 311]; *County of Los Angeles* v. *Hoe* (1955) 138 Cal.App.2d 74, 78 [291 P.2d 98].) Under this line of cases, the condemner argues, the general increase in neighborhood land values which frequently accompanies the announcement of a desirable public improvement constitutes "project enhanced value" for which the landowner is never entitled to be compensated; in sum, the benefit conferred upon the land by the condemner should not be charged against the benefactor.

This position, based on an expansive interpretation of the concept of "project enhanced value," which past decisions have indicated is to be excluded from compensation, obscures pertinent distinctions between different types of "project enhanced value." The value of land can be said to increase "by reason of the proposed improvement" (*County of Los Angeles* v. *Hoe* (1955) 138 Cal.App.2d 74, 78 [291 P.2d 98]) for at least three distinct reasons: (1) the worth of *property known to be within the project* may rise when the land is valued *as part of* the proposed improvement rather than as a separate tract of land; (2) the value of *property expected to be condemned* may rise because of the anticipation that the condemner will be required to pay an inflated price for the land at the time of condemnation; and (3) the value *of property expected to be outside of the proposed improvement* may rise because it is anticipated that the land will reap the benefits resulting from *proximity* to the coming project. Although past California decisions have not found it necessary to distinguish between these various "increases in value," the district's contention in the instant case brings the need for such analysis into sharp focus. We shall analyze each of these three situations in the course of this opinion.

We begin with the seminal decision of *San Diego Land etc. Co.* v. *Neale* (1888) 78 Cal. 63 [20 P. 372]. In *Neale*, defendant's land was being condemned as a reservoir site in connection with the construction of a dam

on a neighboring tract. At trial, the condemnee asked his appraiser to evaluate the land on the basis of its use as a reservoir site, taking into account the on-going construction of the dam. In holding this question improper on appeal, the *Neale* court declared: "it seems monstrous to say that the benefit arising from the proposed improvement is to be taken into consideration as an element of the value of the land. . . ." In context, this statement, which gave rise to the doctrine relied on by the district in the instant case, clearly is no more than a declaration of the firmly established premise that "compensation is based on loss imposed on the owner, rather than on benefit received by the taker. [Citations.] The beneficial purpose to be derived by the condemner's use of the property is not to be taken into consideration in determining market values, for it is wholly irrelevant." (*People* v. *La Macchia* (1953) 41 Cal.2d 738, 754 [264 P.2d 15]; see *City of Stockton* v. *Vote* (1926) 76 Cal.App. 369, 404 [244 P. 609]; *Boston Chamber of Commerce* v. *City of Boston* (1910) 217 U.S. 189, 195 [54 L.Ed. 725, 727, 30 S.Ct. 459].) (4) Thus, the improper "enhancement" or "benefit" referred to in *Neale* is simply the increase in value which a condemned tract gains when it is valued *as part* of the proposed project, i.e., the first type of "project enhanced value" referred to in the preceding paragraph. It is clear, of course, that this incremental value is one which could never be considered in determining "just compensation" under the established definition of "market value" set out above.[4]

We turn to the second aspect of "project enhanced value" which we have noted in the trilogy outlined *supra*. (5) A situation in which the enhanced value of the land should not be included as compensation occurs when the increased value is due to speculation based upon the imminence of a taking. After a parcel of land has been designated for condemnation, the "actual market value" of the parcel will frequently fluctuate as a result of the impending condemnation. An increase in the value of property which can reasonably be expected to be condemned can generally be explained only as a result of speculation by potential purchasers that the condemner may be compelled to pay an artificially inflated price for the property. (See Palmer, Manual of Condemnation Law (1961) § 154.) Although this speculation does, in a sense, affect "actual market value" (see 1 Orgel on Valuation Under Eminent Domain (2d ed. 1953) § 83, p. 355 et seq.), this is not the "open market" value contemplated by our controlling decisions (e.g., *Sacramento So. R.R. Co.* v. *Heilbron* (1909) 156 Cal. 408, 409 [104 P. 979]; cf. *United States* v. *Cors* (1949) 337 U.S. 325, 333

[4]All of the early cases applying the *Neale* rule, did so to bar the inclusion of this type of "enhancement value." (*Sacramento So. R.R. Co.* v. *Heilbron* (1909) 156 Cal. 408, 412 [104 P. 979]; *City of Stockton* v. *Vote* (1926) 76 Cal.App. 369, 404 [244 P. 609]; *City of Pasadena* v. *Union Trust Co.* (1934) 138 Cal.App. 21, 25-26 [31 P.2d 463].)

[93 L.Ed. 1392, 1399, 69 S.Ct. 1086]). Almost all courts universally agree that such an increase in value, based on a purchaser's conjecture of what the condemner may ultimately be required to pay, is not a proper element of "fair market value" for "just compensation" purposes. (See, e.g., *United States* v. *Reynolds* (1970) 397 U.S. 14, 16 [25 L.Ed.2d 12, 15, 90 S.Ct. 803]; *United States* v. *Miller* (1943) 317 U.S. 369, 377 [87 L.Ed. 336, 344, 63 S.Ct. 276, 147 A.L.R. 55]; *Olson* v. *United States* (1934) 292 U.S. 246, 261 [78 L.Ed. 1236, 1247, 54 S.Ct. 704].) If a tribunal were required, in setting just compensation, to consider an increase in value arising merely from the anticipation of the tribunal's final award, then logically a speculator would in effect be able to set "just compensation" through his own purchase price. (See 1 Orgel on Valuation Under Eminent Domain (2d ed. 1953) § 83, p. 359.) In our view this type of "enhanced" value is clearly not a legitimate element of just compensation and thus we now reiterate that such increases in value cannot properly be taken into consideration in determining the fair market value contemplated by our constitutional just compensation requirement.

The (1) "enhanced value" arising from the condemner's potential use of the property itself for the project, as in *Neale*, and (2) the "enhanced value" resulting from speculation over the amount of an imminent condemnation award are clearly distinguishable, however, from (3) the increase in land values of property which is expected to be adjacent to or near a proposed project. This category is the third in the grouping set out above. Although the increase in value of the adjacent or nearby property is undoubtedly "attributable" to the project, it results not from the expectation that the land will be taken for the project, as in the case of the property in *Neale*, which is included in the project, or of the property which enjoys the speculative gain, but instead from the expectation that the land will *not* be taken for the project. It is this distinction which the argument of the condemner in the instant case ignores, and upon which, we have concluded, plaintiff's position founders.

The difference between the project enhanced value of the adjacent property and that of the other two situations discussed above is that the rise in value of the adjacent property is a legitimate element of its "fair open market value."[7] (6) Clearly, the expected proximity of a tract of land

[7] In one passage in *Neale* the court did aver to this distinction between different kinds of "project enhancement." After declaring that "benefit arising from the improvement" would be "inadmissible as a direct element of value," the court observed: "It is possible that [the landowner] might get some benefit from [the project] indirectly. That is to say, the public knowledge of a proposed improvement might cause an actual demand in the market and a subsequent advance in the current rate of price. In such case it would be impracticable for a court to analyze the price and determine the proportion in which any particular element contributed thereto. The

to a proposed project constitutes a factor "which a buyer would take into consideration in arriving at a fair market value, were he contemplating a purchase of the property" (*People* ex rel. *Dept. of Public Works* v. *Donovan* (1962) 57 Cal.2d 346, 352 [19 Cal.Rptr. 473, 369 P.2d 1]); and as such we think the value attributable to this anticipated proximity constitutes a proper element of just compensation. "The rule is, that the owner is entitled to the market value of his land; to be determined in view of all the facts which would naturally affect its value in the minds of purchasers generally. . . . 'Any existing facts which enter into the value of the land in the public and general estimation, and tending [*sic*] to influence the minds of sellers and buyers, may be considered.' [citation]." (*Spring Valley Water Works* v. *Drinkhouse* (1891) 92 Cal. 528, 533 [28 P. 681]; see *Joint Highway Dist. No. 9* v. *Ocean Shore R.R. Co.* (1933) 128 Cal.App. 743, 753-759 [18 P.2d 413]; *City of Stockton* v. *Vote* (1926) 76 Cal.App. 369, 401-407 [244 P. 609].)

The courts have long held that benefits of government activities, reflected in market value, compose part of just compensation for land. Thus, increases in the value of a condemnee's land "attributable to" a wide variety of activities paid for by government, or instituted at the behest of government, are properly includable in computations of just compensation. (See, e.g., *People* ex rel. *Dept. of Public Works* v. *Donovan* (1962) 57 Cal. 2d 346, 352-354 [19 Cal.Rptr. 473, 369 P.2d 1] ("reasonable probability of a zoning change" a factor to be considered); *County of Los Angeles* v. *Hoe* (1955) 138 Cal.App.2d 74, 78-79 [291 P.2d 98] (increase in value from neighboring city improvements includable in determining value of tract to be taken for county project); *City of San Diego* v. *Boggeln* (1958) 164 Cal.App.2d 1, 6-7 [330 P.2d 74] (same).) Under these precedents the increase in value of lands expected to be outside a project constitutes a proper element of "just compensation."

The district argues, however, that even if this increased value in neighborhood property is a valid component of "market value," it should not be considered in determining "just compensation." Just compensation, the condemner asserts, is only intended to put the landowner in the same

scales of justice do not balance quite so delicately as that. But aside from this indirect benefit . . . it seems monstrous to say that the benefit arising from the proposed improvement is to be taken into consideration as an element of the value of the land." (78 Cal. at pp. 74-75.)

Although defendant reads this passage as firmly holding that "indirect enhancement" is a proper element of just compensation, we do not believe the decision can properly be interpreted as going that far. The quoted dictum does not declare that a landowner is *entitled* to this "indirect" benefit, but only that he might obtain this benefit because it would be "impracticable" for a court to analyze the price to eliminate this factor. In our view the discussion in *Neale* cannot be fairly said to have resolved the issue before us one way or the other.

position he would have held if the project had not been built; the inclusion of this "enhancement" element in compensable value transgresses the principle that "just compensation" requires that compensation be "just" to the public as well as to the condemnee. (See *People* ex rel. *Dept. of Public Works* v. *Pera* (1961) 190 Cal.App.2d 497, 499 [12 Cal.Rptr. 129].) To require a condemner to pay for value which has arisen only because of its initiation of a project, plaintiff suggests, is to give the landowner a "windfall" at the expense of the public fisc.

We believe that the condemner's argument rests upon its assertion that the basic purpose of "just compensation" is simply to return a landowner to the same position he would have held if the public project had never been constructed *or contemplated*. In positing such a purpose to our constitutional provision, however, the district has subtly assumed away the entire question at issue. (7) Of course, as we have stated above, "just compensation" contemplates compensation measured by what the landowner has lost rather than by what the condemner has gained (*People* v. *La Macchia* (1953) 41 Cal.2d 738, 754 [264 P.2d 15]). Nevertheless, the long-established recognition of "market value at the time of taking" as the general measure of "just compensation" reflects a deeply rooted judgment that, in determining just how much the landowner *has* lost, the state bears the responsibility of meeting the reasonable market evaluations of potential sellers or purchasers. General adherence to the "market value" measure insures a landowner that, in general, he will not be penalized for retaining his land after general public knowledge of the project. He should be assured that if his property is ultimately condemned, the condemner will compensate him for its "market value," ideally at the price at which he could have sold the land on the open market just prior to the taking.

Inclusion of "project enhanced value" in compensation is essential if, in accordance with the above principle, the reasonable evaluations of landowners are to be met. (8) In a situation in which the government decides, some time after the initial completion of a project, that expansion of the project is necessary, "just compensation" would clearly require that a condemnee, who had previously purchased his property at an increased price in the expectation that he would be near the improvement, should be compensated for "full" market value, including the increment paid for "project enhancement."[8] (See 4 Nichols on Eminent Domain (3d ed. 1962) § 12.3151[3], pp. 210-211.) Since these owners purchased the property at

[8]This analysis is also applicable to landowners who acquired the land prior to the public improvement. Although such owners have not paid out money in reliance on the project, they effectively have made an equivalent investment by retaining the land rather than selling it at the "enhanced price." (See 1 Orgel on Valuation Under Eminent Domain (2d ed. 1953) § 98, p. 425.)

the enhanced value, we could hardly justify the exclusion of this "enhanced" value from compensation if their property is ultimately taken.

For the same reason, the increase in value of land which is initially expected to be outside the boundaries of a proposed improvement, must be recognized to constitute a proper element of just compensation. Purchasers and sellers regularly, and quite reasonably, take into account the benefit that the land can be expected to reap from an imminent public project, and it would be equally unfair and incompatible with the principles underlying our constitutional just compensation provision to exclude such enhanced value. Although the district chooses to characterize compensation for this project enhanced value as a "windfall" to the landowner, that epithet might equally be applied to the wide variety of other components of market value for which a landowner might not have directly "paid," factors such as zoning laws, public services and general neighborhood appearance which, as previously noted, have long been recognized to be legitimate elements of "just compensation."

(9) In light of this analysis and the weight of authority, we now hold that increases in value, attributable to a project but reflecting a reasonable expectation that property will not be taken for the improvement, should properly be considered in determining "just compensation."

The following Court of Appeal decisions are disapproved to the extent that they contain broad statements inconsistent with this conclusion: *People* ex rel. *Dept. Pub. Wks.* v. *Shasta Pipe etc. Co.* (1968) 264 Cal.App.2d 520, 539 [70 Cal.Rptr. 618]; *People* ex rel. *Dept. Water Resources* v. *Brown* (1967) 255 Cal.App.2d 597, 599 [63 Cal.Rptr. 363]; *Community Redevelopment Agency* v. *Henderson* (1967) 251 Cal.App.2d 336, 343 [59 Cal.Rptr. 311]; *City of San Diego* v. *Boggeln* (1958) 164 Cal.App.2d 1, 5 [330 P.2d 74]; *County of Los Angeles* v. *Hoe* (1955) 138 Cal.App.2d 74, 78 [291 P.2d 98]; *City of Pasadena* v. *Union Trust Co.* (1934) 138 Cal. App. 21, 26 [31 P.2d 463].

(b) *The trial court properly instructed the jury to exclude all "project enhancement" accruing after it was probable that the land to be valued would be taken for the project.*

We have recognized above that under certain circumstances an increase in the value of land which is "attributable" to the proposed project may appropriately be included as just compensation. We also recognize that, in practice, the segregation of those cases in which "enhancement" should be compensable from those in which it should not will often entail a difficult task. To that problem we now turn.

In some instances the public may know from the time of the first announcement of the improvement that certain land will be included in the project. In such cases, since the public knows that the land will not receive the benefits of proximity to the project, the market value of the property will experience no such enhancement; thus, when such property is condemned, the landowner should not receive any "project enhanced value." "If it is known from the very beginning exactly where the improvement will be located if it is constructed at all, the property that will be required for its site will not participate in the rise or fall in values, for, since the property is bound to be taken if the improvement is constructed, it can never by any possibility either suffer from or enjoy the effects of the maintenance of the public work in its neighborhood; and consequently, it is well settled that in such a case in valuing the land the effect of the proposed improvement upon the neighborhood must be ignored." (4 Nichols on Eminent Domain (3d ed. 1962) § 12.3151[1], pp. 205-206; see Note, *Recovery for Enhancement and Blight in California* (1969) 20 Hastings L.J. 622, 629.)

Even when public information does not disclose *definitely* that a given piece of property will be used for the project, however, the landowner may not be properly entitled to "project enhanced" value. Governmental bureaucratic action is notoriously slow, and in many instances the public in general, and, in particular, interested landowners and potential buyers, will be able to determine accurately, well in advance of the formal acceptance of condemnation plans, that a given tract of property will probably be taken for the improvement. In such a case the market value of the land facing imminent condemnation will not rise because, as in the instance of "definite inclusion," potential purchasers and sellers can reasonably foresee that the property will not enjoy the advantages of the coming improvement. As our earlier analysis demonstrates, the inclusion of "enhancement value" in compensation serves only to preserve the reasonable market value of the property. We see no reason to require the state to pay an incremental value if an informed individual could not reasonably expect that the property would be outside of the project.[9] **(10)** As the United States Supreme Court has stated in *United States* v. *Miller* (1943) 317 U.S. 369, 377 [87 L.Ed 336, 344, 63 S.Ct. 276, 147 A.L.R. 55],

[9]Furthermore, if we were to ignore realities and were to require compensation up until the date of *definite* inclusion instead of the date of *probable* inclusion, we might effectively encourage the condemning authority to establish definite project boundaries quite hastily; we would thus discourage the government's use of procedures, such as public hearings, which afford the public some direct participation in the planning and placement of such projects. Procedures permitting public participation inevitably delay the official pronouncement of the definite boundaries of a public project; these procedures might prove prohibitively costly if the government were required to pay for a rise in land values, not shared by the property likely to be condemned, that might occur during the course of public hearings.

enhancement value should not be includable in "just compensation" whenever the condemned lands "were probably within the scope of the project from the time the Government was committed to it."[10]

(11) If, on the other hand, when plans for the proposed project first became public and when the consequent enhancement of land values began, the probability was that the land in question would not be taken for the public improvement, the landowner would be entitled to compensation for some "project enhancement." During that period when it was not likely that his land would be condemned, the fair market value of the property may have appreciated because of anticipation that the land would partake in the advantages of the proposed project. The owner would be entitled to such increase in value. On the other hand, once it becomes reasonably foreseeable that the land is likely to be condemned for the improvement, "project enhancement," for all practical purposes, ceases.[11]

[10]Courts have utilized a variety of linguistic tests in describing the requisite "certainty of inclusion" that is required before "project enhanced value" should be excluded. In the *Miller* case itself, the court, after initially declaring that the crucial question was whether the lands were "probably" within the project (317 U.S. at p. 377 [87 L.Ed. at p. 344]), later states that no "project enhanced value" should be considered if the lands were "within that area where they were *likely* to be taken for the project, but might not be . . ." (317 U.S. at p. 379 [87 L.Ed. at p. 345]) (italics added) (see also *United States* v. *Crance* (8th Cir. 1965) 341 F.2d 161, 163 ("might likely be acquired"); *United States* v. *172.80 Acres of Land, etc.* (3d Cir. 1965) 350 F.2d 957, 959 ("probability of future inclusion"); *Cole* v. *Boston Edison Company* (1959) 338 Mass. 661, 666 [157 N.E.2d 209, 212] ("if it was *contemplated* . . . that . . . land in question would sooner or later be taken") (original italics).)

Despite this lack of uniformity or precision in terminology, however, most of the cases appear to exclude project enhancement whenever the court concludes that an informed owner could reasonably anticipate that the property might well be taken for the project. (See, e.g., *United States* v. *Miller* (1943) 317 U.S. 369, 377 [87 L.Ed. 336, 344, 63 S.Ct. 276, 147 A.L.R. 55] (enhancement excluded when "one probable [site]" for the project was marked out over defendant's land); *Shoemaker* v. *United States* (1893) 147 U.S. 282 [37 L.Ed. 170, 13 S.Ct. 361] (congressional act authorized acquisition of fixed acreage for park within larger area but did not fix boundaries of park; enhancement value excluded for *all* property within larger area).)

In our view the "probability of inclusion" standard, utilized by the federal courts, expresses this concept adequately and in a readily comprehensible formula; the latter quality is certainly a most important one in this area, where the factual inquiries are invariably quite complex and frequently not susceptible to precise resolution. Accordingly, we believe that this standard is the appropriate one to be utilized in future cases. (See *People* ex rel. *Dept. Pub. Wks.* v. *Arthofer* (1966) 245 Cal.App.2d 454, 465 [54 Cal.Rptr. 878].)

[11]Technically, it is possible that there may be some project enhancement of value even after this time, for some potential purchasers may conceivably be willing to pay more for such property in the hope, however remote, that ultimately the property will not be taken for the improvement. As we have explained earlier, however, any rise in value after this date is far more likely to be attributable to speculation upon the amount that the condemning authority will be compelled to pay. Because, as a

Thus, in computing "just compensation" in such a case, a jury should only consider the increase in value attributable to the project up until the time when it became probable that the land would be needed for the improvement. (See *United States* v. *2,353.28 Acres of Land, etc., State of Fla.* (5th Cir. 1969) 414 F.2d 965, 971; *United States* v. *172.80 Acres of Land, etc.* (3d Cir. 1965) 350 F.2d 957, 959.)

The approach prescribed by the trial judge in the instant case appears to accord with these standards. At the request of the parties, the trial judge conducted preliminary proceedings, prior to the empanelment of the jury, at which both parties presented evidence relating to the timetable of the Lake McClure project and to the inclusion of defendant's land within that project. The trial judge concluded, first, that general public knowledge of the proposed recreational aspect of the project commenced in January 1963; then, applying the *Miller* standard of "probable" inclusion at defendant's urging, the court set January 1, 1965 as the date when it became probable that the Woolstenhulme property would be taken. (See fn. 4, *supra*.)[12]

Because defendant's property lay immediately adjacent to the proposed lake, the trial judge might reasonably have found that this land was probably within the scope of the project from as early as the time in 1963 when the public first learned that some additional property would be needed for recreational facilities (cf. *United States* v. *Crance* (8th Cir. 1965) 341 F.2d 161, 165). The record makes clear, however, that during these early stages it was not known just how much of the property around the lake would be needed for public recreation, and, under these circumstances, the trial court could properly find that the probability of inclusion did not

practical matter, it would be impossible to determine the precise source of an increase in actual market value, and since those who purchase property after the date of probable inclusion voluntarily assume the risk of condemnation, we believe that the date of "probable inclusion" constitutes the most appropriate "cut-off" date for project enhancement.

[12]As stated in the text, the trial court conducted an inquiry into the date of "probable inclusion" and rendered a finding on that matter upon the agreement of both parties. We believe that, whether or not the parties so agree, such procedure should be followed in future cases. If the trial judge is precluded from making an early determination on this issue, he cannot properly determine which sales are sufficiently "comparable" to the condemned property to be admitted into evidence; furthermore, unless the trial judge is permitted to determine the appropriate "cutoff date," we believe that, as a practical matter, it may be impossible to devise comprehensible instructions which explain to the jury which "enhanced value" is to be included in just compensation and which is to be excluded. We therefore conclude that the trial court, rather than the jury, should determine the issue of "probable inclusion." The United States Supreme Court recently reached the same conclusion with respect to federal eminent domain proceedings. (*United States* v. *Reynolds* (1970) 397 U.S. 14, 20 [25 L.Ed.2d 12, 18, 90 S.Ct. 803].)

occur until the plans for the recreation sites became somewhat more definite around January 1, 1965. (Cf. *United States* v. *2,353.28 Acres of Land, etc., State of Fla.* (5th Cir. 1969) 414 F.2d 965, 970-971; *Calvo* v. *United States* (9th Cir. 1962) 303 F.2d 902, 907-909.)

Thereafter, in instructing the jury as to the proper determination of compensation, the trial judge directed the jury that it was not to "consider any enhancement that came about by virtue of public knowledge of this project for recreation purposes after [January] 1, 1965."[13] We conclude that this instruction did not permit the jury to award compensation for an increase in value to which the defendant was not entitled.

3. *The trial court did not err in admitting evidence of sales which took place in the Lake McClure region in 1965 and 1966 as "comparable sales" under Evidence Code section 816.*

The district contends that the trial judge erred in permitting defendant's appraisal witness to support his opinion of the proper valuation of the land by presenting evidence of sales of nearby lands which occurred in 1965 and 1966. **(12a)** The trial court did find that these 1965 and 1966 sales reflected a "substantial enhancement" attributable to the recreational aspects of the Lake McClure project, but admitted them into evidence nonetheless, indicating that he would instruct the jury to eliminate improper enhancement. The district claims that sales which are found to reflect "substantial project enhancement" not properly shared by the condemned land,[14] can never constitute "comparable sales" within the meaning of section 816 of the Evidence Code, and are thus inadmissible.

Section 816 of the Evidence Code provides in pertinent part that "[w]hen 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 . . . [of] comparable property if the sale . . . was freely made in good faith within a reasonable time before or after the date of the valuation. In order to be considered comparable, the sale or contract must have been made sufficiently near in time to the date of the valuation, and the property sold must be located sufficiently near the

[13] Initially, the trial judge inadvertently stated the date as October 1, 1965, but he immediately corrected the date to January 1, 1965, when counsel advised him of his slip.

[14] To the extent that "project enhanced" value is a proper element of the condemned land itself, other sales reflecting similar project enhancement may, of course, be considered comparable. Since we have concluded in the prior section that defendant was entitled to "project enhancement" until January 1, 1965, the condemner's present objection is properly directed only at that element of the "comparable" sale prices reflecting project enhancement subsequent to January 1, 1965.

property being valued, and must be sufficiently alike in respect to character, size, situation, usability, 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 may be fairly considered as shedding light on the value of the property being valued."

