#63.70 7/21/77

Memorandum 77-52

Subject: Study 63.70 - Evidence of Market Value of Property

Background

The Commission's tentative recommendation relating to evidence of market value of property, a copy of which is attached, was distributed for comment this spring. The Commission tentatively recommended that the Evidence Code provisions concerning valuation of property, which now apply only in eminent domain and inverse condemnation proceedings, be applied to all types of proceedings involving property valuation. In addition, the Commission tentatively recommended a number of specific amendments to the Evidence Code provisions designed to liberalize the admissibility of evidence.

The responses to these tentative recommendations are appended as Exhibits 2-24; Exhibit 1 (pink) is a letter containing comments of Chairman McLaurin addressed to an earlier draft, which the Commission deferred consideration of until this time. We are informed that the State Bar Committee on Condemnation has reviewed the tentative recommendations but, due to a failure of communication, we have not received their comments; we will append their comments to a supplementary memorandum when received.

The function of this memorandum is to analyze the comments and responses.

General Reaction

Most of the letters received spoke to particular aspects of the tentative recommendations. However, there were some comments to the effect that the writer approved the proposals generally. See Exhibits 2 (Arnold--yellow), 3 (Hansen--green), 5 (Kulla--blue), and 7 (Huxtable--white).

There were also a few letters that addressed problems beyond the scope of the evidence of market value study. Both Hansen (Exhibit 3--green) and Reach (Exhibit 6--gold) suggested revisions of the law relating to a determination of the probability of a zoning change. Hansen also suggested revision of the law relating to compensability of damages caused by exercise of the police power. The staff intends to treat

these suggestions as suggestions for new topics of study and will discuss them in connection with other new topic proposals this fall.

§ 810. Application of Evidence Code provisions

The concept of applying the eminent domain evidence provisions to other types of proceedings generated a considerable amount of interest. Apart from general comments to the effect that the commentator approved the Commission's proposals, there were seven letters specifically approving the idea of extending the evidence provisions. See Exhibits 2 (Arnold--yellow), 3 (Hansen--green), 8 (County of Los Angeles--pink), 9 (McCormick--yellow), 12 (Underhill--white), 13 (Metro. Water Dist. So. Cal.--gold), and 14 (City of Los Angeles--white).

On the other hand, there were seven letters that, while they did not object to the idea of extending the evidence provisions generally, did object to extending them to apply to property tax assessment and equalization proceedings. These letters are collected as Exhibits 15-21 and include communications from three counties, the State Board of Equalization, the State Bar Subcommittee on Property, Sales, and Local Tax, a property analyst, and a property tax representative. (It is worth noting, however, that the County of Los Angeles (Exhibit 8--pink) specifically endorses the application of these provisions to real property taxation.) Their comments are uniformly to the effect that property tax assessment and equalization appeals are administrative-type proceedings that involve laymen, are intentionally informal, and should not be restricted by imposition of the Evidence Code limitations. The staff agrees with these comments and believes it would be a mistake, both practically and politically, to attempt to apply the Evidence Code provisions to property tax assessment and equalization. The staff would revise Evidence Code Section 810 to make the provisions applicable to any action "other than ad valorem property tax assessment or equalization." The Comment would note:

> Property tax assessment and equalization proceedings, whether judicial or administrative, are not subject to this article. See, e.g., Rev. & Tax. Code §§ 1609, 1636-1641 (equalization proceedings); Cal. Admin. Code, Tit. 18 (public revenues regulations).

Should the Commission nonetheless desire to attempt to apply the Evidence Code provisions to property taxation, the staff will prepare a subsequent memorandum dealing with the problems involved.

There was one letter objecting to use of the Evidence Code provisions in commercial and criminal cases and in taxation cases generally. See Exhibit 22 (Bogart--pink). The objections are evidently based on a misunderstanding of the effect of the Commission's proposals. The proposals do not purport to codify the "highest price" rule of eminent domain for noneminent domain valuations--the "highest price" rule is a substantive standard of value that appears only in the Eminent Domain Law and does not appear in the Evidence Code provisions.

The application of the Evidence Code rules to inheritance taxation is discussed in two letters, Exhibits 23 (State Controller--yellow) and 24 (State Bar Probate Section--green). The State Controller believes this is a desirable proposal. The State Bar Probate Section has no comment on the proposal but is apprehensive that it might be construed to require the Inheritance Tax Referee to hold a hearing and take evidence; the referee is permitted to do so now but, normally, the referee does not hold a hearing. The staff believes language in the Comment should be adequate to clarify this point:

> 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).

There were also two letters noting areas of the law that would be affected by the extension that were not specifically mentioned by the Commission: mortgage deficiency litigation (Huxtable--Exhibit 7--white) and gift taxation (State Controller--Exhibit 23--yellow). The staff plans to revise the relevant portions of the recommendation and Comments to refer to these two areas.

§ 811. "Value of property"

There were two letters addressed to use of the phrase "market value or its equivalent" in Section 811. See Exhibits 1 (Chairman McLaurin--pink) and 14 (City of Los Angeles--white). These letters are based on an earlier draft of Section 811, and the offending language has since been deleted. However, the same phrase is used in Section 812, and the letters are discussed in connection with that section.

§ 812. "Market value" or its equivalent

Chairman McLaurin (Exhibit 1--pink), Mr. Arnold (Exhibit 2--yellow), and the City of Los Angeles (Exhibit 14--white) all see confusion being created by referring to "market value" or its equivalent. Both Arnold and the City of Los Angeles suggest that the confusion could be eliminated by rephrasing Section 812 to refer to the specific statutory standards intended to be covered. This could be done as follows:

> 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," "market price," "actual value," or otherwise.

§ 813. Opinion testimony by nonexperts

Testimony by individual owner. Subdivision (a)(2) of Section 813 permits an individual owner of property to testify as to the value of the property, even though not an expert. The tentative recommendation expands this provision to permit the owner of an interest to testify as to the value of the whole property. The expansion was suggested to the Commission by the State Bar Committee on Condemnation; it is an effort to cure the problem that arises where property is being valued as whole in the first stage of the valuation proceeding, and the lump-sum award is not sufficient to accommodate owners of lesser interests in the apportionment stage. The expansion would make clear the right of the owner of a lesser interest to testify as to the value of the whole in order to assure that there will be an adequate lump-sum to compensate the lesser interest owners. McCormick (Exhibit 9--yellow) believes the change is commendable; Chairman McLaurin (Exhibit 1--pink), the Department of Transportation (Exhibit 11--buff), and the City of Los Angeles (Exhibit 14--white) all believe the expansion is inappropriate since the presumption that a property owner knows the value of what he owns does not extend to knowledge of the value of the whole where he only owns a part, and since the expansion will merely add to the time and expense of trial.

The staff believes that the tentative recommendation addresses a real problem, but also that the criticisms of the solution proposed in the tentative recommendation are valid. The staff recommends as an alternative solution amending a portion of the Eminent Domain Law to

make clear the right of the owner of an interest to introduce evidence of the value of the whole property without authorizing the lesser interest owner to testify in person (unless he can qualify as an expert):

> 1260.220. (a) Except as provided in subdivision (b), where there are divided interests in property acquired by eminent domain, the value of each interest and the injury, if any, to the remainder of such interest shall be separately assessed and compensation awarded therefor.
>
> (b) The plaintiff may require that the amount of compensation be first determined as between plaintiff and all defendants claiming an interest in the property. Thereafter, in the same proceeding, the trier of fact shall determine the respective rights of the defendants in and to the amount of compensation awarded and shall apportion the award accordingly. Nothing in this subdivision limits the right of a defendant to present during the first stage of the proceeding evidence of the value of, or injury to, ~~his~~ the property or the defendant's interest in the property; and the right of a defendant to present evidence during the second stage of the proceeding is not affected by ~~his~~ the failure to exercise ~~his~~ the right to present evidence during the first stage of the proceeding.
>
> Comment. Subdivision (b) of Section 1260.220 is amended to make clear the right of a defendant, whether or not a fee owner, to present evidence of the value of the whole property in order to assure an adequate award for purposes of apportionment.

