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Memorandum 77-16

Subject: Evidence (Evidence of Market Value of Property)

You will recall that some time ago the Commission considered a draft of a tentative recommendation relating to evidence of market value of property. The draft of the tentative recommendation was generally satisfactory but the tentative recommendation was to be revised to reflect various Commission decisions. In addition, the Commission wanted to review the portion of the revised tentative recommendation relating to the use of the capitalization of hypothetical improvements approach to valuation.

A copy of the revised tentative recommendation is attached. The portions you wanted to review are set out on pages 7-9 (preliminary portion recommending a change in the law to permit use of a capitalization of hypothetical improvements method of valuation in certain situations) and pages 18-20 (proposed amendment to Section 819 of the Evidence Code to effectuate that recommendation).

The staff requests approval of the attached tentative recommendation for the purpose of sending it out to interested persons and organizations for review and comment. If you are willing to read and mark your suggested editorial revisions on all or a portion of the tentative recommendation, the staff would be grateful for your assistance.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

LETTER OF TRANSMITTAL

The California Law Revision Commission tentatively recommends that the Evidence Code rules relating to value, damages, and benefits in eminent domain and inverse condemnation cases be revised and extended to all cases where the market value of property is in issue. A copy of the tentative recommendation is attached.

This tentative recommendation is being distributed to interested persons and organizations for review and comment. All comments received will be considered when the Commission determines the recommendation, if any, it will submit to the Legislature. The Commission would appreciate receiving your comments on the tentative recommendation by June 1, 1977. Comments may be sent to the California Law Revision Commission, Stanford Law School, Stanford, California 94305.

## TENTATIVE RECOMMENDATION

relating to

### EVIDENCE OF MARKET VALUE OF PROPERTY

#### Background

The California Evidence Code provisions relating to value, damages, and benefits in eminent domain and inverse condemnation cases<sup>1</sup> were enacted in 1965.<sup>2</sup> These provisions were the result of recommendations of the California Law Revision Commission<sup>3</sup> although they were not ultimately enacted on Commission recommendation.

The Evidence Code provisions relating to value, damages, and benefits in eminent domain and inverse condemnation cases have been the subject of extensive review and comment since their enactment. They have been discussed in law review articles<sup>4</sup> and treatises,<sup>5</sup> they have been considered in a national monograph,<sup>6</sup> and they have been the subject of a thorough questionnaire distributed among practitioners by the Law Revision Commission.<sup>7</sup>

The Commission has reviewed the Evidence Code provisions and has determined that a number of changes are desirable. These changes are discussed below.

1. Evid. Code §§ 810-822.
2. Cal. Stats. 1965, Ch. 1151, § 4.
3. See Recommendation and Study Relating to Evidence in Eminent Domain Proceedings, 3 Cal. L. Revision Comm'n Reports at A-1 (1960).
4. See, e.g., Carlson, Statutory Rules of Evidence for Eminent Domain Proceedings, 18 Hastings L.J. 143 (1966); Whitaker, Real Property Valuation in California, 2 U.S.F. L. Rev. 47 (1967).
5. See, e.g., Matteoni, "Just Compensation," in Condemnation Practice in California, §§ 4.25-4.51, at 57-74 (Cal. Cont. Ed. Bar 1973); Dankert, "Condemnation Practice Handbook," in 14 California Real Estate Law and Practice, §§ 508.01-509.42 (1976); B. Witkin, California Evidence §§ 440-447, at 397-405 (2d ed. 1966).
6. See Highway Research Board, Rules of Compensability and Valuation Evidence for Highway Land Acquisition (1970).
7. The questionnaire results were analyzed in a consultant's report dated March 24, 1972 (unpublished).

### Application of Evidence Code Provisions

The provisions of the Evidence Code relating to valuation of property apply only to eminent domain and inverse condemnation proceedings.<sup>8</sup> Other actions involving the valuation of property, with a few limited exceptions,<sup>9</sup> are governed by case law. It has been suggested by several commentators that the eminent domain valuation provisions could be equally well applied to the other actions.<sup>10</sup>

The major areas of litigation, other than eminent domain and inverse condemnation, where the determination of property value is important include property taxation and inheritance taxation, breach of contract of sale of property, fraud in sale of property, damage or injury to property, and marital dissolution and division of property. In each of these areas, the critical determination is the "market value" of the property.<sup>11</sup> This is also the determination in an eminent domain

8. Evidence Code Section 810 provides, "This article is intended to provide special rules of evidence applicable only to eminent domain and inverse condemnation proceedings."

