

# K-100

9/27/78

Memorandum 78-66

Subject: Study K-100 - Evidence of Market Value (Application of  
Evidence Code Property Valuation Rules in Noncon-  
demnation Cases)

Attached is a staff redraft of the tentative recommendation to extend the Evidence Code property valuation rules to noncondemnation cases. It has been revised in accordance with the Commission's decisions at the September 1978 meeting. We have omitted reference to the applicable rule where judgment is taken by default; the case we were using to illustrate the rule was not a good one on the facts, and the general law is adequate.

Because of the concern expressed by some of the Commissioners at the September meeting, the staff now believes it would be inadvisable to print and introduce this recommendation immediately. Rather, we suggest that it be distributed as a tentative recommendation to the various State Bar committees and other interested persons for comment. Our objective would be to make any necessary revisions as a result of the comments and introduce legislation in the 1980 session.

Respectfully submitted,

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Assistant Executive Secretary

STATE OF CALIFORNIA  
CALIFORNIA LAW  
REVISION COMMISSION

STAFF DRAFT

TENTATIVE RECOMMENDATION

relating to

APPLICATION OF EVIDENCE CODE PROPERTY VALUATION  
RULES IN NONCONDEMNATION CASES

CALIFORNIA LAW REVISION COMMISSION  
Stanford Law School  
Stanford, California 94305

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

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

November 1978

STAFF DRAFT  
TENTATIVE RECOMMENDATION

relating to

APPLICATION OF EVIDENCE CODE PROPERTY VALUATION  
RULES IN NONCONDEMNATION CASES

Introduction

The provisions of the Evidence Code relating to valuation of property apply only to eminent domain and inverse condemnation proceedings.<sup>1</sup> Other actions involving the valuation of property, with a few limited exceptions,<sup>2</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>3</sup>

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

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

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

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

also the determination in an eminent domain or inverse condemnation proceeding.<sup>7</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>8</sup> Confusion is generated by the existence of multiple standards.<sup>9</sup> The case law in this area is sparse and difficult to locate. And the lack of clear statutory standards in cases where the market value issue is not frequently litigated poses real problems.<sup>10</sup>

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

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

tangible personal property.<sup>12</sup> The Commission also recommends a few changes in the Evidence Code rules to accomodate their expanded application.<sup>13</sup>

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

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

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12. The Evidence Code provisions do not govern valuation of intangible personal property such as stock or goodwill of a business. See Section 811 and Senate Judiciary Committee Comment (Report of Senate Committee on Judiciary on Assembly Bill 2282, Senate J. (June 8, 1978) at 11580). See also *South Bay Irr. Dist. v. California-American Water Co.*, 61 Cal. App.3d 944, 979-80, 133 Cal. Rptr. 166, \_\_\_\_ (1976) (Evidence Code provisions limited to valuation of land and improvements, and do not apply to valuation of a business).

13. See discussion, infra, under "Value Shown Only by Opinion Testimony."

14. Cf. Carlson, Statutory Rules of Evidence for Eminent Domain Proceedings, 18 Hastings L.J. 143, 159 (1966) ("As a general proposition, the codification tends to clarify this area of law. It has reduced to 13 sections what has been judicially determined in hundreds of decisions, dating back to the 1850's. For the appraiser and general practitioner who embarks into the specialty of eminent domain practice, it should provide a convenient legal and appraisal tool, easily available for ready reference.").

15. For example, the eminent domain concept of "fair market value" is embodied in Code of Civil Procedure Section 1263.320, and is not incorporated in the Evidence Code valuation rules.

16. See Evidence Code § 812. See also discussion, infra, under "Non-compensable Items."

such an opinion.<sup>17</sup> The rules do not purport to embody all appraisal practice or to cover every valuation situation that may arise.<sup>18</sup> They do, however, provide a clear and usable body of rules to govern most valuation problems, without rigidifying the law or stifling the development of appropriate appraisal techniques.

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

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17. *South Bay Irr. Dist. v. California-American Water Co.*, 61 Cal. App.2d 944, 970, 133 Cal. Rptr. 166, \_\_\_\_ (1976) ("There is a distinction between a measure of just compensation in an eminent domain action and the methods used to determine the amount of that compensation under that measure. Rules of law establishing the former are substantive, while those fixing the latter are procedural."); *People v. Southern Pac. Transportation Co.*, 84 Cal. App.3d 315, 325, \_\_\_\_ Cal. Rptr. \_\_\_\_, \_\_\_\_ (1978) (not final) ("Plaintiff's argument seems to suggest that methods of establishing just compensation are inflexible and jurisdictional. The contrary is true. They are procedural in nature only").