This would also take care of the problems concerning the accuracy of the Comment to Section 813(a)(2). See Exhibits 1 (Chairman McLaurin-- pink) and 14 (City of Los Angeles--white).

There were also two comments questioning the basic policy of permitting a property owner who is not an expert to testify as to the value of his property. Joseph Miller Realty (Exhibit 4--buff) points out some drawbacks of permitting a nonexpert to attempt to evaluate market data and deliver an opinion as to value. The City of Los Angeles (Exhibit 14--white) would limit the right of an owner who is not familiar with property values to testify--"Perhaps, the owner's testimony should be permitted unless the opposing party establishes, by voir dire or otherwise, that the prospective witness does not have adequate knowledge to express an opinion of value." While the staff acknowledges the force of these comments, the staff believes it is necessary to permit owner testimony to take care of the case of the small property owner who is

unable or unwilling to employ an expert witness. If the owner's testimony is defective, this can be shown on cross-examination, and more dependable opinion testimony can be put on to persuade the trier of fact.

Testimony by corporate owner. Subdivision (a)(3) of Section 813 would parallel the provision permitting an individual owner to testify by permitting a corporate or other entity owner to testify. This is intended to take care of the mom and pop store which may be unable or unwilling to employ an expert witness. The Commission's proposal is to permit an officer or employee designated by the owner to testify, provided the designee is knowledgeable as to the character and use of the property.

Chairman McLaurin (Exhibit 1--pink), the Department of Transportation (Exhibit 11--buff), and the City of Los Angeles (Exhibit 14--white) all object to this provision on the ground that it does not require the designee to be knowledgeable as to the value of the property. Huxtable (Exhibit 7--white), on the other hand, whole-heartedly agrees with the recommendation and proposes language to make somewhat easier the foundational showing required to qualify the designee to give an opinion as to value.

The staff is inclined to agree, along with the opponents of this provision, that the designee should be required to be familiar with the value of the property; this would be an appropriate limitation, without requiring the designee to be a valuation expert generally. The staff would revise Section 813(a)(3) to permit opinion testimony by:

> (3) An officer, employee, or partner designated by a corporation, partnership, or unincorporated association claiming ownership of the property or property interest being valued if the designee is familiar with the value of the property or property interest.
>
> Comment. Paragraph (3) is added to Section 813(a) to make clear that, where a corporation, partnership, or unincorporated association owns property being valued, a designated officer, employee, or partner who is familiar with the value of the property may testify to an opinion of its value as an owner, notwithstanding any contrary implications in City of Pleasant Hill v. First Baptist Church, 1 Cal. App.3d 384, 82 Cal. Rptr. 1 (1969). The designee may be familiar with the value of the property as a result of being instrumental in its acquisition, use, or management, or as a result of being otherwise knowledgeable as to its character and use; the designee need not qualify as a valuation expert generally.

Compare Section 720 (qualification as an expert witness). Nothing in paragraph (3) affects the authority of the court to limit the number of expert witnesses to be called by any party (see Section 723) or to limit cumulative evidence (see Section 352).

The City of Oakland (Exhibit 10--green) queries why an individual owner should not be able to designate an employee to testify as to value. The answer is that there is a presumption only that the owner is knowledgeable as to value; but, in the case of a nonnatural owner such as a corporation, the nonnatural owner must testify through a natural person, such as a designated employee shown to be familiar with the value. The City of Oakland also queries why a partnership is permitted to designate an employee and not other cases where two or more persons own property jointly. The answer here is that, where two or more persons own property jointly, they are owners presumed to know the value of the property and can testify as natural persons; the status of partnership property, however, is not so clear, so the statute spells out that a natural person may be designated to testify for the partnership, thus avoiding the question whether a partner is an "owner" of partnership property.

§ 815. Sale of subject property

The amendment to Section 815 is technical, designed to accommodate the expansion of the Evidence Code provisions to actions other than eminent domain and inverse condemnation. There was one comment specifically approving this change. See Exhibit 9 (McCormick--yellow).

§ 816. Comparable sales

Subdivision (c) of Section 816 was added to the tentative recommendation at the urging of the State Bar Committee on Condemnation, which felt that in practice some courts were being unduly restrictive in their admissibility of comparable sales. The comments received concerning this proposal were generally split along line of condemnor versus property owner. Representatives of property owners felt the proposal is a good one and maybe should go even farther in limiting the discretion of the court to limit admissibility of sales. See Exhibits 3 (Hansen--green), 5 (Kulla--blue), 6 (Reach--gold), and 7 (Huxtable--white) (Huxtable also suggests that the statute make clear the authority of the court to strike prejudicial evidence and properly instruct the jury

concerning its weighing of the evidence). Representatives of public entities felt that the court already is overly liberal in admitting comparable sales, that the effect of the proposal would be to destroy any discretion the court has left and throw the case wide open to speculation, and that the Legislature should not attempt to infringe on the domain of the court. See Exhibits 8 (County of Los Angeles--pink), 9 (McCormick--yellow), 11 (Department of Transportation--buff), 13 (Metro. Water Dist. of So. Cal.--gold), and 17 (County of Riverside--green).

Norman Roberts of the City of Los Angeles (Exhibit 14--white) offers a possible middle ground out of this impasse. He suggests that it is futile to attempt to cure a defect in subdivision (b) by adding a subdivision (c) and that subdivision (b) should be more liberally phrased to define the terms of comparability. He suggests that the key test of comparability should be whether the sale "sheds light" on the value of the subject property since sales of properties dissimilar in size or condition, and distant from each other, may be relevant to a determination of value. A similar concern is also expressed by Reach (Exhibit 6--gold) and McCormick (Exhibit 9--yellow) involving the question whether an appraiser may use a sale of improved property to help show the value of unimproved property.

Short of taking the Roberts suggestion of eliminating all standards of comparability other than that of "shedding light" on the value of the subject property, it would be possible to liberalize the standards for admissibility. The Uniform Eminent Domain Code Section 1108 provides:

> A sale or contract is comparable within the meaning of this section if it was made within a reasonable time before or after the valuation date and the property is sufficiently similar in the relevant market, with respect to situation, usability, improvements, and other characteristics, to warrant a reasonable belief that it is comparable to the property being valued.

Professor Van Alstyne has analyzed the differences between this standard and the California standard as follows:

> The Uniform Code omits any requirement, such as is found in California Evidence Code Section 816, that in order to be comparable the property must be located "sufficiently near" the property being valued. The Uniform Code, in this connection, requires that the property be "sufficiently similar in the relevant market" to warrant a reasonable belief that it is comparable to the property

being valued. What is "a relevant market" is regarded by the Uniform Code as a much more pertinent inquiry than the mere question of geographical proximity which is suggested by the phrase "sufficiently near." Competent property appraisers who advised the Special Committee that drafted the Uniform Code indicated that in some circumstances the relevant market for certain kinds of property may be a national market, while in other situations it may be a much more localized market. The Uniform Code has thus taken the position that geographical proximity, per se, is not a desirable limitation to be engrafted upon the use of comparable sales.

The California approach to comparable sales appears to be susceptible of an interpretation that, in order to rely upon a particular sale, the court must be satisfied that the sale must have been "sufficiently near in time" and "sufficiently near" in geographic terms, as well as "sufficiently alike" in specified particulars "to make it clear" to the presiding judge that the property is in fact comparable. In other words, the California test in Section 816 of the California Evidence Code appears to treat the various elements of the definition as going to the question of admissibility. The Uniform Code, on the other hand, uses a much more liberal approach with respect to comparable sales, making admissibility depend only upon whether the similarities are sufficient "to warrant a reasonable belief" that the property is in fact comparable to the property being valued. Since the valuation expert will ordinarily be prepared to testify that in his judgment it does warrant that "reasonable belief," the Uniform Code approach seems more liberal.