Given the inherent vagueness of this standard of "comparability," appellate courts have recognized that " 'the trial judge . . . must be granted a wide discretion' " (*County of Los Angeles* v. *Faus* (1957) 48 Cal.2d 672, 678 [312 P.2d 680]) in determining the admissibility of sales sought to be relied upon as "comparable." "[N]o general rule can be laid down regarding the degree of similarity that must exist to make such evidence admissible. It must necessarily vary with the circumstances of each particular case. Whether the properties are sufficiently similar to have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the sound discretion of the trial court, which will not be interfered with unless abused." (*Wassenich* v. *Denver* (1919) 67 Colo. 456, 464 [186 P. 533, 536]; see *San Bernardino County Flood Control Dist.* v. *Sweet* (1967) 255 Cal.App.2d 889, 905 [63 Cal.Rptr. 640]; *People* ex rel. *State Park Com.* v. *Johnson* (1962) 203 Cal.App.2d 712, 719 [22 Cal. Rptr. 149].)

Although the district does not deny that this broad discretion resides in the trial court, it does maintain that sales which are "substantially enhanced" can never properly be found to be "comparable sales," because, assertedly by definition, such sales are not "sufficiently alike [the property to be valued] in respect to character, situation [or] usability. . . ." Section 816, however, does not establish criteria of "substantial" or "insubstantial" comparability, but rather requires the trial court to measure whether or not "the property sold" is "sufficiently alike" the property to be valued, by determining whether "the price realized for the property sold *may be fairly considered as shedding light on the value of the property being valued.*" (Italics added.)

We recognize, of course, that in many, perhaps most, cases, a trial judge may find that sales of neighboring property which "substantially" reflect an enhancement value not properly shared by the condemned property, will not "shed light" on the value of the subject property, but rather will tend to confuse the issue if admitted into evidence. In such cases the sales should properly be excluded. We can conceive of a variety of situations, however, in which a trial court may reasonably find that such sales will "shed light" on the value of condemned land even though the sales reflect "substantial enhancement."

In some cases, for example, a project will remain in the planning and

construction stage for a great many years before a tract of land, originally designated for condemnation, is actually taken by the condemner. Although all sales in the neighborhood over that period may reflect "substantial project enhancement," such sales may also reflect recent increases in land values attributable to other factors, such as other new public or private improvements or zoning changes, which the owner of the condemned land is entitled to have included in a consideration of the market value of his land at the time of taking. (See *United States* v. *Miller* (1943) 317 U.S. 369, 373 and fn. 6 [87 L.Ed. 336, 342, 63 S.Ct. 276, 147 A.L.R. 55]; *Urban Renewal Agency* v. *Spines* (1968) 202 Kan. 262, 265-267 [447 P.2d 829, 831-833].)

Under these circumstances a trial court might reasonably conclude that the "substantially enhanced" sales could "fairly be considered as shedding light" on the value of the condemned property, since without the admission of such sales a landowner could not support his appraiser's opinion of the increase in value attributable to these non-project factors. The conclusion is particularly viable if an expert appraisal witness can fairly estimate the amount of each of the enhanced sales prices which is attributable to "project enhancement." In such a case, the trier of fact could subtract the amount of value which he finds to be due to project enhancement, and could then test the witness's valuation of the condemned land against this "adjusted" sales price.[15] Indeed, the trial court followed the latter procedure in the instant case: the defendant's appraisal witness introduced evidence of other sales in the neighborhood and estimated the extent of "project enhanced value" at $50 an acre; the plaintiff contended, on the other hand, that in each of these sales, any amount over $125 an acre was attributable to project enhancement.

The district now argues, however, that in permitting defendant's appraiser to isolate this "enhancement factor" in other, allegedly "comparable" sales, the trial court violated Evidence Code section 822, subdivision (d), which renders inadmissible "[a]n opinion as to the value of any property or property interest other than that being valued." **(13)** The district apparently reads section 822, subdivision (d), as precluding an appraiser, when referring to "comparable sales," from explaining any adjustments that must be made in the "comparable sale" price in utilizing that sale as an indicant of the value of the property to be taken.

[15]Of course a trial court is not required to admit a proffered sale simply because an appraiser declares that he can isolate and eliminate all improper "enhancement" value. In every case it remains for the trial court, rather than the witness, to decide, from all the circumstances before it, whether a sale offered into evidence "may be fairly considered as shedding light on the value of the property being valued." (See *Los Angeles etc. School Dist.* v. *Swenson* (1964) 226 Cal.App.2d 574, 583 [38 Cal. Rptr. 214].)

Such an interpretation of section 822, subdivision (d), however, goes considerably beyond the main purposes of that section and inevitably conflicts with the practical application of the entire "comparable sale" approach of section 816. Under the comprehensive statutory scheme relating to the evidentiary procedure for eminent domain proceedings enacted in 1961 (see, generally, Cal. Law Revision Com. Recommendations Relating to Evidence in Eminent Domain Proceedings (1960) [hereinafter cited as Law Rev. Com. Report]), appraisers, in relating their "opinion" as to the value of the property, are permitted to utilize a wide variety of valuation techniques, including "income capitalization" (Evid. Code, § 819), "reproduction" costs (Evid. Code, § 820) and comparative sale data (Evid. Code, §§ 816, 818). As the drafters of section 822, subdivision (d), indicated, in excluding "opinion" evidence as to the value of property other than the condemned property, the section simply attempts to avoid the host of collateral issues, and the consequent prolongation of eminent domain trials, that would arise if appraisers were permitted to testify, under these liberalized evidentiary rules, as to their "opinion" of the value of other property. (See Law Rev. Com. Report, p. A-8.) An appraiser's testimony relating to adjustments to be made in "comparable sales," however, does not normally raise collateral issues of great magnitude.

Moreover, the procedure of which the district complains is a most natural and, indeed, necessary component of the entire "comparable sales" approach sanctioned by section 816. It is a familiar statement that no two parcels of land are precisely equivalent; the property which is the subject of a "comparable sale" will always differ in some particulars from the property being valued. Commonly a "comparable sales price" will vary in some respect from an appraiser's opinion of the condemned land's "value"; when this happens, the appraiser will most naturally want to explain the distinguishing features between the property sold and the property to be valued, which he has taken into account in inferring the value of the land under consideration from the "comparable sale." Moreover, even if the appraiser does not so testify on direct examination, he will frequently be questioned on cross-examination as to the relevant differences between the assertedly "comparable" parcel and the subject land. In response he will be compelled to disclose how he took these relevant differences into account in deriving his valuation figure. (See, e.g., *City of Los Angeles* v. *Cole* (1946) 28 Cal.2d 509, 518 [170 P.2d 928], overruled on other grounds in *County of Los Angeles* v. *Faus* (1957) 48 Cal.2d 672, 680 [312 P.2d 680].) Such inquiries are essential if the jury is intelligently to determine the weight that should be given to such "comparable sales" evidence. (See Law Rev. Com. Report, pp. A-50–A-51.)

Our courts have accepted this "adjustment" process as an integral ele-

ment of the "comparable sale" approach. In *San Bernardino County Flood Control Dist.* v. *Sweet* (1967) 255 Cal.App.2d 889 [63 Cal.Rptr. 640], for example, the court, in affirming the trial judge's admission of "comparable sales" of property three to five miles distant from the subject property, stated: "The admissibility of testimony relating to comparable sales rests largely in the discretion of the trial court. [Citations.] In the present case, the court carefully considered the question of comparability and required the witness to adjust the sales prices to the date of value of the subject property. We find no abuse of discretion in the court's ruling." (255 Cal.App.2d at p. 905.) Likewise, in *City of San Diego* v. *Boggeln* (1958) 164 Cal.App.2d 1, 7-8 [330 P.2d 74], the procedure utilized by the court in the instant case was endorsed in the context of project "enhanced" comparable sales. (See *County of Los Angeles* v. *Hoe* (1955) 138 Cal.App.2d 74, 79-80 [291 P.2d 98]; cf. *City of Gilroy* v. *Filice* (1963) 221 Cal.App.2d 259, 271 [34 Cal.Rptr. 368]. See also *United States* v. *Miller* (1943) 317 U.S. 369, 380 [87 L.Ed. 336, 346, 63 S.Ct. 276, 147 A.L.R. 55]; *State* v. *Wood* (1969) 22 Utah 2d 317, 320-321 [452 P.2d 872, 874].)

(12b) The district also contends that even if "substantially enhanced" sales may be admitted under certain circumstances, such circumstances did not exist in the instant case; in other words, the district claims that the 1965 and 1966 sales were "noncomparable" as a matter of law and thus that the trial court's admission of these sales constituted an abuse of discretion. Considerable testimony, however, attributed the rise in land values in the area to a substantial number of factors other than the Lake McClure project; the district's appraisal witness, for example, conceded that the inflation of the mid-1960's had affected the value of land around the state, and, as recounted earlier, the landowner's witness cited a number of factors, including population growth and construction of freeways, as contributing to the increase in value. The trial judge could reasonably conclude that the 1965 and 1966 land sales might "shed light" on the effect of these factors on the property to be valued, particularly since, without the introduction of such sales, the jury would have been deprived of all "objective" market evidence on these matters. Under the circumstances, we conclude that the court did not abuse its discretion in permitting the witness to testify as to the challenged sales.

4. *The trial court did not err in awarding defendant attorney's fees in connection with a partial abandonment of the condemnation; it did err, however, in determining the scope of the abandonment.*

Plaintiff raises one final issue on this appeal. The district contends that the trial court erred in awarding the landowner, Mrs. Woolstenhulme,

$3,500 for attorney's fees based upon a partial abandonment by the condemner. The award was made pursuant to section 1255a of the Code of Civil Procedure which provides that a condemnee shall be compensated for "reasonable costs and disbursements," including attorney's fees, which he incurs in preparing to defend a condemnation action which is later abandoned by the condemner.

In the initial complaint filed by the irrigation district in February 1966, the district sought to condemn (1) a fee interest in areas designated parcels 1, 2, 4 and 5 and (2) the cattle grazing and watering rights to 199.9 acres designated as parcel 3. Defendant and a predecessor had earlier sold parcel 3 to the district but had reserved the grazing and watering rights and, thus, the district's intention in the initial complaint was to acquire the remainder of the complete fee interest in that tract. After this initial complaint was filed, defendant, through litigation, succeeded in rescinding her prior sale of parcel 3 to the district. The district, thereafter, in August 1967, filed an amended complaint, seeking condemnation of the fee interest of parcels 1 and 2 and 117 acres of parcel 3; this amended complaint dropped the demand for grazing and watering rights, and excluded parcels 4 and 5 completely. The trial court held that the amendment of the complaint constituted a partial abandonment, and awarded defendant an attorney's fee of $3,500 based on money expended to defend parcels 4 and 5; and the grazing and watering rights of parcel 3.

(14) The district does not, and could not properly, contend that the amended complaint did not constitute a "partial abandonment" entitling the landowner to attorney's fees with respect to property and property rights omitted from the subsequent complaint. (*County of Kern* v. *Galatas* (1962) 200 Cal.App.2d 353, 356-357 [19 Cal.Rptr. 348].)[16] The district, however, does raise two other objections to the $3,500 award.

First, the district, relying on the rule of *Franklin-McKinley Sch. Dist.* v. *Lester* (1963) 223 Cal.App.2d 347, 348-349 [35 Cal.Rptr. 727]; *City of Los Angeles* v. *Welsh* (1935) 10 Cal.App.2d 441, 443 [52 P.2d 296]; and *City of Long Beach* v. *O'Donnell* (1928) 91 Cal.App. 760, 761 [267 P. 585], contends that defendant was entitled to no award of attorney's fees at all since, it is asserted, she had only a contingent fee contract with her attorney. Assuming, without deciding, that these cases correctly interpret section 1255a as precluding an award of attorney's fees when those fees are purely contingent, we still cannot agree with the condemner that such fees should not have been awarded in the instant case.

[16]In 1968, after the trial in this case, section 1255a was amended to codify the rule of the *Kern* case.

Although the original contract between defendant and her lawyer provided only for a purely contingent fee arrangement, the attorney subsequently wrote his client stating that in the event of abandonment, the fee would be based on "reasonable charges" (see Cal. Condemnation Practice (Cont. Ed. Bar) pp. 18-19), and the trial court found that this second letter constituted a modification of the attorney-client fee agreement. The record contains substantial evidence to support a finding that defendant agreed to this modification of the fee contract, and therefore the trial court could properly find that the arrangement was no longer a purely contingent one. (Cf. *Franklin-McKinley Sch. Dist.* v. *Lester* (1963) 223 Cal.App.2d 347, 349 [35 Cal.Rptr. 727].) Thus, even under the authorities relied on by the district, the court could properly make an award under section 1255a.

(15a) Second, the district maintains that the trial court erred in characterizing the amended complaint as "abandoning" its instant demand for grazing and watering rights of parcel 3, and in awarding attorney's fees related to the defense of those rights. We conclude that this contention has merit.

(16) Section 1255a is designed to compensate a defendant for expenses incurred in anticipation of an eminent domain proceeding, when the condemner declines to carry the proceeding through to its conclusion. (*Oak Grove School Dist.* v. *City Title Ins. Co.* (1963) 217 Cal.App.2d 678, 698 [32 Cal.Rptr. 288].) By amending its complaint to seek a fee interest in 117 acres of parcel 3, while dropping its request for grazing and watering rights over the entire 199.9-acre tract, the district did abandon its efforts with respect to the 82.9 acres of parcel 3 omitted from the amended complaint. **(15b)** With respect to the 117-acre portion of parcel 3, however, the amendment did not constitute an *abandonment* of the initial claim for grazing and watering rights, but instead represented an *enlargement* of the original demand, seeking, in addition to the watering and grazing rights, all the other interests in the land which make up the fee simple estate. Thus, with respect to these 117 acres, the district did not fail to carry the proceeding through to conclusion; the services performed by the attorney with respect to that acreage were completely utilizable in the instant action. The court erred in viewing the district's shift in position with respect to these 117 acres as an abandonment.

The abandonment was thus less extensive than understood by the trial court at the time it entered its cost award. The trial court is in the best position to determine how the reduced compass of the abandonment should affect the amount of the fee award and we believe that the proper disposi-

tion is to set aside the present cost order and remand this matter to the trial judge for recomputation.

We vacate the cost order and remand defendant's motion for costs and disbursements to the trial court for recomputation in accordance with the conclusions expressed herein. In all other respects the judgment is affirmed. Plaintiff shall bear the costs of appeal.

Wright, C. J., McComb, J., Peters, J., Mosk, J., Burke, J., and Sullivan, J., concurred.

Memorandum 72-75

EXHIBIT VII

FILED
SEP 22 1972
G. E. L... k
S. F. Deputy

C O P Y

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

FRANK KLOPPING, JR., et al., Plaintiffs and Appellants, v. CITY OF WHITTIER et al., Defendants and Respondents.	L.A. 29994 (Super. Ct. No. 923721)
CLIFFORD SARFF et al., Plaintiffs and Appellants, v. CITY OF WHITTIER et al., Defendants and Respondents.	L.A. 29995 (Super. Ct. No. 929190)

Plaintiffs Klopping and Sarff (plaintiffs) instituted separate actions in inverse condemnation for damages alleged to have been caused by activities of the City of Whittier (city) prior to the eventual condemnation of the property then owned by plaintiffs. After the trial court

sustained the city's demurrers, judgments of dismissal were entered. Plaintiffs appeal.

On May 11, 1965, the city adopted a resolution to initiate proceedings designed to culminate in the formation of a parking district. Included among the properties to be condemned as part of those proceedings were parcels owned by plaintiffs. On November 10, 1965, the city initiated condemnation proceedings against the subject properties and parcels owned by third persons. Subsequently, the city directed that assessments be levied against certain individuals in order to pay costs involved in the establishment of the district. On February 23, 1966, one of the property owners to be assessed, Alpha Beta Acme Markets, Inc., filed a suit to enjoin the assessment. Judgment was against Alpha Beta in the trial court and on May 7, 1968, the Court of Appeal affirmed. (Alpha Beta Acme Markets, Inc. v. City of Whittier (1968) 262 Cal.App.2d 16.)

On July 7, 1966, during the pendency of the Alpha Beta challenge, the city adopted a second resolution, reciting that: (1) because of the Alpha Beta suit, it was impossible to sell the bonds designed to finance the proposed parking facility; (2) by reason of the lack of funds from that source, the proposed acquisition of property could not proceed; (3) it was not "fair and equitable" to continue the restraining

effect of the pending condemnation suit on the use of the properties sought to be condemned. The resolution then authorized the dismissal of the pending condemnation suits but declared the city's firm intention to reinstitute proceedings when and if the Alpha Beta matter was terminated in the city's favor.

On November 16, 1966, the condemnation suits against the properties owned by plaintiffs and others were dismissed. Contra to the contention of the city that the termination was a voluntary dismissal under Code of Civil Procedure section 581, the Court of Appeal ruled that it was, in law, an "abandonment" under Code of Civil Procedure section 1255a. (City of Whittier v. Aramian (1968) 264 Cal.App.2d 683.) Accordingly, the court allowed plaintiffs and other individuals to recover the costs they incurred as a result of the commencement of the condemnation proceedings and the subsequent abandonment, as provided under subdivision (c) of section 1255a.

On July 6, 1967, while both the Alpha Beta and Aramian suits were pending, plaintiffs Klopping and Sarff submitted to the city a claim for damages based on the original resolution of intent to condemn and on the resolution abandoning the condemnation proceeding but simultaneously announcing the city's intention to resume eminent domain action in the future. This claim was

rejected and the present actions followed. Demurrers by the city were sustained without leave to amend as to any matters occurring prior to the dismissal of the original condemnation action but with leave to amend as to matters occurring thereafter. Plaintiffs chose not to amend, and judgments of dismissal were entered. Plaintiffs in both actions appeal and we have consolidated the proceedings for decision.

Plaintiffs seek to recover under inverse condemnation, one of two basic procedural devices for insuring that the constitutional proscription that "[p]rivate property shall not be taken or damaged for public use without just compensation having first been made to . . . the owner . . . " is not violated. (Cal. Const., art. I, § 14.) The other procedure is eminent domain, the significant difference being that in the latter the public authority takes the initiative whereas in the former it is the property owner who commences litigation. (3 Witkin, Summary of Cal. Law (7th ed. 1960) Constitutional Law, § 223, at p. 2033.) The constitutional guarantee of compensation extends to both types of cases and not merely where the taking is cheap or easy; indeed the need for compensation is greatest where the loss is greatest. (Stoebuck, Condemnee's Rights (1970) 56 Iowa L. Rev. 293, 307.)

In either action the constitutional standard of "just compensation" remains the guide. In general that standard "is

to be measured by the market value of the property . . ." at the time of the taking. (Rose v. State of California (1942) 19 Cal.2d 713, 737; see Code Civ. Proc., § 1249.) "Market value," in turn, traditionally has been defined as "the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable." (Sacramento etc. R.R. Co. v. Heilbron (1909) 156 Cal. 408, 409.)

While expert witnesses testifying on behalf of the public authority and those on behalf of the property owner may differ widely on their opinion as to the value of the property taken, this difference usually reflects the elusive nature of the fair market value concept and not the appropriate date on which valuation should be based. However, a variety of circumstances may actually becloud the proper valuation date. While in California this date is set by statute at the time the summons is issued (Code Civ. Proc., § 1249), depending on the nature of those activities occurring prior to the issuance of summons a different date may be required in order to effectuate the constitutional requirement of just compensation. (Peacock v. County of Sacramento (1969) 271 Cal.App.2d 845, 856; Foster v. City of Detroit, Mich. (E.D.Mich. 1966) 254 F.Supp. 655, 661-666, affirmed (6th Cir. 1968) 405 F.2d 138;

cf. People ex rel. Dept. of Public Works v. Lillard (1963) 219 Cal.App.2d 368, 377.)

In analyzing the complexities inherent in a determination of the factors occurring prior to the statutory valuation date to be considered in the final award, the parties have concentrated on whether the precondemnation activities of defendant city were a "blight" on the subject properties or a "de facto taking" of those properties. (4 Nichols, The Law of Eminent Domain (3d ed. rev. 1971) § 12.3151[5]; City of Buffalo v. J. W. Clement Co. (1971) 321 N.Y.S.2d 345, 356.)

At the onset we note that the actions of defendant did not constitute "condemnation blight" in the sense that blight describes the converse of the situation with which we were faced in Merced Irrigation Dist. v. Woolstenhulme (1971) 4 Cal.3d 478. In <u>Merced</u> we held that the value by which property was <u>enhanced</u> due to a public project, before it was reasonably expected that the parcel in question would in fact be taken by the project, should be included in the measure of just compensation. There the condemnation suit was filed in 1967 but plans for a massive redevelopment of the Lake McClure region had been announced as early as the late 1950s. "By 1962 the district had begun a quest for federal funds to assist in the financing of the project, and early in 1963 several newspaper articles informed the public that the completed

Lake McClure project would include recreational facilities, such as camping, boating and fishing. The trial court found that about January 1, 1963 the public, while unaware of 'exactly what area, what spots were to be recreation,' did know of the general recreation plans, and that, as a result, property values in the area began to increase within a short time thereafter." (4 Cal.3d at p. 485.)

Because of this precondemnation activity concerning a project which would have a beneficial impact on a <u>general area</u>, property values in that area tended to rise. We deemed that increase "project enhancement" and held that under appropriate circumstances the condemnee was entitled to include such enhancement in his measure of recovery. The converse of the situation in <u>Merced</u> is project, or condemnation, blight. Thus, under some circumstances an announcement that an undesignated parcel or parcels of land may be appropriated at some future time for a generally unappealing project may tend to decrease land values in the vicinity. (See Comment, <u>Condemnation Blight: Uncompensated Losses in Eminent Domain Proceedings--Is Inverse Condemnation the Answer?</u> (1972) 3 Pacific L.J. 571, 573.) For example, publicity that a refuse dump will be located somewhere within a 10-square-mile area may tend to depress the value of all land within that area because of the adverse impact a dump might have on other property in close proximity.

In the case at bar, however, the precondemnation publicity complained of consisted of announcements directly aimed at plaintiffs' properties and not at an undesignated area. We therefore are not concerned here with blight in terms of the converse of the circumstances presented in Merced. (Merced Irrigation Dist. v. Woolstenhulme, supra, 4 Cal.3d at p. 483, fn. 1.)[1/]

Having discarded the theory that the instant case involves blight, we turn to the type of damages sought by plaintiffs. While admittedly the pleadings are not a model of clarity on this point, it appears that plaintiffs claim the fair market value of their properties declined as a result of defendant's two announcements of intent to condemn made prior

---

[1/] To allow recovery in every instance in which a public authority announces its intention to condemn some unspecified portion of a larger area in which an individual's land is located would be to severely hamper long-range planning by such authorities (cf. Merced Irrigation Dist. v. Woolstenhulme, supra, 4 Cal.3d at p. 496, fn. 9), some of which may be required by state law (see generally Gov. Code, § 65101 et seq.). On the other hand, it would be manifestly unfair and violate the constitutional requirement of just compensation to allow a condemning agency to depress land values in a general geographical area prior to making its decision to take a particular parcel located in that area. (See 4 Nichols, supra, § 12.3151[2], at pp. 328-329; cf. Buena Park School Dist. v. Metrim Corp. (1959) 176 Cal.App.2d 255, 258-259.) The length of time between the original announcement and the date of actual condemnation may be a relevant factor in determining whether recovery should be allowed for blight or for other oppressive acts by the public authority designed to depress market value. (Cf. Foster v. City of Detroit, Mich., supra, 254 F.Supp. 655, 661-666.)

to instituting eminent domain proceedings.[2/] They contend that because of the condemnation cloud hovering over their lands, they were unable to fully use their properties and that this damage, reflected in loss of rental income, should be recoverable.

The city insists that plaintiffs are not entitled to recover for losses caused by the precondemnation announcements because during the period between the public statements and the taking of the properties there was neither physical invasion of plaintiffs' lands nor any direct interference with the condemnees' possession and enjoyment of their lands. Such an assertion contains the implication that plaintiffs seek recovery under a "de facto taking" theory.

In de facto taking cases, the landowner claims that because of particularly oppressive acts by the public authority the "taking" actually has occurred earlier than the date set by statute (Code Civ. Proc., § 1249). (See Foster v. City of Detroit, Mich., supra, 254 F.Supp. 655.) The prevailing rule,

---

[2/] The first announcement was made on May 11, 1965, after which actions in eminent domain were commenced. These proceedings were terminated on November 16, 1966, after the city had announced on the previous July 7 that even though it would dismiss the pending actions, condemnation proceedings would be reinstituted at some later date. On August 21, 1969, a second condemnation suit was brought against plaintiff Klopping. Plaintiff Sarff lost his property through foreclosure on May 16, 1968; his successor sold it to the city.

as stated recently by the New York Court of Appeals in City of Buffalo v. J. W. Clement Co., supra, 321 N.Y.S.2d 345, 356, is that before a de facto taking results there must be a "physical invasion or direct legal restraint." (See also 4 Nichols, supra, § 12.3151[5], at p. 336.) One example of a "legal restraint" discussed in several California cases has been a particularly harsh zoning regulation, often calculatingly designed to decrease any future condemnation award. (Peacock v. County of Sacramento, supra, 271 Cal.App.2d 845, 856, 862-864; Sneed v. County of Riverside (1963) 218 Cal.App.2d 205, 209-211; Kissinger v. City of Los Angeles (1958) 161 Cal. App.2d 454, 458-460.)