9. See, e.g., Com. Code §§ 2723, 2724 (proof of market price in cases involving sale of goods).

10. In Carlson, Statutory Rules of Evidence for Eminent Domain Proceedings, 18 Hastings L.J. 143, 144 (1966), it was said:

In any event, the Law Revision Commission and the legislature should consider legislation making the Evidence Code provisions applicable to all actions and special proceedings involving the valuation of real property.

And in Whitaker, Real Property Valuation in California, 2 U.S.F. L. Rev. 47, 68 (1967), it was said:

But if the standard value for purposes of eminent domain is the same as value for purposes of real property taxation and inheritance taxation, no reason appears why the evidentiary rules for determining value should be limited to eminent domain and inverse condemnation cases.

11. See, e.g., Cal. Const., Art. XIII, § 1, and Rev. & Tax. Code §§ 110, 110.5, 401 (use of "fair market value" or "full value" for taxation purposes); Rev. & Tax. Code §§ 13311, 13951 (inheritance tax based on "market value" of property); Civil Code § 3343 (measure of damages in fraud based on "actual value" of property); Ins. Code § 2071 (fire insurance covers loss to the extent of "the actual cash value" of the property). The cases have uniformly interpreted these varying standards to mean "market value." See, e.g., Jefferson Ins. Co. v. Superior Court, 3 Cal.3d 398, 402, 475 P.2d 880, 882, 90 Cal. 2d 608, 610 (1970) (fire insurance); DeLuz Homes, Inc. v. County of San Diego, 45 Cal.2d 546, 561-562, 290 P.2d 544,

or inverse condemnation proceeding.<sup>12</sup>

The lack of statutory standards of evidence for the valuation of property in areas other than eminent domain and inverse condemnation has created a number of problems. The same basic factual question--the determination of market value of property--is governed by different rules of evidence depending upon the type of case in which the question arises.<sup>13</sup> In addition to the inequity created by such a scheme, confusion among appraisers and attorneys, as well as among the courts, is generated by the existence of multiple standards.<sup>14</sup> And the lack of clear statutory standards in cases where the market value issue is not frequently litigated poses real problems for the parties and the court.<sup>15</sup>

One solution adopted by the courts has been simply to follow the statutory evidence rules in cases other than eminent domain and inverse

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554 (1955) (property tax); Guild Wineries & Distilleries v. County of Fresno, 51 Cal. App.3d 182, 187, 124 Cal. Rptr. 96, 99 (1975) (property tax); Union Oil Co. v. County of Ventura, 41 Cal. App.3d 432, 436, 116 Cal. Rptr. 13, 16 (1974) (property tax); Campbell Chain Co. v. County of Alameda, 12 Cal. App.3d 248, 253, 90 Cal. Rptr. 501, 504 (1970) (property tax); Estate of Powell, 132 Cal. App.2d 421, 429, 282 P.2d 163, 168 (1955) (inheritance tax); Bagdasarin v. Gragnon, 31 Cal.2d 744, 752-753, 192 P.2d 935, 940 (1948) (fraud damages); Pepper v. Underwood, 48 Cal. App.3d 698, 706 n.7, 122 Cal. Rptr. 343, 349 n.7 (1975) (fraud damages).

12. E.g., Code Civ. Proc. § 1263.310 (measure of compensation in eminent domain is "fair market value" of property).
13. See Carlson, Statutory Rules of Evidence for Eminent Domain Proceedings, 18 Hastings L.J. 143, 144 (1966).
14. See id.
15. See, e.g., In re Marriage of Folb, 53 Cal. App.3d 862, 868, 126 Cal. Rptr. 306, 310 (1975):

We recognize that section 4800, subdivision (a) of the Family Law Act requires an equal division of community property, and that the trial court, therefore, is required to make specific findings concerning the nature and value of all assets of the parties before the court. . . . Neither the Family Law Act, nor the decisional law of this state relating to community-property division, offers any particular guidance as to how the value of a disputed real property asset should be ascertained.

condemnation.<sup>16</sup> In the case of In re Marriage of Folb,<sup>17</sup> for example, the court was confronted with the factual question of the value of a particular asset involved in a community property division. In the absence of applicable statutory and decisional rules of evidence, the court sought guidance from the Evidence Code provisions and the condemnation cases construing them.<sup>18</sup>

The Law Revision Commission recommends that the Evidence Code rules applicable to eminent domain and inverse condemnation cases be extended to include all cases not now covered by statute where there is an issue of the "market value" (or its equivalent) of property. The Evidence Code rules are sufficiently general in scope, and sufficiently liberal in their admission of all recognized valuation techniques, to justify their use in all areas identified by the Commission.