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

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

19. The changes are noted, where ascertainable, in the following discussion.

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

### Value Shown Only by Opinion Testimony

The value of some types of property, such as listed securities or goods regularly sold on commodity markets, may be easily ascertained by evidence of sales and purchases.<sup>21</sup> However, the value of most types of property and particularly of real property, is not so easily determinable. Value ordinarily must be shown by opinion testimony.<sup>22</sup>

Evidence Code Section 813(a) codifies the rule that value must be shown by opinion testimony. The effect of the codification is to prevent evidence, otherwise admissible, from being used to support a verdict outside the range of opinion testimony.<sup>23</sup> This rule avoids results such as those in Foreman & Clark Corp. v. Fallon<sup>24</sup> and In re Marriage of Folb,<sup>25</sup> described below.

Foreman & Clark was an action for damages for breach of a lease which required a determination of the rental value of the premises. Testimony as to the rental value of the premises was given by the lessor and by expert witnesses for both lessee and lessor. The lowest opinion given by any of the witnesses would yield a rental value of \$350,000; the trial court, relying on independent evidence of value such as the agreed rent and prior leases of portions of the premises, arrived at a rental value of \$25,000. The prior leases predated the breach by almost

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21. McBaine, California Evidence Manual § 519 (2d ed. 1960). Cf. Bagdasarian v. Gragnon, 31 Cal.2d 744, 755, 192 P.2d 935, \_\_\_\_ (1948) ("Market value of personal property may, of course, be established by testimony of expert witnesses, but this is not the only method, and it has been generally held that the reasonable value of marketable personal property may be shown by market prices or actual specific sales of other similar property, provided such sales are bona fide and not too remote in time or place. [Citations.]") (Italics in original.)

22. B. Witkin, California Evidence § 441 (2d ed. 1966); McBaine, California Evidence Manual §§ 519-521 (2d ed. 1960); 31 Cal. Jur.3d, Evidence §§ 560-569 (\_\_\_\_).

23. State v. Wherity, 275 Cal. App.2d 241, 249, 79 Cal. Rptr. 591, \_\_\_\_ (1969).

24. 3 Cal.3d 875, 479 P.2d 362, 92 Cal. Rptr. 162 (1971).

25. 53 Cal. App.3d 862, 126 Cal. Rptr. 306 (1975).



two years. On appeal, the Supreme Court refused to apply the eminent domain rule that the value must be within the range of the expert testimony.<sup>26</sup>

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

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

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26. The court distinguished this case from eminent domain on the basis of the "special problems" of eminent domain, without an indication of what those problems might be. 3 Cal.3d at 890, 479 P.2d at \_\_\_, 92 Cal. Rptr. at \_\_\_.

27. 53 Cal. App.3d at 871, 126 Cal. Rptr. at \_\_\_.

28. California Law Revision Commission, Recommendation and Study Relating to Evidence in Eminent Domain Proceedings A-5-A-6 (1960); T. Dankert, Condemnation Practice Handbook, 14 California Real Estate Law & Practice § 508.04 (1976).

the trier of fact to act intelligently in arriving at a determination of value.<sup>29</sup>

The rule of Evidence Code Section 813(a) is sound. It should be extended to noncondemnation cases, changing the result in such cases as Foreman & Clark and Folb.<sup>30</sup> It should not, however, preclude a valuation based on independent evidence in situations where this would be appropriate, such as the valuation of commodities regularly sold in an established market,<sup>31</sup> or the valuation of automobiles for which price guides are available.<sup>32</sup> The Evidence Code should be amended accordingly.

#### Persons Entitled to Give Opinions of Value

Opinion testimony may generally be given only by experts or by the owner of the property.<sup>33</sup> Because of this rule, there has been concern over the litigation cost required by use of professional appraisal

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29. Pollak & Downs, The Antiparalleling Statute: A New Dimension in Public Utility Condemnation, 60 Cal. L. Rev. 1116, 1136 (1972).

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

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

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

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

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

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

testimony.<sup>34</sup> The Evidence Code provisions are as liberal as, and in some cases more liberal than, general law in permitting qualified nonappraisal witnesses to give opinions of value.