In light of the more liberal approach of the Uniform Code, the omission from the Code of the new proposed subdivision (c) of Section 816 of the California Evidence Code, specifically mandating a liberal construction of the comparable sale section so that an expert witness would have wide discretion in his selection of comparable sales, is not an indication of any difference in basic policy as to the need for such a broad liberal interpretation.

§ 817. Leases of subject property

The language at the end of Section 817(a) relating to leases occurring after the lis pendens is added at the suggestion of Chairman McLaurin (Exhibit 1--pink). His letter also objects to the statement that subdivision (a) is subject to subdivision (b). The staff believes this statement makes clear the relationship of the two subdivisions and that it should be retained; the offending language in the Comment has previously been deleted.

§ 819. Capitalization of income

Existing Section 819 permits as a technique for valuing property capitalization of the reasonable net rental value attributable to the

land and existing improvements. The tentative recommendation would broaden this provision to permit capitalization of the reasonable net rental value that would be attributable to the land if the property were improved for its highest and best use, provided the highest and best use is one for which the property is reasonably adaptable and available, and provided also that there is inadequate market data on which to base an opinion as to value. This proposal is easily the single most controversial provision in the tentative recommendation.

The arguments pro and con are too numerous to repeat here, other than to summarize the major and most commonly taken positions. The arguments for adopting the proposal, and in fact broadening it even further, may be found in Exhibits 3 (Hansen--green), 7 (Huxtable--white), and 18 (Betts--buff). The arguments against adoption of the proposal may be found in Exhibits 1 (Chairman McLaurin--pink), 6 (Reach --gold), 8 (County of Los Angeles--pink), 9 (McCormick--yellow), 10 (City of Oakland--green), 11 (Department of Transportation--buff), 13 (Metro. Water Dist. of So. Cal.--gold), 14 (City of Los Angeles--white), and 17 (County of Riverside--green). The proponents believe that the capitalization of income technique for hypothetical improvements is a standard valuation technique used in the ordinary course of valuation in the real world and thus should be available in condemnation proceedings; the decision when to use the technique should be left to the judgment of the appraiser making the valuation rather than to a court determination based on foundational requirements such as lack of adequate market data and availability and adaptability of the property for the hypothetical improvement. The opponents of the proposal believe that capitalization of income from hypothetical improvements is a technique used by appraisers only as a check on other more reliable appraisal techniques, that even though used by sophisticated appraisers it can only serve to confuse a jury in an eminent domain trial, that the technique itself is highly speculative and unreliable, and that the prerequisites to its use laid out in the tentative recommendation provide inadequate safeguards. This summarizes the major positions; there are a number of other points made, pro and con, which may be gleaned from the letters.

The staff must confess that it is persuaded by the arguments of the opponents of permitting capitalization of hypothetical improvements. The staff found the arguments of the County of Los Angeles (Exhibit 8--pink) and the Department of Transportation (Exhibit 11--buff) particularly forceful on this point. The staff recommends that the change in Section 819 be deleted from the recommendation. Should the Commission decide to keep the change, the staff will prepare a subsequent memorandum discussing particular improvements that might be made in it, suggested in the letters.

§ 822. Matter upon which an opinion may not be based

(a) Sales to public entity. Although the tentative recommendation makes no proposals for change in the provision excluding sales to public entities as a basis for an opinion, one letter suggested that this provision should be changed. See Exhibit 6 (Reach--gold). The Commission has distributed a questionnaire on this matter, and the staff plans to consider this letter along with the questionnaire responses, when received.

(b) Offer or option to purchase or lease property. Although the tentative recommendation makes no proposals for change in the provision excluding offers or options to purchase or lease property as a basis for an opinion, several letters suggested that this provision should be changed. Huxtable (Exhibit 7--white) feels that offers to purchase the property play a legitimate role in property valuation and should not be excluded. The City of Los Angeles (Exhibit 14--white) and Betts (Exhibit 18--buff) feel there should be no limitations on the ability of the appraiser to use relevant offers and listings.

As presently drafted, the statute would permit admission of an offer or listing to sell by the present owner to a third person. Huxtable would add the following provision:

> Nothing in this subdivision is intended to exclude testimony concerning, nor an opinion based in part upon a written bona fide offer to purchase the property or property interest being valued where it is shown that said offer was made by a person, firm, or corporation, ready, willing and able to buy said property or property interest at the time said offer was made.

The staff believes that a strong case can be made for such an expansion since the objection made to written offers generally--that the range of collateral inquiry would be too great--may not be valid insofar as bona fide offers to purchase the very property being valued are concerned. In determining the market value of property, a person of ordinary business judgment would certainly want to know about any offers that had been made for the property. Moreover, a reasonable buyer, knowing that a seller has declined a previous offer from a willing and able purchaser, would not believe that the seller would accept less than the previous offer. And it is difficult to persuade a property owner who has declined a well-secured offer because he thought it was not high enough that his property is not worth at least the amount of the offer.

Nonetheless, when the evidence in eminent domain provisions were first enacted, the Governor twice vetoed the bills, primarily on the ground that they did not exclude offers.

(c) Assessed value of property and taxes due. The addition of taxes due to this subdivision is considered highly desirable by McCormick. See Exhibit 9 (yellow).

(d) Opinion as to value of property other than subject property. Although the tentative recommendation makes no proposals for change in the provision excluding an opinion as to the value of property other than the subject property, a note is added to the Comment to the effect that subdivision (d) does not prohibit a witness from testifying to adjustments made in sales of comparable property used as a basis for his opinion. A number of letters felt that a note in the Comment is inadequate in light of the magnitude of the problem created by the apparently exclusive statutory language and that amelioratory language should be added to the statute to make clear that an appriaiser may make adjustments in comparable sales in order to arrive at an opinion as to the value of the subject property. See Exhibits 6 (Reach--gold), 9 (McCormick--yellow), 14 (City of Los Angeles--white), and 18 (Betts--buff). The language suggested by McCormick is:

> Nothing in this subdivision prohibits a witness from testifying to adjustments made in sales of comparable property used as a basis for his opinion.

This language would not cure the problem raised by Betts that, occasionally, it may be necessary to value one or more interests in the property

(such as the fee or leased fee) in order to arrive at a value for the remaining interest (such as the leasehold).

(g) Trade or exchange. Subdivision (g) was added to preclude evidence of a trade or exchange since that would involve valuation of property other than the subject property; it is a specific application of subdivision (d). This subdivision was added at the suggestion of the State Bar Committee on Condemnation; but there were many objections to the proposal. See Exhibits 1 (Chairman McLaurin--pink), 7 (Huxtable--white), 9 (McCormick--yellow), 12 (Underhill--white), 14 (City of Los Angeles--white), and 18 (Betts--buff). The commentators felt that a trade or exchange might be a perfectly legitimate open market transaction, where the values of the properties involved are clear, and would be the best evidence of the value of the subject property. They felt that the appraiser should be permitted to use a transaction involving a trade or exchange if the transaction is relevant; questions of accuracy should be directed to its weight rather than to its admissibility.

Revenue & Taxation Code § 4986

The tentative recommendation proposes the deletion of the provision making mention of taxes due ground for a mistrial; the proposal makes taxes inadmissible as evidence under Evidence Code Section 822(c), along with assessed valuation, and not automatic grounds for mistrial. Mr. McCormick (Exhibit 9--yellow) believes this change is highly desirable; Chairman McLaurin (Exhibit 1--pink) believes the change is undesirable. The Commission felt that automatic mistrial for the mention of unpaid taxes was too severe; simply making unpaid taxes inadmissible and leaving the remedy to the discretion of the court was adequate.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

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OUR FILE NO.