Broad application of the statutory evidence rules will to some extent change existing case law.<sup>19</sup> However, the courts have applied

16. This has been suggested in Carlson, Statutory Rules of Evidence for Eminent Domain Proceedings, 18 Hastings L.J. 143, 144 (1967): "It may well be that the trial and appellate courts will want uniformity and may well follow the new evidence rules for all cases involving the valuation of real property."
17. 53 Cal. App.3d 862, 126 Cal. Rptr. 306 (1975).
18. See In re Marriage of Folb, 53 Cal. App.3d 862, 868-871, 126 Cal. Rptr. 306, 310-312 (1975). The court ultimately held some of the Evidence Code provisions not controlling in a marital dissolution case. Id. at 871, 126 Cal. Rptr. at 312.
19. For example, the value of property in eminent domain and inverse condemnation cases may be shown only by opinion testimony of expert witnesses or of the owner of the property. Evid. Code § 813. Evidence of sales of the subject property or of comparable sales is admissible on direct examination but only for the purpose of explaining the witness' opinion. See Evid. Code §§ 815, 816; Carlson, Statutory Rules of Evidence for Eminent Domain Proceedings, 18 Hastings L.J. 143, 149 (1966). Thus, after hearing such evidence, the jury is instructed to consider it "only for the limited purpose" of enabling it "to understand and weigh the testimony of the witnesses as to their opinion" of value and to return a verdict within the range of the expert opinions of value. BAJI 11.80 (1975 Rev.).

On the other hand, existing law applicable to other than eminent domain and inverse condemnation cases permits a verdict based on a comparable sale even though the verdict is outside the range of the expert opinion of value. See Foreman & Clark Corp. v.

many of the basic principles applicable to eminent domain cases in the other areas where valuation is important, particularly in property taxation and inheritance taxation,<sup>20</sup> and the benefit of eliminating the existing uncertainty by having a uniform set of rules of evidence applicable to all property valuations far outweighs any inconvenience of minor changes in existing case law rules.

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Fallon, 3 Cal.3d 875, 386, 479 P.2d 362, 369, 92 Cal. Rptr. 162, 169 (1971); In re Marriage of Folb, 53 Cal. App.3d 862, 871, 126 Cal. Rptr. 306, 312 (1975). The application of the evidentiary rules of Evidence Code Sections 810-822 to all cases where the value of property is in issue (except cases already covered by statute--see Com. Code §§ 2723-2724) would apply the rule of limited admissibility of sales data to such cases and would thus change the rule of Foreman & Clark Corp. v. Fallon, supra, In re Marriage of Folb, supra, and similar cases.

20. See Whitaker, Real Property Valuation in California, 2 U.S.F. L. Rev. 47, 101 (1967).

### Testimony by Owner

Although generally the value of property may be shown only by the opinion of an expert witness, Evidence Code Section 813 permits the owner of property to give an opinion as to its value. This provision should be revised to make clear that not only the fee owner, but the owner of any compensable interest in the property, may testify as to its value. This is important in eminent domain proceedings since, in a bifurcated trial, the owner of an interest in the property may find it necessary to testify as to the value of the entire property in order to establish the value of his interest.<sup>21</sup>

The right of the owner to give an opinion as to the value of property has been construed to refer only to natural persons. Where the owner is a corporation, for instance, a corporate representative may not testify unless he is otherwise qualified as an expert.<sup>22</sup> This rule should be changed. Where the property is owned by a corporation, partnership, or unincorporated association, an officer, employee, or partner designated by the owner should be permitted to give an opinion of the value of the property if the designee is knowledgeable as to the character and use of the property.<sup>23</sup> This will enable the small organization to give adequate testimony as to the value of its property in cases where it might not be able to afford the cost of an expert.

### Admissibility of Comparable Sales

A witness may, in appropriate cases, rely on sales of comparable properties as a basis for an opinion of the value of property.<sup>24</sup> Experience under this rule reveals that the requirement of comparability has been too narrowly construed by some courts so that sales of comparable properties that could be fairly considered as shedding light on the value of the property being valued have been ruled inadmissible.

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21. See Code Civ. Proc. § 1260.220 (procedure where there are divided interests).