Qualifications of expert. The expert is usually a professional appraiser or real estate broker, though the expert need not always be so qualified.<sup>35</sup> A general knowledge of real estate values is not sufficient to qualify a witness as an expert.<sup>36</sup> The expert must be familiar with: (1) the property in question, (2) the value of comparable property, (3) the state of the market for the property in question, and (4) sales of comparable property.<sup>37</sup>

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

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

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

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

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

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

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

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

Right of property owner to testify. The owner of real or personal property being valued is permitted to give an opinion as to the value of the property, in all types of market value litigation.<sup>41</sup> This rule was originally "predicated on the theory that the owner who resided on and owned property for a period of years would be presumed to have acquired sufficient knowledge of the property and of the value of the land in that neighborhood to be able to give an intelligent estimate as to the value of his own property."<sup>42</sup> Although the validity of this presumption has been questioned in recent years,<sup>43</sup> Section 813(a)(2) codifies the rule that the owner of property may testify as to value,<sup>44</sup> thus preserving the rule for cases governed by the Evidence Code.

Occasionally persons in a relationship with the owner, such as the managing agent of a corporation, the pastor of a church, an agent, or the son of an owner, attempt to testify as an owner. Attempts to broaden the owner's right to testify to include such persons closely related to the owner have generally met with failure.<sup>45</sup> Section 813(a)(3) statutorily expands the owner's right to testify to include an officer, regular employee, or partner designated by a corporation, partnership, or unincorporated association that is the owner of the property, provided the designee is knowledgeable as to the value of the property.<sup>46</sup>

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

42. City of Pleasant Hill v. First Baptist Church, 1 Cal. App.3d 384, 411, 82 Cal. Rptr. 1, \_\_\_\_ (1969).

43. See, e.g., The Opinion Rule in California and Federal Courts: A Liberal Approach, 9 U.C.D. L. Rev. 233, 240 n.49 (1976); "Court Dissolution Policy Revised in East District," L.A. Daily Journal, July 12, 1978, p.1, col.4-5 (in marriage dissolution cases "it has been the experience of the Court in the past that the testimony of the parties as to values is of little help in making an accurate determination of the true value of the property").

44. B. Witkin, California Evidence § 441(b) (2d ed. 1966).

45. T. Dankert, Condemnation Practice Handbook, 14 Calif. Real Estate Law & Practice § 508.40[2] (1976).

46. 1978, Cal. Stats., Ch. 294 § 6. The Uniform Eminent Domain Code contains a similar provision. Section 1103(a)(3) (opinion may be given upon proper foundation by "a shareholder, officer, or regular employee designated to testify on behalf of an owner of the property, if the owner is not a natural person").

This provision enables the small organization to give adequate testimony as to the value of its property in cases where it might not be able to afford the cost of an expert.<sup>47</sup> Section 813(c) is also more liberal than general law in permitting a person entitled to possession of the property to testify, even though the person may not be technically an "owner."<sup>48</sup>

Matter Upon Which Opinion May Be Based

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

While it has been suggested that the Evidence Code "limits" admissibility by a "strict statutory scheme,"<sup>51</sup> Section 814 makes clear that a witness is not limited to the three approaches specified in the Evidence Code.<sup>52</sup> Market value can be determined many ways, none of which is exclusive.<sup>53</sup> An opinion may be based on any matter that is of a type

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47. California Law Revision Commission, Recommendation Relating to Evidence of Market Value of Property, 14 Cal. L. Revision Comm'n Reports 105, 113 (1977).

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

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

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

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

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

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

that reasonably may be relied upon by an expert in forming an opinion as to the value of property, including but not limited to matters specifically mentioned in the Evidence Code.<sup>54</sup> This provision reflects the appraiser's practice of considering any information that might possibly be relevant and evaluating that information in the light of the appraiser's past experience.<sup>55</sup>

Under this provision, for example, the fact that the Evidence Code specifically permits use of capitalization of net rental income does not preclude use of gross rentals or capitalization of nonrental income, where appropriate.<sup>56</sup> The fact that the Evidence Code permits use of comparable sales does not preclude use of price trend or other data for noncomparable properties, where appropriate.<sup>57</sup> And the fact that the

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

55. Whitaker, *Real Property Valuation in California*, 2 U.S.F. L. Rev. 47, 71 (1967).

56. *Redevelopment Agency v. Del-Camp Investments, Inc.*, 38 Cal. App.3d 836, 113 Cal. Rptr. 762 (1974) (gross rentals); *South Bay Irr. Dist. v. California-American Water Co.*, 61 Cal. App.3d 944, 133 Cal. Rptr. 166 (1976) (nonrental income). See T. Dankert, *Condemnation Practice Handbook*, 14 California Real Estate Law & Practice at § 508.11[4] (1976): "It appears from Evidence Code Sections 813 and 814 that opinion testimony could embrace any type of capitalization study not precluded by some exclusionary rule."

