

#36.300

7/11/75

Memorandum 75-54

Subject: Study 36.300 - Eminent Domain (Fair Market Value--Church Property)

Attached as Exhibit I (green) is a letter requesting that the Commission amend AB 11 to provide a special rule for valuing property held for nonprofit, educational, religious, charitable, or related eleemosynary purposes. The rule suggested in the letter is that of the Uniform Eminent Domain Code, which is reproduced in Exhibit II (yellow).

The Commission has considered this suggestion on previous occasions. The rule proposed by the Commission in AB 11 appears in subdivision (b) of Section 1263.320.

(b) The fair market value of property taken for which there is no relevant market is its value on the date of valuation as determined by any method of valuation that is just and equitable.

The Commission has felt that this rule is adequate and is more flexible than that contained in the Uniform Eminent Domain Code.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary

Memorandum 15-94

EXHIBIT I



Archdiocese of San Francisco  
Diocese of Oakland  
Diocese of Sacramento  
Diocese of Santa Rosa  
Diocese of Stockton

Archdiocese of Los Angeles  
Diocese of Fresno  
Diocese of Monterey  
Diocese of San Diego

**CALIFORNIA CATHOLIC CONFERENCE**  
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June 25, 1975

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

Dear Mr. DeMouilly:

I am enclosing a copy of a recent federal court decision of the Third Circuit Court of Appeals in Pennsylvania. This decision holds that in the event of condemnation of a special purpose property owned by the Lutheran Church that the condemnee was entitled to either the undepreciated cost of substitute facilities or if the fair market value of the parcel acquired exceeds the cost of substitute facilities, the higher of the two measures of compensation.

I call your attention to this decision in regard to the eminent domain bills which are currently before the California Legislature and which also touch on this subject. It is our opinion that the language of the eminent domain bill introduced by Assemblyman Z'berg as AB 486 which states that the "fair market value of property owned by a person organized and operated on a nonprofit basis is deemed to be not less than the reasonable cost of functional replacement if (1) the property is devoted to and needed by the owner in order to continue in good faith its actual use to perform--nonprofit, educational, religious, charitable or related eleemosynary services; and (2) the facilities or services are available to the general public," more accurately reflects the intent of the Court in the Lutheran Church case than does the somewhat broader language presently contained in AB 11.

May I request that the Law Revision Commission entertain an amendment to AB 11 to substitute the language of AB 486 in regard to the definition of fair market value of organizations which perform nonprofit, educational, religious, charitable or related eleemosynary services.

Sincerely,

William R. Burke  
Legislative Counsel

WRB:nmc  
Enclosure

CASE OF THE JNTH No. 1  
 (1-3-2.4) Substitution Cost  
*United States v. 564.54 Acres*  
 (3rd Civ.) 506 F2d 796

This is an interlocutory appeal on a question certified by the trial court: whether cost of replacement of the taken property can be a permissible compensation method to a non-governmental condemnee. The trial court answered this question in the negative (in its pretrial order) and ruled that "evidence at the trial should be restricted to fair market value as of the date of taking, or if that measure is unavailable, to depreciated replacement cost of the properties as improved on that date." Upon the owner's appeal, Held: reversed.

The owner was the Southeastern Pennsylvania Synod of the Lutheran Church, and the subject property consisted of three camps totalling 305.81 acres. The government deposited \$485,400 with its declaration of taking, but the owners contended that by reason of certain "grandfather clauses" in Pennsylvania legislation they are able to operate these camps, but that legislation and federal environmental laws now require far more elaborate facilities, with the result that it would take \$5,800,000 to develop substitute facilities. In any event, it was undisputed that \$485,000 would fall far short of providing substitute facilities.

The court started with the premise that the thrust of modern law of eminent domain is to interpret "just compensation" as a principle of indemnity. "The condemnee is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but he is entitled to no more." If the government condemns property with a ready market (such as commodities) payment of fair market value is complete indemnity, since it makes replacement possible. However, some properties have no market. At least, if the property is operated for profit the owners will be able to take their capital investment (valued by use of capitalized earning capacity) and put it to other profitable use. But where the unique property is not operated for profit — as in this case — this approach breaks down, and the consequent problems are not always solved by awarding a depreciated replacement cost. "Fair indemnification in such circumstances requires compensation sufficient to provide a substitution for the unique facilities so that the functions carried out by or on behalf of members of the community may be continued. Depre-

ciated replacement cost often will not permit continuation of such functions."