However, a fundamental difference arises between the relief sought in de facto taking situations and that sought here. In the former, the owner claims his property has been <u>taken</u> on the earlier date; thus all decline in value after that date is chargeable to the condemner. This would include damages wholly unrelated to the precondemnation activity of the public agency. For example, losses due to a general decline in market value in the area or to the adverse consequences of a natural disaster would be borne by the condemner since the <u>taking</u> of the property is said to have occurred at the earlier date.

In the instant case, however, plaintiffs do not contend that the subject properties should be treated as if they were actually condemned on either May 11, 1965, or July 7, 1966. The date of the taking, at least for plaintiff Klopping (see fn. 2), remains the date the summons was issued. Rather plaintiffs submit that any decrease in the market value caused by the precondemnation announcements should be disregarded and that the property should be valued without regard to the effect of the announcements on the property. Under this contention, any decline in the market value of the properties caused by general conditions unrelated to the activities of the condemner would be shouldered by the landowner.

The relevant issues in a de facto taking situation are significantly distinct from those arising when the claim is that the adverse economic effect of precondemnation publicity on the proposed taking should be disregarded. The valuation issue to be resolved in normal eminent domain proceedings (Sacramento etc. R.R. Co. v. Heilbron, supra, 156 Cal. 408, 409) is wholly unrelated to the determination of the issue of the presence of activities by the condemner which constitute a taking of the property even though no summons has been issued.

The earliest pronouncement on the subject of the effect to be given to announcements of proposed condemnation

in determining just compensation appears to have come from the Court of Appeal in Atchison, Topeka and Santa Fe Ry. Co. v. Southern Pacific Co. (1936) 13 Cal.App.2d 505, disapproved on other grounds in County of Los Angeles v. Faus (1957) 48 Cal.2d 672, 680. There the court upheld the trial judge's refusal to permit the condemnee to inquire into any decrease in the market value between precondemnation announcements and the institution of the eminent domain action.

"It is appellants' contention that the commission's order of July 8, 1927, was an important element to be employed by anyone seeking to determine the market value as of the date of filing the complaint herein, namely, December, 1933, in that the very order itself, becoming known, retarded this area, i.e. 'stigmatized' it, and affected its market value. The law does not, however, lend a willing ear to speculation. While appellants may have evidenced change for the worse in the demand for real estate there between July, 1927, and October 4, 1933, when the commission issued its decision 26399, approving the Plaza Set Back Plan, yet the trial court would have permitted an indulgence in unfathomable speculation had it opened the road to the examination of witnesses, using the order of July, 1927, and said Plan 4-B as a basis in order to determine whether there was a slump in the market in this

area, and if so, what it was due to, during that period. Appellants' statement: 'In other words, appellants were entitled to have the market value of this land determined as if the decision of the commission had never existed', to us is paradoxical. The market value is in effect and we are not governed by the cause that brings it about in order to determine it." (13 Cal.App.2d at p. 517.)

In support of its decision, the court in Atchison relied on our early case of San Diego Land etc. Co. v. Neale (1888) 78 Cal. 63. In Neale defendant's land was being taken as a reservoir site in connection with the construction of a dam on a neighboring tract. At trial, the condemnee asked his appraiser to evaluate the land on the basis of its worth as a reservoir site. On appeal, we held this question improper, stating: "it seems monstrous to say that the benefit arising from the proposed improvement is to be taken into consideration as an element of the value of the land." (78 Cal. at p. 75.)

This statement, which unfortunately spawned the development of the project enhancement doctrine prior to our decision in Merced, was in reality nothing more than a declaration of "the firmly established premise that 'compensation is based on loss imposed on the owner, rather than on benefit

received by the taker. [Citations.] The beneficial purpose to be derived from the condemner's use of the property is not to be taken into consideration in determining market value, for it is wholly irrelevant.'" (Merced Irrigation Dist. v. Woolstenhulme, supra, 4 Cal.3d at p. 491.)

The court in Atchison nevertheless seized on the above-quoted language from Neale and rhetorically asked: "If the benefits may not be considered, why consider the detriment? A value so derived is too remote and speculative." (13 Cal.App.2d at p. 518.)

Thus the seminal case in the field of loss occasioned by precondemnation announcements relied on two factors in rejecting recovery: (1) what it perceived to be persuasive authority from this court in an analogous area; and (2) the concern that testimony on the effect of public announcements on market value would be speculative. We reject this rationale on both counts.

The court in Atchison viewed Neale as standing for the proposition that an increase in market value occasioned by the announcement of a condemnation project was to be disregarded. Therefore, it reasoned, evidence on any decrease in value caused by the announcement must likewise be disallowed. However, that conclusion is in fact the converse of the

necessary corollary to the holding in Neale. Since Neale held that increases due to precondemnation publicity should be disregarded it follows that where there is decline in value such decreases are likewise to be disregarded. This can be accomplished only by allowing testimony as to what decline, if any, was due to any announcements made prior to condemnation. (Andersen, Consequence of Anticipated Eminent Domain Proceedings--Is Loss of Value a Factor? (1964) 5 Santa Clara Law. 35, 38; see also Comment, Condemnation Blight: Uncompensated Losses in Eminent Domain Proceedings--Is Inverse Condemnation the Answer?, supra, 3 Pacific L.J. at pp. 582-583.)

The second consideration prompting the court in Atchison to disallow evidence as to the decline in value occasioned by such publicity was its concern over the speculative quality of the evidence. However, in the field of appreciation in value, the condemnee is put to a similar task in being required to ferret out various factors affecting market value. Indeed, under the rule set forth in Merced the burden on the condemnee is doubly difficult. First of all, he must prove that it was not "reasonably foreseeable" that the parcel involved would be included in the project from the beginning. (4 Cal.3d at p. 497.) Such a standard, while

legally sound, will undoubtedly give rise to testimony based on some element of speculation. Furthermore, if it was reasonably foreseeable that the property was to be included in the original project, and yet the owner seeks to demonstrate the presence of nonproject increases in market value over the same period, he must distinguish between appreciation caused by the project and appreciation caused by nonproject variables. (See generally City of Pasadena v. Union Trust Co. (1934) 138 Cal.App.21, 27, disapproved on other grounds in Merced Irrigation Dist. v. Woolstenhulme, supra, 4 Cal.3d at p. 495.) There is no more speculation inherent in distinguishing between project and nonproject depreciation than there is between project and nonproject appreciation. (Andersen, Consequence of Anticipated Eminent Domain Proceedings--Is Loss of Value a Factor?, supra, 5 Santa Clara Law. at pp. 43-46.)

Since the condemnee has the burden of proving damages (San Francisco v. Tillman Estate Co. (1928) 205 Cal. 651, 653; People ex rel. Dept. of Pub. Wrks. v. Younger (1970) 5 Cal. App.3d 575, 579), requiring the condemnee to lay a proper foundation in these matters (People ex rel. Dept. of Public Works v. Lillard, supra, 219 Cal.App.2d 368, 377) and properly instructing the jury should adequately circumscribe speculation

and render unnecessary a rule of exclusion created from apprehension of speculation. (Webber, The Lost Identity of Blight (1970) 45 State Bar J. 492, 495-496.)

Because Atchison's conclusion to disallow testimony on decline in market value occasioned by precondemnation announcements rested on a dubious premise and overemphasized the speculation inherent in such testimony, that case and subsequent cases based thereon (City of Oakland v. Partridge (1963) 214 Cal.App.2d 196, 202-203; People v. Lucas (1957) 155 Cal.App.2d 1, 5-7) are no longer controlling and are disapproved.

Instead we adopt the rule implicitly approved by the Court of Appeal in People ex rel. Dept. of Public Works v. Lillard, supra, 219 Cal.App.2d 368 and Buena Park School Dist. v. Metrim Corp., supra, 176 Cal.App.2d 255.

In Lillard the state sought to condemn land for widening a freeway and for building a frontage road, thereby cutting off defendant's direct access to the main throughway. Defense counsel was not permitted to ask a state witness about the depreciation in value due to the threat of condemation. On appeal the court found that defendant had failed to lay a sufficient foundation for such a question because there was no evidence as to any threat of condemnation or any damages caused thereby. However, the Court of Appeal then

declared (at p. 377): "Properly framed and with a foundation-laid inquiry, cross-examination of an adverse witness on this subject would have been proper. Although there appears to be a conflict of authority on whether 'market value' is still the yardstick of just compensation when it is established that a depressed market for the property is created by a proposed condemnation (see 1 Orgel on Valuation Under Eminent Domain, p. 449), at least one California case has said that the trial court 'could have, within the limits of sound legal and equitable principles, advised the jury that they should treat the property as having the value that it would have had, had no preliminary action been taken by the board toward the acquisition of the property.' [Citation.]"

In the Buena Park School Dist. case the matter was presented somewhat differently. There defendant landowner sought to introduce evidence as to the availability of his parcel for subdivision purposes. The Court of Appeal, in an appeal by the school district, held that the subdivision element was properly included in the market value instruction even though it was obvious that defendant could not subdivide because eminent domain proceedings were threatened. The court, after quoting the definition of market value contained in Sacramento etc. R.R. Co. v. Heilbron, supra, 156 Cal. 408, 409,

stated: "This classic definition of market value contemplates, of course, the price which the property would have brought at the time of valuation had it then been placed upon the market and had it then been available for sale. It is obvious that in determining that value the trier of fact must disregard the fact that at that time because of the filing of condemnation proceedings the property was not actually salable. It is a matter of common knowledge that a purchaser would not buy property in the process of being condemned except at a figure much below its actual value. It follows, therefore, that in arriving at the fair market value it is necessary that the jury should disregard not only the fact of the filing of the case but should also disregard the effect of steps taken by the condemning authority toward that acquisition. To hold otherwise would permit a public body to depress the market value of the property for the purpose of acquiring it at less than market value." (176 Cal.App.2d at pp. 258-259; see also United States v. Virginia Electric and Power Co. (1961) 365 U.S. 624, 636.)

We agree in principle with this statement.[3/] However,

[3/] It is worthy to note that a similar rule has been adopted by the Legislature for the purposes of achieving just compensation when property is taken by negotiated sale rather than by eminent domain. Government Code section

we are also aware that to allow recovery under all circumstances for decreases in the market value caused by precondemnation announcements might deter public agencies from announcing sufficiently in advance their intention to condemn. The salutary by-products of such publicity have been recognized by this court (Merced Irrigation Dist. v. Woolstenhulme, supra, 4 Cal.3d at p. 496, fn. 9); plaintiffs likewise agree that a reasonable interval of time between an announcement of intent and the issuance of the summons serves the public interest. Therefore, in order to insure meaningful public input into condemnation decisions, it may be necessary

---

7267.2 provides: "Before the initiation of negotiations for real property, the public entity shall establish an amount which it believes to be just compensation therefor, and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the public entity's approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property to be acquired prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner or occupant, will be disregarded in determining the compensation for the property. The public entity shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount it established as just compensation. Where appropriate, the just compensation for the real property acquired and for damages to remaining real property shall be separately stated."

for the condemnee to bear slight incidental loss.[4/] However, when the condemner acts unreasonably in issuing precondemnation statements, either by excessively delaying eminent domain action or by other oppressive conduct, our constitutional concern over property rights requires that the owner be compensated. This requirement applies even though the activities which give rise to such damages may be significantly less than those which would constitute a de facto taking of the property so as to measure the fair market value as of a date earlier than that set statutorily by Code of Civil Procedure section 1249. Under our conclusion here in

---

[4/] We note that for purposes of a negotiated sale Government Code section 7267.2 (see fn. 3, supra) does not require a finding of unreasonable action before decreases caused by "the likelihood that the property would be acquired" are to be disregarded. However, the Legislature may by statute include in the final award certain costs and expenses not required by the Constitution. (Cf. County of Los Angeles v. Ortiz (1971) 6 Cal.3d 141, 144-145; compare Central Pacific R. Co. v. Pearson (1868) 35 Cal. 247, 263, overruled on other grounds in County of Los Angeles v. Faus supra, 48 Cal.2d 672, 680; Town of Los Gatos v. Sund (1965) 234 Cal.App.2d 24, 28, with Gov. Code, § 7262 [moving expenses]; and County of Los Angeles v. Ortiz, supra, 6 Cal.3d 141, 143 fn. 2, 148-149 with Code Civ. Proc., § 1246.3 [attorneys' fees and appraisal costs].)

Furthermore, section 7267.2 explicitly refers to acquisition of public property by negotiated sale rather than by eminent domain. In view of the legislative command that negotiated sales are to be favored over condemnation suits for a variety of policy reasons (see Gov. Code, § 7267), it is understandable that in order to acquire property by agreement the state might be more generous than is required under the Constitution.

most instances the valuation date remains fixed at the date of the issuance of the summons. Thus a public authority is not required to compensate a landowner for damages to his property occurring after the announcement if the injury is not unreasonably caused by the condemning agency; interest is likewise to run not from the announcement but from the valuation date. (4 Nichols, supra, § 12.3151[5], at p. 344; City of Buffalo v. J. W. Clement Co., supra, 321 N.Y.S.2d at pp. 356-357.)

Accordingly we hold that a condemnee must be provided with an opportunity to demonstrate that (1) the public authority acted improperly either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation; and (2) as a result of such action the property in question suffered a diminution in market value.[5/]

[5/] Our holding thus does not cast doubt on the validity of the decision in Silva v. City & County of San Francisco (1948) 87 Cal.App.2d 784. There the plaintiff sued for declaratory relief, seeking a determination that if his property was worth $10,000 at the time the board of supervisors announced its intent to condemn he would automatically be entitled to $10,000 at the time the condemnation suit was actually commenced. The court denied relief. Only if it is concluded that a de facto taking in the traditional sense has occurred would the valuation date be moved up as was sought by the plaintiff. Only in unusual circumstances would an announcement of intent to condemn constitute a de facto taking.

In Bank of America v. County of Los Angeles (1969) 270 Cal.App.2d 165, a deputy county counsel appeared at a probate

Here plaintiffs seek to prove at trial that the fair market value of their properties was diminished because of the precondemnation statements issued by defendant city. Specifically they allege that they were unable to fully use their properties and suffered a loss of rental income.[6/] It has long been established that rent is an appropriate criterion for measuring fair market value. (4 Nichols, supra, §§ 12.312, 12.3122.) "[I]f property is rented for the

---

sale and announced that the board of supervisors had adopted a resolution to condemn the parcel in question. Plaintiffs complained that this announcement stifled the bidding process. They sought to recover the difference between the price at which the property was sold and the anticipated higher bid. The Court of Appeal rejected this claim. To the extent the decision holds that losses occasioned by an announcement of intent to condemn are not recoverable (see 270 Cal.App.2d at p. 177), it is disapproved. However, we note that the speculative nature of "anticipated bids" is such that the case presented matters not currently before us.

Finally, in Hilltop Properties v. State of California (1965) 233 Cal.App.2d 349, the plaintiff claimed that the state had requested that it exclude two strips of land from its proposed subdivision plan so that a freeway could be widened. While recovery for inverse condemnation was denied, it should be noted that at no time did the state formally announce its intention to condemn. Furthermore, relief was granted on a promissory estoppel theory.

6/ No claim is made that as a result of the threat of condemnation the properties or any buildings deteriorated to such a degree that the holdings became virtually worthless. (Cf. Foster v. City of Detroit, Mich., supra, 254 F.Supp. 655, 661-666; see Webber, The Lost Identity of Blight, supra, 45 State Bar. J. at pp. 493-494.)

use to which it is best adapted, the actual rent reserved, capitalized at the rate which local custom adopts for the purpose, forms one of the best tests of value . . . ." (4 Nichols, supra, § 12.3122, at p. 169.) On the date on which an announcement of future intent to condemn is made, the market value may properly be measured by the anticipated rental income to be received throughout the lifetime of the property. If as a result of precondemnation statements rental income is lost, the anticipated rental income would be diminished and a decline in the fair market value would follow. While we reiterate that the valuation date set statutorily at the issuance of the summons remains intact, if the steps taken toward condemnation are to be disregarded when the condemner acts unreasonably, the condemnee must be compensated for loss of rental income attributable to such precondemnation publicity. Rental losses occasioned by a general decline in the property value or by a natural disaster occurring prior to the date of taking must, however, be borne by the property owner.

Compensation for loss of rental income caused by an announcement of future condemnation action has been recently allowed by the Supreme Court of Wisconsin in Luber v. Milwaukee County (Wis. 1970) 177 N.W.2d 380. There appellants complained

that the imminence of condemnation proceedings caused a principal tenant not to renew his lease. In holding that the condemnee could recover for loss of rental income for the period between the announcement and the time the suit was filed, the court stated: "We think that under property concepts one's interest in rental income is such as to deserve compensation under the 'just compensation' provision of the Wisconsin Constitution. In the instant case it is undisputed that the pendency of the condemnation was the sole cause of the appellants' rental loss. . . . [¶] The importance of allowing recovery for incidental losses has increased significantly since condemnation powers were initially exercised in this country. During the early use of such power, land was usually undeveloped and takings seldom created incidental losses. Thus the former interpretation of the 'just compensation' provision of our constitution seldom resulted in the infliction of incidental losses. The rule allowing fair market value for only the physical property actually taken created no great hardship. In modern society, however, condemnation proceedings are necessitated by numerous needs of society and are initiated by numerous authorized bodies. Due to the fact people are often congregated in given areas and that we have reached a state wherein re-development is necessary, commercial and

industrial property is often taken in condemnation proceedings. When such property is taken, incidental damages are very apt to occur and in some cases exceed the fair market value of the actual physical property taken. . . . [¶] We believe that one's interest in rental loss is such as is required to be compensated under the 'just compensation clause' . . . . Sec. 32.19(4), Stats., insofar as it limits compensation for the taking of such interest is in conflict with the state constitution. The rule making consequential damages damnum absque injuria is, under modern constitutional interpretation, discarded . . . ." (177 N.W.2d at pp. 384-385, 386; cf. Jacksonville Express. Auth. v. Henry G. Du Pree Co. (Fla. 1958) 108 So.2d 289, 291, 292.)[7/]

7/ The Wisconsin Supreme Court characterized the damages suffered by the appellant in Luber as "incidental." This is accurate in the sense that they are not occasioned by the fact of condemnation but on activity engaged in by the public agency prior to condemnation. However, we note that recovery of lost rental income relates directly to the fair market value of the property and hence is distinguishable from such traditional incidental damages as, for example, moving expenses. (4 Nichols, supra, § 13.32.) In California, moving expenses are excluded from the constitutional requirement of just compensation (Central Pacific R. Co. v. Pearson, supra, 35 Cal. 247, 263; Town of Los Gatos v. Sund, supra, 234 Cal.App.2d 24, 28) but are compensable under some circumstances by statute (Gov. Code, § 7262). Similarly, recovery for expert witness and attorneys' fees is not compelled constitutionally (County of Los Angeles v. Ortiz, supra, 6 Cal.3d 141, 143, fn. 2, 148-149) but is authorized in some limited instances by statute (Code Civ. Proc., § 1246.3).

Plaintiffs here have alleged that defendant's actions were unreasonable and performed for the purpose of depressing the fair market value and preventing plaintiffs from using their land. Defendant announced on two separate occasions its intent to condemn. The first resolution was adopted on May 11, 1965; the second on July 7, 1966, at which time defendant abandoned eminent domain proceedings for the stated reason that it was not "fair and equitable" to maintain the cloud of condemnation over property owned by plaintiffs and others during the Alpha Beta challenge. Yet in the same resolution the city recreated a cloud by announcing its intent to reinstitute condemnation proceedings if the Alpha Beta matter was resolved in the city's favor. This latter declaration appears to have no discernible relation to a desire to insure public input into the decision-making process since, presumably, discussion on the advisability and location of a parking district occurred at the time of the May 11, 1965, announcement. In any event, whether there was unreasonable delay or whether the July 7 announcement itself constituted unreasonable action on the part of defendant is a question of fact.

We now turn to additional complexities in this case. The city contends that since plaintiffs did not seek to set aside the abandonment of the initial condemnation

proceedings, they are bound by Code of Civil Procedure section 1255a.[8/] Under the city's argument, plaintiffs are thus limited to recovering only their costs and disbursements

---

8/ Section 1255a provides in part:

"(a) The plaintiff may abandon the proceeding at any time after the filing of the complaint and before the expiration of 30 days after final judgment, by serving on defendants and filing in court a written notice of such abandonment. Failure to comply with Section 1251 of this code shall constitute an implied abandonment of the proceeding.

"(b) The court may, upon motion made within 30 days after such abandonment, set aside the abandonment if it determines that the position of the moving party has been substantially changed to his detriment in justifiable reliance upon the proceeding and such party cannot be restored to substantially the same position as if the proceeding had not been commenced.

"(c) Upon the denial of a motion to set aside such abandonment or, if no such motion is filed, upon the expiration of the time for filing such a motion, on motion of any party, a judgment shall be entered dismissing the proceeding and awarding the defendants their recoverable costs and disbursements. Recoverable costs and disbursements include (1) all expenses reasonably and necessarily incurred in preparing for the condemnation trial, during the trial, and in any subsequent judicial proceedings in the condemnation action and (2) reasonable attorney fees, appraisal fees, and fees for the services of other experts where such fees were reasonably and necessarily incurred to protect the defendant's interests in preparing for the condemnation trial, during the trial, and in any subsequent judicial proceedings in the condemnation action, whether such fees were incurred for services rendered before or after the filing of the complaint. In case of a partial abandonment, recoverable costs and disbursements shall include only those recoverable costs and disbursements, or portions thereof, which would not have been incurred had the property or property interest sought to be taken after the partial abandonment been the property or property interest originally sought to be taken. Recoverable costs and disbursements, including expenses and fees, may be claimed in and by a cost bill, to be prepared, served, filed, and taxed as in civil actions. Upon judgment of dismissal on motion of the plaintiff, the cost bill shall be filed within 30 days after notice of entry of such judgment."

pursuant to subdivision (c) of that section. Plaintiffs were awarded their costs by the Court of Appeal in City of Whittier v. Aramian, supra, 264 Cal.App.2d 683.

Section 1255a, subdivision (c), provides, in part: "Upon the denial of a motion to set aside such abandonment or, if no such motion is filed, . . . a judgment shall be entered dismissing the proceeding and awarding the defendants their recoverable costs and disbursements." The statute does not provide recovery for decreases in market value caused by pre-condemnation publicity. But since our decision here is based on constitutional principles the fact that section 1255a is silent on damages does not foreclose consideration of the subject. While the city seeks to cast the failure to set aside the abandonment as an election of remedies, thereby precluding additional compensation, it appears that the procedure set forth in section 1255a does not bear on the issue of whether an individual whose property was once singled out for condemnation is able to recover the diminution in market value caused by an announcement of the public authority's intent to condemn.

Section 1255a, subdivision (a), permits the condemning agency to abandon eminent domain proceedings "any time after the filing of the complaint and before the expiration

of 30 days after final judgment." Thus the statute contemplates instances in which the governmental entity proceeds to judgment and yet elects not to convert private property to public use. The section, therefore, provides the flexibility necessary to protect the public plaintiff from being required to take property which it no longer needs.

However, the provision is manifestly open to abuse and for that reason subdivisions (b) and (c) provide some protection for property owners. Subdivision (b) allows the defendant to set aside the abandonment on estoppel principles if the position of the defendant "has been substantially changed to his detriment in justifiable reliance" upon the condemnation action. (Cf. McGee v. City of Los Angeles (1936) 6 Cal.2d 390, 392 [demolished building].)

In those instances in which there has been no detrimental reliance, subdivision (c) compensates the property owner for some of his costs and expenses in anticipation of an eminent domain trial. The provision does not attempt to deal with losses due to a decline in the market value or other damages to the property. (Merced Irrigation Dist. v. Woolstenhulme, supra, 4 Cal.3d 478, 505; La Mesa-Spring Valley School Dist. v. Otsuka (1962) 57 Cal.2d 309, 312-314, 315-318.)

"The statute operates to prevent the condemner, within reasonable limits, from prosecuting successive claims [citations], and to protect innocent owners against expenses to which they may be put in preparing a defense which has become unnecessary because the condemner for any reason chooses to give up the intended taking [citation]." (Frustuck v. City of Fairfax (1964) 230 Cal.App.2d 412, 417.)