57. *City of Los Angeles v. Retlaw Enterprises, Inc.*, 16 Cal.3d 473, 485, 546 P.2d 1380, \_\_\_, 128 Cal. Rptr. 436, \_\_\_ (1976) (price trend data): "To deny such discretionary power would be to sanctify a wooden conception of comparability that would unjustifiably shackle the fact-finding process." See also *People v. Home Trust Investment Co.*, 8 Cal. App.3d 1022, 1026, 87 Cal. Rptr. 722, \_\_\_ (1970) (discretionary power of court to permit evidence of noncomparable sales used as a basis for opinion where there were no comparable sales).

Evidence Code permits use of replacement cost to determine the value of existing improvements does not preclude use of replacement cost to determine the value of land.<sup>57a</sup> The Supreme Court has emphasized that "Evidence Code Section 814 permits a witness to base his testimony on relevant evidence, 'including but not limited to the matters listed in sections 815 to 821.'"<sup>58</sup>

While the Evidence Code valuation provisions are flexible in their admission of relevant evidence, Section 814 imposes a significant limitation--the matter upon which an opinion is based must be of a type that "reasonably may be relied upon by an expert in forming an opinion as to the value of property." This limitation assures that the witness has an adequate basis for an opinion.<sup>59</sup>

#### Sales of Subject Property

Generally, prior and subsequent sales of the property being valued are relevant evidence of its value, provided the sales are voluntary, not too remote in point of time, and not otherwise shown to lack probative value.<sup>60</sup> This rule is firmly established in eminent domain law,

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57a. *People v. Southern Pac. Transportation Co.*, 84 Cal. App.3d 315, 325, \_\_\_ Cal. Rptr. \_\_\_, \_\_\_ (1978) (not final) ("The rules for determining value of condemned land are not to be considered inflexible. In each case just compensation is the goal and if rigid application of a rule tends to produce injustice, the court must deviate from that rule. [citation].")

58. *City of Los Angeles v. Retlaw Enterprises, Inc.*, 16 Cal.3d 473, 486 n.8, 546 P.2d 1380, n.8, 128 Cal. Rptr. 436, n.8 (\_\_\_). See also *South Bay Irr. Dist. v. California-American Water Co.*, 61 Cal. App.3d 944, 980, 133 Cal. Rptr. 762, \_\_\_ (\_\_\_):

By virtue of Evidence Code Section 814, an opinion and determination of the market value of condemned property may be based on matters which the hypothetical buyer and seller described in the general market value rule would consider in determining the price at which to purchase and sell the property under consideration "including but not limited to the matters listed in Sections 815-821" of that code (see also *City of Santa Barbara v. Petras*, 21 Cal. App.3d 506, 510 [98 Cal. Rptr. 635]); and thus capitalization of the income of a condemned public utility, which is not a matter included in Evidence Code section 819, may be a basis for such an opinion or determination.

59. See, e.g., *City of Los Angeles v. Lowensohn*, 54 Cal. App.3d 625, 638-39, 127 Cal. Rptr. 417, \_\_\_ (1976).

60. *Bagdasarian v. Gragnon*, 31 Cal.2d 744, 755-58, 192 P.2d 935, \_\_\_ - \_\_\_ (1948); *Eatwell v. Beck*, 41 Cal.2d 128, 134, 257 P.2d 643, \_\_\_ (1953); 31 Cal. Jur.3d Evidence § 192 (\_\_\_).

and is codified by Evidence Code Section 815.<sup>61</sup> As a matter of trial and appellate court practice in eminent domain, there appears to be a tendency towards liberality in admitting sales of the subject property.<sup>62</sup> Thus, recent cases have upheld use of sales of the subject property made from three to six years prior to the date of valuation.<sup>63</sup> Noncondemnation cases have drawn upon eminent domain law to conclude that evidence of sales of the subject property should be admissible to prove value.<sup>64</sup>