March 3, 1977

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

Re: Memorandum 77-16 and Attached Draft of Recommendation

Dear John:

The following are just a few comments with reference to the proposed changes in the Evidence Code.

First, Section 811: The phrase "... or its equivalent" seems to be unnecessary, confusing and unintelligible when used with the phrase "... market value of property..." Your comment states that this section is amended to broaden the application to all cases where a market value standard is used. If this is the purpose, then the phrase "... or its equivalent" is unnecessary. Further, I do not know what the "equivalent" of market value is. Market value is market value. If the phrase "actual value" is deemed an equivalent of market value, then it is unnecessary to use the phrase. If "actual value" is not the same as market value, then it cannot be the equivalent. I would suggest the deletion of the phrase "... or its equivalent" from Section 811 and Section 812.

Second, Section 813(2): I do not believe that the owner of any right, title or interest in the property being valued should be permitted to express an opinion of the entire property being valued other than the value of his right, title or interest, or unless he is otherwise qualified to express such an opinion. The right of an owner to testify

as to the value of his property is predicated upon a presumption that he has knowledge thereof purely by virtue of his ownership. This presumption should not be extended to one who has an ownership of only an interest in the property being condemned for purposes of permitting him to testify to an opinion of the value of the entire property being condemned. This presumption should be limited to its present extent and not extended. To extend it, I believe, would lead to a prolongation of time of trial where there are divided interests and result in unnecessary expense of both money and time by the parties as well as the court.

I believe that the statement in your comment, "This is consistent with Code of Civil Procedure Section 1260.220 (procedure where there are divided interests)" should be omitted. As I read Section 1260.220, it is not consistent. This latter section permits of either a separate assessment of compensation or a determination of the total compensation as between plaintiff and all defendants claiming an interest in the property. In this latter instance, nothing in Section 1260.220 limits the right of a defendant to present during the first stage of the proceeding evidence of the value of or injury to his interest in the property. This section does not permit the owner of any interest in the property to testify as to the value of the entire property being acquired.

Third, Section 813(3): The qualification of an officer, etc. to testify to an opinion of value if he is knowledgeable as to the character and use of the property should be extended as follows: "is knowledgeable as to the character and use of the property and its value." Many individuals are knowledgeable as to the character of property, knowledgeable as to the use of property, but are not knowledgeable with reference to value.

Fourth, Section 817: Unfortunately, I do not understand your comment, "Section 817 is amended to make clear that subdivision (b) is a limitation on subdivision (a)." Nor do I understand your addition of the phrase in subdivision (a), "subject to subdivision (b),...". To my recollection, Section 817 was to permit testimony with reference to leases on the property being taken where there was a fixed rental paid and explicity to permit testimony with reference to a lease where the rental was fixed by a

percentage or other measurable portion of gross sales or gross income. These are two separate categories or types of leases. Consequently, subdivision (b), which is similar to the second sentence in the existing Section 817, cannot be a limitation on subdivision (a). To have subdivision (b) a limitation on subdivision (a) is to limit testimony with reference to existing leases solely to situations where the rent is fixed by a percentage or other measurable portion of gross sales or gross income from a business conducted on leased property. It is my recollection that the percentage lease situation was codified for purposes of making it clear that this type of factual situation can be used by the appraiser, as stated in People vs. Frahm.

Fifth, Section 819: I have very serious reservations with reference to the advisability of proposing Section 819 as you have it set forth. In the first instance where this section is applicable, it will call for two trials. The first trial will call for a judicial determination of your two so-called limitations. Also, this trial will have to be held far enough in advance so that if there is an adverse ruling by the trial court, the appraiser who is urging a hypothetical capitalization of income position will have ample time to prepare his appraisal on another basis in conformity with the court's ruling. It will also necessitate interim findings of fact and conclusions of law and, possibly, a judgment with reference to the situation. These findings, etc. may be determined by one judge, whereas the basic issue of compensation will subsequently be determined by another judge unless there is a court rule or court procedure which will require this type of case being assigned to one judge for all purposes.

More importantly, the limitations which you have before the hypothetical capitalization of income can be considered, means that the court is imposing its judgment upon the matter on which an appraiser should be allowed to form an opinion: first, that the existing improvements do not permit use of the property for its highest and best use, and, second, that there is no adequate market data as described in Section 816. Both of these matters are

factual matters which go to the weight of the evidence rather than admissibility. Further, no consideration has been given to the reproduction cost method of analysis of value of the property. Your limitation with reference to a lack of adequate market data seems to place an undue emphasis on a comparable sales approach to value. Additionally, even with your proposed limitations, this method of valuation permits great speculation on the part of appraisers. As you know, it is with reluctance that I mention this latter point.

Sixth, Section 822(g): This subsection seems to restrict the admissibility of a trade or exchange of any property where such includes the property being valued. I do not believe that this was your intent. Additionally, I feel that this limitation is too broad because there are many situations where a trade or an exchange of property is involved, but the parties thereto have placed a total price on the property, and real estate equaling that value has to be purchased. For example, the parties to a purchase of Property "X" agree that Property "X" has a value of $1,000,000. The buyer is then directed by the seller to go out and obtain various types of property or designated properties which will total $1,000,000 in their purchase prices. Those properties then are exchanged for Property "X". This type of a trade has been held in various trial courts to be admissible. Your proposal would eliminate it.

Seventh, Taxation and Revenue Code Section 4986: I do not feel that the deletion as proposed with reference to grounds for mistrial is appropriate. This provision was placed in the Revenue and Taxation Code on the theory that any mention of such is so egregious as to be grounds for a mistrial without any argument or doubt. Therefore, there should be no discretion on the part of the trial court in either granting or denying a motion for mistrial on this basis. One of the theories which was espoused in this situation was that jurors can determine from the taxes the assessed value of the property and, therefore, the assessor's determination of market value by virtue of their mere knowledge of the tax rate. This would then permit them to take into

consideration a matter which is beyond the evidence produced at the time of trial: to wit, the assessor's determination of fair market value. There would be no way by which the injured party could reach or cure this error.

Eighth: By way of interest, existing Code Section 817 with reference to leases of subject property permitting consideration of such leases where they were in effect within a reasonable time either before or after the date of valuation--this section does not contain a limitation with reference to leases of the subject property after the date of valuation which is similar to the limitation on a sale of the subject property which occurs after the date of valuation and after the filing of a lis pendens. It would seem to me that Section 817 should be amended to include a similar limitation.

With warmest regards,

JOHN N. McLAURIN
OF
HILL, FARRER & BURRILL

JNMcL/rs

Memorandum 77-52

EXHIBIT 2

#63.70

KENNETH JAMES ARNOLD
ATTORNEY AT LAW
P. O. BOX 14218
SAN FRANCISCO, CALIFORNIA 94114

March 26, 1977

California Law Revision Commission
School of Law
Stanford, CA 94305

Attn: John H. DeMoully, Executive Secretary

Mr. DeMoully:

Enclosed is the pink slip to enable you to keep my name on your mailing list.

I have read over the tentative recommendations on commissioners and market value. With respect to the former, I suppose that is the way the law is going, but, personally, I am opposed to allowing commissioners to hear any contested matter absent a stipulation by the parties. I am firmly committed to the proposition that all people should have a constitutional right to have their disputes adjudicated by judges who are answerable to the people and can be recalled, impeached, or removed from office; I deplore the trend of adjudication by administrative hearing officers, boards of governors, commissioners, referees, and what have you who cannot be removed from office by the will of the people. This, of course, is a philosophical matter with which I suppose you are not concerned.

My reaction to your recommendation on market value is entirely different. I wholeheartedly support your efforts on this and believe your recommendation is a good one. My only criticism is with your amendment to Ev C § 812. My feeling is that the section as amended is confusing. You attempt to clarify it in your comment, but the comment is not part of the statute. Too, you state earlier in your explanation that the purpose of the law is to change some of the decisional law. If your intent is to change decisional as opposed to statutory law, I would also include a section defining market value as including such terms as "market price," "actual value", "full value," etc. as used in various statutes. (Unfortunately, while I was t ping this paragraph I had a four interruption which has broken my train of thought, but I think if you reexamine the amended section and your comment vis a vis the text explanation, you will understand my objection.)