In fact when the Court of Appeal concluded that plaintiffs here and others were entitled to costs and expenses under subdivision (c), it noted that under "the language of the statute it is not the condemnation _project_ which must be abandoned, but rather the _action_ in which costs and fees have been incurred." (City of Whittier v. Aramian, supra, 264 Cal.App.2d 683, 686; italics added.) Conversely, insofar as losses occasioned by precondemnation announcements are concerned, these losses occur irrespective of whether eminent domain proceedings are eventually instituted. Thus, while recovery for costs and disbursements under section 1255a relates primarily to the filing of the complaint and not the precondemnation announcement of intent, recovery for a decline in the fair market value relates principally to the announcement and not to the filing of the action. Accordingly, we conclude that the statute does not require a property owner to elect one of two alternative remedies.

Our conclusion is supported by recent legislation in this area. Section 1243.1 of the Code of Civil Procedure states, in part: "In any case in which a public entity . . . which possesses the power of eminent domain establishes by resolution or ordinance the necessity to acquire a particular parcel or parcels of real property by eminent domain, and such public entity does not thereafter initiate, within six months, an action in eminent domain to take such parcel, the owner of the parcel may bring an action in inverse condemnation requiring the taking of such parcel and a determination of the fair market value payable as just compensation for such taking. In such inverse condemnation action, the court may, in addition, *or in the alternative*, if it finds that the rights of the owner have been interfered with, award damages for any such interference by the public entity." (Italics added.)

This provision recognizes that an action in eminent domain frequently is not filed within six months of a public entity's announcement of intent to condemn. Under such circumstances a property owner may bring an action to require the taking of his property and "in addition, or in the alternative" be awarded damages. Section 1243.1 obviously contemplates, for example, that in some instances a precondemnation statement will interfere so substantially with the right of a property

owner to lease his land that after six months the owner should be able to recover for such interference irrespective of whether the property is taken. In fact subdivision (3) of section 1243.1 provides that the above-quoted statutory language "shall not affect a public entity's authority to . . . abandon the condemnation action." Thus recovery for loss of rental income after the condemner has excessively delayed bringing an action in eminent domain or has otherwise acted unreasonably is permitted irrespective of whether condemnation proceedings are abandoned or whether they are instituted at all.[9/]

Both plaintiffs here seek to recover damages in inverse condemnation and not as part of an eminent domain award. The city contends that since neither currently owns the property they are each barred. With regard to plaintiff

---

9/ Section 1243.1 requires a property owner to wait six months after a resolution or ordinance of intent to condemn is passed before he may bring an inverse condemnation action. We do not decide whether the Legislature intended that any delay of less than six months is per se reasonable or whether it enacted the waiting period to provide public entities with a minimum period of time in which to negotiate a purchase of the property and thus avoid litigation altogether. (Cf. Luber v. Milwaukee County, supra, 177 N.W.2d 381, 382-383 [statute limiting the right to recover rental loss to one year prior to taking].) We do note that in the last two years the Legislature has enacted comprehensive legislation designed to decrease the number of condemnation suits. (Stats. 1971, ch. 1574, §§ 10-15, at pp. 3160-3162.) In any event, plaintiffs here waited more than six months after defendant's second announcement of intent before bringing the present actions.

Klopping, the city asserts that since his land was taken in a second condemnation action which proceeded to judgment he should have claimed the damages he now seeks as part of his eminent domain award. We agree. While it is true that Klopping did bring his inverse condemnation suit before the city instituted its second condemnation action[10/] the eminent domain action proceeded to final judgment first. Since Klopping could have claimed his loss of rental income, if any, occasioned by the two precondemnation announcements in the eminent domain suit, he is barred from seeking those damages in inverse condemnation once the condemnation proceeding becomes final. "Where two actions involving the same issue are pending at the same time, it is not the final judgment in the first suit, but the first final judgment, although it may be rendered in the second suit, that renders the issue res judicata in the other court." (Domestic & Foreign Pet. Co., Ltd. v. Long (1935) 4 Cal.2d 547, 562; 4 Witkin, Cal. Procedure (2d ed. 1971) Judgment, § 166.) Had the city abandoned its condemnation action for a significant period of time so that the inverse

---

10/ The instant case was filed on December 22, 1967. The city filed its second condemnation suit against Klopping on August 21, 1969.

condemnation action proceeded to judgment first, any recovery there would bar a duplicate award for the same damage when eminent domain proceedings were subsequently reinstituted.

Plaintiff Sarff filed his inverse condemnation suit on March 26, 1968. On the following May 16, he lost his property through foreclosure. Certainly this fortuity does not preclude him from recovering for any damages caused by the city in making the two announcements in question. Sarff complains that he was unable to rent the property during the period following the precondemnation announcements. Under the rules discussed above rental loss is a proper element of recovery. In the petition for hearing, filed herein, it also appears that he seeks recovery for damages occasioned by the fact that his property was ultimately foreclosed because the condemnation resolution prevented him from deriving income from his land in order to make mortgage payments. The availability of this element of damage can be more fully explored on remand.

The judgment dismissing the action brought by plaintiff Klopping in No. 29994 is affirmed and the judgment

dismissing the action brought by plaintiff Sarff in No. 29995 is reversed and remanded for proceedings consistent with the views hereinabove expressed. Plaintiffs in both cases are to recover costs (People ex rel. Dept. Pub. Wks. v. International Tel. & Tel. Corp. (1972) 26 Cal.App.3d 549).

MOSK, J.

WE CONCUR:

WRIGHT, C.J.
McCOMB, J.
PETERS, J.
TOBRINER, J.
BURKE, J.
SULLIVAN, J.

[Civ. No. 35956. Second Dist., Div. One. Dec. 8, 1970.]

THE PEOPLE ex rel. DEPARTMENT OF PUBLIC WORKS, Plaintiff and Respondent, v. CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF THE LATTER-DAY SAINTS, Defendant and Appellant.

SUMMARY

The state, through its Department of Public Works brought an eminent domain proceeding to acquire land for construction of a freeway. Over objection of the property owner, the state introduced evidence that after construction of the freeway, the property remaining would have the same general potential for development that it had before the taking. The owner had made no claim for severance damage. The trial court refused the owner's offered instruction to the effect that the property taken should be valued as a distinct piece of property if that value was higher than its value as part of the whole. The jury returned an award based on a valuation substantially lower than that sought by the owner. (Superior Court of Los Angeles County, John W. Holmes, Judge.)

On appeal by the property owner, the Court of Appeal reversed the judgment of the trial court, holding that it was error to admit the evidence of potentially higher value and to refuse the offered instruction as to valuation as a distinct parcel, and that the errors undoubtedly prejudiced the property owner. The court pointed out that under Code Civ. Proc., § 1248, special benefits to remaining property may be offset only against severance damages and not against the value of the property taken. Considering that the property condemned was of a size and shape susceptible of valuation as an independent parcel, the court deemed it appropriate to determine what a willing buyer would pay a willing seller for the land actually taken. (Opinion by Thompson, J., with Wood, P. J., concurring. Gustafson, J., concurred in the judgment.)

HEADNOTES

Classified to McKinney's Digest

(1a, 1b) Eminent Domain §§ 80, 102(0.5)—Evidence as to Damages—Admissibility: Instructions.—In an action to condemn real property for a freeway, it was prejudicial error to receive evidence of potential commercial and multiple residential uses of the remaining property which would be created by the project, and to refuse to instruct the jury that the property taken should be valued as a distinct parcel if that value were higher than its value as a part of the whole, where no claim of severance damage was made (Code Civ. Proc., § 1248), and where the property condemned was of a size and shape susceptible to valuation as an independent parcel.

[See **Cal.Jur.2d, Rev.,** Eminent Domain, § 129; **Am.Jur.2d,** Eminent Domain, § 283.]

(2) Eminent Domain § 67—Compensation—Value of Property Taken—Market Value.—Where property taken in an eminent domain proceeding is not of a size and shape which renders it independently usable, it cannot be valued on the basis of the amount that a willing buyer would pay a willing seller for the land taken, but the property must be valued as a part of a larger whole, and the whole of which the condemned property is a part cannot arbitrarily be separated into zones of value where the possibility of those zones is uneffected by the taking.

(3) Eminent Domain § 67—Compensation—Value of Property Taken—Market Value.—Where property condemned is of a size and shape that renders it independently usable, it is appropriate to determine what a willing buyer would pay a willing seller for the parcel taken; in such case, the highest and best use of the parcel taken is critical and the proposition that the project may shift a similar highest and best use to the remainder of the property becomes significant only as a matter of special benefits.

COUNSEL

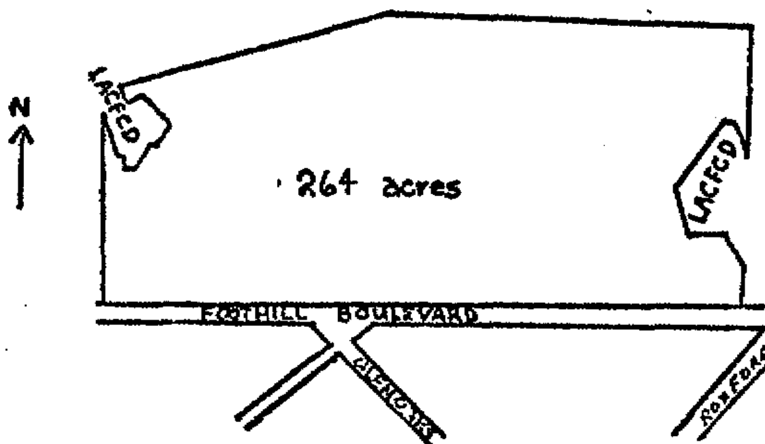
Gibson, Dunn & Crutcher, Samuel O. Pruitt, Jr., and John L. Endicott for Defendant and Appellant.

Harry S. Fenton, Joseph A. Montoya, Richard L. Franck, Robert L. Meyer and Charles E. Spencer, Jr., for Plaintiff and Respondent.

OPINION

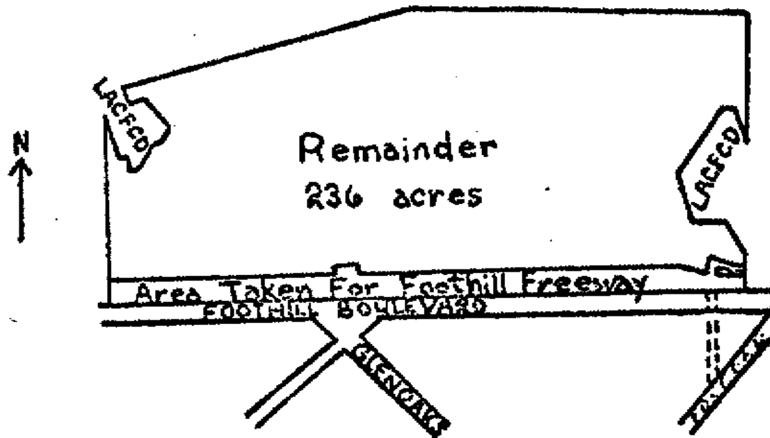
THOMPSON, J.—This is an appeal by the landowner, defendant in an eminent domain proceeding. We reverse the judgment upon the authority of *People* v. *Silveira,* 236 Cal.App.2d 604 [46 Cal.Rptr. 260].

The essential facts of the case at bench are not in dispute. Respondent filed the action in eminent domain which results in the appeal now before us to acquire property for the construction of the Foothill Freeway. Prior to the taking incident to the action, appellant owned a 264-acre parcel of property located to the north of Foothill Boulevard in the Sylmar area of San Fernando Valley. The property was approximately one mile long and one-half mile deep with access to Foothill Boulevard for most of its length. Prior to the taking the property appeared generally as follows:



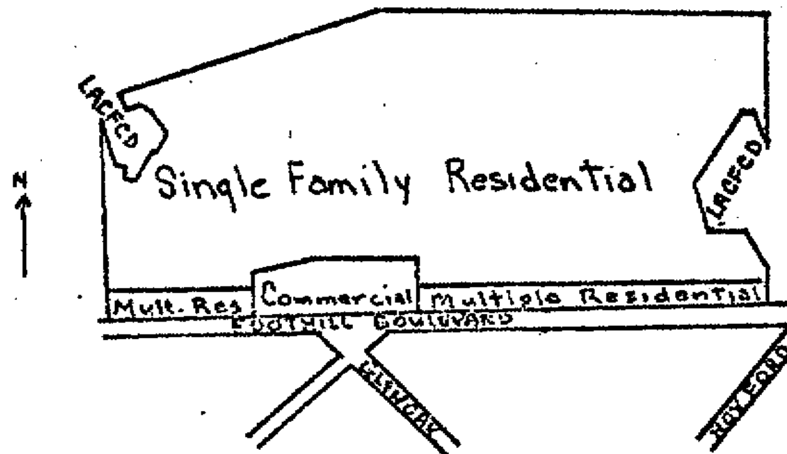
Respondent, by the eminent domain action, condemned two parcels consisting of a strip of land approximately 240 feet deep running the entire

length of the property adjoining Foothill Boulevard. After the taking, the property appeared generally as follows:



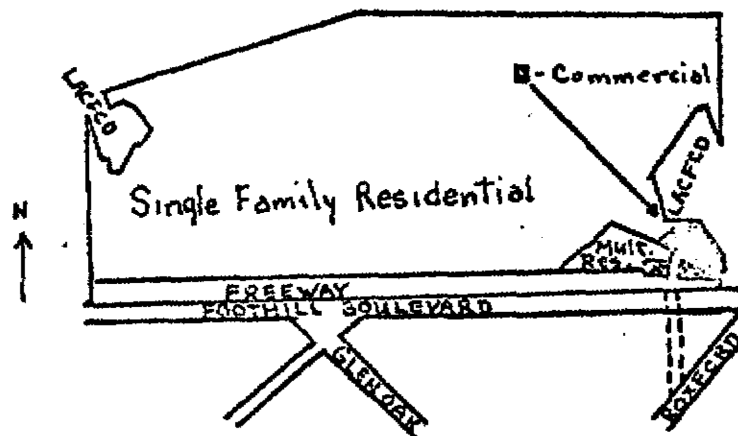
Prior to the taking, the land had unrestricted access to Foothill Boulevard. After the taking, access was limited on the south to the southeast corner and to Glenoaks to the south via a tunnel.

Appellant's expert witnesses testified to a value of the property taken based upon a highest and best use consisting of commercial development near the intersection of Glenoaks and Foothill, multiple residential development along the remainder of the Foothill frontage, and single-family residential development on the rest of the property in the following fashion:



Appellant made no claim to severance damage. It sought compensation for the portion of the property taken at the rate of $65,000 per acre for the "commercial area," $40,000 per acre for the "multiple residential area," and $22,500 for the "single family residential area."

Respondent's expert witnesses testified to a value of the property taken based upon a "holding use," an investment holding for a period of time until market demand justified development. Those experts assigned a uniform value of $17,000 per acre to all of appellant's land. Respondent offered evidence that after the condemnation of the property and the construction of the freeway, the property remaining to appellant would have a potential commercial and multiple residential use generally as follows:



The newly created commercial and multiple residential uses are projected at a freeway interchange at the southeast corner of the remaining property. Respondent also offered evidence that after the construction of the freeway, the property remaining will have the same general potential for development that it had before the taking.

Appellant objected to the evidence upon the ground of irrelevancy. It argued that no claim of severance damage was made and that the potential of commercial and multiple dwelling uses created by the project tended only to establish a special benefit from the project which could not be offset against the landowner's compensation where severance damage was not claimed. The trial court overruled the objection and permitted the introduction of the proffered evidence. No direct evidence of enhancement in

value of the newly created potential of commercial and multiple dwelling uses was offered.

The trial court instructed the jury that it must value the property as a whole and that: "Value as a part of the whole is not, however, necessarily based upon the average value of the whole. . . . The relative worth of the lands taken, as compared to other parts of the property, should be considered. Therefore, in arriving at the value of the property taken, proper allowances should be made for differences in value if any." The court refused instructions tendered by appellant that it should not use the average method of valuation if it found the property taken to be the most valuable of the whole and that it should award the value of the property taken as a distinct piece of property if that value was higher than its value as part of the whole. The jury returned an award based upon a valuation of $18,000 per acre.

Issues on Appeal

(1a) Appellant contends: (1) the trial court erred in receiving evidence of the potential commercial and multiple residential uses of the remaining property created by the project; and (2) the court erred in refusing its instruction that the property taken should be valued as a distinct parcel if that value were higher than its value as a part of the whole.

Higher Zone of Value

Code of Civil Procedure section 1248 requires that the trier of fact determine the value of the property sought to be condemned, the severance damage to the property remaining if the condemned property consists of part of a larger parcel, and the value of special benefits to the remaining property. Those benefits, however, may be set off only against severance damage and "shall in no event be deducted from the value of the portion taken." The rule in section 1248 essentially codifies a long-standing rule of determination of compensation in California eminent domain proceedings. (*Contra Costa County Water Dist.* v. *Zuckerman Constr. Co.*, 240 Cal.App.2d 908, 912 [50 Cal.Rptr. 224].) The evidence of potential higher (and hence more valuable) uses of land on the property remaining occasioned by the project is thus irrelevant if it tends only to establish a special benefit because no severance damages are claimed in the case at bench. It is relevant if it goes to the valuation of the property taken. Our problem is to determine whether the former or latter situation prevails in the case at bench.

Two California cases have considered the problem aptly designated the "reestablishment of a higher zone of value on the remainder." (Matteoni,

The Silveira case and Reestablishment of the Higher Zone of Value on the Remainder (1969) 20 Hastings L. J. 537.) Unfortunately for our peace of mind, those two cases reach contrary results on very similar facts.

City of Los Angeles v. *Allen,* 1 Cal.2d 572 [36 P.2d 611], involves an eminent domain proceeding instituted by the City of Los Angeles to acquire a 33-foot strip of land for the widening of Santa Monica Boulevard. The total parcel consisted of 38.6 acres fronting on Santa Monica for a distance of 800 feet. The property was 2,000 feet deep. The property to a depth of 107 feet from Santa Monica Boulevard was assigned the highest and best use of commercial and appraised at $1.64 per square foot. The rear portion of the property was appraised at 25¢ per square foot. The condemnee contended that it was entitled to be compensated at the rate of $1.64 per square foot, the value directly assignable by the appraisers to the property taken. The trial court awarded compensation at the rate of 32¢ per square foot, the average of the two zones of value. Our Supreme Court affirmed the determination of the trial court. In so doing, it said: "[T]he appellant . . . contend[s] that it is entitled to be awarded the potential value of the strip taken, that is, its value for city lot purposes [$1.64 per square foot] and not as part of the entire acreage. To comply with appellant's request would be to award indirectly to it severance damage when in fact no severance damage exists." (1 Cal.2d 572, 576.) The court rationalized its rejection of the condemnee's argument that the method of computation utilized by the trial court in effect charged it with special benefits when no severance damage was claimed (1 Cal.2d 572, 575) by stating that to award compensation at the rate of $1.64 per square foot for the property taken where the zone of higher use was shifted to the 107 feet adjoining the widened street would unjustly enrich the landowner. (1 Cal.2d 572, 576-577.)

Twenty-one years after the decision of our Supreme Court in *City of Los Angeles* v. *Allen, supra,* a similar issue reached the Court of Appeal of the First District in *People* v. *Silveira,* 236 Cal.App.2d 604 [46 Cal.Rptr. 260]. In *Silveira,* the State Division of Highways condemned a parcel of property along Highway 101 for freeway purposes. The parcel consisted of 9.304 acres and varied in depth from 30 feet at the southerly end to 850 feet at the northerly end. The portion taken was part of a larger 354-acre parcel. Prior to the action, the parcel had highway access at four points. The taking for freeway purposes destroyed that access to Highway 101 and the state was precluded from presenting evidence of a substitute access by a pre-trial order which ruled that the condemner had admitted that all access was taken. The condemnee presented evidence based upon division of the property into various zones of value that the highest and best use of the bulk of property taken which had adjoined Highway 101 was highway commercial. Other

property within the taking was assigned the highest and best use as a part of a subdivision for single and multiple family residences. The highest and best uses assigned the property within the take gave it a higher value than the remaining property in the larger parcel. The trial court instructed that the jury should value the property taken either as a separate parcel or as part of the entire tract, whichever resulted in the greater value. The jury returned a verdict valuing the property separately and taking into account the higher value resulting from the highest and best use as highway commercial. The Court of Appeal affirmed the judgment and hearing was denied in the Supreme Court. The Court of Appeal for the First District expressly approves the earlier decision in *Allen*. It distinguishes *Allen* with the following statements: "In *City of Los Angeles* v. *Allen* on which plaintiff relies . . . [t]here was no evidence of the value which the part taken would have if separately owned and unconnected with the remainder and the parties seemed to have assumed that a piece of land of such slight depth could not have been put to a very valuable use. It was clear, however, that the acreage near the boulevard was more valuable than that remote from it. Accordingly, the referees averaged out the higher values ($1.64) per square foot of the front area with the lower value (25 cents) of the rear area and arrived at an average value (32 cents) per square foot for the entire tract. . . . Since the condemnee in the case claimed no severance damages, the portion of the property not taken under the above method of computation had the same value after the severance. The court therefore properly rejected the condemnee's claim on appeal that the part taken should have been valued at the higher per square foot rule of $1.64 since this would leave the condemnee in possession of more than it had originally and its receipt 'could be justified only if damage resulting to the remaining portion by the severance reduced its value to that extent.' . . . But *Allen* does not stand for the proposition . . . that where the property sought to be condemned is part of a larger parcel, it must in all instances be valued as a part of the whole, despite the fact that it may have a greater value as a separate and distinct piece of property."

There are factual distinctions between *Allen* and *Silveira* not considered significant by the Court of Appeal in the latter case. For example, in *Silveira*, all access to the highway was taken while in *Allen* it was not. We do not consider those distinctions, however, since the denial of hearing in *Silveira* dictates that we seek to reconcile that case with *Allen* on the basis of its decision.

We view the significant disinction to be that in *Allen* the parcel taken was of such a size and shape that it was not susceptible to being valued as a separate and distinct parcel. It was therefore necessary to compute its value as a

portion of a larger piece of property. *Allen* holds that in such a circumstance the larger piece of property must be the entire parcel and not a part of it to which a theoretical value is assigned by the appraisers. Thus the Supreme Court says, "The line between the two portions of the tract [the 107 feet and the remainder] was arbitrarily chosen." (1 Cal.2d 572, 575.) In *Silveira*, the portion taken was of a size and shape susceptible of valuation as a separate parcel. Hence the court could approve a jury instruction that it was to be valued as such if that method of valuation resulted in a greater award.

The distinction between *Allen* and *Silveira*, which we draw here, reconciles the result of the two cases upon the basis of decision used in each. It also treats *Allen* as compatible with the ruling principle that special benefits from the project may not be offset against compensation to the landowner for the value of his land which is condemned. **(2)** Where the property taken is not of a size and shape which renders it independently usable, it cannot be valued on the basis of the amount that a willing buyer would pay a willing seller for the land taken, for by definition there could not be a willing buyer and seller of unusable land. The property must be valued as a part of a larger whole. In that situation, says *Allen*, the whole of which the condemned property is a part cannot arbitrarily be separated into zones of value where the possibility of those zones is unaffected by the taking. **(3)** Where, however, the property condemned is of a size and shape that renders it independently usable, it is appropriate to determine what a willing buyer would pay a willing seller for the parcel taken. If the value is so determined, the highest and best use of the parcel taken is critical and the proposition that the project may shift a similar highest and best use to the remainder of the property becomes significant only as a matter of special benefits.

(1b) In the case at bench, as in *Silveira*, we deal with property condemned which is of a size and shape susceptible to valuation as an independent parcel. We conclude, therefore, that we must be guided by the rule of that case and not by the principle of *Allen*. The rule of *Silveira* renders the evidence to which appellant objected irrelevant and the jury instructions tendered by appellant appropriate. Unquestionably, the improperly received evidence and the refusal of the jury instructions prejudiced appellant. The judgment must therefore be reversed.

Respondent argues that the result for which appellant contends and which we reach here is unfair because the condemnee receives a windfall in the form of an enhanced value in a portion of his remaining land resulting from the creation of a higher use upon it by the project of the same general char-

acter as the highest and best use of the land taken. Thus it argues that the "potential" of the land was not taken. The argument must be rejected. The "unfairness" noted by respondent is that which is always inherent from application of the rule of Code of Civil Procedure section 1248, which precludes the offset of special benefits against the value of the portion of the land taken. Respondent's argument might properly be directed to the Legislature but it is not dispositive of the problem before us. Similarly, the argument ignores that in eminent domain proceedings it is land that is taken and not "potential," and that it is the value of the land that must be determined in the manner dictated by the governing statute.

Disposition

The judgment is reversed.

Wood, P. J., concurred.

GUSTAFSON, J.—I concur in the judgment.