22. E.g., *City of Pleasant Hill v. First Baptist Church*, 1 Cal. App.3d 384, 411-412, 82 Cal. Rptr. 1, 19 (1969).

23. Section 1103(a)(3) of the Uniform Eminent Domain Code contains a similar provision.

24. Evid. Code § 816.

The Commission recommends that the courts be encouraged to permit an expert witness wide discretion in the selection of sales. It is better to have all relevant evidence available to the trier of fact than to have insufficient evidence. The degree of comparability of a sale should affect the weight, rather than the admissibility, of evidence of the sale.<sup>25</sup> To this end, the right of full cross-examination concerning comparable sales should be preserved.

#### Capitalization of Income

A witness may, in appropriate cases, rely on the capitalized value of the net rental value attributable to the property as improved with existing improvements as a basis for an opinion of the value of the property.<sup>26</sup> In many cases, however, the property may not be improved for its highest and best use so that use of a capitalization of income technique does not yield an accurate estimate of market value. In most cases, this drawback is surmountable since there are usually other more reliable valuation techniques available, notably use of market data (comparable sales). However, in some cases, there may be no adequate market data upon which an opinion as to the value of the property may be based. This is particularly true in case of special use or special purpose properties.

The capitalization of the reasonable net rental income that would be attributable to the land if it were improved for its highest and best use, even though it is not presently so improved, should be permitted in cases where the court determines that there is no adequate market data (comparable sales). This would provide a limited exception to the general rule of Evidence Code Section 819 which permits use of the capitalization of income approach only for the land and the existing improvements thereon.

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25. Of course, if the expert witness refers to sales which are too remote, they are subject to a motion to strike and the jury should be instructed to disregard them.

26. Evid. Code § 819.

Under the recommended valuation approach, the expert witness will be permitted to take into account in formulating his opinion a capitalization of income analysis based on the reasonable net rental value of the land as improved by the hypothetical improvement that would be required to be constructed to permit the property to be devoted to its highest and best use. Such an analysis could, for example, involve a determination of the reasonable net rental value of the property as improved by the hypothetical improvement, the apportionment of the reasonable net rental value so determined between the land and the hypothetical improvement and the capitalization of the reasonable net rental value apportioned to the land.

There will be a number of restrictions on the use of the valuation approach described above. Before the new valuation approach may be used, the recommended legislation requires a court determination that there "is no adequate market data described in Section 816 [comparable sales] upon which an opinion may be based as to the value of the property for the highest and best use for which the property is reasonably adaptable and available." Hence, the use of the valuation approach is limited to cases where the court first determines that there are no adequate comparable sales; if there is adequate market data to permit valuation, the capitalization of hypothetical improvements approach may not be used. The recommended legislation also requires that the highest and best use be one that the court determines is a use for which the property "is reasonably adaptable and available" and limits the use of the valuation approach to cases where "relevant to the determination of the value of the property." The new valuation approach is thus limited to cases where that type of approach to valuation would be taken into consideration in determining the price at which to purchase and sell the property by a willing purchaser and a willing seller, dealing with each other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available. The use of the new valuation approach is further limited by the general requirement stated in Evidence Code Section 814 that the matter upon which the expert's

opinion is based be "of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of the property." These limitations require the court to restrict the use of the new valuation approach to appropriate cases and to deny its use where based on unrealistic or highly speculative assumptions.

Under the recommended legislation, the new valuation approach is permitted only if the witness is an "expert" witness so that the data will be presented with the aid of analysis and explanation by an expert valuation witness.

#### Admissibility of Unpaid Taxes

Evidence Code Section 822(c) permits consideration of "actual or estimated taxes" for the purpose of capitalization of income. However, Revenue and Taxation Code Section 4986(b) prohibits mention of "the amount of the taxes which may be due on the property." The relationship between these two provisions has caused some confusion in practice.

The apparent conflict between the two provisions is resolved by observing that the Revenue and Taxation Code provision relates only to mention of unpaid taxes.<sup>27</sup> The Commission believes that this distinction should be made clear, however, by relocating the taxation provision in the Evidence Code. The language of Revenue and Taxation Code Section 4986(b) concerning mistrial should be deleted.<sup>27a</sup> The general rule will thus apply, which gives the court discretion to declare a mistrial when evidence has been presented which is inadmissible, highly prejudicial, and cannot be corrected by an admonition to the jury.<sup>28</sup>

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27. See Carlson, Statutory Rules of Evidence for Eminent Domain Proceedings, 18 Hastings L.J. 143, 157 (1966).

27a. The Commission plans to devote further study to the simplification of the structure of Revenue and Taxation Code Section 4986.

28. See Wolford & Endicott, "Motions During Trial" in California Civil Procedure During Trial, §§ 15.61-15.63, at 372-373 (Cal. Cont. Ed. Bar 1960); 4 B. Witkin, California Procedure, Trial § 130, at 2954 (2d ed. 1971).