Very truly yours,

Kenneth James Arnold

Kenneth James Arnold

EXHIBIT 3

LAW OFFICES OF
ERDESANI, HANSEN & ELOS
1000 BANK OF AMERICA BUILDING
SAN JOSE, CALIFORNIA 95113
TELEPHONE (408) 994-0868

RICHARD V. ERDESANI
(1904-1968)

GERALD H. HANSEN
RICHARD D. ELOS

March 29, 1977

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

RE: Your tentative recommendation on evidence of market value of property dated 3/15/77

Dear John:

In response to your request of March 23 to me as a member of the State Bar Committee on Condemnation my individual response is as follows:

I approve almost completely of your draft and particularly the making uniform of evidence rules in various types of cases. While I voted contrary to this position, it was based on minor objections that could be handled by one amendment I am suggesting. That amendment deals with the factual situation, where the same piece of property would be valued in a dissolution case between husband and wife or partners by one method, but under existing eminent domain laws would be valued at less than market value. Put the case of a commercial property, that depends most substantially for its rental value on a left turn traffic pattern into the property on an existing street. Assume further there is no thought of ever restricting a left hand turn there, in all practicality. In this factual situation in a private dissolution proceeding, the fair market value of the property is not diminished by any consideration that there is not a proprietory right to have the left turn traffic continue to enter the property. However, in eminent domain valuation, on the rationale that this element of value is one that arises out of a non-proprietory interest that can be cut off at any time by the exercise of police power, the actual compensable value of the property is arrived at by penalizing the property's value accordingly.

People buy and sell property all of the time, putting a value on the abilities of the property that could well be lessened by the

exercise of police power. Every time one buys a vacant piece of commercial land, or any property zoned in any manner that is subject to dezoning, this is going on.

I suggest that the concept of disallowing value on the rationale that police power could take it away is a fallacy, whether applied to a typical property subject to downzoning or applied to a commercial property depending upon left turn traffic. On a particular public project in front of a commercial property where there is a street widening and a new center divider blocking off left turn traffic, such blocking off is really not an exercise of the police power in the general sense at all, but is more realistically an exercise of the eminent domain power to accomplish an affirmative public use project, particularly against one property, not similarly affecting all properties in the community.

I, therefore, would propose an amendment which states, in effect, that in any eminent domain proceeding, market value will be ascertained without deduction for any element of value of the property on the basis that such element of value could be eliminated by an exercise of the police power, unless all properties in the community (the zone of benefit) are similarly affected.

Proceeding to other observations:

I agree thoroughly on your recommendation to add Section 816(c) to give an appraiser wider discretion in selection of comparables. The Courts have been grossly preclusive. Juries usually have more sense than these judges. I would prefer to expressly limit the discretion of the Court to limit the number of sales to the situation where such are cumulative and add substantially nothing to the evidence.

Your proposed change to Section 819 does not go far enough in my opinion. Presently one can capitalize income from existing improvements and you proposed to capitalize income from future improvements if the property is not developed for its size and best use, and there is no adequate market data. I believe you should be able to capitalize income from future improvements as long as the evidence will support the practicality and economic value of the improvements. The rule has been stated that one can

not capitalize from "hypothetical" improvements. I don't know why not as long as the improvements are economic and practical. I knew that all the time in analyzing property for development or straight land lease. It happens in the market and it is sensible and should be allowed. Objections to impracticability and noneconomic use go to the weight of the evidence in my opinion.

My last comment has reference to an area untouched by your tentative revision. It has to do with the time-honored proposition that one can consider higher uses not permitted under present zoning if one can show "a reasonable probability of rezoning in the near future". That is mechanical and not realistic in two regards. A 49% chance of rezoning certainly affects value and even though it might not occur in what we call the near future it certainly has an affect on value. The rule should be that the effect, if any, on land value arising out of the possibility, if any, of a rezoning should be considered if that rezoning is possible soon enough to have any effect. I had a jury once on an important case hang up on the meaning of "near future" and determined that it meant one calendar year, and we prevailed, but I don't blame them for being mechanical when the Court's instruction was mechanical. I am handling sales today where readily half of the value being paid is on the less than 50-50 chance that within 20 years the property will be zoned for higher use. People don't offer a higher price if they can get over two mechanical hurdles in their own mind. They offer a price by integrating a possibility with the far-distant time element involved.

Very truly yours,

Gerald B. Hansen

GBH/djt

Memorandum 77-52

#63.70

EXHIBIT 4

Joseph Miller Realty

RESIDENTIAL AND INCOME COMMERCIAL PROPERTIES

LICENSED REAL ESTATE BROKERS

5650 WEST THIRD STREET • LOS ANGELES 36, CALIFORNIA
(1 Block East of La Brea) WE 7-4111

April 14th, 1977

California Law Revision Commission
Stanford Law School
Stanford, CA. 94305

Gentlemen:

We would appreciate receiving a copy of the recommendation in connection with the Rules of Evidence Code.

We would also like to make a comment concerning the rights of the property owner to testify as to the value of the property even though not qualified as an expert.

In many instances, the owner may hear or know of a property in the same general area in which he lives, and which has been listed by a Broker for a certain price. Invariably, the owner feels that his property is worth more than the one which has been put up for sale, and consequently he pushes the valuation of his own property still higher. The property which has been listed for sale may be in another block which perhaps has more character, it may be on a corner, it may have certain features which make it more readily saleable, and in the sale price there may be personal property included, such as chandeliers, mirrors, stove and refrigerator, carpets and drapes, and finally the property may not be sold for the price at which it is listed, but the property owner testifying as to value does not know the actual price obtained. Such other matters as termite work, or the property being taken in an "as is" condition can sometimes apply, and play an important part in the ultimate price of a property.

It is important that when people testify as to value and give comparables, that they should only do so when they have personally inspected the interior of the house. The two houses may be identical in architecture on the outside, but the modernisation which has taken place on the inside of one of them may be considerable. Consequently, to all intents and purposes the property is sold for a higher price, and yet the party testifying as to the value of his property is not aware of

April 14th, 1977

California Law Revision Commission

the additional features in the other property which has been sold, and which so affect the value.

I trust that the above will assist you in arriving at some conclusion concerning the proposed changes in the valuation of property.

Very truly yours,
JOSEPH MILLER REALTY COMPANY

Joseph Miller

JM/jt

EXHIBIT 5

LAW OFFICES OF
KULLA & OWEN
926 J STREET
SUITE 408
SACRAMENTO, CALIFORNIA 95814

NORMAN KULLA
WILLIAM J. OWEN

TELEPHONE
(916) 441-3365

April 18, 1977

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Gentlemen:

Thank you for sending me your tentative recommendation relating to evidence of market value of property.

I favor the recommendations except insofar as they make inadmissible relevant comparable sales data.

Sincerely,

Norman Kulla

NK/do

EXHIBIT 6

C.S. REACH, FRICS, MAI, ASA
19006 Chase Street
Northridge, California 91324
(213) 885-6166

Fellow, Royal Institution of Chartered Surveyors

Member, American Institute of Real Estate Appraisers

Senior Member, American Society of Appraisers

Member, International Real Estate Federation

Licensed Real Estate Broker, California

Appraisals, Consultations Investments

May 9th, 1977

Law Revision Commission
School of Law
Stanford University
Ca 94305

Dear Sirs:

Evidence of Market Value of Property.

With reference to the Commission's recommendations I have the following comments:

Comparable Sales

The Commission recommends that wide discretion be given to the expert witness in the selection of sales.