The result of the court's effort to reconcile *Los Angeles* v. *Allen* (1934) 1 Cal.2d 572 [36 P.2d 611] with *People* v. *Silveira* (1965) 236 Cal.App.2d 604 [46 Cal.Rptr. 260] is that when the land taken has a higher unit value than the remainder of the parcel, the landowner is entitled to an award based upon the higher value if the land taken can be sold as a distinct piece of property for a price based upon the higher value, but the landowner is not entitled to an award based upon the higher value if, because of the size or shape of the land taken, the property taken cannot be sold as a distinct piece of property for a price based upon the higher value. I think that such a rule is unfair and that it is not compelled for the reason that *Allen* no longer has vitality.

The Supreme Court in *L.A. County Flood etc. Dist.* v. *McNulty* (1963) 59 Cal.2d 333 [29 Cal.Rptr. 13, 379 P.2d 493] held that "it is not proper to attribute a per-square-foot value to defendants' entire property and then apply the value to the parcel condemned unless each square foot of defendants' land has the same value and that, if the parcel condemned is different in quality from the rest of the land, it should be assigned a different value." There was no limitation confining this rule to a case where the taken property can be sold as a distinct piece of property for a price based upon the higher value. I think that *Allen* was impliedly overruled.

In its petition for rehearing, the condemner asserts that since 1954 it has conceded that a condemnee is entitled to an award based upon the

unit value of the property taken when that property is part of an area having a higher unit value than the balance of the entire property of the condemnee, even though the property taken is of such size or shape that it cannot be sold in the open market for the amount of the award. I agree with the condemner that the court's decision "will be unjust to property owners in situations where small unusable areas are taken."

Suppose that a landowner owns highway frontage of 100 feet with a depth of 500 feet. To a depth of 200 feet the property is usable for commercial purposes and is worth $10 a square foot. The remainder is best suited for residential purposes and is worth $1 per square foot. The entire parcel is worth $230,000 or an average of $4.60 a square foot. To widen a street, a condemner seeks a depth of 2 feet or 200 square feet. The remaining commercial property to a depth of 198 feet retains its value of $10 a square foot so there is no severance damage. The narrow strip being taken would not be saleable on the open market. If by reason of that fact the landowner is entitled to only $920 ($4.60 per square foot), he is left with property of a value of $228,000 and has lost $1,080. Only if he receives $2,000 ($10 per square foot for land worth $10 per square foot) will he be made whole. If the landowner owned only the commercial property and not the residential property, he would unquestionably be entitled to $2,000. The fact that he happens to own the residential property should not penalize him.

A petition for a rehearing was denied January 6, 1971, and the opinion was modified to read as printed above. Respondent's petition for a hearing by the Supreme Court was denied February 3, 1971.

Memorandum 72-75

EXHIBIT IX

[Civ. No. 27477. First Dist., Div. One. Nov. 15, 1971.]

THE PEOPLE EX REL. DEPARTMENT OF PUBLIC WORKS, Plaintiff and Respondent, v.
VOLUNTEERS OF AMERICA, *Defendant and Appellant.*

SUMMARY

In an action to condemn a narrow strip of a single parcel of defendant's property in connection with the building of a new freeway, defendant's proffered evidence of severance damages with respect to the remainder of the parcel was excluded. Such evidence related to the diminution in the value of the remainder of the parcel caused by noise emanating from the use of the freeway that would render the premises uninhabitable and unusable, that would reduce the highest and best use of the property from multiple housing to low grade residential or commercial, and that would depreciate its value from $3 to $1.50 per square foot. The court's basis for excluding the proffered evidence was that the freeway itself, which at that point was to be elevated, was not to be built over the condemned strip, but beyond it. The strip was merely to be fenced off as an integral part of the right of way, which, under the elevated freeway, was to be converted into a small park project. Judgment was entered awarding defendant only the stipulated market value of the strip itself. (Superior Court of Santa Clara County, No. 204555, Peter Anello, Judge.)

The Court of Appeal reversed. It was held that although an owner whose land is being condemned in part, may not generally recover damages to the remainder of his land caused by the manner in which the works are to be constructed or operated on the lands of others, this rule does not apply where, as here, the property taken is an integral part of the right of way upon which the improvement is to be constructed, maintained, and used. The court, tracing judicial and other comment on the line of demarcation between, on the one hand, a proper exercise of the police power, through routing and controlling traffic, and, on the other, the invasion of private rights, noted that there was some question whether elements of damage that are general to all property owners in the neighborhood, and not special to the defendant, may be recovered, even if some property is taken. How-

ever, the court determined that where property is taken, traffic noise could be a proper consideration for assessing the diminution of the value of the remaining property, and held the exclusion of defendant's proffered evidence thereon to be reversible error. (Opinion by Sims, J., with Molinari, P. J., and Elkington, J., concurring.)

HEADNOTES

Classified to McKinney's Digest

(1) Eminent Domain § 71—Damages to Contiguous Land—Severance Damages—Where Improvements on Land of Others.—Although an owner, whose land is being condemned in part, may not generally recover for damages to the remainder of his land caused by the manner in which the works are to be constructed or operated on the lands of others, this rule does not apply where the construction or use of the improvement causes tangible damage to, or affects an established right of access to, adjoining property, nor does it apply where the property taken is an integral part of the right of way on which the improvement is to be constructed, maintained, and used.

(2) Eminent Domain § 182—Reversible Error—Exclusion of Evidence on Severance Damages.—In an action to condemn a narrow strip of a single parcel of defendant's property for freeway purposes, it was reversible error to exclude, on the sole ground that none of the elevated, paved part of the highway was to be built over the condemned strip, evidence of severance damages proffered by defendant to show the diminution of the value of the rest of the parcel that would be occasioned by the construction and operation of the freeway, where the strip was to be fenced off as an integral part of the right of way.

(3) Eminent Domain § 74(0.5)—Compensation—Damages to Contiguous Land—Elements in Ascertainment of Damage.—When part of a landowner's parcel is being condemned, the value of the remainder before and after the construction of the public improvement is not a conclusive test as to the compensation to which the landowner is entitled. The damage for which compensation is to be made is damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment.

[See **Cal.Jur.2d,** Eminent Domain, § 148; **Am.Jur.2d,** Eminent Domain, § 310.]

(4) **Eminent Domain § 74(3)—Compensation—Damages to Contiguous Land—Elements in Ascertainment of Damage—Severance Damages Based on Noise From New Freeway.**—In an action to condemn a narrow strip of a single parcel of defendant's property in connection with the building of a new freeway, defendant would have been entitled, if proper proof were adduced, to recover severance damages based on the diminution in the value of the remainder of the parcel caused by noise emanating from the use of the freeway that would render the premises uninhabitable and unusable, that would reduce the highest and best use of the property from multiple housing to low grade residential or commercial, and that would depreciate its value from $3 to $1.50 per square foot. It was thus reversible error to exclude defendant's proffered evidence to this effect.

COUNSEL

Morgan, Beauzay & Hammer for Defendant and Appellant.

Henry S. Fenton, John P. Horgan, Lee Tyler, William R. Edgar and Robert R. Buell for Plaintiff and Respondent.

OPINION

SIMS, J.—The Volunteers of America, a corporation, the property owner and defendant in an action in eminent domain instituted by the Department of Public Works to acquire certain real property for freeway purposes, including a part of the entire parcel owned by defendant, has appealed from a judgment which granted it $1,365 as the stipulated market value of the portion of the property taken, including the improvements thereon. The appeal is directed to the failure of the judgment to award the property owner claimed severance damages, and particularly attacks the ruling of the trial court which excluded the evidence of severance damages proffered by the property owner in an offer of proof, the finding of the court that the property owner suffered no severance damages for the parcel taken and for all damages suffered or to be suffered by the property owner by reason of the taking of the parcel and the construction of the improvement in the manner proposed by the state.

The issues, as framed by the respondent condemnor which initiated the proceedings in the trial court by its motion to exclude evidence, are (1)

whether the property owner can recover severance damages when those damages admittedly flow from the construction and use of improvements which are to be physically located on lands acquired from others; and (2) whether, in any event, the property owner can recover severance damages when the alleged diminution in the value of its remaining property is caused by noise emanating from the use of the freeway which would render the premises, as then improved, uninhabitable and unusable.[1]

The property involved is a narrow triangle along the northerly boundary of the parcel owned by the defendant. The property taken measures 82.01 feet along that boundary from the northeasterly corner, 5.89 feet southerly from that corner along the boundary, and then 82.23 feet on a hypotenuse westerly back to the northerly boundary. The area taken is approximately 223 square feet.[2] The parcel before the taking was approximately 125 feet

[1]The background of the question presented is well stated in Orgel, Valuation under Eminent Domain (2d ed. 1953) section 54, page 253 et seq., where the author comments on the distinction between damages due and damages not due to the taking of a portion of the owner's property, as follows: "The courts have all recognized that the depreciation in market value of the remainder caused by the physical separation or severance of the part taken is due to the taking and they have held that compensation for this type of injury must be included in damages to the remainder. But they have distinguished these severance damages from the 'consequential' damages arising by reason of the use to which the condemner intends to put the part taken. It is with reference to these so-called consequential damages that the problem of differentiating between damage that is due and damage that is not due to the taking chiefly arises.

"The *attempt* of the courts to draw this distinction is due to the fact that, with certain exceptions, an owner of property is not entitled to recover for any diminution in value which it may suffer by virtue of the construction and operation of adjacent public works where no part of his property is deemed to have been 'taken.' It would seem, therefore, to be unfair discrimination to reimburse a property owner for all similar damages done to his property simply because a portion of it, however small, may have been condemned. Bearing this point in mind, the courts have attempted, some of them more vigorously than others, to distinguish between damages which a particular owner has suffered *because* a part of his property has been taken, and damages which this same owner may have suffered along with adjacent property owners because public works, detrimental to the remainder of his property, have been located in the neighborhood. Needless to say, there are great difficulties, both practical and theoretical, in making a distinction between these two types of damages, and courts have differed not only in the manner, but also in the zeal, with which they have attempted to draw it." (Fns. omitted.)

See also, 4A Nichols on Eminent Domain (rev. 3d ed. 1971) § 14.1 at p. 14-5, fn. 4 and accompanying text; and Van Alstyne, *Intangible Detriment* (1969) 16 U.C.L.A. L.Rev. 491, 503-505.

[2]The complaint seeks, in addition to this triangle, the underlying fee interest, if any, appurtenant to the triangle, in and to a 25-foot lane which adjoins the whole parcel on the easterly side and the extinguishment of any right of access the remainder of the whole parcel may have over that lane, as such access will be curtailed by the closing of the lane, as it runs northerly, by the general southerly line of the freeway. No mention of these matters is found in the findings or judgment other than a general reference to the parcel number which included those interests. Whether abandoned, or included in the taking, they are not at issue on this appeal. Although appellant in

from its westerly to its easterly boundary, and 100 feet from its northerly to its southerly boundary, and had a total area of about 12,957 square feet.

The record revealed that the only improvement planned to be located on the property taken would be a fence approximately six inches inside the right of way line for the freeway. It was suggested that by arrangement with the city the city would erect an ornamental fence in connection with a project to put a park under the freeway. The traveled roadway itself would be 23 feet above ground level on an elevated platform 16½ feet above the ground. The traveled portion of the freeway was planned to be located at a distance of 23 feet inside the southerly line of the freeway after the taking, but the structure itself, with allowance for a shoulder, would be 8 feet closer, or 15 feet from the new property line. The structure would be tilted toward and slightly lower to the south.

The defendant's property is located on the northeast corner of two intersecting streets. The improvement which was taken consisted of a shed in the northeasterly corner of the property. It is not a factor in this appeal. The property is also improved by two houses which had been connected for joint use. The foundation line of the northerly rear corner of the northerly house is located about 5 feet from the new freeway right of way line at the closest point. This structure's northerly wall parallels the original northerly property line for about 50 feet at a distance of between 6 and 7 feet. The westerly point of the property taken is opposite a point about half way back from the front of the house. The structure itself overhangs the foundation slightly.

The plaintiff concluded its presentation of the foregoing physical facts on the first day of trial. At the outset of the proceedings on the second day, the following offer of proof was made on behalf of the property owner: ". . . we would offer testimony, (1) that the freeway which is to be constructed, must be considered as a whole . . . as one integral part, and that you cannot separate the portion of the improvement, which is going to be on the land of the defendant Volunteers of America; that the location of the freeway at the point at which it is to be located, including the portion thereof which is on the land of the defendant Volunteers of America, will cause a serious diminution in value to the property of the defendant, approximately $55,000 by way of severance damages; that . . . before the take and before the construction of the improvement, the highest and best

its brief has alluded to the fact that the condemnation closes the east alley and the property owner's right to use it to go north from the residue of its property, this element of damage was not mentioned in its offer of proof, and cannot be considered for the first time on appeal.

use of the property, as presently improved, is that of either student housing or of the present use to which it is being made, that is, a home for unwed mothers and women in distress, sort of a boarding house; that after the take and the construction of the improvement proposed by the state, both on the defendant's land and the land of others, the highest and best use of the property will be that of, what would be testified to as low-grade residential or commercial, that is, either one-story duplex or apartment house or one-story commercial use such as a warehouse; that it would be economically impossible for the property to be sold for the erection of multi-level residential use or any other multilevel procedures, any other multiheight use;

"That the sound level which will be created by the erection of the improvement, as proposed by the state, would be such as to make the premises, as presently improved, uninhabitable and unusable; that all of the property of the defendant Volunteers of America is within 118 feet of the location of . . . the freeway proper, that the improvements are considerably closer . . . one hundred eighteen feet, . . . being the furthest distance; that the property, as presently used, real property without improvements, is worth approximately three dollars per square foot; that the property's after use is worth approximately $1.50 per square foot; that the improvements, as presently on the property, would be virtually useless . . . with this freeway located as it is."

It was further stipulated that the physical location of the traveled portion of the freeway would be on the land of others; that no part of the bridge structure would be closer than 9 feet from the existing property line of defendant's property; and that the defendant's witnesses would not be able to testify to severance damages unless they were permitted to testify as to the effect of the freeway on defendant's property.

The court thereupon ruled that the testimony would be excluded. The parties stipulated to the compensation for the property taken. The court ordered judgment accordingly and excused the jury. The defendant unsuccessfully pursued its contention that it should be awarded severance damages by filing objections and proposed counterfindings to those proposed by the condemnor, but findings and judgment were entered as ordered by the court, and this appeal ensued.

I

Section 1248 of the Code of Civil Procedure provides in relevant part: "The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

"1. The value of the property sought to be condemned, and all improvements thereupon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed;

"2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff; . . ." This court recently stated, "Accordingly, when a portion of private property consisting of a contiguous parcel of land is condemned for public use under the state's power of eminent domain, compensation is due not only for the value of the land directly taken, but also for so-called severance damages, that is, the damages to the remaining property as the result of its being severed from the part actually taken for public use. [Citations.]" (*People* ex rel. *Dept. Pub. Wks.* v. *Romano* (1971) 18 Cal.App.3d 63, 69 [94 Cal.Rptr. 839].)

(1) The condemnor, however, relies on the following rule: "An owner, whose land is being condemned in part, may not recover damages in the condemnation action to the remainder of his land caused by the manner in which the works are to be constructed or operated on the lands of others. The detriment for which he may recover compensation is that which will result from the operation of the works upon his land alone. [Citations.]" (*Sanitation Dist. No. 2* v. *Averill* (1935) 8 Cal.App.2d 556, 561 [47 P.2d 786]. See also *People* v. *Symons* (1960) 54 Cal.2d 855, 861 [9 Cal. Rptr. 363, 357 P.2d 451]; *People* ex rel. *Dept. Pub. Wks.* v. *Romano, supra,* 18 Cal.App.3d 63, 69-70; *Lombardy* v. *Peter Kiewit Sons' Co.* (1968) 266 Cal.App.2d 599, 602-603 [72 Cal.Rptr. 240] [app. dism. 394 U.S. 813 (22 L.Ed.2d 748, 89 S.Ct. 1486)]; *People* ex rel. *Dept. of Public Works* v. *Wasserman* (1966) 240 Cal.App.2d 716, 723-726 and 732 [50 Cal.Rptr. 95]; *People* ex rel. *Dept. Pub. Wks.* v. *Elsmore* (1964) 229 Cal. App.2d 809, 811 [40 Cal.Rptr. 613] [disapproved in *People* ex rel. *Dept. Pub. Wks.* v. *Ramos* (1969) 1 Cal.3d 261, 264, fn. 2 [81 Cal.Rptr. 792, 460 P.2d 992], as discussed below]; *City of Berkeley* v. *Von Adelung* (1963) 214 Cal.App.2d 791, 793 [29 Cal.Rptr. 802]; 4A Nichols, Eminent Domain (Rev. 3d ed. 1971) § 14.1[1], p. 14-6 et seq., § 14.21[1], p. 14-53 et seq. and § 14.2462, fns. 6-10, and accompanying text, pp. 14-276/14-278; 1 Orgel, Valuation Under Eminent Domain, §§ 56-57, pp. 257-266; and Van Alstyne, *Intangible Detriment* (1969) 16 U.C.L.A. L.Rev. 491, 504, fn. 51, and accompanying text.)

The *Symons* rule does not apply in two other situations. If the construction or use of the improvement on public property causes tangible damage

to, or affects an established right of access to adjoining property, there may be compensable damage. (See *Albers* v. *County of Los Angeles* (1965) 62 Cal.2d 250, 256-264 [42 Cal.Rptr. 89, 398 P.2d 129]; *House* v. *L.A. County Flood Control Dist.* 1944) 25 Cal.2d 384, 392 [153 P.2d 950]; *Bacich* v. *Board of Control* (1943) 23 Cal.2d 343, 349-352 [144 P.2d 818]; *Eachus* v. *Los Angeles etc. Ry. Co.* (1894) 103 Cal. 614, 617-622 [37 P. 750]; and *Reardon* v. *San Francisco* (1885) 66 Cal. 492, 505-506 [6 P. 317].) Under such circumstances, where there is a special detriment to the private land involved, it should be immaterial whether the works which caused the damage were wholly, or partially, or in no way upon some land which was taken from the private owner.

In the second place, since the trial of this case, it has been recognized that even though the roadbed, or paved portion of a freeway is not on the property taken, if the strip taken is a part of the freeway right of way, the rule of *People* v. *Symons, supra,* does not apply. In *Symons* the court ruled that an owner, whose property was taken for purposes other than the construction of the freeway itself, was not entitled to compensation, or severance damages, for those impediments to the property resulting from the objectionable features caused by the maintenance and operation of the freeway proper on lands other than those taken from the defendants. (54 Cal.2d at pp. 860-862. See also *People* ex rel. *Dept. of Pub. Wks.* v. *Elsmore, supra,* 229 Cal.App.2d 809, 811.) In *Symons* the property condemned was for the enlargement of a turnaround for a cul-de-sac necessitated by but not a part of the freeway project, and the property owners sought as severance damages "the decreased value of their property arising from such factors, among others, as the change from a quiet residential area, loss of privacy, loss of view to the east, noise, fumes and dust from the freeway, loss of access over the area now occupied by the freeway, and misorientation of the house on its lot after the freeway construction." (54 Cal.2d p. 858. See also *People* ex rel. *Dept. of Public Works* v. *Wasserman, supra,* 240 Cal.App.2d 716, 723-727.) In *Elsmore,* as in this case, the land taken was not to be used for the construction of the roadway itself. The opinion recites: "The only improvement to be constructed on the land taken from appellants is a chain link fence to be placed on or near the property line separating the state-acquired property from the remainder of Parcel 2. The part of Parcel 2 acquired by the state was taken for freeway purposes but not for the construction of the freeway proper. It is to be a portion of an unimproved and cleared strip about 25-30 feet wide located to the side of the freeway roadbed. This cleared strip, designed to run along the entire length of the freeway from San Jose to San Francisco, is to be used only for emergency and maintenance vehicles and operations. All of the land taken from appellants is included within this proposed road-

side strip." (229 Cal. App.2d at p. 810.) The trial court properly applied *Elsmore* to the facts before it in this case.[3]

Thereafter in *People* ex rel. *Dept. Pub. Wks.* v. *Ramos* (1969) 1 Cal.3d 261 [81 Cal.Rptr. 792, 460 P.2d 992], the court overruled a judgment denying severance damages in a situation where the property taken was not used for the paved portion of the freeway. In distinguishing *Symons* the court said, "In the present case, however, Parcel 3-A of the defendants' property was taken for use as a part of the freeway itself, and the chain link fence was constructed on it. Although Parcel 3-A was not used for the paved portion of the freeway, but for a dirt strip or shoulder paralleling the traffic lanes, it was taken as a part of the freeway right-of-way, and the fence was placed on it to act as a physical barrier to the limited access freeway. Accordingly, the rule of the *Symons* case is not applicable, and the trial court's contrary ruling was in error." (1 Cal.3d at p. 264, fn. omitted.) In a footnote the court stated, "Any implications found in *People* ex rel. *Dept. of Public Works* v. *Elsmore* (1964) 229 Cal.App.2d 809 . . . , contrary to the views we express today must be deemed disapproved." (*Id.*, fn. 2.)

It is therefore concluded that the condemnor cannot rely upon the rule of the *Averill* case when, as here, the property taken is an integral part of the right of way upon which the improvement is to be constructed, maintained and used. It is urged that *Ramos* should be limited to its facts, that is, since the fence which deprived the property owner of access was erected on property taken from him, the test of *Averill* was satisfied.

(2) On the other hand, the authority under which the property was taken in this case was allegedly and admittedly "For Freeway purposes." The condemnor could have placed its freeway six feet northerly and avoided taking any of defendant's property. It did not, and having found his property necessary for the project, it should be bound by the general rules concerning severance damages.[4]

---

[3]At the time of its decision, May 5, 1969, and the entry of judgment, June 11, 1969, the trial court was also relying on the opinion of the Court of Appeal for the Fifth District in *People* ex rel. *Department of Public Works* v. *Ramos*, Civ. No. 1035, decided April 18, 1969 (77 Cal.Rptr. 130). In that opinion the court reluctantly followed *Elsmore*. Its challenge was accepted, and the opinion was vacated when the Supreme Court granted a hearing June 18, 1969, a week after the entry of judgment in this case.

[4]In *Andrews* v. *Cox* (1942) 129 Conn. 475 [29 A.2d 587], a small triangle appraised at $9 was taken. Damages amounting to $1,700 were also suffered by reason of the highway construction not only on the land taken but also upon the adjoining lands not belonging to the property owner. The court ruled it was error to fail to

As will be noted below, the dividing line between those who are entitled to consequential damages, and those who are not, is at best arbitrary. On the one hand it can be said that certain diminution of the value of its property resulting to the defendant is no greater than that suffered by neighboring property owners who lost no land by reason of the improvement (see below). By the same token this diminution of value is just as great as that suffered by a landowner who retains an equivalent parcel after giving up a strip of greater width which falls under part or all of the projected improvement. It is concluded that the court erred insofar as it denied the defendant an opportunity to show the diminution in the value of its remaining property which would be occasioned by the construction and operation of the freeway in the manner proposed by plaintiff on the ground that the property taken from plaintiff did not extend under the roadway itself.

---

allow the latter sum. It said, "The element of cause and effect is present in any award for depreciation in the value of the remaining land due to use of the land taken for the making of the improvement; damages of that kind are given because they are caused by the use of the land taken; and where the making of the improvement requires as an integral and inseparable part the use of the land taken, though the improvement as a whole extends to adjoining land, that use is a contributing cause of the effect produced by the entire improvement." (129 Conn. at p. 481 [29 A.2d at p. 590]. See also *Hollister* v. *Cox* (1943) 130 Conn. 389, 393-394 [34 A.2d 633, 634]; *Chicago, K. & N. Ry. Co.* v. *Van Cleave* (1893) 52 Kan. 665, 667-669 [33 P. 472, 473-474], app. dism. 41 L.Ed. 1177, 17 S.Ct. 992]; and cf. *De Vore* v. *State Highway Commission* (1936) 143 Kan. 470, 472-474 [54 P.2d 971, 972-973]; *City of Crookston* v. *Erickson* (1955) 244 Minn. 321, 325-328 [69 N.W.2d 909, 912-914]; and cf. *Thomsen* v. *State* (1969) 284 Minn. 468, 472-476 [170 N.W.2d 575, 579-581]; *State Highway Commission* v. *Bloom* (1958) 77 S.D. 452, 461-462 [93 N.W.2d 572, 577-578, 77 A.L.R.2d 533]; *Dennison* v. *State* (1968) 22 N.Y.2d 409, 413 [293 N.Y.S.2d 68, 71, 239 N.E.2d 708, 710]; and *Purchase Hills Realty Associates* v. *State* (1970) 35 App.Div.2d 78, 81-82 [312 N.Y.S.2d 934, 937-938]; and *Bronxville Palmer, Ltd.* v. *State* (1971) 36 App.Div.2d 10, [318 N.Y.S.2d 57, 61].)