The Evidence Code provision should also be amended to make clear that it is inapplicable in cases where the ultimate issue is the assessed valuation of property.

Admissibility of Sale or Exchange

It is improper for a valuation witness to give an opinion as to the value of property other than that being valued.<sup>29</sup> A particular application of this rule is to trades or exchanges involving the property being valued since a determination of the value of the property depends in part upon the value of the property for which it is traded or exchanged.<sup>30</sup> The Commission recommends that the statute make clear that transactions involving the trade or exchange of property are not a proper basis for an opinion as to the value of the property.<sup>31</sup>

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

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29. Evid. Code § 822(d).

30. See *People v. Reardon*, 4 Cal.3d 507, 515-516, 483 P.2d 20, 26, 93 Cal. Rptr. 352, 858 (1971).

31. Section 1113(5) of the Uniform Eminent Domain Code contains a similar provision.

An act to amend the title of Article 2 (commencing with Section 810) of Chapter 1 of Division 7, and to amend Sections 810, 811, 812, 813, 816, 817, 819, and 822 of the Evidence Code, and to amend Section 4986 of the Revenue and Taxation Code, relating to evidence in the valuation of property.

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

Evidence Code §§ 810-822 Title (amended)

SECTION 1. The title of Article 2 (commencing with Section 810) of Chapter 1 of Division 7 of the Evidence Code is amended to read:

Article 2. Value, Damages, and Benefits in Eminent Domain  
and Inverse Condemnation Cases Evidence of  
Market Value of Property

Evidence Code § 810 (amended)

SEC. 2. Section 810 of the Evidence Code is amended to read:

310. This article is intended to provide special rules of evidence applicable only to eminent domain and inverse condemnation proceedings to any action in which the value of property is to be ascertained.

Comment. Section 810 is amended to remove the limitation on application of this article to eminent domain and inverse condemnation proceedings. This article applies to any action or proceeding in which the "value of property" is to be determined. See Section 811 and Comment thereto ("value of property" defined). See also Sections 105 and 120 ("action" includes action or proceeding). It should be noted, however, that--where a particular provision requires a special rule relating to value--the special rule prevails over this article. See, e.g., Com. Code §§ 2723, 2724.

Evidence Code § 811 (amended)

SEC. 3. Section 811 of the Evidence Code is amended to read:

811. As used in this article, "value of property" means the amount of "just compensation" to be ascertained under Section 19 of Article I of the State Constitution and the amount of value, damage, and benefits to be ascertained under Articles 4 (commencing with Section 1263.310) and 5 (commencing with Section 1263.410) of Chapter 9 of Title 7 of Part 3 of the Code of Civil Procedure, market value of property or its equivalent.

Comment. Section 811 is amended to broaden the application of this article to all cases where a market value standard is used. These cases include, but are not limited to, the following:

- (1) Eminent domain proceedings. See, e.g., Code Civ. Proc. § 1263.310 (measure of compensation is fair market value of property taken).
- (2) Property taxation. See, e.g., Cal. Const., Art. XIII, § 1, and Rev. & Tax. Code §§ 110, 110.5, 401 (property assessment and taxation based on fair market value or full value).
- (3) Inheritance taxation. See, e.g., Rev. & Tax. Code §§ 13311, 13951 (property taxed on basis of market value).
- (4) Breach of contract of sale. See, e.g., Com. Code §§ 2708, 2713 (measure of damages for nonacceptance or repudiation is based on market price). It should be noted that, where a particular provision requires a special rule relating to proof of value, the special rule prevails over this article. See, e.g., Com. Code §§ 2723, 2724.
- (5) Fraud in the purchase, sale, or exchange of property. See, e.g., Civil Code §§ 3343 (measure of damages based on actual value of property).
- (6) Other cases in which no statutory standard of market value or its equivalent is prescribed but in which the court is required to make a determination of market value, such as cases involving damage to

property, sale of property, marital dissolution proceedings, or other valuation or appraisal of property.

It should be noted that this article applies only where the market value or its equivalent of property is to be determined. In cases involving some other standard of value, the rules provided in this article are not made applicable by statute.

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Evidence Code § 812 (amended)

SEC. 4. Section 812 of the Evidence Code is amended to read:

812. This article is not intended to alter or change the existing substantive law, whether statutory or decisional, interpreting "just compensation" as used in Section 19 of Article I of the State Constitution or the terms "fair market value," "damage," or "benefit" as used in Articles 4 (commencing with Section 1263.310) and 5 (commencing with Section 1263.410) of Chapter 9 of Title 7 of Part 3 of the Code of Civil Procedure; the meaning of "market value" or its equivalent.