I welcome this freedom given to the appraiser. However, I believe it should be made clear that there would be no restriction on the use of sales of land improved with buildings where it is necessary to demonstrate the value of vacant land. This would be especially true where there is a scarcity of easily comparable vacant land sales. Also it should be made clear that the appraiser may, in order to make the proper adjustment because of the existence of the improvements on the sale land, use his expertise to separate the price paid between land and buildings as indicated by the sale and consider the resultant price paid for the sale land in his estimate of the value of the subject vacant land. It should be proper for an expert witness to give an opinion as to the segregation of the price paid between land and buildings on a sale.

Capitalization of Income.

The Commission recommends that if the Court determines that there are no adequate market data, permission may be given to capitalize the reasonable net rental value of the land as improved with hypothetical buildings.

I recognize the right of an appraiser to use all known valuation techniques. However, this technique has been most subject to abuse in the past. It involves the capitalization of a hypothetical rent reserved in a hypo-

thetical lease of hypothetical premises constructed at a hypothetical cost for a hypothetical size, quality and design. Properly used it is a useful tool in the hands of competent and ethical appraisers, especially if carried out under the discipline of the market place and not merely in a hearing of value with no prospect of testing. The Commission's recommendation would provide court approval (although in a limited number of situations) to the use of this technique.

I would rather see the whole of the restrictions against the use of capitalization methods be removed from the Evidence Code than have court approval in some cases.

If the Commission's recommendation is enacted into law, however, I urge that procedures be set up so that either side knows well in advance of the trial date and even before final pre-trial, if the other is to seek the court's permission.

Sales to Agencies with the power of Eminent Domain

The blanket prohibition of the use of these sales is a needless hardship and cost to the taxpayers. Where it can be shown that the sale to the Agency was entirely or at least substantially voluntary and definitely with no threat of condemnation, it should be permitted to be introduced into evidence. Also where there are multiple acquisitions (say at least 10) and 51% of the owners have agreed to a settlement with the agency, then such settlements should be permitted to be introduced by either side.

Where there are awards made by a court (not reasonably subject to further review or appeal), these awards should be permitted to be introduced into evidence. However, stipulated awards or settlements should not be so introduced.

Exactions.

Where it is claimed that the land sought to be acquired, in whole or in part, is not serving its highest and best use and that it is reasonably probable that approval could be obtained for a change of zone, variance, conditional use, subdivision, lot split, building permit, coastal permit, agricultural exemption permit or any other procedure under the control of a state or local agency, then it should be incumbent upon the party claiming probable

approval, also to provide the court with a statement as to what conditions would probably be attached to such approval, including, but not limited to, required dedications of land and public improvements at the owner's cost.

I am, gentlemen,

Yours sincerely

C.S. Reach

C.S. Reach

EXHIBIT 7

LAW OFFICES OF
O'NEILL AND HUXTABLE
800 WEST FIRST STREET, SUITE 800
LOS ANGELES, CALIFORNIA 90012
TELEPHONE (213) 627-5017

FRANCIS H. O'NEILL
RICHARD L. HUXTABLE
LEROY A. ABELSON

May 12, 1977

California Law Revision Commission
School of Law
Stanford University
Stanford, CA 94305

Attention: John H. DeMoully, Executive Secretary

Re: Tentative Recommendation Relating to Evidence of Market Value of Property

Gentlemen:

I have received and reviewed your tentative recommendation relating to the rules of evidence in the valuation of property. In your commentary, you enumerate the areas in which statutory law would be helpful in property valuation. You fail to enumerate one such area as including mortgage deficiency litigation where a foreclosing mortgagor is entitled to recover such deficiency only to the extent that the indebtedness exceeds the market value of the property securing the debt, irrespective of the amount for which the property was sold at judicial sale. Although this form of litigation seldom occurs, when it does occur there are frequently hugh sums of money involved and virtually no evidentiary law to aid the Court at the time of trial.

Amendment of Evidence Code Section 813. I wholeheartedly agree that a designated officer, employee or partner should be entitled to testify on behalf of a corporate or partnership owner. My only question concerning this Amendment is the use of the qualification that such a person must be "knowledgeable as to the character and use of the property." I would suggest that the appropriate qualification should be that "such a person is shown to be instrumental in the purchase, use, or management of the property or property interest being valued or is otherwise knowledgeable as to the character and use of said property."

This additional qualification defines a foundational showing that would not require a partner or corporate officer or employee to possess qualifications of an expert in order to be "knowledgeable". In short, the attorney preparing for trial would be confident that his witness will be able to testify if he can show that he is or was instrumental in the purchase, use or management of the property in question.

Amendment of Evidence Code Section 816. I wholeheartedly agree that the trial Courts should be encouraged to be liberal in the exercise of discretion permitting sales into evidence and that such encouragement should not limit the Court's discretion in limiting the number of sales nor should it prejudice the right of cross-examination. I also believe that such encouragement should not affect the Court's right to exclude evidence under the provisions of Evidence Code Section 352 nor limit the Court's obligation to give appropriate instructions concerning the matter in which the Jury should consider such sales evidence. In short, I believe that provisos (3) and (4) should be added to new subsection (c), e.g.:"(3) the right of the Court to exclude evidence under Evidence Code Section 352, or (4) the obligation of the Court to give appropriate instructions to the Jury concerning the matter in which they may consider such sales evidence. "

Amendment of Evidence Code Section 819. Your proposed Amendment would permit consideration of the capitalized value of the reasonable net rental value that would be attributable to the land if the property were improved so that it could be used for the highest and best use. This concept seems to be addressed to the proposition that only unimproved land has a future. Frequently, an existing building may require substantial alteration or repair in order to adapt it to its highest and best use. Although I would not want to jeopardize whatever probability of adoption may exist, it is possible that subsection (b) should be modified to permit a consideration of "the capitalized value of the reasonable net rental value that would be attributable to the land or to the land and existing improvements, if the property were improved, or said existing improvements were modified, so that it could be used for its highest and best use. . ."

Amendment of Evidence Code Section 822. I note that you had failed to consider that subsection (b) continues to exclude any consideration of an offer to purchase the subject property even where that offer is shown to have been bona fide, in writing, and by a prospective purchaser who was ready, willing and able to buy the subject property. I have, on several occasions, found it virtually impossible to explain to a client that such a bona fide written offer cannot be received in evidence. If an owner can actually produce such a bona fide written offer for his property, it is very difficult to explain that such evidence is not admissible because the lawyers for public agencies are afraid that the people of California will fabricate such offers, commit perjury at time of trial, and that they, as lawyers, are incompetent to establish that the written offer was not bona fide. We have ample discovery procedures through which the attorneys for the public agencies will have weeks or even months of advance notice in which to investigate the proposed offer. I suggest that Section 822 (b) be amended to add, "; and nothing in this subdivision is intended to exclude testimony concerning, nor an opinion based in part upon a written bona fide offer to purchase the property or property interest being valued where it is shown that said offer was made by a person, firm, or corporation, ready, willing and able to buy said property or property interest at the time said offer was made."

Your proposed Amendment of Evidence Code Section 822 (g) may have unfortunate results. It is a common practice for two parties to agree to purchase and to sell a given piece of property at an agreed dollar value, but in a transaction in which the seller may require the purchaser to acquire and trade another property and that the seller who will be acquiring the trade property will receive cash to the extent that the trade property should cost less than the agreed value of the property being sold or will provide "boot" to the extent that additional capital is required to purchase the trade property. Such transactions are just as much open market transactions as any other sale where the agreed value of the property being sold is ascertained before the identity and purchase price of the trade property is known.

It is my personal opinion that the subject of whether a transaction involving a trade or exchange may be considered by the appraiser is one that should be left to case law and should not be fixed by statute.

My comments above are offered as suggestions concerning the manner in which an excellent proposal can be made better. I urge you to pursue and perfect the proposal and to offer it as legislation.

Thank you for this opportunity to comment.