Andrews v. *Cox, supra; Chicago, K. & N. Ry. Co.* v. *Van Cleave, supra;* and *City of Crookston* v. *Erickson, supra,* were all distinguished in *People* ex rel. *Dept. Pub. Wks.* v. *Elsmore, supra,* (see 229 Cal.App.2d at pp. 811 and 813) because, as to the first two cases, the court in *Elsmore* believed "the damages to the remainder attributable to the taking and use of appellants' land acquired are readily severable from the overall damages caused by the entire 200-foot freeway strip and thus can be determined." This distribution is understandable if the strip were an addition to the existing freeway. The situation was then one in which the property owner's property line was moved back from the roadway, with no change in the relationship between the objectionable features and the residue of the property. (Cf. *People* v. *O'Connor* (1939) 31 Cal.App.2d 157, 159 [87 P.2d 702].) The distinction is questionable when, as in this case, a new freeway of prescribed dimensions is partly interposed on the claimant's property. Although, as pointed out in *Elsmore*, the *Erickson* case does refer to the fact that the property owner cannot, as in this state, recover in the future for additional damage occasioned by further improvements on the property acquired, the court in *Erickson* did follow *Andrews* v. *Cox, supra,* insofar as it indicates that any taking is sufficient to give rise to a right to consequential damages.

II

The property owner relies upon the general rule for ascertaining severance damages which is stated in *People* v. *Loop* (1954) 127 Cal.App.2d 786 [274 P.2d 885], as follows: "Severance damages are determined by ascertaining the market value of the property not taken as it was on the date fixed for determining such damages, and by deducting therefrom the market value of such remaining property after the severance of the part taken and the construction of the improvement in the manner proposed by the plaintiff. [Citation.] Severance damages may be shown by proving the market value of the remainder before and after taking and leaving the computation of the difference to the jury, or by competent evidence of severance damages in a lump sum" (127 Cal.App.2d p. 799. See also *San Bernardino County Flood Control Dist.* v. *Sweet* (1967) 255 Cal.App.2d 889, 904 [63 Cal.Rptr. 640]; 4A Nichols, *op cit.*, §§ 14.23, 14.231, 14.232 and 14.232[1], pp. 14-76 et seq.; and 1 Orgel, *op. cit.*, §§ 50, 51, pp. 234-236.) It claims it was entitled to show that the remaining property would be depreciated 50 percent by the construction, maintenance and use of the freeway.

(3) "The constitution does not . . . authorize a remedy for every diminution in the value of property that is caused by a public improvement. The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the constitution; but the property itself must suffer some diminution in substance, or be rendered intrinsically less valuable by reason of the public use. The erection of a county jail or a county hospital may impair the comfort or pleasure of the residents in that vicinity, and to that extent render the property less desirable, and even less salable, but this is not an injury to the property itself so much as an influence affecting its use for certain purposes; but whenever the enjoyment by the plaintiff of some right in reference to his property is interfered with, and thereby the property itself is made intrinsically less valuable, he has suffered a damage for which he is entitled to compensation." *Eachus* v. *Los Angeles etc. Ry. Co.*, *supra*, 103 Cal. 614, 617. See also *People* v. *Symons*, *supra*, 54 Cal.2d 855, 858-859; *City of Oakland* v. *Nutter* (1970) 13 Cal.App.3d 752, 769 [92 Cal. Rptr. 347]; *Lombardy* v. *Peter Kiewit Sons' Co.*, *supra*, 266 Cal.App.2d 599, 603; *People* ex rel. *Dept. of Pub. Wks.* v. *Presley* (1966) 239 Cal.App. 2d 309, 312 [48 Cal.Rptr. 672]; *People* ex rel. *Dept. Pub. Wks.* v. *Elsmore*, *supra*, 229 Cal. App.2d 809, 811; and *City of Berkeley* v. *Von Adelung*, *supra*, 214 Cal.App.2d 791, 793.)

That the value of the remainder before and after the construction of the improvement in the manner proposed is not a conclusive test is demonstrated by *People* v. *Gianni* (1933) 130 Cal.App. 584 [20 P.2d 87]. There a small portion of the property was taken, and the value of the remainder was diminished by reason of the relocation of the highway. In denying recovery for the latter loss the court observed, "We might concede the claim that a test of damage is the value of the property before the taking and its value thereafter. But this test is not conclusive. By way of illustration, it cannot be denied that in a vast majority of cases a development of new territory reacts to the damage of established districts. Almost every large city demonstrates a decrease in realty values consequent upon a branching out of business and population. To apply the test of values, before and after, in those cases would be beyond any notion of law or reason. [Citation.]" (130 Cal.App. at p. 587.)

(4) The question here is whether the property owner, on a proper showing, is entitled to recover for the diminution of the value of the remainder which is occasioned solely by the fact that the sound level which will be created will render the premises, as presently improved, uninhabitable and unusable, will reduce the highest and best use of the property from multiple housing to low grade residential or commercial, and will depreciate its value from $3 to $1.50 per square foot. A learned commentator has said, "It is clear . . . that if the project responsible for the claimed proximity damage [defined as vehicular noise, fumes, dust, glare, and loss of light or view—the incident and intensity of which are dependent upon proximity to the highway] is constructed upon land taken from the claimant, his recovery of severance damages to the remainder of the parcel may include losses caused by increased noise, dust and fumes, as well as interference with air, light, and view, unfavorable consequences of the project which would be taken into account by an informed potential purchaser.

"The cutting edge of the prevailing rules of proximity damages is not the logic of distance but the accident of location of the injury-producing activity upon land taken from the claimant. If no part of the claimant's land has been taken for the project, though it be immediately adjoining, he must suffer resulting proximity losses without recourse; but if a partial taking occurs, however slight, those losses are compensable as severance damages. Concededly of rough utility, this rule of thumb—like the 'next-intersecting-street' rule applied in cul-de-sac cases—manifestly yields indefensible results in a significant number of specific cases." (Van Alstyne, *op. cit.*, U.C.L.A. L.Rev., at pp. 504-505, fns. omitted.)

The cases do not reveal the clarity which the commentator professes.

In *Pierpont Inn, Inc.* v. *State of California* (1969) 70 Cal.2d 282 [74 Cal.Rptr. 521, 449 P.2d 737], the court adopted the following statement from the vacated decision of the Court of Appeal, "Where the property taken constitutes only a part of a larger parcel, the owner is entitled to recover, inter alia, the difference in the fair market value of his property in its 'before' condition and the fair market value of the remaining portion thereof after the construction of the improvement on the portion taken. Items such as view, access to beach property, *freedom from noise*, etc. are unquestionably matters which a willing buyer in the open market would consider in determining the price he would pay for any given piece of real property. Concededly such advantages are not absolute rights, but to the extent that the reasonable expectation of their continuance is destroyed by the construction placed upon the part taken, the owner suffers damages for which compensation must be paid." (70 Cal.2d at p. 295, italics added. Cf. 68 Cal.Rptr. at p. 243.) There is nothing in the opinion as adopted and republished (*Id.*, at p. 284, fn. 1), to indicate that "freedom from noise" of the traffic was an element considered in determining severance damages. The remarks were addressed to the following question: "Appellant contents that the trial court erred in permitting the jury to consider the property's loss of view and relatively unrestricted access to the beach in determining severance damages." (*Id.*, pp. 294-295.) The court did approve damages for the period of construction when heavy equipment, including pile drivers, were creating noise, dust and disturbing vibrations that affected its remaining property. . . ." (*Id.*, p. 300.) This is a thin reed upon which to float recovery of severance (consequential) damages (see 4A Nichols, *op. cit.*, § 14.1[3], pp. 14-31/14-35) for prospective traffic noise alone. In *Symons*, cited by the commentator and by the court in Pierpont, the court stated, "It is established that when a public improvement is made on property adjoining that of one who claims to be damaged by such general factors as change of neighborhood, *noise*, dust, change of view, diminished access and other factors similar to the damages claimed in the instant case, there can be no recovery where there has been no actual taking or severance of the claimant's property. [Citations.]" (54 Cal.2d at p. 860, italics added.) The reference to noise is acknowledgedly dictum.

Symons (54 Cal.2d at p. 859), and *Pierpont* (in quoting it without credit) (70 Cal.2d at p. 295; and cf. 68 Cal.Rptr. at p. 243) do give vitality to *People* v. *O'Connor* (1939) 31 Cal.App.2d 157 [87 P.2d 702], a case in which the state took a 10-foot strip of land along the front of the defendant's property for the purpose of widening an existing highway. In *O'Connor* the jury awarded, and the judgment provided for, an award of $35 for the parcel taken, and $1,500 severance damages. The condemnor

contended that the court erred in denying its motion to strike all of the testimony of defendant's two valuation witnesses as to severance damages because it was based on speculative, remote and conjectural elements of damage. According to the opinion: "Both of them, after giving their opinions as to the severance damage, stated that said opinions were based on the fact that the widening of the highway right of way would decrease the distance from the house to the right of way line from 37 to 27 feet; that the lawn and landscaping in front of the house would be adversely affected; that the highway being slightly raised, would be more difficult of access, and ingress and egress to and from the premises would be more difficult; and that the increased closeness of the highway would increase *traffic noises and hazards.*" (31 Cal.App.2d at p. 159, italics added.) The court concluded, "All of the matters mentioned were proper reasons to be advanced by the experts as bases for their opinions as to value, and the jury could determine what weight to give the opinions in proportion to the weight the reasons had with them." (*Id.*,) The question of whether the 10-foot strip would be used for the traveled portion of the highway or for a shoulder (see part I above) was not raised. It is obvious, however, that even if the 10-foot strip was used for one lane of traffic it would be impossible to disassociate the traffic noises emanating from that lane, from those occasioned by the overall traffic. *O'Connor* was also recognized and followed by this court in *City of Oakland* v. *Nutter, supra,* 13 Cal.App.3d 752, where it was concluded "that the court properly permitted evidence of the effect on the value of the subjacent land of excessive noise, vibration, discomfort, inconvenience and interference with the use and enjoyment of that land as such factors were occasioned by flights through the easement condemned." (13 Cal.App.3d at p. 772.) In *Nutter,* however, it was clear that consideration was limited to damages arising by use of the airspace actually condemned (see part I above).

Support for the property owner's view is also found in *Pacific Gas & Elec. Co.* v. *Hufford* (1957) 49 Cal.2d 545 [319 P.2d 1033], where among the approved elements considered in determining the diminution in value to the remaining property occasioned by the taking of an easement for the construction, operation and maintenance of an electric transmission line, was the fact that cattle would not gain weight for quite a while under a power line because the noise (buzzing) would disturb them and they would not bed down under it. (49 Cal.2d at p. 559. See also *Sacramento, etc. Drainage Dist.* ex rel *State Reclamation Bd.* v. *Reed* (1963) 215 Cal. App.2d 60, 71 [29 Cal.Rptr. 847].)

In *City of Pleasant Hill* v. *First Baptist Church* (1969) 1 Cal.App.3d 384 [82 Cal.Rptr. 1], the condemnor complained because "there were re-

peated references to noise and distraction and inconvenience caused by having the public street in front of the church." (1 Cal.App.3d at p. 435.) This court observed, referring to *Pierpont* and *Symons*, "The evidence was properly admitted and alluded to, not because it showed elements which interfered with the condemnee-church's particular pleasure or enjoyment, or because it showed the church property was subjected to detrimental factors which were common to all properties in the neighborhood, but because the matters adduced were proper elements to be considered in determining the value of the remainder of the property of which the city had taken a portion. [Citations.]" (*Id.*)

On the other hand, it appears in *People* ex rel. *Dept. of Pub. Wks.* v. *Presley, supra*, that a portion of the property owners' property was condemned, that is, the fee of so much of their parcel as underlay an existing street, and their right of access to that street. The trial court refused to include in the damages any compensation for the increased noise, fumes and annoyance which would result from the more heavily trafficked freeway, or any compensation for the loss of the parking privileges which they had enjoyed on the former street. The court stated, ". . . consideration of the problem in terms of whether the damage suffered is unique to the condemnee or only that which he shares in general with the rest of the traveling public is one of the more vital factors which aid in reaching a solution of the question . . . ." (239 Cal.App.2d at p. 314.) With respect to the damages claimed for the increased traffic, the court followed *City of Berkeley* v. *Von Adelung, supra*. (*Id.*, at p. 317.) In *Von Adelung* a portion of the property owners' property was taken to round off a corner of the existing street which was being improved to make it a major thoroughfare. His efforts to prove that the value of the remainder would be depreciated by the increased fumes and traffic noises was rejected. In affirming the court opined, as an alternative ground of decision, ". . . the asserted injury is not compensable because it is general to all property owners in the neighborhood, and not special to defendant [citation]." (214 Cal. App.2d at p. 793.)

Although a hearing in the Supreme Court was not requested in either of the foregoing cases, they demonstrate that there may be some question whether elements of damage which are "general to all property owners in the neighborhood, and not special to the defendant" may be recovered even if some property is taken. The principle relates back to the issue of determining the line of demarcation between a proper exercise of the police power, through routing and controlling traffic, and an invasion of private rights (see fn. 1, *supra*). In *Albers* v. *County of Los Angeles, supra*, 62 Cal. 2d 250, the governing principles, as expounded in earlier cases, were re-

viewed as follows: "This court in considering a similar policy question in *Clement* v. *State Reclamation Board*, *supra*, said at 35 Cal.2d 628, 642: 'The decisive consideration is whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking.' In the concurring opinion of Traynor, J., in *House* v. *Los Angeles County Flood Control Dist.*, *supra*, 25 Cal.2d 384, 397, the same statement is followed by the language: 'It is irrelevant whether or not the injury to the property is accompanied by a corresponding benefit to the public purpose to which the improvement is dedicated, since the measure of liability is not the benefit derived from the property but the loss to the owner.'

"The competing principles are stated in *Bacich* v. *Board of Control*, *supra*, 23 Cal.2d 343, 350: 'It may be suggested that on the one hand the policy underlying the eminent domain provision in the Constitution is to distribute throughout the community the loss inflicted upon the individual by the making of the public improvements. . . . On the other hand, fears have been expressed that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost.' " (62 Cal.2d at pp. 262-263.)

The case for denial of consequential damages occasioned by reason of fumes, noise, dust, shocks and vibrations incident to the operation of a freeway is most forcefully stated in *Lombardy* v. *Peter Kiewit Sons' Co.*, *supra*, an action however in which no property was taken. The court said: "The mental, physical and emotional distress allegedly suffered by plaintiffs by reason of the fumes, noise, dust, shocks and vibrations incident to the construction and operation of the freeway does not constitute the deprivation of or damage to the property or property rights of plaintiffs for which they are entitled to be compensated." (266 Cal.App.2d at p. 603.) Subsequently in considering whether there a nuisance was created, the opinion states, "All householders who live in the vicinity of crowded freeways, highways and city streets suffer in like manner and in varying degrees. The roar of automobiles and trucks, the shock of hearing screeching brakes and collisions, and the smoke and fumes which are in proportion to the density of the motor vehicle traffic all contribute to the loss of peace and quiet which our forefathers enjoyed before the invention of the gas engine. . . . [¶] The conditions of which appellants complain are obnoxious to all persons who live in close proximity to the state's freeways but they must be endured without redress." (*Id.*, at p. 605.)

Lombardy can, of course, be readily distinguished from this case because no property was taken. *Presley* and *Von Adelung* may be, and have been distinguished, because in each case it was only the enlargement of an

existing public use which occasioned the factors which allegedly resulted in the diminution of the value of the property. An even broader distinction may be drawn between the improvement of an existing street and the rerouting of traffic (*City of Berkeley* v. *Von Adelung, supra*; and see *People* v. *Avon* (1960) 54 Cal.2d 217, 223-224 [5 Cal.Rptr. 151, 352 P.2d 519]), and the creation of a freeway, particularly when the latter is not patterned on an existing street (*People* ex rel. *Dept. of Pub. Wks.* v. *Presley, supra*) but is carved anew through established neighborhoods. The property owner properly may be charged with knowledge that traffic patterns may be upset by traffic regulations and the establishment of ordinary thoroughfares which control the local flow of traffic. In such a case he may have to anticipate growth and increased use of existing facilities which necessitate their improvement, or the substitution of new thoroughfares. It is quite another thing to say that he should suffer comparable, but probably more inconvenience and loss in property value, because the public elects to put a nonaccessible freeway over or next to his property to accommodate the flow of traffic from community to community, or from one center of population or trade to another, without any regard for the needs of his neighborhood. In the latter case the consequential damages are more akin to that caused by railroads and airports, and commensurate principles should apply.[5] It is difficult to justify principles of law which permit consideration of the well being of Mr. and Mrs. Causby's chickens (see *United States* v. *Causby* (1946) 328 U.S. 256, 259 [90 L.Ed. 1206, 1209, 66 S.Ct. 1062]), and the Hufford's cows (see *Pacific Gas & Elec. Co.* v. *Hufford, supra*, 49 Cal. 2d 545, 549), but refuse to permit consideration of the mental, physical and emotional distress of the present and prospective occupants of defendant's residences, insofar as that distress, and the noise which occasions it, is reflected in a diminution of the value of the property.

It has already been pointed out that the test of whether the property taken is used for the portion of the project giving rise to the detrimental conditions is an arbitrary one (see part I above). It is also obvious that adjacent property is damaged to the same degree by the detrimental factors of a freeway

[5]In *City of Yakima* v. *Dahlin* (1971) 5 Wash.App. 129, —— [485 P.2d 628, ——] the analogy to overflights was applied to the diminution in property value caused to a particular parcel from noise occasioned by the manner of construction of a freeway ramp even though no property was taken. Other jurisdictions, however, have refused to recognize noise and other inconveniences caused by traffic as an element to be considered in determining damage. (See *Northcutt* v. *State Road Department* (Fla. App. 1968) 209 So.2d 710, 711; *State* v. *Galeener* (Mo. 1966) 402 S.W.2d 336, 340; and *Arkansas State Highway Commission* v. *Kesner* (1965) 239 Ark. 270, 273 [388 S.W.2d 905, 908], but note *Arkansas State Highway Commission* v. *Kennedy* (1970) 248 Ark. 301, 307 and 309, fn. 1 [451 S.W.2d 745, 748 and 749, fn. 1] in which both majority and dissenting opinions suggested reconsideration of the rule.

whether no property is taken,[6] whether a mere narrow strip is taken, or whether a substantial portion of the property is taken for the construction of the improvement. (See Van Alstyne, *op.cit.*, 16 U.C.L.A. L.Rev., at pp. 503-505.) Until such time as provision is made for compensation of those who are merely adjacent (see *id.*, at pp. 517-518; and *Andrews* v. *Cox* (1942) 129 Conn. 475, 478 [29 A.2d 587, 588-589]), they presumably may not recover proximity damages. Two wrongs do not make a right. Though illogical, the taking of the strip warrants the allowance of consequential damages under existing precedents. The trial court erred in refusing to receive the evidence proffered by the property owner.

In *Bacich* v. *Board of Control* (1943) 23 Cal.2d 343 [144 P.2d 818], former Chief Justice Traynor, then an associate justice, in dissenting observed, "The cost of making such improvements may be prohibitive now that new rights are created for owners of property abutting on streets that would be at right angles to the improvements, for these rights must be condemned or ways constructed over or under the improvements. The construction of improvements is bound to be discouraged by the multitude of claims that would arise, the costs of negotiation with claimants or of litigation, and the amounts that claimants might recover. Such claims could only be met by public revenues that would otherwise be expended on the further development and improvement of streets and highways." (23 Cal.2d at p. 380.) Here the right recognized, although not clearly established, is not a new right. In any event, with changing concepts of the rights of an individual to his privacy and to enjoy an environment unpolluted by noise, dust, and fumes, it may not be improper to consider whether other means of transportation should be substituted for the private automobile. Any consideration of this question is clouded if the true economic burden of providing freeways for motor vehicle traffic is concealed by requiring adjacent owners to contribute more than their proper share to the public undertaking. If there is, as in this case, warrant for the compensation of such an owner, because a portion of his property has been taken, it should be granted if established by proper proof.

The judgment is reversed.

Molinari, P. J., and Elkington, J., concurred.

[6]There is some precedent for recovery of damages peculiar to the adjacent property, even when no property is taken. (See *United States* v. *Certain Parcels of Land in Kent County, Mich.* (W.D.Mich. 1966) 252 F.Supp. 319, 323; *City of Yakima* v. *Dahlin* (1971) 5 Wash.App. 129, —— [485 P.2d 628, 630]; and *Bd. of Ed. of Morristown* v. *Palmer* (1965) 88 N.J. Super. 378 [212 A.2d 564, 568-571], revd. as premature (1966) 46 N.J. 522 [218 A.2d 153].)

Memorandum 72-75

EXHIBIT X

[Civ. No. 38026. Second Dist., Div. Three. Apr. 27, 1972.]

[As modified on denial of petition for rehearing, May 23, 1972.]

CITY OF BALDWIN PARK, Plaintiff and Respondent, v.
BERTHA STOSKUS, Defendant and Appellant.

SUMMARY

A city condemned a strip of defendant's property for the construction of a street and storm drain, which resulted in a special assessment lien of over $8,000 being imposed on defendant's remaining property to pay for such improvements, with a special benefit to defendant of only $550. In determining severance damages during the trial, only testimony by the city's expert witness was offered, and he testified that he did not consider the existence of the assessment lien in valuating such damages. (Superior Court of Los Angeles County, No. 921 635, Richard Barry, Temporary Judge.*)

The Court of Appeal reversed for a retrial on the issues of severance damages and special benefits, holding that since the imposition of the special assessment by lien on defendant's property was incident to the construction of the improvement, the assessment must be considered as an element of severance damages accruing from such construction. The court noted that while the weight of authority renders evidence of special assessments inadmissible in determining severance damages, and likewise prohibits its' setoff against special benefits, it was more realistic and just to take into account both the related special assessment lien and the special benefits accruing to the property in determining the fair market value of the portion of defendant's property remaining after the taking than to ignore both of those factors. (Opinion by Cobey, J., with Schweitzer, Acting P. J., and Allport, J., concurring.)

*Pursuant to Constitution, article VI, section 21.

HEADNOTES

Classified to McKinney's Digest

(1) Eminent Domain § 43(1)—Necessity For and Right to Compensation —State Constitutional Guaranty.—Under California Const., art. I, § 14, private property may not be damaged for public use without just compensation being paid to the property owner, who, generally, must be made monetarily whole for the loss he suffers by reason of the involuntary sale of his property to the condemner.

(2) Eminent Domain § 74(0.5)—Compensation—Damages to Contiguous Land—Severance.—Under Code Civ. Proc., § 1248, subd. (2), severance damages resulting from an assessment lien incident to the condemner's use of the improvement on the condemned portion of the property are allowed, even though the statute expressly refers only to damages arising from the severance itself or from the construction of the improvement.

(3) Eminent Domain § 74(0.5)—Damages to Contiguous Land—Severance—Resulting Special Assessments.—A property owner in a condemnation action was entitled to have a special assessment on her property considered in evidence as an element of severance damages where the condemnation by a city of a strip of her residential property for construction of a street and storm drain resulted in a special assessment lien on the property to finance such improvements, which lien greatly exceeded the value of the special benefit to the property owner. Special benefits are required to be set off against severance damages.

[See **Cal.Jur.2d,** Eminent Domain, §§ 105-111; **Am.Jur.2d,** Eminent Domain, § 269.]

COUNSEL

Renner, Cook, Shaykin, Lyon & Weltner, William Gorenfeld and A. F. Weltner for Defendant and Appellant.

Robert Flandrick, City Attorney, Martin & Flandrick and Norman Lieberman for Plaintiff and Respondent.

OPINION

COBEY, J.—The sole issue on this appeal by defendant property owner in this eminent domain proceeding is whether the existence of a special assessment lien in the amount of $8,413.74 upon her property and resulting from the making by the City of the improvement involved herein, should have been considered in determining her right to severance damages. The parties are agreed that the award of $1,584 for the property taken is correct.

The only testimony as to severance damages sustained by defendant as a result of the City's taking of a strip of land 30 by 132 feet along one side of her residential property for a street and storm drain was offered by the City. Its expert valuation witness testified that the fair market value of defendant's property prior to the taking was $16,250 and that after the taking and the construction of the improvement, such value was $16,800. He stated that in arriving at this conclusion of no severance damages he did not consider the existence of the aforementioned assessment lien upon her property.

Prior to the taking herein defendant's property was unencumbered. Thus, with respect to it, we have apparently a special assessment of $8,413.74 and a possible special benefit of $550.[1]

(1) Under article I, section 14 of the California Constitution private property may not be damaged for public use without just compensation being paid to the property owner. All of eminent domain law, procedure and practice is but a means to this end of just compensation for the property

[1]Since the expert valuation witness found no severance damages, he did not consider the existence of special benefits to defendant's property by reason of the improvement because special benefits may be deducted only from severance damages. (See Code Civ. Proc., § 1248, subd. 3.)