#### Comparable Sales

Evidence of sales of personal property similar to the property being valued is admissible to prove market value.<sup>65</sup> Whether sales of comparable real property are likewise admissible is not clear, however. Cases prior to 1957 have held that such sales are not admissible on direct examination.<sup>66</sup> In 1957 the Supreme Court in County of Los Angeles v. Faus<sup>67</sup> held that comparable sales were admissible on direct examination in eminent domain proceedings, overruling and disapproving prior eminent domain cases; the court was not, however, called upon to

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61. B. Witkin, California Evidence § 362 (2d ed. 1966).
  62. T. Dankert, Condemnation Practice Handbook, 14 California Real Estate Law & Practice § 509.04 (1976).
  63. City of Los Angeles v. Retlaw Enterprises, Inc., 16 Cal.3d 473, 546 P.2d 1380, 128 Cal. Rptr. 436 (1976) (six years); South Bay Irr. Dist. v. California-American Water Co., 61 Cal. App.3d 944, 133 Cal. Rptr. 166 (1976) (three years).
  64. See, e.g., In re Marriage of Folb, 53 Cal. App.3d 862, 867-71, 126 Cal. Rptr. 306, \_\_\_\_ (1975) (marriage dissolution); 53 Cal. Ops. Atty. Gen. 97 (1970) (property tax assessment).
  65. B. Witkin, California Evidence § 361 (2d ed. 1966); 31 Cal. Jur.3d § 194 (\_\_\_\_).
  66. See, e.g., Estate of Ross, 171 Cal. 64, 151 P. 1138 (1915) (inheritance taxation); Thompson v. Stoakes, 46 Cal. App.2d 285, \_\_\_\_ (1941) (damages in real estate transaction).
  67. 48 Cal.2d 672, 312 P.2d 680 (1957).



determine the admissibility of comparable sales in noncondemnation cases, and this issue has not since been resolved.

Since 1957, the rule of Faus has been codified in Section 816 of the Evidence Code, which permits a witness in an eminent domain case to base an opinion on comparable sales freely made within a reasonable time before or after the date of valuation.<sup>68</sup> In order to be considered comparable, the sale must have been made sufficiently near in time to the date of valuation, and the property sold must be located sufficiently near the property being valued, and must be sufficiently alike in respect to character, size, situation, useability, and improvements, to make it clear that the property sold and the property being valued are comparable in value and that the price realized for the property sold may be fairly considered as "shedding light" on the value of the property being valued.<sup>69</sup> Under this test, the courts have been given and have utilized broad and liberal discretion in determining comparability.<sup>70</sup> The application of Section 816 is summarized well in City of Ontario v. Kelber:<sup>71</sup>

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68. T. Dankert, Condemnation Practice Handbook 14 California Real Estate Law & Practice §§ 509.01-509.03 (1966); B. Witkin, California Evidence § 363 (2d ed. 1966).

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

70. See, e.g., Community Redevelopment Agency v. Henderson, 251 Cal. App.2d 336, 59 Cal. Rptr. 311 (1967) (properties much larger, in different areas with different zoning and uses; rejected); San Bernardino County Flood Control District v. Sweet, 255 Cal. App.2d 389, 63 Cal. Rptr. 640 (1967) (properties three to five miles distant; admitted); County of Los Angeles v. Union Distributing Co., 260 Cal. App.2d 125, 67 Cal. Rptr. 107 (1968) (property across the street, improved, rented and used, excluded; condemned property was unimproved and vacant for over 40 years); Pleasant Hill v. First Baptist Church, 1 Cal. App.3d 384, 82 Cal. Rptr. 1 (1969) (properties less than one mile apart but in different cities; admitted); County of San Louis Obispo v. Bailey, 4 Cal.3d 518, 93 Cal. Rptr. 859, 483 P.2d 27 (1971) (comparable sales 30 to 50 miles away from condemned land; admitted).

71. 24 Cal. App.3d 959, 970, 101 Cal. Rptr. 428, \_\_\_\_ (1972).