Sincerely,

RICHARD L. HUXTABLE

RLH/lar

EXHIBIT 8

COUNTY OF LOS ANGELES
OFFICE OF THE COUNTY COUNSEL
648 HALL OF ADMINISTRATION
LOS ANGELES, CALIFORNIA 90012
974-1909

JOHN H. LARSON, COUNTY COUNSEL

May 25, 1977

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Re: Tentative Recommendation relating to
Evidence of Market Value of Property

Gentlemen:

We fully endorse your efforts to revise the Evidence Code Valuation Sections to apply uniformly wherever the value of property is in issue.

There is at least one area where uniformity will not be achieved unless other changes are made. Your proposed 816(c) provides for great liberality by the expert witness in the selection of sales. However, in determining property value for real property taxation any sale more than 90 days after the lien date is not "near in time." (Revenue and Taxation Code Section 402.5) It is our recommendation that Revenue and Taxation Code be amended to delete this unduly restrictive time limitation. It has been our experience that important sales data has been denied admissibility sometimes because of a few days.

It is our view that proposed Section 819(b) should be deleted. As you have noted, the hypothetical building approach to valuation is a recognized technique, but it is far from reliable. We have attached as an exhibit a demonstration of the unreliability of this approach. We have assumed that no vacant land sales are available in close proximity to the subject property. We have followed the steps outlined in The Valuation of Real Estate, A. Ring (2d ed. 1970) set out at page 285 et seq.

In the attached example we have assumed as a hypothetical improvement a small take out restaurant that would cost $120,000 including accessory improvements (paving etc.). The assumed gross income and expenses per square foot are also set forth in steps 2 and 3. The building charges and miscellaneous charges are set forth in steps 5 and 6. In steps 7 and 8 the net income attributable to land is processed into a land value conclusion of slightly over $21,100.

Under Condition I the same basic assumptions are made except that assumptions are made in steps 1, 2, 3, 5 and 6 that would tend to increase the residual land value. These changes are a mere 10% from our original assumptions. The 10% figure was used for ease of computation and supported as a typical difference in opinion. (In practice appraisers assumptions and conclusions frequently vary by a much greater percentage.) The resulting residual land value under Condition I is $112,500, over five times greater than the value indication under our originally assumed facts.

Under Condition II the process is repeated except that assumptions in steps 1, 2, 3, 5 and 6 are varied by 10% from the original in a manner which would tend to decrease the original land residual conclusion. In final application the resulting land value is a negative $56,900, an absurdity. The actual dollar difference would be greater with a positive net income to land because of the higher interest and recapture rates.

We invite you to follow the same process using figures of your own. The result will invariably reflect a wide value difference between Condition I and Condition II, particularly where the assumed land value is relatively low.

Since appraising is, to a great degree, a question of judgment we believe that the sanctioning of the hypothetical building value technique will result in a wide disparity of value with little support other than judgment.

It is our view that the appraisal of properties with limited market data can reliably be made under existing law without resorting to the hypothetical building approach to value. Land lease comparables can provide a very helpful and reliable basis for value subject only to the leverage impact of interest rate selection rather than the multiple leverage impact of the hypothetical building approach to value. Consistent with the philosophy of proposed section 816(c) the appraiser could utilize market data, as they do now, a little less desirable in terms of time and/or distance or other factors of comparability with greater reliability than the hypothetical building value approach.

Very truly yours,

JOHN H. LARSON
County Counsel

By Dennis M. Devitt
DENNIS M. DEVITT
Deputy County Counsel

DMD:map

HYPOTHETICAL BUILDING

ASSUMED FACT	CALCULATION	10% CHANGE, HIGHER VALUE CONDITION I	10% CHANGE - LOWER VALUE CONDITION II
1.) BUILD 2000 SQ. FT. RESTAURANT FOR $60 PER SQ. FT.	$60 X 2000 = $120000	$54 X 2000 = $108000	$66 X 2000 = $132000
2.) ANNUAL GROSS INCOME $15 PER SQ. FT.	$15 X 2000 = $30000	$16.50 X 2000 = $33000	$13.50 X 2000 = $27000
3.) ANNUAL EXPENSES $6 PER SQ. FT.	$6 X 2000 = $12000	$5.40 X 2000 = $10800	$6.60 X 2000 = $13200
4.) NET INCOME	$30000 - $12000 = $18000	$33000 - $10800 = $22200	$27000 - $13200 = $13800
5.) BUILDING CHARGE (ASSUMES 25 YEAR LIFE) INTEREST 9.0 %, RECAPTURE 4.0 %, 13.0 TOTAL	$120000 (COST) X 13 % = $15600	$108000 (COST) X 11.7 % (8.1 % INTEREST + 3.6 % RECAPTURE) = $12640	$132000 (COST) X 14.32 % (9.9 % INTEREST + 4.4 % RECAPTURE) = $18880
6.) MISC. DEVELOPEMENT COSTS AT $500	500	450	550
7.) NET INCOME TO THE LAND AFTER BUILDING CHARGE AND MISC. DEVELOPEMENT	$18000 - 15600 - 500 = $1900	$22200 - 12640 - 450 = $9110	$13800 - 18800 - 550 = -5630 (NEGATIVE FIGURE)
8.) LAND VALUE (NET INCOME ÷ INTEREST)	$1900 ÷ .09 = $21,100	$9110 ÷ .081 = $112,500	$-5630 ÷ .099 = -$56900 (NEGATIVE FIGURE)

COUNTY OF LOS ANGELES
OFFICE OF THE COUNTY COUNSEL
648 HALL OF ADMINISTRATION
LOS ANGELES, CALIFORNIA 90012

JOHN H. LARSON, COUNTY COUNSEL
DONALD K. BYRNE, CHIEF DEPUTY

June 1, 1977 974-1876

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Attn: Nathaniel Sterling
Assistant Executive Secretary

Re: Proposed Change in Evidence Code on Market Value on Property

Gentlemen:

This letter is directed to your proposed recommendations to:

1. Liberalize the introduction of comparable sales into evidence - Evidence Code Section 816;

2. Permit the capitalization of rental income based as if the property were improved to its highest and best use - Evidence Code Section 819.

Our experience in this office is limited to eminent domain trials in Los Angeles County only. Last year our Property Division, which handles all inverse and eminent domain cases in the Los Angeles County Counsel's office, was involved in 20 trials, 13 of which were jury trials. Our experience has been over the last few years a rather liberal attitude by most trial judges on the admissibility of sales and other evidence in an eminent domain - inverse condemnation case. We believe that the evidence rules instead of being amended to provide for a more liberal admission of sales should instead be amended to encourage a trial judge to exercise his discretion in preventing sales and other evidence from coming into evidence, (irrespective of which side offers the evidence) if said evidence

contributes little, if anything, for a jury to determine the value of property. In other words, a judge should be permitted to be just that, a "judge" of the relevant evidence which sheds light on the value of the subject property under consideration. If the sale or evidence does not shed light on the value of the subject property, then the trial judge should be encouraged to exclude such evidence rather than your proposal which encourages the admission of doubtful evidence. The trial judge and not the "expert witness" should determine what evidence will go to a jury.

As to the capitalization of income, it has always been an approach to value that has built within it the makings of a wide disparity in value for small differences in any one of the steps essential in the approach. This fact is recognized by any appraisal handbook one studies with respect to the income approach and is probably one of the reasons our California Courts have consistently rejected the income approach use on unimproved land. People v. Johnson, (1962) 203 C.A. 2d 712. The American Institute of Real Estate Handbook entitled "The Appraisal of Real Estate", 3rd edition states at page 71:

> "Selecting the capitalization rate is one of the most important steps in the income approach. A variation of only one half of one percent can make a difference of many thousands of dollars in the capitalized value of the income. The difference between an annual income of $27,500 capitalized at 5% and 5 1/2% is $50,000."