Comment. Section 812 is amended to make clear that nothing in this article affects the substantive meaning given the term "market value" (as used, for example, in the statutes relating to inheritance taxation) or equivalent terms such as "market price" (breach of contract of sale), "actual value" (fraud in a transaction), "full value" (property taxation), "fair market value" (property taxation, eminent domain), or "just compensation," "damage," or "benefit" (eminent domain).

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Evidence Code § 813 (amended)

SEC. 5. Section 813 of the Evidence Code is amended to read:

813. (a) The value of property may be shown only by opinion of:  
(1) Witnesses qualified to express such opinions; and

(2) The owner of any right, title, or interest in the property or property interest being valued; valued; and

(3) An officer, employee, or partner designated by a corporation, partnership, or unincorporated association claiming any right, title, or interest in the property being valued if such person is knowledgeable as to the character and use of the property.

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

Comment. Section 813(a)(2) is amended to make clear that not only the fee owner of the property, but any person having a compensable interest in the property, may testify as to the value of the property or his interest therein. Cf. Code Civ. Proc. §§ 1235.170 ("property" defined), 1263.010 (right to compensation). This is consistent with Code of Civil Procedure Section 1260.220 (procedure where there are divided interests).

Paragraph (3) is added to Section 813(a) to make clear that, where a corporation, partnership, or unincorporated association owns property being valued, a designated officer, employee, or partner who is knowledgeable as to the character and use of the property may testify to his opinion of its value as an owner, notwithstanding any contrary implications in City of Pleasant Hill v. First Baptist Church, 1 Cal. App.3d 384, 82 Cal. Rptr. 1 (1969). Nothing in paragraph (3) affects the authority of the court to limit the number of expert witnesses to be called by any party (see Section 723) or to limit cumulative evidence (see Section 352).

Evidence Code § 816 (amended)

SEC. 6. Section 816 of the Evidence Code is amended to read:

816. (a) When relevant to the determination of the value of property, a witness may take into account as a basis for his an opinion the price and other terms and circumstances of any sale or contract to sell and purchase comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation.

(b) In order to be considered comparable, the sale or contract must have been made sufficiently near in time to the date of valuation, and the property sold must be located sufficiently near the property being valued, and must be sufficiently alike in respect to character, size, situation, usability, and improvements, to make it clear that the 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.

(c) The provisions of this section shall be liberally construed to the end that an expert witness is permitted a wide discretion in the selection of comparable sales. Nothing in this section affects either (1) the right of the court in its discretion to limit the number of sales used by a witness or (2) the right fully to cross-examine the witness concerning the sales.

Comment. Subdivision (c) is added to Section 816 to incorporate a policy of liberal admissibility of sales on the theory that an error of exclusion is more likely to be prejudicial than an error of admission.

This policy applies only to expert witnesses. It is not intended to limit the court's discretion in placing a reasonable limitation upon the number of sales that may be admissible for any appraisal purpose so as to avoid the cumulative effect of such testimony. Nor does it affect the right of liberal cross-examination granted in Section 721. However, the right of cross-examination may not be used as a means of placing improper matters before the trier of fact. While subdivision (c) adopts a policy of liberality in the admissibility of comparable sales, this policy is subject to the basic standard of comparability set out in subdivision (b).

It should be noted that existence of project enhancement or blight on comparable sales does not necessarily affect their relevance under this section. See Code Civ. Proc. § 1263.330 (changes in property value due to imminence of project); City of Los Angeles v. Retlaw Enterprises, Inc., 16 Cal.3d 473, 479-483, 546 P.2d 1380, 1383-1387, 128 Cal. Patr. 436, 439-443 (1976).

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Evidence Code § 817 (technical amendment)

SEC. 7. Section 817 of the Evidence Code is amended to read:

817. (a) When Subject to subdivision (b), when relevant to the determination of the value of property, a witness may take into account as a basis for ~~his~~ an opinion the rent reserved and other terms and circumstances of any lease which included the property or property interest being valued or any part thereof which was in effect within a reasonable time before or after the date of valuation.

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

Comment. Section 817 is amended to make clear that subdivision (b) is a limitation on subdivision (a). It should be noted that Section 817 applies only to the determination of the value of property and not to such matters as loss of goodwill since the determination of loss of goodwill does not entail a determination of "market value." See Section 311 and Comment thereto; Code Civ. Proc. § 1263.510 and Comment thereto.