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

### Sales to Public Agencies

Comparable sales, and sales of the subject property, may be used as a basis for an opinion of value only if "freely made."<sup>72</sup> A forced sale or other involuntary sale is not an accurate gauge of market value; foreclosure, execution, and possibly probate sales are examples of sales that may be inadmissible for this reason.<sup>73</sup>

Sales to persons having eminent domain power may or may not be voluntary, but are inherently suspect. Prices paid by a condemnor may be more or less than the market value of the property because of either party's desire to avoid litigation. When the litigation avoidance motive is prominent, the sale price is not a reasonable or fair index of value.<sup>74</sup>

In noncondemnation cases, evidence of sales to public agencies is apparently admissible if it can be shown that the sales were "voluntarily" made.<sup>75</sup> Section 822(a) of the Evidence Code, as a matter of

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

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

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

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

policy, excludes from consideration all sales to potential condemners.<sup>76</sup> Such transactions are considered settlements in compromise of litigation or tend to exhibit the characteristics of forced sales.<sup>77</sup> They are not sufficiently voluntary as a general rule to justify the investigation and trial time and the collateral inquiry required to admit them or to risk the substantial possibility of error or prejudice from their admission.

#### Offers to Buy or Sell

General noncondemnation law is unclear as to the admissibility of offers to buy or sell property as evidence of market value.<sup>78</sup> Until 1958, the general rule was that evidence as to what the owner was offered for the property or what other persons seeking the purchase of similar property were willing to give for it, or as to offers of the owner to sell the property at a specified price, was not admissible.<sup>79</sup> A 1958 Supreme Court Case, Pao Ch'en Lee v. Gregoriou,<sup>80</sup> permitted an oral offer to purchase the property as evidence of the value of the property.

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

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

77. California Condemnation Practice § 9.49 (Cal. Cont. Ed. Bar 1973); Uniform Eminent Domain Code § 1113(1) (1974) (Comment).
78. Carlson, Statutory Rules of Evidence for Eminent Domain Proceedings, 18 Hastings L.J. 143, 156 (1966); T. Dankert, Condemnation Practice Handbook, 14 California Real Estate Law & Practice, § 509.21 (1976).
79. 31 Cal. Jur.3d Evidence § 193 (\_\_\_\_).
80. 50 Cal.2d 502, 326 P.2d 135 (1958).

Evidence Code Section 822(b) makes clear that offers, options, and listings to buy, sell, or lease property are inadmissible to support a valuation opinion. This rule is consistent with the majority view in the United States, which regards such evidence as inherently unreliable, easily susceptible to abusive manipulation, and at best merely a representation of the opinion of one party to a hypothetical transaction that was never confirmed by the opinion of another.<sup>81</sup> Moreover, offers require collateral inquiry to determine if they are an accurate indication of market value or if they are influenced by personal reasons unrelated to market value, and the offeror may not be before the court and subject to cross-examination.<sup>82</sup> For these reasons, and because the value of evidence of offers is slight, they are excluded entirely from consideration except as admissions.<sup>83</sup>

#### Leases of Subject Property

Theoretically, the reasonable rental value of the property is an accurate guide to the value of the property at any particular time, and an existing lease is relevant evidence of the reasonable rental value.<sup>84</sup> Section 817 of the Evidence Code codifies the rule that a lease of the subject property may be used as a basis for an opinion as to the value of the property.<sup>85</sup> Extension of the Evidence Code to noncondemnation cases would not change this general principle of law.<sup>86</sup>

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- 81. Uniform Eminent Domain Code § 1113(2) (1974) (Comment).
  - 82. Note, Valuation Evidence in California Condemnation Cases, 12 Stan. L. Rev. 766, 785-88 (1960).
  - 83. Recommendation and Study Relating to Evidence in Eminent Domain Proceedings, 3 Cal. L. Revision Comm'n Reports A-1, A-7-A-8 (1960).
  - 84. *San Bernardino County Flood Control District v. Sweet*, 255 Cal. App.2d 889, 63 Cal. Rptr. 640 (1967); *California Condemnation Practice* § 4.56 (Cal. Cont. Ed. Bar 1973).
  - 85. *People v. Lynbar, Inc.*, 253 Cal. App.2d 870, 876, 62 Cal. Rptr. 320, \_\_\_\_ (1967); *People v. Dunn*, 46 Cal.2d 639, 297 P.2d 964 (1956); *People v. Pera*, 190 Cal. App.2d 497, 12 Cal. Rptr. 720 (1963).
  - 86. See, e.g., *Foreman & Clark Corp. v. Fallon*, 3 Cal.3d 875, 479 P.2d 362, 92 Cal. Rptr. 162 (1971); 31 Cal. Jur.3d, Evidence § 195 (\_\_\_\_).