The validity and the amount of the special assessment against defendant's property are not in issue in this case. We note, though, that under the applicable statute, the Improvement Act of 1911 (Sts. & Hy. Code, §§ 5000-6794), defendant could not have prevented the formation of the special assessment district (see § 5222) and any appeal to the City Council regarding the assessment against her property would have reached only the "correctness" of the special assessment against it (see §§ 5366-5369) or in other words whether the special assessment against her property (her share of the cost of making the improvement) reflected accurately the proprotionate benefit her property received from the improvement. (See § 5343.)

We note further that since the assessment against her property apparently exceeded the benefit to it, a possible basis existed for attacking the constitutionality of the assessment, notwithstanding its apparent regularity. (See *Norwood* v. *Baker*, 172 U.S. 269, 279 [43 L.Ed. 443, 447, 19 S.Ct. 187]; *City of Plymouth* v. *Superior Court*, 8 Cal.App.3d 454, 464 [96 Cal.Rptr. 636], hg. den.) We do not, of course, decide whether such an attack would have been successful.

owner. Generally speaking, the involuntary seller, the property owner, must be made monetarily whole for the loss he suffers by reason of the involuntary sale of his property to the condemner. (See *People* ex rel. *Dept. Pub. Wks.* v. *Lynbar, Inc.*, 253 Cal.App.2d 870, 879-880 [62 Cal. Rptr. 320].)

(2) According to Code of Civil Procedure section 1248, subdivision 2 severance damages are those "damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the [condemner]." The City contends that pursuant to this statute severance damages in this state are confined to those damages arising either from the severance or from the construction of the improvement. Under this view the assessment lien before us could not be considered in determining severance damages because it arose solely by reason of the method the City chose to finance the improvement rather than from its construction.

We do not believe, however, that this narrow and literal construction of the statute is correct. An award of damages in eminent domain must once and for all fix the damages, present and prospective, that will accrue reasonably from the making of the improvement. (*People* ex rel. *Dept. Pub. Wks.* v. *Silveira*, 236 Cal.App.2d 604, 621-622 [46 Cal.Rptr. 260], hg. den.) Therefore, severance damages resulting from the condemner's *use* of the improvement are allowed, although such use is not expressly mentioned in section 1248, subdivision 2. (See *City of Oakland* v. *Nutter*, 13 Cal.App.3d 752, 759, 760, 764, 765 [92 Cal.Rptr. 347].)

(3) Financing the making of a public improvement (including its construction) by means of special assessments upon the benefited property is but an incident of the making of the improvement. Without this incident there would be no taking and no construction of the improvement. The incident follows the principal. (See Civ. Code, § 3540.) Accordingly, we hold that since the imposition of the assessment by lien upon the subject property was incident to the construction of the improvement, such assessment must be considered as an element of severance damages accruing from the construction of the improvement.[2]

[2]Presumably part of this assessment reflects the property owner's share of the City's cost of acquisition of the land. To avoid double payment to the property owner, this share should be deducted in considering the assessment as an element of severance damages. In other words, having been paid for her land by the taking damages ($1,584), she should not again be paid for it in severance damages. The one sure way to avoid this result in this case would be to deduct for this purpose $1,584 from $8,413.74.

Where the property taken constitutes only a part of a larger parcel, as here, the property owner is entitled to recover as severance damages the difference between the fair market value of the remainder before the taking and that value after the taking. (See *Pierpont Inn, Inc.* v. *State of California*, 70 Cal.2d 282, 295 [74 Cal.Rptr. 521, 449 P.2d 737].) In arriving at the fair market value of the remainder left to the property owner after the taking, consideration must be given to all those things upon which well informed persons dealing in the open market would reasonably rely. (*People* ex rel. *Dept. Pub. Wks.* v. *Lynbar, Inc.*, *supra*, 253 Cal.App.2d 870, 881; cf. Evid. Code, § 814.) One of these things in this case would be the existence of the special assessment lien upon the remaining portion of defendant's property.

In so ruling we are well aware that we are going against the weight of the authority and the prevailing law elsewhere. This law generally renders inadmissible evidence of the existence of a special assessment and likewise prohibits its set off against special benefits. (See 4A Nichols on Eminent Domain (rev. 3d ed. 1971) § 14.248[1]; *City of Tucson* v. *Rickles* (Ariz. App.) 488 P.2d 180, 181; Ann., Eminent Domain: Deduction of Special Benefits, 13 A.L.R.3d 1149, 1202.) In California ordinarily, however, special benefits must be set off against severance damages. (See *City of Hayward* v. *Unger*, 194 Cal.App.2d 516, 518 [15 Cal.Rptr. 301].) This is not done though in the case of public improvements financed by special assessment proceedings. (Sts. & Hy. Code, § 4206, subd. (c); *Oro Loma Sanitary Dist.* v. *Valley*, 86 Cal.App.2d 876, 882-884 [195 P.2d 913], hg. den.)[3]

We think that it is both more realistic and just to take into account both the existence of the related special assessment lien and the special benefits accruing to the property in determining the fair market value of the portion of defendant's property remaining after the taking than to ignore both of these factors as the prevailing law elsewhere does. As indicated earlier, the concept of fair market value is but a means to the constitutional end of just compensation and this legal concept should accord with the practices of the market place which it is supposed to reflect. No well informed buyer and seller in the market place would ignore these things and we believe that the law likewise should not blind itself to their existence.

[3]The *Oro Loma* decision states and follows the general rule that special benefits may not be set off against severance damages where the improvement is financed by special assessment proceedings because this would be double taxation since the property owner would twice pay for special benefits. This occurs, however, only if the special assessment against the subject property is ignored. What is spread over the benefited land by special assessment proceedings are not the benefits of an improvement but rather its total cost.

We do not think that this rule of law dooms special assessment financing of public improvements, as the City contends. Normally and properly a special assessment against a property arising from the related improvement is but an insignificant fraction of the special benefits conferred upon the property by reason of the improvement.

The judgment is reversed for retrial of the issues of severance damages and special benefits in accordance with the views expressed in this opinion.

Schweitzer, Acting P. J., and Allport, J., concurred.

Memorandum 72-75

EXHIBIT XI

[Civ. No. 13102. Third Dist. Dec. 17, 1971.]

[As modified Dec. 21, 1971.]

THE PEOPLE ex rel. DEPARTMENT OF PUBLIC WORKS, Plaintiff and Respondent, v.
GIUMARRA FARMS, INC., Defendant and Appellant.

SUMMARY

In a condemnation case, the jury found that the construction of a new freeway across, and of an interchange contiguous to, the condemnee's 145-acre parcel of farm land, 23 acres of which were taken for the construction of the freeway, conferred a special benefit to the remainder of the parcel and that the value of such benefit, as an offset against the $37,000 severance damages, was $26,250. The condemnor's expert had testified to "sight prominence" and "highway speculation" benefits to the remainder, based on a reasonable probability of a zone change from agricultural to commercial use (such as service, rest, and food facilities), estimated to be worth nearly $42,000 according to comparable sales. Judgment on the verdict was entered accordingly. (Superior Court of Kern County, No. 96018, Marvin E. Ferguson, Judge.)

The Court of Appeal affirmed. Noting that decisional law in California was conflicting as to whether the existence, as distinguished from the amount, of special benefits to the remainder of the condemnee's land resulting from the condemnor's improvements is a factual issue or whether it is one of law, the court nevertheless rejected the condemnee's claim of error based on the argument that such issue should not have been determined by the jury; in the instant case, the trial court had independently made a finding to the same effect. As to whether special benefits may attach to the owner's remaining land by the concentration and funneling of vehicular traffic caused by the location, construction, and operation of a freeway and interchange on the land taken, the court, observing that the question was apparently one of first impression in California, held that they may. Supporting its conclusion by a summary of the law applicable

to "special" benefits, the court held that such benefits are not restricted to results of physical alterations in the character of the remainder; they may result from a nonphysical effect thereon, such as improved access and better accommodation of transportation, or access to improved roads and increased traffic, vehicular or pedestrian. In the present case, there was substantial evidence to support the existence and amount of the benefits as found in the trial court, and such finding could not be disturbed on appeal. (Opinion by Richardson, P. J., with Friedman and Regan, JJ., concurring.)

HEADNOTES

Classified to McKinney's Digest

(1) Eminent Domain § 161—Province of Court and Jury—Existence of Special Benefits to Remainder.—Decisional law in California is conflicting as to whether, in a condemnation case, the existence (as distinguished from the amount) of special benefits to the remainder of the condemnee's land resulting from the condemnor's improvements is a factual issue or whether it is one of law; nevertheless, on the condemnee's appeal in a highway improvement case, he could not successfully urge that it was error for the jury to have found the existence of such special benefits, where a similar finding was independently made by the court itself.

(2a-2d) Eminent Domain § 75(4)—Compensation—Damages to Contiguous Land—Setoff of Benefits—Highways—Benefits From Interchange.—On appeal from a condemnation judgment, the reviewing court was bound by the finding, in the trial court, that the construction of a new freeway across, and of an interchange contiguous to, the condemnee's 145-acre parcel of farm land, 23 acres of which were taken for the construction of the freeway, conferred a special benefit to the remainder of the parcel and that the value of such benefit, as an offset against the $37,000 severance damages, was $26,250, where there was substantial evidence, in the form of testimony by the condemnor's expert, of "sight prominence" and "highway speculation" benefits to the remainder, based on a reasonable probability of a zone change from agricultural to commercial use (such as for service, rest, and food facilities), estimated to be worth nearly $42,000 according to comparable sales, and where such evidence indicated that the improvement left the remainder in a special and unique position

of benefit with respect to the freeway, to the flow of traffic along it, and to the surrounding neighborhood.

(3) **Eminent Domain § 75(0.5)—Compensation—Damages to Contiguous Land—Setoff of Benefits—Restricted to Special Benefits.**—Under the constitutional guaranty of just compensation in condemnation cases (Cal. Const., art. I, § 14), offsets based on a condemnor's improvements may be made only against severance damages and only for "special" benefits to the condemnee, namely, for benefits that result from the mere construction of the improvement and that are peculiar to the remainder of the condemnee's land.

[Eminent domain: Deduction of benefits in determining compensation or damages in proceedings involving opening, widening, or otherwise altering highway, note, 13 **A.L.R.3d** 1149. See also **Cal.Jur.2d, Rev.,** Eminent Domain, § 152; **Am.Jur.2d,** Eminent Domain, § 368.]

(4) **Eminent Domain § 75(1)—Compensation—Damages to Contiguous Land—Setoff of Benefits—Special and General Benefits.**—If benefits to the remainder of a condemnee's land arising from the condemnor's improvements are "special," they remain so despite the enjoyment of benefits by other residents in the immediate neighborhood or upon the same street, and despite the possibility that the special benefits might be terminated by the condemnor. The duration of such benefits is merely a factor in determining their value.

(5a, 5b) **Eminent Domain § 75(1)—Compensation—Damages to Contiguous Land—Setoff of Benefits—Special and General Benefits.**—Where there is an enhancement in the value of the remainder of a condemnee's land caused exclusively by the condemnor's improvement, the public is entitled to an appropriate credit against severance damages for the special benefit conferred upon him. Such benefit need not result from physical alteration in the character of the remainder; it may result from a nonphysical effect, such as improved access and better accommodation of transportation, or access to improved roads and increased traffic, vehicular or pedestrian.

(6) **Eminent Domain § 71—Estimation of Damages—Damages to Contiguous Land—"Just Compensation."**—The constitutional guaranty of "just compensation" in condemnation cases means that compensation must be just, not merely to the individual whose property is taken, but also to the public, which has to pay for it. Thus, when only part of a parcel of land is taken for a highway, the value of

that part is not the sole measure of compensation; if the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account, and, conversely, if the part that he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened.

COUNSEL

Mack, Bianco, Means, Mack & Stone for Defendant and Appellant.

Harry S. Fenton, John Matheny, Robert A. Munroe and Stephen A. Mason for Plaintiff and Respondent.

OPINION

RICHARDSON, P. J.—Defendant property owner appeals from a judgment in condemnation wherein the jury found that the remaining property received special benefits in the sum of $26,250, resulting from the construction of the condemnor's improvements.

Before the commencement of these proceedings, defendant Giumarra Farms, Inc., owned a parcel of farm land consisting of 145.362 acres, situated west of Tehachapi and east of Bakersfield in Kern County. Prior to condemnation the land was bordered on the north by existing State Highway 58, known as the Edison Highway, on the east by Towerline Road, and on the south by Muller Road. Plaintiff condemnor constructed on the parcel a four-lane limited access freeway running generally east and west and dividing the subject property into two remaining parcels, 33.43 acres to the north and 89.03 acres to the south. Condemnor constructed a complex of on-and-off-ramps on the easterly edge of the subject property, which interchange served to funnel east and west bound freeway traffic to and from Towerline Road. The result of the construction is that both the northwest and southwest quadrants of the interchange are immediately contiguous to the remainder of the real property of defendant Giumarra Farms both north and south of the freeway.

The parties stipulated that the fair market value of the take was $28,663 and the total severance damage to the remainder was $37,000. Expert testimony presented by the condemnor indicated that a special benefit was

conferred on the remainder of the property as to the northerly 5 acres by virtue of "sight prominence from the freeway to a westbound traveler," and as to 10 of the remaining southerly 89 acres "by virtue of suitability for highway speculation purposes." Additionally, construction of the interchange and the freeway was found to make the remainder of the property "a point for all traffic; the only part of this particular area where they can depart the freeway and enter the freeway and it becomes a magnet to the highway traffic that is going by in this area." Condemnor's expert testified that the construction of the off-ramps made the subject property accessible and inviting to the traveling public. This, in turn, would result in rezoning to a higher use and a markedly greater land value to the remainder.

(1) Defendant contends, first, that the issue of the existence of any special benefits should have been determined by the trial court rather than the jury.

The present state of the California law is not altogether clear on whether the existence (as distinguished from amount) of special benefits constitutes a factual issue or one of law. The later decisions appear to assume that both the existence and amount of special benefits are factual issues to be resolved by the jury. (*L. A. County Flood etc. Dist.* v. *McNulty* (1963) 59 Cal.2d 333, 338-339 [29 Cal.Rptr. 13, 379 P.2d 493]; *United Cal. Bank* v. *People ex rel. Dept. Pub. Wks.* (1969) 1 Cal.App.3d 1, 8 [81 Cal.Rptr. 405]; *People ex rel. Dept. Pub. Wks.* v. *Schultz Co.* (1954) 123 Cal. App.2d 925, 936 [268 P.2d 117].) *City of Hayward* v. *Unger* (1961) 194 Cal.App.2d 516, 519 [15 Cal.Rptr. 301], is a clear holding that both the existence and nature of benefits is a fact question, the trier in that case being the court. However, in *People* v. *Ricciardi* (1943) 23 Cal.2d 390, at page 402 [144 P.2d 799], the Supreme Court, quoting from the earlier case of *Vallejo etc. R. R. Co.* v. *Reed Orchard Co.*, 169 Cal. 545, 556 [147 P. 238] stated: "'It follows that, except those relating to compensation, the issues of fact in a condemnation suit, are to be tried by the court, and that if the court submits them to a jury it is nevertheless required to make findings either by adopting the verdict thereon or making findings in its own language.'" The *Ricciardi* court, quoting from *Oakland* v. *Pacific Coast Lumber etc. Co.*, 171 Cal. 392 [153 P. 705], added (at pp. 402-403): "'. . . It is only the "compensation," the "award," which our constitution declares shall be found and fixed by a jury. All other questions of fact, or of mixed fact and law, are to be tried, as in many other jurisdictions they are tried, without reference to a jury. [Citation.]' . . .

"It was therefore within the province of the trial court and not the jury to pass upon the question whether under the facts presented, the defendants' right of access will be substantially impaired. If it will be so impaired,

the extent of the impairment is for the jury to determine. This is but another way of saying that the trial court and not the jury must decide whether in a particular case there will be an actionable interference with the defendants' right of access. . . ."

Notwithstanding the apparent force of the later decisions, we need not attempt to resolve these divergent views because the record before us reflects that the trial court did in fact make and enter its independent findings of fact herein, which findings, like those of the jury, were adverse to defendant.

(2a) Defendant's second contention raises a more serious and complicated issue. Briefly and narrowly stated, the question posed is whether special benefits may attach to the owner's remaining land by the concentration and funneling of vehicular traffic caused by the location, construction and operation of a freeway and interchange on the land taken.

Surprisingly, this appears to be a matter of first impression in California.

(3) Certain principles of general application have long been accepted. The constitutional guarantee of just compensation contained in article I, section 14, of the California Constitution has been construed to permit an offset against damages of benefits to the remainder, but two important refinements have developed. While initially the offset was permitted against damages generally, only severance damages may now be so reduced. (*Contra Costa County Water Dist.* v. *Zuckerman Const. Co.* (1966) 240 Cal.App.2d 908, 909-912 [50 Cal.Rptr. 224]; compare *S. F., A. & S. R.R. Co.* v. *Caldwell* (1866) 31 Cal. 367, 374-376; see *Benefits & Just Compensation in California* (1969) 20 Hastings L.J. 764, 765-767.) Secondly, the kinds of benefits for which an offset has been permitted have been limited. In *Beveridge* v. *Lewis* (1902) 137 Cal. 619, 623-624 [67 P. 1040, 70 P. 1083], the court in a classic statement distinguished general benefits, which it defined as those which "consist in an increase in the value of land common to the community generally, from advantages which will accrue to the community from the improvement," from special benefits, defined "as result[ing] from the mere construction of the improvement, and [which] are peculiar to the land in question." It is special benefits alone that are offset against severance damages.

The California rule of special benefits has been criticized as illogical, inequitable and unduly favorable to the landowner. (*Benefits & Just Compensation in California* (1969) 20 Hastings L.J. 764, 772.) There it has been compared unfavorably with the federal rule (33 U.S.C.A., § 595), which, in effect, compares the value of the entire parcel before the take and the value of the remainder, taking into consideration any elements of

severance and benefits. Such a rule would conform to the original California doctrine. (*S. F., A. & S. R.R. Co.* v. *Caldwell, supra*, 31 Cal. 367.) Nonetheless, the *Beveridge* principle remains the law of California.

The enunciation of the rule, however, has proven somewhat easier than its application. Appellate courts have found special benefits in varying factual situations: for example, new access to a public road or highway where none existed before, if accompanied by an increase in market value (*Los Angeles* v. *Marblehead Land Co.*, 95 Cal.App. 602 [273 P. 131]); direct improvement to the land occasioned by the public project (*L. A. County Flood etc. Dist. v. McNulty* (1963) 59 Cal.2d 333 [29 Cal.Rptr. 13, 379 P.2d 493]; *People* v. *Thomas* (1952) 108 Cal.App.2d 832 [239 P.2d 914]); probability that a higher and better use of the land will result from the project (*People* ex rel. *Dept. of Public Works* v. *Hurd* (1962) 205 Cal.App.2d 16 [23 Cal.Rptr. 67]); and an increase in the flow of accessible traffic (*City of Hayward* v. *Unger* (1961) 194 Cal.App.2d 516 [15 Cal.Rptr. 301]). The application of the *Beveridge* principle has not been uniform and it has been criticized as causing "confusion." (See Gleaves, *Special Benefits in Eminent Domain, Phantom of the Opera* (1965) 40 State Bar J. 245, 249.)

Nor has there been uniformity of opinion in other jurisdictions as to what constitutes benefits chargeable against the landowner in a condemnation action. "Upon this subject there is a great diversity of opinion and more rules, different from and inconsistent with each other, have been laid down than upon any other point in the law of eminent domain." (3 Nichols on Eminent Domain 57.)

Certain principles helpful to a resolution of the problem herein presented have been generally accepted, however. **(4)** The benefit does not cease to be special because it is enjoyed by other residents in the immediate neighborhood or upon the same street. (*United States* v. *River Rouge Improvement Co.*, 269 U.S. 411 [70 L.Ed. 339, 46 S.Ct. 144].) The possibility that benefits might subsequently be terminated by the condemnor does not preclude the deduction of the benefit, although its duration may properly be considered in determining its present value. (*People* ex rel. *Dept. of Public Works* v. *Edgar*, 219 Cal.App.2d 381 [32 Cal.Rptr. 892].) **(5a)** The benefit may come from a nonphysical effect on the land, such as improved access and the better accommodation of transportation. (*People* v. *Edgar, supra.*) Finally, access to improved roads and increased traffic, both vehicular and pedestrian, constitutes a special benefit. (*City of Hayward* v. *Unger, supra*, 194 Cal.App.2d 516.)

The problem remains to establish a standard for differentiating between

general benefit to the community and special benefits to the specific property in a consistent and meaningful way.

(2b) In the instant case, no new access to the remaining property is afforded by the construction of the freeway and off-ramps. In the before condition, the landowner could move freely and fully in all directions along a state highway with access from 590 feet on the northerly boundary of the property, along Muller Road on the southerly boundary and along Towerline Road on the easterly boundary. Nonetheless, what is added to the picture, and what constitutes the claim of special benefit, is that by virtue of the construction the landowner's property is now located on two quadrants of a freeway interchange. The property presently zoned agricultural reasonably can be expected to be rezoned to a higher use, and portions of the property are suited for service, rest and food facilities. In short, the property has become a magnet for traffic related commercial activity with measurable financial value and profit to defendant.

Do such factors, coupled with evidence of enhanced value, provide a basis upon which a trier of fact may conclude that special benefits exist in mitigation of severance damages?

(6) The federal and state constitutions only assure the landowner "just compensation." As was said 75 years ago by the United States Supreme Court, compensation must be " 'just, not merely to the individual whose property is taken, but to the public which is to pay for it.' [Citation.] The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.

"Consequently, when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened." (*Bauman* v. *Ross*, 167 U.S. 548, 574 [42 L.Ed. 270, 283, 17 S.Ct. 966].)

It has been said by one highly respected authority in the field: "Subject to these limitations the tribunal is entitled to consider the entire plan of

improvement and the probable effect of the improvement upon the use and value of the land, and it may consider all of the evidence, pro and con, on that issue. It may consider evidence of improved outlet to market to said premises, of higher and better use, as for subdivision, residential, or commercial purposes, frontage on a better road, modes of access, and, in general, any substantial evidence that the improvement will add to the convenience, accessibility, use, and value of the land if such benefit is not shared by nonabutting lands. The fact that other lands abutting on the improvement are also specially benefited, is immaterial.

"One of the distinguishing tests of special benefit has been said to depend on whether or not the special facilities afforded by the improvement have advanced the market value of the property beyond the mere general appreciation of the property in the neighborhood." (3 Nichols on Eminent Domain 72.)

(2c) The enhancement in value of the subject property was described in the testimony of the condemnor's expert, Gerald E. Fisher. Fisher pointed out freeway entrances and exits at two-mile intervals. His opinion was that as to 5 acres in the northerly portion of the remainder a benefit accrued from sight prominence to a westbound traveler and as to 10 acres in the southerly remainder adjacent to Towerline Road a "highway speculation" benefit was conferred. He estimated the net benefit accruing to the northerly 5 acres to be $37,250, and the net benefit to the southerly 10 acres at $4,500. Fisher defined "highway speculation" as "those uses that would be consistent with those found around other interchanges in the state highway system," such as mobile home sites, drive-ins, fruit stands and truck-stop restaurants. He inquired of the appropriate public officials regarding "reasonable probability" of a zone change from agricultural to commercial use, and he supported his appraisals and opinions with comparable sales.

The court holds that the trier of fact could properly find that the value of the subject property was enhanced by the unique combination of access and traffic conferred upon it by the improvements. There is no satisfactory basis upon which the two elements can be separated. Access without traffic or traffic without access would not have conferred a benefit, but the combination of the two, coupled with the site situation immediately contiguous to the quadrants of the freeway interchange, constitutes a benefit which was special and measurable. **(5b)** In principle, where there is an enhancement in value to the remainder caused exclusively by the improvement, there is a conferred benefit. And if a conferred benefit, the condemning public is entitled to an appropriate credit against severance damages. No

California authority has been cited, nor has our independent research disclosed any support for defendant's contention that benefits, to be special, must result from physical alteration in the character of the land which is claimed to be benefitted. **(2d)** This court finds no persuasive policy reason why the trier of fact should not be permitted to find such benefit. Therefore, its determination that such benefits exist in the sum of $26,250, based as it is on sufficient evidence, is binding upon this court on appeal. (See *City of Hayward* v. *Unger*, *supra*, 194 Cal.App.2d 516, 519.)

We are mindful that the possibility of inequity may be inherent in permitting a deduction from severance damages of the kind of claimed benefit herein presented. The property of the landowner's neighbor may also be enhanced to some extent by the improvement, yet the neighbor is not charged with that benefit. However, although increased facilities for travel by the public usually benefit, to some extent, the entire adjacent community, it is clear from the testimony of condemnor's experts that they were well aware of the distinction between special and general benefits, and that their opinions, based upon comprehensive analysis of the issue, provided substantial evidence that construction of the improvement left defendant's remaining property in a special and unique position of benefit with respect to the freeway, the flow of traffic along the freeway and the surrounding neighborhood.