968/887

Evidence Code § 319 (amended)

§19. (a) When relevant to the determination of the value of property, a witness may take into account as a basis for his an opinion the capitalized value of the reasonable net rental value attributable to the land and existing improvements thereon (as distinguished from the capitalized value of the income or profits attributable to the business conducted thereon).

(b) When relevant to the determination of the value of property, an expert witness may take into account as a basis for an opinion the capitalized value of the reasonable net rental value that would be attributable to the land if the property were improved so that it could be used for the highest and best use for which it is reasonably adaptable and available, but this subdivision applies only if the court determines that both of the following requirements are met:

(1) The land and the existing improvements thereon, if any, do not permit use of the property for the highest and best use for which the property is reasonably adaptable and available.

(2) There is no adequate market data described in Section 316 upon which an opinion may be based as to the value of the property for the highest and best use for which the property is reasonably adaptable and available.

Comment. Subdivision (b) is added to Section 819 to permit the capitalization of the reasonable net rental income that would be attributable to the land if it were improved for its highest and best use, even though it is not presently so improved, in a case where the court determines that there are no adequate comparable sales (Section 816) upon which an opinion as to the value of the property may be based. Subdivision (b) provides a limited exception to the general rule stated in subdivision (a), which permits use of the capitalization of income approach only for the land and the existing improvements thereon.

If the court makes the requisite findings set forth in paragraphs (1) and (2) of subdivision (b), the expert valuation witness is permitted to take into account in formulating his opinion a capitalization of income analysis based on the reasonable net rental value of the land as improved by the hypothetical improvement that would be required to be constructed to permit the property to be devoted to its highest and best use. Such an analysis could, for example, involve a determination of the reasonable net rental value of the property as improved by the hypothetical improvement, the apportionment of the reasonable net rental value so determined between the land and the hypothetical improvement, and the capitalization of the reasonable net rental value apportioned to the land.

There are a number of restrictions on the use of the valuation approach described in subdivision (b). The highest and best use must be one for which the property is reasonably adaptable and available and the valuation approach must be "relevant to the determination of the value of property." The use of subdivision (b) is thus limited to cases where that approach to valuation would be taken into consideration in determining the price at which to purchase and sell the property by a willing purchaser and a willing seller, dealing with each other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available. Subdivision (b) is further limited by the requirement stated in Section 814 that the matter upon which the expert's opinion is based be "of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of the property." These limitations require the court to restrict the use of the valuation approach described in subdivision (b) to appropriate cases.

Subdivision (b) requires that the witness be an "expert" witness so that the data will be presented with the aid of analysis and explanation by an expert valuation witness. In addition, the data is presented to the trier of fact only for the limited purpose of enabling the trier of fact to understand the basis for the opinion of the witness and to determine the weight to be given to the opinion. See Section 813.

10/166

Evidence Code § 322 (amended)

SEC. 9. Section 322 of the Evidence Code is amended to read:

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

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

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

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

reasonable net rental value attributable to the property or property interest being valued. This subdivision does not apply in an action to ascertain the value of property as assessed for taxation purposes.

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

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

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

(g) A transaction involving the trade or exchange of any property including the property being valued.

Comment. Subdivision (c) of Section 822 is amended to incorporate a provision formerly found in Revenue and Taxation Code Section 4936 and to make clear that it does not apply in tax assessment cases.

Subdivision (g) is added to Section 822 to make clear that transactions involving a trade or exchange of property are not a proper basis for an opinion since use of such transactions requires valuation of property other than the property being valued. See subdivision (d); People v. Reardon, 4 Cal.3d 507, 515-516, 483 P.2d 20, 26, 93 Cal. Rptr. 852, 858 (1971). It should be noted, however, that subdivision (d) does not prohibit a witness from testifying to adjustments made in sales of comparable property used as a basis for his opinion. Merced Irrigation District v. Woolstenhulme, 4 Cal.3d 478, 501-503, 483 P.2d 1, 16-17, 93 Cal. Rptr. 833, 848-849 (1971).

Section 822 does not prohibit cross-examination of a witness on any matter precluded from admission as evidence if such cross-examination is for the limited purpose of determining whether a witness based his opinion in whole or in part on matter that is not a proper basis for an opinion; such cross-examination may not, however, serve as a means of

placing improper matters before the trier of fact. See Evid. Code §§ 721, 802, 803.