### Comparable Leases

As a general rule, leases of comparable property, unlike sales of comparable property, have been inadmissible to show the value of property being valued.<sup>87</sup> A major problem in the comparison of lease data as opposed to sales data is that, in addition to land size, shape, location, and utility, the terms, circumstances, and conditions of the lease must also be taken into account.<sup>88</sup>

Evidence Code Section 818 permits use of comparable leases for the limited purposes of determining the value of a leasehold interest in the subject property and for deriving a reasonable rental value for the subject property for purposes of capitalization. The safeguards defining criteria for comparability of sales in Section 816 are incorporated in Section 818; for leased property to be considered comparable for purposes of basing an opinion on it, it must meet the criteria specifically set forth in Section 816.<sup>89</sup>

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

### Value of Other Property

Although sales and leases of comparable property are a proper basis for an opinion as to value, an opinion of the value of the comparable property is not a proper basis.<sup>90</sup> Consideration of an opinion of the

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87. Whitaker, California Property Valuation, 2 U.S.F. L. Rev. 47, 76 (1967).

88. T. Dankert, Condemnation Practice Handbook, 14 California Real Estate Law and Practice § 509.25 (1976).

89. *City of Ontario v. Kelber*, 24 Cal. App.3d 959, 101 Cal. Rptr. 428 (1972).

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

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

These rules are specific applications of the general principle that evidence may be excluded if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of confusing the issues or of misleading the jury.<sup>94</sup> The specific application is appropriate in any case in which the value of property is in issue.

#### Capitalization of Income

Although commonly used in inheritance taxation cases, California law generally precluded capitalization of income to value real property until the enactment of the Evidence Code valuation provisions.<sup>95</sup> The reason for this position was that the capitalization technique involves a significant potential for inaccuracy. It requires an estimate of the

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See also *People v. Southern Pac. Transportation Co.*, 84 Cal. App.3d 315, 326-327, \_\_\_ Cal. Rptr. \_\_\_, \_\_\_-\_\_\_ (1978) (cost of acquisition of other property admissible to derive replacement cost of subject property) (not final).

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

92. Evid. Code § 822(f).

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

94. Evid. Code § 352.

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

expected annual income from the property, and selection of an appropriate capitalization rate. A small difference in capitalization rate will substantially affect the resulting value.<sup>96</sup> Because of the multitude of data required for accurate analysis, the income capitalization technique is often unreliable and may result in speculative values.<sup>97</sup>

There are situations where the technique can yield accurate results which may be objectively tested. The clearest example is where rental is the highest use of the property and it has been committed to that use, since rent income is often stable and largely attributable to the property, and information as to similar investments is frequently available to indicate accurately the capitalization rate.<sup>98</sup> It is in this situation that Evidence Code Section 819 liberalizes case law by permitting use of the capitalization of income technique.<sup>99</sup>

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

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

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

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

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

Section 819 provides safeguards against speculative values by imposing a number of limitations on use of the capitalization technique:<sup>100</sup>

(1) Only rental income, as opposed to income or profits from a business conducted on the property, may be capitalized. This preserves the general rule that business income may not be used to show the value of property.<sup>101</sup> Profits from a business may not be capitalized because this would introduce unduly speculative and uncertain elements depending upon managerial skills or other factors that are remote from the issue of property value.<sup>102</sup>

(2) Only the reasonable, as opposed to the actual, net rental value may be capitalized. The actual rental may be above or below market, which when capitalized results in a distorted value.<sup>103</sup>

(3) In deriving a reasonable net rental value, only leases that satisfy safeguards of comparability may be used.<sup>104</sup>

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

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

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

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

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



(4) Only rental from existing, as opposed to hypothetical, improvements may be capitalized. This rule prevents undue speculation; it preserves existing law.<sup>105</sup>

Section 819 is a carefully circumscribed expansion of the general law relating to evidence of market value. It is consistent with the practice in inheritance tax valuation cases.<sup>106</sup> Since its enactment, one noncondemnation appellate case, City Bank of San Diego v. Ramage,<sup>107</sup> has enunciated similar rules:

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

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

#### Replacement Cost

The extent to which replacement cost may be used to value land and structures is not clear. There is case law to the effect that depreciated replacement cost is a proper means of valuing structures.<sup>108</sup> The technique is also commonly used in property tax assessment cases.<sup>109</sup>

Evidence Code Section 820 makes clear for eminent domain and inverse condemnation cases that depreciated reproduction or replacement cost may be used to value property. This represents a significant

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

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

107. 266 Cal. App.2d 570, 586, 72 Cal. Rptr. 273, \_\_\_\_ (1968) (foreclosure and fraud).