The judgment is affirmed. Appellant is to recover costs on appeal.

Friedman, J., and Regan, J., concurred.

Memorandum 72-75

EXHIBIT XII

California Compensation Provisions

§ 1248. Hearing; items to be ascertained and assessed

The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceeding, and thereupon must ascertain and assess:

1. **Value.** The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed;

2. **Severance damages.** If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff;

3. **Benefits.** Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiffs. If the benefit shall be equal to the damages assessed under subdivision 2, the owner of the parcel shall be allowed no compensation except the value of the portion taken. If the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value. If the benefit shall be greater than the damages so assessed, the owner of the parcel shall be allowed no compensation except the value of the portion taken, but the benefit shall in no event be deducted from the value of the portion taken;

4. **Water; benefits.** If the property sought to be condemned be water or the use of water, belonging to riparian owners, or appurtenant to any lands, how much the lands of the riparian owner, or the lands to which the property sought to be condemned is appurtenant, will be benefited, if at all, by a diversion of water from its natural course, by the construction and maintenance, by the person or corporation in whose favor the right of eminent domain is exercised, of works for the distribution and convenient delivery of water upon said lands; and such benefit, if any, shall be deducted from any damages awarded the owner of such property;

5. **Railroads.** If the property sought to be condemned be for a railroad, the cost of good and sufficient fences, along the line of such railroad, and the cost of cattle guards, where fences may cross the line of such railroad; and such court, jury or referee shall also determine the necessity for and designate the number, place and manner of making such farm or private crossings as are reasonably necessary or

proper to connect the parcels of land severed by the easement condemned, or for ingress to or egress from the lands remaining after the taking of the part thereof sought to be condemned, and shall ascertain and assess the cost of the construction and maintenance of such crossings;

6. **Structures.** If the removal, alteration or relocation of structures or improvements is sought, the cost of such removal, alteration or relocation and the damages, if any, which will accrue by reason thereof;

7. **Separate assessment.** As far as practicable, compensation must be assessed for each source of damages separately;

8. **Encumbrances; indebtedness not yet due.** When the property sought to be taken is encumbered by a mortgage or other lien, and the indebtedness secured thereby is not due at the time of the entry of the judgment, the amount of such indebtedness may be, at the option of the plaintiff, deducted from the judgment, and the lien of the mortgage or other lien shall be continued until such indebtedness is paid; except that the amount for which, as between the plaintiff and the defendant, the plaintiff is liable under Section 1252.1 may not be deducted from the judgment;

9. **Encumbrances; position of property sought to be taken.** Where property is encumbered by a mortgage or other lien and only a portion of the encumbered property is sought to be taken, and where the property being taken, or some portion of it, is also encumbered by a mortgage or other lien which is junior to the first-mentioned lien and such junior mortgage or other lien is against only a portion of the property encumbered by the senior mortgage or other lien, it shall be determined whether the award is sufficient in amount so that the amounts owing to the holders of such senior and junior liens may be paid in full from the award.

If it is determined that the award is not sufficient in amount to pay in full such senior and junior liens, the amount of indebtedness which is secured respectively by the senior and junior liens on the property taken, and which will be paid from the award or deducted from the judgment pursuant to subdivision 8, shall be determined as follows:

(a) The total amount of the award which will be available for payment to the senior and junior lienholders shall be determined. Such amount shall tentatively be allocated first to the senior lien up to the full amount of the indebtedness secured by the senior lien, and the remainder, if any, shall tentatively be allocated to the junior lien.

(b) It shall then be determined whether the payment to the junior lienholder of the amount tentatively allocated to the junior lien together with elimination of the junior lien on the property taken, would cause the junior lienholder's security remaining after the taking, if any, to be of less value in proportion to the indebtedness owing after the taking than was the value of his security prior to the taking in proportion to the indebtedness to him prior to the taking.

(c) If it is determined that the proportionate security of the junior lienholder would be reduced by the taking if only the tentative amount allocated to the junior lien were paid to the junior lienholder, the tentative allocations to the senior and the junior liens shall be adjusted. To make such adjustment there shall be deducted from the amount tentatively allocated to the senior lien, and there shall be added to the amount tentatively allocated to the junior lien, an amount sufficient, considering the junior lienholder's remaining lien on property not taken, to preserve the security of the holder of the junior lien for amounts which will remain owing to him after payment to him from the award. Deduction shall not be made from the amount tentatively allocated to the senior lien to the extent that the remaining amount allocated to the senior lien, if paid to the senior lienholder, would cause the security of the senior lienholder remaining after the taking to be of less value in proportion to the amount remaining owing to him after such payment, than the value of his security prior to the taking, in proportion to the amount secured by his lien before such payment.

(d) No adjustment of the tentative allocations shall be made if it is determined that the security of the junior lienholder which will remain after the taking appears to be sufficient in value to satisfy the indebtedness which will remain owing to the junior lienholder after the taking.

The amounts tentatively allocated to such senior and junior liens, adjusted by such deduction and addition, if any, are the amounts of indebtedness owing to such senior and junior lienholders which are secured by their respective liens on the property taken, and any other indebtedness owing to the senior or junior lienholders shall not be considered as secured by the property to be taken. If the amount of such indebtedness payable to either the senior or to the junior lienholder is not due at the time of entry of the judgment, and the plaintiff makes the election provided in subdivision 8, the indebtedness which shall be deducted from the judgment is the indebtedness in the amount so determined, and the lien shall continue until that amount of indebtedness is paid.

§ 1249. Compensation and damages; accrual of right; improvements after service of summons

For the purpose of assessing compensation and damages the right thereto shall be deemed to have accrued at the date of the issuance of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected, in all cases where such damages are allowed as provided in Section 1248; provided, that in any case in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial. No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages.

#36 10/28/71

THE MARKET VALUE CONCEPT IN EMINENT DOMAIN PROCEEDINGS*

*This study was made for the California Law Revision Commission by the law firm of Hill, Farrer & Burrill, Los Angeles. This study is an extract from pages A-15--A-21 of "A Study Relating to Evidence in Eminent Domain Proceedings," 3 CAL. LAW REVISION COMM'N REPORTS A-11 (1961). No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons and the study should not be used for any other purpose at this time.

A STUDY RELATING TO THE MARKET VALUE CONCEPT

Note: This study is an extract from pages A-15--A-21 of "A Study Relating to Evidence in Eminent Domain Proceedings," 3 CAL. L. REVISION COMM'N REPORTS A-11 (1961).

THE MARKET VALUE STANDARD

If the struggle in eminent domain is "between the people's interest in public projects and the principle of indemnity to the landowner,"[32] then market value is its fulcrum. The dictates of the federal and all state constitutions call for just compensation.[33] But nowhere in these constitutions is the phrase further developed. By and large, condemnation statutes fail to spell out the meaning of just compensation; generally, they merely state that the owner shall receive "value," "actual value" or "fair cash value."[34]

A few states, as well as England, have actually adopted in statutes the term "market value" to represent the measure of just compensation.[35] But despite such terminology or lack thereof in the statute, it is, as the California courts have stressed, "universally agreed that the compensation required is to be measured by the market value of the property taken."[36]

Approximately 500 different definitions of market value appear in *Words and Phrases*.[37] There is, in fact, a genuine dispute over the meaning of this term.[38] The controversy, however, is not so much what the term reasonably connotes as it is what the elements are that bring it about. That is to say, in regard to the standard definition of market value—"the price that can be obtained under fair conditions as between a willing buyer and a willing seller when neither is acting under necessity, compulsion, or peculiar and special circumstances"[39]—disagreements mainly concern the factors that must be considered to determine this hypothetical result rather than the "ideal" itself. True, there are conflicts as to whether this standard presumes that price which an "informed" buyer would consider or merely that price which the "average" buyer, whether he be informed or not, would consider. Moreover, there are conflicts as to whether the definition implies an average price or the highest price obtainable in the market. Both of these points are reasonably well resolved in California; in this State, both the *informed* buyer and the *highest* price he could get are elements of the standard.

---

[32] United States *ex rel.* T.V.A. v. Powelson, 319 U.S. 266, 280 (1943).

[33] U.S. CONST. amend. V; CAL. CONST. art. I, § 14. All but two states have similar provisions in their constitutions. In those states, New Hampshire and North Carolina, this requirement has been read into the state constitutions by the courts.

[34] 1 ORGEL 79-89.

[35] See Acquisition of Land Act, 1919, 9 & 10 Geo. 5, ch. 57, § 2. See also PA. STAT. ANN. tit. 26, § 101 (1958); TEX. STAT., REV. CIV. art. 3265(2) (1948); WASH. REV. CODE §§ 8.04.112, 8.12.140 (1956).

[36] Rose v. State 19 Cal.2d 713, 737, 123 P.2d 505, 519 (1942); Sacramento So. R.R. v. Heilbron, 156 Cal. 408, 104 Pac. 979 (1909); People v. Al. G. Smith Co., 86 Cal. App.2d 308, 194 P.2d 750 (1948). See also Spencer v. The Commonwealth, 5 Commw. L. R. 418 (Austl. 1907).

[37] 26(a) WORDS & PHRASES, *Market Value*, 66-110 (1953).

[38] 1 ORGEL 93 *et seq.*

[39] Maher v. Commonwealth, 291 Mass. 343, 348, 197 N.E. 78, 81 (1935).

As a working definition and as an accepted frame of reference, the California Supreme Court has spelled out the meaning of market value as:

> [T]he highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable.[40]

The crux of the problem, therefore, is not the definition of this term, but rather the manner of ascertaining its elements, its inherent limitations and the method of its presentation in a trial. It is to these that we shortly shall turn our attention.

ALTERNATIVES TO MARKET VALUE STANDARD

There are two other possible alternatives that might be established as the measure of compensation: value to the taker and value to the owner. Even a precursory study of these alternative standards quickly reveals the wisdom shown by the courts in rejecting either of these standards as the *basic* criterion of compensation.

Value to Taker

In this context, the term is limited to basing the criterion of compensation to what the particular condemnor would pay, *if necessary*, on the open market. By such a definition, it is the worth to the condemnor—ignoring the fact that often the condemnor would not have to pay its "worth" to him but rather a compromise figure that usually falls some place between the "worth" to each of the parties. As an illustration, if the State of California needed one additional parcel of land to complete a freeway—and without that parcel a large portion of the freeway would otherwise be useless—the State conceivably might conclude that such a parcel is "worth" ten times what it would cost to buy a comparable piece of property. And without the power of eminent domain the State might have to pay such an amount solely because it is in a position to be "held up." Analogously, a condemned parcel might have a high value on the market and to the owner; but for the condemnor's purpose it is worth significantly less than could be demanded and received on an open market. Patently, to adopt value to

[40] Sacramento So. R.R. v. Heilbron, 156 Cal. 408, 409, 104 Pac. 979, 980 (1909). Compare Taeuber, *An Argument in Favour of the Acceptance of the Doctrine of One Value for All Purposes*, 24 APPRAISAL J. 561, 563 (1956), where the author, speaking of the definition of market value, states: "It may be argued that very few sales of property—the main source of a valuer's data—satisfy the requirements of that definition. That may well be the case but at the same time the definition provides a set of circumstances which are easy to visualise in the concept of the hypothetical sale. Better to consider the hypothetical sale as taking place under those conditions than to attempt to conceive a definition which will cover the infinite range of combinations of circumstances when either of the hypothetical parties do not satisfy the requirements of that definition. In making the valuation, the available data and the methods of application should be used to meet the demands of the market value definition. If this concept of market value is accepted there can never be any ambiguity over the meaning of a valuation."

the taker as the basic standard in eminent domain would be indefensible. It is for this obvious reason that the United States Supreme Court stated:

> [T]he value of the property to the Government for its particular use is not a criterion. The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available uses and purposes.[41]

Value to Owner

If indemnity to the landowner is the equivalent of just compensation, as the courts have repeatedly indicated,[42] then the criterion "value to the owner" should, in theory, be the measure of compensation. Although the courts are sometimes prone to stretch the market value standard or to declare there is no market value in order to effectuate indemnification, generally they are reticent to adopt the value to the owner standard in lieu of market value. The reason for this is basically a practical one.[43] Value to the owner is a subjective standard; it enables the condemnee to present a myriad of factors that may or may not in fact exist to enlarge his award. It opens the door to sham and fabrication. It has no limits, it has no control. By itself, it seriously weakens the concept of "just compensation"—"just" to the condemnor as well as the condemnee.

Experience has indicated that value to the owner is often an unworkable standard. In England from 1845 to 1919 the final criterion of compensation, established by judicial decisions, was the value of the land to the owner.[44] But in 1919, a special parliamentary report pointed out that the utilization of the formula "value to the owner" resulted in entirely unpredictable compensation and excessive condemnation costs. This criterion, the report asserted, often produced "highly speculative elements of value which had no real existence."[45] As a result of this report, that country adopted the market value standard. It should be noted here, however, that while Great Britain has adopted market value as the standard of compensation, Great Britain has also enacted other statutory provisions to allow compensation for losses in addition to market value.[46] In addition the method of proving market value is far more liberal than the method generally used in this country.[46a]

On the other hand, Canada fairly clearly has adopted value to the owner as the final criterion of compensation. And in so doing, that nation, unlike its neighbor to the south, has unequivocally refused to equate just compensation with market value. In 1951, after a period of some uncertainty, the Supreme Court of Canada in *Woods Manufactur-*

[41] United States v. Chandler-Dunbar Co., 229 U.S. 53, 81 (1913).

[42] See, *e.g.*, United States v. Miller, 317 U.S. 369, 373 (1943) ("the owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken").

[43] *Id.* at 374-76.

[44] LAURANCE, COMPULSORY PURCHASE AND COMPENSATION 62 (1952); MINISTRY OF RECONSTRUCTION, SECOND REPORT OF THE COMMITTEE DEALING WITH THE LAW AND PRACTICE RELATING TO THE ACQUISITION AND VALUATION OF LAND FOR PUBLIC PURPOSES 8 (Scott Rep. 1918). The basic reason for this standard was the public distrust of private railroad enterprises. See note 42 *supra*. *Cf.*, Watkins, *Appraisal Practices in Great Britain*, 21 APPRAISAL J. 251, 253 (1953).

[45] LAURANCE, *op. cit. supra*, note 44.

[46] *Cf.* W. Rought, Ltd. v. West Suffolk County Council, [1955] 2 All E.R. 337 (C.A.); Acquisition of Land Act, 1919, 9 & 10 Geo. 5, ch. 57, § 2; Watkins, *Appraisal Practices in Great Britain*, 21 APPRAISAL J. 251, 253 (1953).

[46a] *Ibid.*

ing Co. v. *The King*[47] enunciated the final criterion and measurement of compensation. There the court pointed out that the principles of compensation as adopted in England (prior to 1919) are now in effect in Canada. Succinctly, in words adopted by the court, the final manner of measuring compensation is that:

> [T]he owner at the moment of expropriation is to be deemed as without title, but all else remaining the same, and the question is what would he, as a prudent man, at that moment, pay for the property rather than be ejected from it.[48]

Aside from indicating that the value-to-the-owner criterion "does not imply that compensation is to be given for value resting on motives and considerations that cannot be measured by any economic standard," the court went on to clarify further its interpretation of the measure of compensation:

> It does not follow, of course, that the owner whose land is compulsorily taken is entitled only to compensation measured by the scale of the selling price of the land in the open market. He is entitled to that in any event, but in his hands the land may be capable of being used for the purpose of some profitable business which he is carrying on or desires to carry on upon it and, in such circumstances it may well be that the selling price of the land in the open market would be no adequate compensation to him for the loss of the opportunity to carry on that business there. In such a case Lord Moulton in *Pastoral Finance Association* v. *The Minister* [(1914) A.C. 1083 at 1088], has given what he describes as a practical formula, which is that the owner is entitled to that which a prudent person in his position would be willing to give for the land sooner than fail to obtain it.[49]

The Canadian practice, therefore, as shown by this and other cases,[50] is that if there is a discrepancy between the amount the owner could get on the market and the amount he would be willing to sell for, the latter figure is the final determinant of compensation. This practice is, at least from the American point of view, a radical standard. On one side, this country limits compensation, at least in theory, to market value. In addition, present methods of proving value are generally restricted to the real property itself. On the other side, Canada not only adopts value to the owner as the final determinant, but also allows for loss of "incidentals" and "disturbance" costs and even adds an additional ten per cent to the award simply because the owner must move against his will.[51] Furthermore, Canada, like England, permits a wide variety of factors to be presented to establish market value.

[47] [1951] Can. Sup. Ct. 504, [1951] 2 D.L.R. 465 (1951).
[48] *Id.* at 505, [1951] 2 D.L.R. at 466.
[49] *Id.* at 507-08, [1951] 2 D.L.R. at 467-68.
[50] Diggon-Hibben Ltd. v. The King, [1949] Can. Sup. Ct. 712, 715, [1949] 4 D.L.R. 785, 787 (1949); Lake Erie & No. Ry. v. Brantford Golf & Country Club, 32 D.L.R. 219, 229 (Can. 1916); The King v. Northern Empire Theatres, [1951] Can. Exch. 321, 324 (1951).
[51] See generally Todd, *The 10% Allowance in Assessing Compensation Payable for Property Expropriated Under Statutory Authority*, 2 U.B.C. LEGAL NOTES 623 (1958).

Although the *final* determinant of compensation in Canada is value to the owner, it is to be noted that market value is still the *basic* criterion for ascertaining value. Thus the Canadian Supreme Court has said:

> The law requires that the market price of the land expropriated should constitute the basis of valuation in awarding compensation.[52]

It is, therefore, only when market value fails to indemnify the owner and make him "whole" that resort is made to the final determinant—value to the owner.

In instances where there is no market value (generally service-type property like a park, church, college campus, recreational camp) [53] and in rare other instances,[54] American courts have awarded compensation based on the value-to-the-owner criterion. Nevertheless, when courts carve out exceptions to the market value formula or circumvent its restrictions, they invariably stress that market value remains the general standard of compensation in eminent domain. Recently, however, some courts have frankly discarded the market value formula when it has failed to indemnify the condemnee for all his losses, particularly "incidental losses." For example, in *Housing Authority* v. *Savannah Iron & Wire Works, Inc.*,[55] a Georgia case wherein the court allowed for "good will," the following charge to the jury was approved:

> *I further charge you, gentlemen, that the Constitutional provision as to just and adequate compensation does not necessarily restrict the lessee's recovery to market value. The lessee is entitled to just and adequate compensation for his property; that is, the value of the property to him, not its value to the Housing Authority.* The measure of damages for property taken by the right of eminent domain, being compensatory in its nature, is the loss sustained by the owner, taking into consideration all relevant factors.[56]

And in 1958 the Florida Supreme Court allowed for moving costs, though recognizing that the weight of authority was clearly against its decision.[57] The court said:

> Although fair market value is an important element in the compensation formula, it is not an exclusive standard in this jurisdiction. Fair market value is merely a tool to assist us in determining what is full or just compensation, within the purview of our constitutional requirement.[58]

---

[52] Toronto Sub. Ry. v. Everson, [1917] 54 Can. Sup. Ct. 395, 419, 34 D.L.R. 421, 438 (1917). See also The King v. Eastern Trust Co., [1945] Can. Exch. 115, 121, [1945] 4 D.L.R. 563, 567 (1945).

[53] Winchester v. Cox, 129 Conn. 106, 26 A.2d 592 (1942) (park); Idaho etc. Ry. v. Columbia etc. Synod., 20 Idaho 568, 119 Pac. 60 (1911) (college campus); Newton Girl Scout Council v. Massachusetts Turnpike Authority, 335 Mass. 189, 138 N.E.2d 769 (1956) (recreational camp); *In re* Simmons, 127 N.Y. Supp. 940, 944 (Sup. Ct. 1910) (church). See Housing Authority of Shreveport v. Green, 200 La. 463, 474, 8 So.2d 295 (1942).

[54] See Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 85 nn.109, 110 (1957).

[55] 91 Ga. App. 881, 87 S.E.2d 671 (1955). The court admitted that the market value formula is the general measure of damages. However, unlike almost any other case at that time, it did not state that special conditions need to exist to set market value aside. Rather, the general standard was to be discarded if it failed to give fair and reasonable value to the owner.

[56] *Id.* at 884-85, 87 S.E.2d at 675.

[57] Jacksonville Express. Authority v. Henry G. Du Pree Co., 108 So.2d 289 (Fla. 1958).

[58] *Id.* at 291.

3—21679

Both of these decisions, and especially the language employed, are unusual. It is too early to suggest that they represent a definite trend in American law. Both clearly represent, however, a generally held belief that the present strictures of the market value formula often prevent just compensation.

The market value standard has been attacked from still another point of view: its alleged objectivity. Courts are reluctant to go beyond the market value system for fear of creating a wilderness in place of a standard of symmetry. But this overlooks serious imperfections in the existing standard, for often the application of market value "involves, at best, a guess by informed persons."[59] The market value system produces radically inconsistent results. A 1932 study of condemnation practices in New York City illustrates that in practice market value is far from objective: expert appraisals made for the condemnor and for the condemnee generally varied about 100 per cent.[60] Analysis of data on more recent Massachusetts takings reveals a more startling inconsistency. Not only do the figures confirm the New York findings (the difference between appraisals averaging 56 per cent and ranging to a maximum of 571 per cent) but they represent the estimates of two or more state experts, each acting on behalf of the condemnor and apparently lacking the conflicting interest that might be said to underlie the divergent estimates of the earlier New York study.[61]

But we must conclude that, despite its inherent weaknesses, the market value system should be retained as the *basic* criterion. First, despite its limitations, it is probably more objective and ascertainable than either of the alternatives.[62] Second, it usually has at least a rough correlation with value to the owner—indemnity.[63] Last, *the standard can be improved in both regards.* In the final analysis, the market value standard must be retained for the lack of a better.[64]

The problem is not answered by this conclusion, however; it merely raises other problems. The effort to insure just compensation in light of the retention of market value can take two fairly distinct approaches. First, the system can be improved by strengthening the methods of presenting and proving, in a court, the elements of market value, *i.e.*, the value of the property taken. This is the "internal" approach. The evidence study was principally directed along such a path. A second approach for insuring just compensation, the "external" approach, is not concerned with the evidentiary mechanics of arriving at market value. Rather it is directed toward those matters that should or should not be included as elements of just compensation in addition to the market value of the property taken, such as moving costs, lost profits, access and noise.

[59] United States v. Miller, 317 U.S. 369, 375 (1943).
[60] WALLSTEIN, REPORT ON LAW AND PROCEDURE IN CONDEMNATION iv (1932).
[61] Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 73 (1957).
[62] Market value, like the appraiser in condemnation cases, may often be characterized as "that scoundrel who stands between the landowner and sudden wealth."
[63] *Cf.* 1 BONBRIGHT, *op. cit. supra* note 24, at 447-49; 1 ORGEL 79.
[64] *Ibid.*

These matters shall be examined in subsequent studies.[65] For now, it is important to keep these distinctions in mind.

Before turning our attention to the internal problem created by the market value standard, we may briefly direct ourselves to the consideration of whether the pertinent statutes in this State, which presently make no reference to *market value* but merely call for "value" and "actual value," should be amended to include the *market value* term. As pointed out above, both in England and in a minority of states the market value term is employed by statute as the basic measure of compensation. Yet, California, like other states without such statutory language, has adopted by judicial interpretation the market value standard, equating "value" with market value. Presuming that we are retaining the market value standard as the basic criterion, it would seem proper to include in the statute the substantive law as it exists. It would help to resolve the doubts of those who question the legal justification of using this standard; and provision could be made for those cases in which there is no market value. More important, however, it might help to avoid confusion that could arise in ascertaining an award figure should just compensation be made to include factors not within the market value formula, such as incidental losses. These latter factors could be separately spelled out in other statutory provisions; precedent for this statutory method exists in England.[66]

On the other hand, it is not necessary to include the term "market value" in the statute since it exists by judicial adoption. Moreover, in support of the status quo of silence in this regard, it might be said that the inclusion of this term might raise other problems, particularly in those cases where there is no market value for the property and courts have found it necessary to resort openly to the value-to-the-owner criterion. More important, however, it is believed that it would be wiser to make this change only in conjunction with a complete re-codification of the laws of condemnation in this State.

[65] The term "incidental losses" is used herein to describe nonphysical losses to the condemnee, such as moving costs, lost profits and good will. These losses usually occur when the entire fee is taken. Often the courts label such losses "consequential." "Consequential damages," however, is more appropriate for describing instances in which property is damaged though no part of the owner's property is taken. Another type of damage, also often misleadingly called "consequential," is that which occurs in partial taking cases. The proper term to designate the loss of value to the residue not taken is "severance damages."

[66] See Acquisition of Land Act of 1919, 9 & 10 Geo. 5, ch. 57, § 2.