

Memorandum No. 23 (1960)

Subject: Study No. 36 - Eminent Domain

Attached to this Memorandum is a proposed recommendation and statute in regard to evidence in eminent domain cases.

Respectfully submitted,

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Assistant Executive Secretary

Although the Faus case eliminated some problems involved in the determination of market value, it created some uncertainties as well. To eliminate these uncertainties, and to bring judicial practice into conformity with modern appraisal practice, the Commission makes the following recommendations:

1. Evidence of value in eminent domain cases should continue to be limited to the opinions of qualified experts, including the owner. Since the Faus decision, and particularly since the 1959 amendment to Code of Civil Procedure Section 1845.5, there has been uncertainty whether evidence of comparable sales is direct evidence of value upon which the trier of fact may base a finding or whether such evidence is received merely to explain and substantiate opinion evidence. The practical effect of this uncertainty is that trial courts have made conflicting decisions upon the question of whether a jury can find a value completely outside the range of opinion testimony in reliance upon some evidence of comparable sales that has been introduced.

The value of property has long been regarded as largely a matter of opinion. If this rule were changed, the trial of an eminent domain case might be unduly prolonged as witness after witness is called to relate facts within his knowledge of comparable sales. This evidence could be submitted to the jury with no expert having been called to analyze and correlate the data. Moreover, the jury would be permitted to return a verdict far above or far below what any expert that has testified thinks the property is worth, even though the jury may never have seen the property being condemned or the comparable property mentioned in the testimony. To avoid these consequences, the long established rule that value is a matter

to be established by opinion evidence should be reaffirmed and codified.

2. An expert should be permitted to give the reasons for his opinion on direct examination. An expert's testimony is more meaningful when he can fully explain the reasons for his opinion on direct examination. If he cannot relate the data relied on in direct examination, the trier of fact may never hear it, for the cross-examiner will ask only about the data most damaging to the expert's opinion. Practitioners in this field of law indicate that the trial of eminent domain cases has been simplified and shortened since this rule was enunciated in the Faus case.

3. The hearsay rule should be made inapplicable to the testimony of an expert witness as to the facts upon which his opinion is based. If all the data relied upon by an expert had to be established by witnesses with direct knowledge of the facts, it would be virtually impossible to try condemnation cases.

4. In formulating his opinion as to the value of the property, an expert should be permitted to rely on any matter that a reasonable, well-informed man would take into consideration in deciding whether to buy or sell the property and the price to pay. As the court is trying to determine the "market" value of the property, it should consider the factors that would actually be taken into account in an arms-length transaction in the market place.

In modern appraisal practice, there are three basic approaches to the determination of value. These involve consideration of the sales of comparable property, the capitalization of the income attributable to the property, and the cost of reproducing the improvements on the property less depreciation. Specific recognition should be given to these methods of

appraising property as they are relied upon extensively to determine market value outside the courtroom.

5. Certain factors should be specifically excluded from consideration in determining value because they are of doubtful validity in their bearing upon value. To remove any doubt concerning the admissibility of these matters under the standards discussed above, it is recommended that the following matters be specifically made incompetent and inadmissible upon the question of value:

a. Sales to persons that could have acquired the property by condemnation for the use for which it was acquired. These sales do not involve a willing buyer and a willing seller. Factors such as the cost of litigation, the hazard of a jury verdict, the delay of court proceedings and similar matters are often reflected in the ultimate price. If a portion of a parcel of real property is purchased, severance damages may be involved. These sales, therefore, are not sales in the "open market" and should not be considered in a determination of market value.

b. Offers between the parties to buy or sell the property sought to be condemned. Pre-trial settlement of condemnation cases would be greatly impaired if the parties were not assured that their offers during negotiations are not evidence against them. These offers are unreliable as indications of market value because they reflect the desire of the parties to avoid litigation, and they should be excluded under the general policy of excluding evidence of an offer to compromise impending litigation.

c. Offers or options to buy or sell the property to be condemned or any other property to third persons, except to the extent that offers

by the owner of the property to be condemned constitute admissions. An unaccepted offer is not an indication of market value because it does not indicate a price at which both a willing buyer and a willing seller can agree. An offer often represents a price at which the offeror is willing to begin negotiations. Moreover, offers may be easily fabricated because no one is bound. Offers cannot be said to represent market value until they are accepted, i.e., until both a buyer and seller are willing to bind themselves to transfer the property at the price stated.

To the extent that the owner's offers to sell constitute admissions, the considerations stated above are inapplicable and there is no reason to preclude consideration of them.

d. Valuations assessed for taxation purposes. It is well recognized that the assessed value of property cannot be relied upon as an indication of its market value.

6. The foregoing recommendations would supersede the provisions of Code of Civil Procedure Section 1845.5 and it should be repealed.

reasonable, well-informed prospective purchaser or seller of real property would take into consideration in deciding whether to purchase or sell the property or property interest and what price to pay, including but not limited to:

(1) The amount paid or contracted to be paid for the property or property interest sought to be condemned or for any comparable property or property interest if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation.

(2) The capitalized value of the fair income attributable to the property or property interest sought to be condemned and the basis therefor as distinguished from the capitalized value of any income or profits from any business conducted thereon.

(3) The value of the land, together with the cost of reproducing the improvements thereon, less whatever depreciation the improvements have suffered, functionally or otherwise, if the improvements are adapted to the land.

SEC. 4. Section 1248.4 is added to the Code of Civil Procedure, to read:

1248.4. Notwithstanding the provisions of Section 1248.3, the following evidence is incompetent and inadmissible upon the issues of the compensation and damages to be assessed for the taking of the property or property interest sought to be condemned under Section 1248:

(1) The price and other terms of an acquisition of property or a property interest if the acquisition was made for a public use specified in this title.

(2) The price and other terms of any offer made between the parties to the action, or on their behalf, to buy, sell or lease the property or interest therein sought to be condemned, or any part thereof.

(3) The price at which an offer or option to purchase or lease was made, or the price at which property was optioned, offered or listed for sale or lease, except to the extent that an option, offer or listing to sell or lease the property or interest therein sought to be condemned constitutes an admission. 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 1248.1.

(4) The value of any property as assessed for taxation purposes.

SEC. 5. Section 1845.5 of the Code of Civil Procedure is hereby repealed.