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

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

change from prior law, and aligns California with the majority of other jurisdictions.<sup>110</sup>

Section 820 includes a number of limitations to ensure that the replacement cost technique will be used only where appropriate. The technique may not be used unless the improvements enhance the value of the property for its highest and best use; otherwise application of the replacement cost technique would result in an improperly low value.<sup>111</sup> In applying the technique, only matters that reasonably may be relied upon by an expert may be used.<sup>112</sup> And replacement cost may only be used when relevant to the particular property being valued,<sup>113</sup> and not speculative.<sup>113a</sup>

The effect of Section 820 is to bring the standards for judicial valuations and appraiser valuations closer together, and to resolve previous uncertainty in the law.<sup>114</sup> It should apply to noncondemnation cases generally.

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

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

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

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

113a. People v. Southern Pac. Transportation Co., 84 Cal. App.3d 315, 326, \_\_\_ Cal. Rptr. \_\_\_, \_\_\_ (1978) (not final).

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

### Conditions in Vicinity

Market value of property is based on the highest and best use to which the property can be put.<sup>115</sup> In determining the value of property, it is desirable not only to determine its adaptability for a particular use by virtue of intrinsic characteristics such as size, shape, and topographical conditions,<sup>116</sup> but also to determine the character of the neighborhood and trends in development of other property in the general vicinity.<sup>117</sup>

Evidence Code Section 821 codifies the rule that a valuation witness may take into account as a basis for an opinion the nature of the improvements on properties in the general vicinity and the character of the existing uses being made of such properties. This codifies prior eminent domain case law.<sup>118</sup> Noncondemnation law on this point is not clear, but should be made clear.

### Assessed Value

Evidence Code Section 822(c) precludes use of the assessed valuation for taxation purposes to determine the value of property. It is well recognized that assessed values of property cannot be relied upon as an indication of its market value since they are generally applied with an eye to equalization of tax loads rather than an ascertainment of market value, and are seldom determined in a consistent and systematic manner.<sup>119</sup> Application of this provision in noncondemnation cases would

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

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

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

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

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

codify existing law,<sup>120</sup> and would be consistent with the rule in the majority of other jurisdictions.<sup>121</sup>

#### Noncompensable Items

Evidence Code Section 822(e) requires that a valuation witness exclude from consideration in forming an opinion the influence of non-compensable items of value. This provision has greatest application in eminent domain and inverse condemnation proceedings, where such matters as the effect of an exercise of the police power are excluded.<sup>122</sup> Other noncompensable items in eminent domain include personal inconvenience, annoyance, or discomfort, damages resulting from diversion of traffic, damages due to impairment of view, and change in the character of the neighborhood.<sup>123</sup> These items are peculiar to the substantive law of eminent domain and inverse condemnation, and application of Section 822(e) to noncondemnation cases would not change the substantive law of those cases. Section 822(e) reiterates a general rule applicable in any case in which opinion testimony is given--a witness may not base an opinion on any matter that the witness "is precluded by law from using."<sup>124</sup>

#### Conclusion

Property valuation issues should be governed by a uniform set of rules. The foregoing discussion demonstrates that the Evidence Code valuation provisions have crystallized an extensive, liberal, and well-developed body of law relating to the determination of market value of

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120. 31 Cal. Jur.3d, Evidence § 196 (\_\_\_\_).

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

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

123. See, e.g., Whitaker, Real Property Valuation in California, 2 U.S.F. L. Rev. 47, 58 (1967).

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

property. Its application to noncondemnation cases is appropriate for both real and personal property value determinations. It will largely codify existing law, and will favorably resolve a number of uncertainties in and unduly restrictive rules applicable in noncondemnation cases. The Law Revision Commission recommends that the Evidence Code property valuation rules be applied in noncondemnation cases.

Proposed Legislation

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

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

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

Evidence Code § 810 (amended)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

31787

Evidence Code § 814 (technical amendment)

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

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

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

40314

Evidence Code § 823 (added)

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

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

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

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

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



31564

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

EVIDENCE OF MARKET VALUE OF PROPERTY

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

31565

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

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

31566

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

31567

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

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

and

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

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

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

31571

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

31568

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

31572

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

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

31569

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

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

31573

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

31574

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

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

38724

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

38723

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

31570

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

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

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

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

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

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

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

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