10/168

Revenue & Taxation Code § 4986 (amended)

SEC. 10. Section 4986 of the Revenue and Taxation Code is amended to read:

4986. (a) All or any portion of any tax, penalty, or costs, heretofore or hereafter levied, may, on satisfactory proof, be canceled by the auditor on order of the board of supervisors with the written consent of the county legal adviser if it was levied or charged:

- (1) More than once.
- (2) Erroneously or illegally.
- (3) On the canceled portion of an assessment that has been decreased pursuant to a correction authorized by Article 1 (commencing with Section 4876) of Chapter 2 of this part.
- (4) On property which did not exist on the lien date.
- (5) On property annexed after the lien date by the public entity owning it.
- (6) On property acquired prior to September 18, 1959, by the United States of America, the state, or by any county, city, school district or other political subdivision and which, because of such public ownership, became not subject to sale for delinquent taxes.

(b) On property acquired after the lien date by the United States of America, if such property upon such acquisition becomes exempt from taxation under the laws of the United States, or by the state or by any county, city, school district or other public entity, and because of

such public ownership becomes not subject to sale for delinquent taxes, no cancellation shall be made in respect of all or any portion of any such unpaid tax, or penalties or costs, but such tax, together with such penalties and costs as may have accrued thereon while on the secured roll, shall be paid through escrow at the close of escrow or, if unpaid for any reason, they shall be collected like any other taxes on the unsecured roll. If unpaid at the time set for the sale of property on the secured roll to the state, they shall be transferred to the unsecured roll pursuant to Section 2921.5, and collection thereof shall be made and had as provided therein, except that the statute of limitations on any suit brought to collect such taxes and penalties shall commence to run from the date of transfer of such taxes, penalties and costs to the unsecured roll, which date shall be entered on the unsecured roll by the auditor opposite the name of the assessee at the time such transfer is made. The foregoing toll of the statute of limitations shall apply retroactively to all such unpaid taxes and penalties so transferred, the delinquent dates of which are prior to the effective date of the amendment of this section at the 1959 Regular Session.

If any property described in this subdivision is acquired by a negotiated purchase and sale, gift, devise, or eminent domain proceeding after the lien date but prior to the commencement of the fiscal year for which current taxes are a lien on the property, the amount of such current taxes shall be canceled and neither the person from whom the property was acquired nor the public entity shall be liable for the payment of such taxes. If, however, the property is so acquired after the commencement of the fiscal year for which the current taxes are a lien on

the property, that portion only of such current taxes, together with any allocable penalties and costs thereon, which are properly allocable to that part of the fiscal year which ends on the day before the date of acquisition of the property shall be paid through escrow at the close of escrow, or if unpaid for any reason, they shall be transferred to the unsecured roll pursuant to Section 2921.5 and shall be collectible from the person from whom the property was acquired. The portion of such taxes, together with any penalties and costs thereon, which are allocable to that part of the fiscal year which begins on the date of the acquisition of the property, shall be canceled and shall not be collectible either from the person from whom the property was acquired nor from the public entity.

In no event shall any transfer of unpaid taxes, penalties or costs be made with respect to property which has been tax deeded to the state for delinquency.

For purposes of this subdivision, if proceedings for acquisition of the property by eminent domain have not been commenced, the date of acquisition shall be the date that the conveyance is recorded in the name of the public entity or the date of actual possession by the public entity, whichever is earlier. If proceedings to acquire the property by eminent domain have been commenced and an order of ~~immediate possession~~ for possession prior to judgment obtained prior to acquisition of the property by deed, the date of acquisition shall be the date upon or after which the plaintiff may take possession as authorized by ~~such~~ the order of ~~immediate possession~~ for possession prior to judgment.

The subject of the amount of the taxes which may be due on the property shall not be considered relevant on any issue in the condemnation action, and the mention of said subject, either on the voir dire examination of jurors, or during the examination of witnesses, or as a part of the court's instructions to the jury, or in argument of counsel, or otherwise, shall constitute grounds for a mistrial in any such action.

No cancellation under paragraph (2) of subdivision (a) of this section shall be made in respect of all or any portion of any tax, or penalties or costs attached thereto, collectible by county officers on behalf of a municipal corporation without the written consent of the city attorney or other officer designated by the city council unless the city council, by resolution filed with the board of supervisors, has authorized the cancellation by county officers. The resolution shall remain effective until rescinded by the city council. For the purpose of this section and Section 4986.9, the date of possession shall be the date after which the plaintiff may take possession as authorized by order of the court or as authorized by a declaration of taking.

Comment. The portion of Section 4986 that related to mention of the amount of taxes which may be due on the property is superseded by Evidence Code Section 822(c). Other technical changes conform the language of Section 4986 to that used in the Eminent Domain Law (Code Civ. Proc. §§ 1230.010-1273.050).