The court candidly recognized that the cost of substitute facilities in most instances will have no relationship to valuation. "The difference between the market value in a private use market and the cost of a public substitute facility often will result from the fact that more stringent building codes will apply to the new public facility even though the old might have continued in use. The community is entitled to be made whole, and making it whole means more than forcing it to abandon its non-profit community use and accept what it could obtain in the marketplace from a profit motivated purchaser. Simply stated, this method insures that sufficient damages will be awarded to finance a replacement for the condemned facility. Nothing less would afford just compensation. And since the owner of a facility devoted to a non-profit, public use has a proprietary as well as a community interest in it, if the fair market value exceeds the cost of the substitute facility, such an owner should be entitled to the higher of the two measures of compensation."

The court went on to reject the government's argument that the applicability of this rule should turn on the owner's legal obligation to replace the taken facilities, because this would make the owner's Fifth Amendment rights subject to the vagaries of local law.

Finally, the court turned to the government's argument that this rule should be available only to governmental condemnees. This was found untenable. The Fifth Amendment — pointed out the court — guarantees against uncompensated takings of private property. Therefore, it is inconceivable that the constitutional framers intended to impose a greater obligation of indemnification toward public than toward private property owners. And, the argument that the constitution does not protect community values has long since been rejected in the context of takings of community facilities owned by a governmental entity. "We are not dealing with congressional largess toward governmental entities, which might justify a distinction between the measure of fair compensation for governmental and non-governmental community facilities. Rather we are dealing with judicial interpretation of the taking clause."

## EXHIBIT II

§ 1004

EMINENT DOMAIN CODE

Art. 10

## Section 1004. [Fair Market Value Defined]

(a) Except as provided in subsection (b), (1) the fair market value of property for which there is a relevant market is the price which would be agreed to by an informed seller who is willing but not obligated to sell, and an informed buyer who is willing but not obligated to buy; and (2) the fair market value of property for which there is no relevant market is its value as determined by any method of valuation that is just and equitable.

(b) The fair market value of property owned by a public entity or other person organized and operated upon a nonprofit basis is deemed to be not less than the reasonable cost of functional replacement if the following conditions exist: (1) the property is devoted to and is needed by the owner in order to continue in good faith its actual use to perform a public function, or to render nonprofit educational, religious, charitable, or eleemosynary services; and (2) the facilities or services are available to the general public.

(c) The cost of functional replacement under subsection (b) includes (1) the cost of a functionally equivalent site; (2) the cost of relocating and rehabilitating improvements taken, or if relocation and rehabilitation is impracticable, the cost of providing improvements of substantially comparable character and of the same or equal utility; and (3) the cost of betterments and enlargements required by law or by current construction and utilization standards for similar facilities.

## COMMENT

Section 1004 defines the meaning of "fair market value" in terms which correspond with widely approved judicial and statutory definitions. The Uniform Eminent Domain Code rejects the "value-to-the-taker" and "loss-to-the-owner" approaches to compensation, and adopts the majority "market value" test as the soundest and fairest measure. The term "price" in Subsection (a) means the amount that would be paid to the seller by the buyer if agreement on a sale were reached. The term "informed" refers to buyers and sellers who have reasonably complete knowledge of all uses and purposes for which the property is reasonably adaptable and available. Moreover, it is not enough that the parties are not legally "obligated" to buy or sell;

this term also includes practical urgency or necessity. On the other hand, if no relevant market for the property exists, any just and equitable method of determining fair market value may be employed.

Subsection (b) recognizes that special purpose properties (e. g., public fire stations, nonprofit schools, churches, parks, cemeteries) for which no realistic market exists, may require a special rule for determining "fair market value" in order to assure just compensation. Thus, under Subsections (b) and (c), compensation in such cases cannot be less (but may be more) than "functional replacement" cost. While this approach requires a showing that relocation and rehabilitation or

replacement are needed in good faith to continue the purpose for which the building taken is presently being used, it does not require any offset for accrued depreciation. This approach, however, is limited to (1) public entities and private owners organized and operated for nonprofit pur-

poses, and (2) properties actually used for public or nonprofit educational, religious, or eleemosynary services that are available to the general public. Property operated by producer or consumer cooperatives, for example, would not qualify under this dual requirement.