It is noted that your proposed amendment of Evidence Code Section 819 would permit the capitalization of income on vacant or unimproved land if there is no other market to measure value. We believe it pertinent that you should note the comments of an appraiser that is recognized and respected by all appraisers, namely George L. Schmutz who stated of the income approach in his "Condemnation Appraisal Handbook" at page 56:

> "It is needful to remark here, however, that although the process is possessed of a wide range of usefulness in the appraisal of properly and adequately improved properties, its use is highly dangerous in the appraisal of inadequately improved properties or properties that can be renovated and sold at a profit."

Dennis M. Devitt, Deputy County Counsel has already prepared and sent to you a letter with an attached chart which demonstrates the wide chasm that can result in "value" emanating from only a 10% disparity on each of the various steps essential in an income approach. The application of the income approach as a method of valuing unimproved and/or underimproved properties is an invitation to permit speculation in the courtroom. The logic of valuing unimproved property as if a building was on the property was recently questioned by the Court of Appeal in a marriage dissolution case which involved the value of unimproved land. In re marriage Folb, 53 C.A. 3rd 862 with the Court saying at page 870:

> "But we know of no legal principle which would permit a finding of market value of unimproved land on the date of value as if it were already in the improved state contemplated. Nor does reason or logic support husband's position. As of June 1963, the question of whether Highland would be transformed into a vastly more valuable improved office building property several years later - considering all the possible expense-producing and other obstacles that might be encountered - was one of <u>sheer speculation</u>." [emphasis ours].

Gentlemen, we believe the rules of evidence in eminent domain are liberal enough now to permit and allow good appraisers the evidence necessary to appraise any type of property in this great state of ours. Please, leave the judge some leeway to "judge" the evidence and leave speculation out of the determination of the value of property.

We strongly recommend you delete the proposed amendments you have set forth for Evidence Code Sections 816 and 819.

Very truly yours,

JOHN H. LARSON
County Counsel

By S. Robert Ambrose
S. ROBERT AMBROSE
Principal Deputy
County Counsel

SRA:va

cc: State of California
Joseph Montoya
County of San Diego
William C. George
City of Los Angeles
Norman Robert
Roger Weisman
League of California Cities
William Kiaser
[Enclosed is a copy of Dennis M. Devitt's letter and attachment]

Memorandum 77-52 #63.70

EXHIBIT 9

RUTAN & TUCKER

ATTORNEYS AT LAW

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IN REPLY PLEASE REFER TO

May 24, 1977

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Tentative Recommendation relating to
Evidence of Market Value of Property

Gentlemen:

In accordance with your request I submit the following comments concerning the above referenced matter:

1. Proposed Evidence Code Sections 810, 811, 812, 813 and 815 are commendable and carry out in effect as a matter of law what a great number of courts do as a matter of fact.

2. Although I understand the intent of Evidence Code 816, it appears to me that Section (c) proposed to be added to that code section will greatly lengthen eminent domain and other trials respecting value, particularly where a jury is involved. I believe it will be almost impossible to get a court to strike a proposed sale if this section is amended in the manner proposed. In the hands of trial judges paragraph (b) will become almost meaningless. I can foresee that the time that will be consumed in cross-examination will markedly extend all trials. In addition, particularly in jury trials, once the jury is informed of sales that only marginally relate to the subject, it is extremely difficult through cross-examination or argument to unring the bell. This proposed amendment simply opens the door for the imagination of so-called experts to parade extremely high or low numbers before a jury, and the chances of unnecessary time consumption and prejudice would be greatly enhanced.

3. I have no objection to proposed Evidence Code Section 817.

4. The proposed amendment to Evidence Code Section 819 opens the door to the most rank sort of speculation. If a party were able to confince the court that the requirements were met for the use of 819(b) this would open the door for that party to present pretty pictures of some hypothetical development on the subject property and determine the rental values of that development. Then the costs of the development would be determined and an applicable amortization of those costs subtracted from that rent to arrive at a hypothetical rent for the land alone. Speculation is built upon speculation in this type of analysis, and those of us who have tried a number of eminent domain cases have seen attorneys attempt this procedure. Some of the fallacies of the procedure are that the rental value of the entire project when built only occurs after a period of time and is the product of a number of factors which are never programed into the formula. That is, the rental stream which flows from a completed development has to include a return to the developer for a profit on each item that goes into the formula together with entrepreneurship combined with an income stream which will pay back the developer for the investments that were placed into the development during the time that it took the developer to put the project together. How this can be brought home to a jury and the dream separated from the real world is as a practical matter impossible.

If the Commission is still committed to go ahead with this kind of proposal, it should certainly add a proviso that the highest and best use for which the property is reasonably adaptable and available must be a use which the court predetermines will take place within the reasonably near future. In a recent case that I was involved in an appraiser attempted this type of an analysis when the highest and best use for which the hypothetical improvements would be constructed would not occur for some 15 years in the future. Fortunately, the court refused to let this type of rank speculation get before the jury.

It is true, as you point out, that some authors of appraisal works have discussed this type of analysis as an appropriate means of valuing property, but they have not discussed it in terms of presenting it to a lay jury in an adversary proceedings. What may be informative and useful to a sophisticated real estate developer can become highly prejudicial and confusing to house wifes and retired people on a jury. Also, we have to be careful not to lengthen such trials through the introduction of such uncontrolled and highly speculative testimony, in light of the judicial load of the courts.

5. Evidence Code Section 822, as proposed to be amended in regard to testimony relating to taxes, is highly desirable, as well as the proposed amendment to Revenue & Taxation Code Section 4986. I have mixed feelings about proposed Evidence Code Section 822(g). Obviously this sort of information relating to trades is excluded because it is too sophisticated for juries to understand and would be confusing, time consuming and prejudicial. I wonder in light of some of the other changes that you suggest above whether 822(g) could be justified, since you are assuming that juries are extremely sophisticated if you are going to subject them to an analysis of income streams from hypothetical improvements, for example. I believe that a transaction involving a trade or exchange should be admissible if certain safeguards are included to prevent the jury from having to be sophisticated in order to understand that transaction. I believe a provision could be added that such transactions are admissible provided that the court determines in advance of any testimony before a jury relating to these exchanges that the parties to the transaction had agreed as to the value of the properties being exchanged. If, for example, the parties agreed that property A was worth $100,000 and that an additional $50,000 in cash was being paid, and that the property plus the cash was being exchanged for property B, then both parties to the transaction have obviously agreed that property B has a value of $150,000. If this were shown to the court's satisfaction, then this type of transaction should be admitted. Another provision could be added that these types of transactions would not be utilized unless the court determined that there was no other adequate market data as described in Section 816 upon which an opinion as to value could be founded if an additional safeguard was desired.

It should be pointed out that although your note to this section states that subdivision (d) of Evidence Code 822 does not prohibit a witness from testifying to adjustments made in sales, some appellate cases in California have arrived at contrary opinions, and those cases were not expressly overruled in Merced. As a result there is a confusion among appraisers and trial courts relating to this issue. I have pointed out the rule of Merced to some trial judges with mixed results. They have wondered whether the statements in Merced were applicable only to the facts of that case or dicta. I would suggest that the following language be added to 822(d): ". . ., but nothing in this subdivision prohibits a witness from testifying to adjustments made in sales of comparable property used as a basis for his opinion." One of the principal problems with 822(d) involves

the question of whether an appraiser can compare improved property to vacant property. The typical appraisal method utilized has been for the appraiser to arrive at the residual land value of the improved land and compare it to vacant land. Some courts believe, however, that this is prohibited under 822(d). Obviously, an amendment could be structured so as to resolve this question and allow such an appraisal method to be utilized in making an adjustment to an improved sale to arrive at a residual land value.

I hope these comments are useful to the Commission.

Sincerely,

RUTAN & TUCKER

Homer L. McCormick, Jr.

HLM:ehe

Memorandum 77-52

#63.70

EXHIBIT 10

CITY OF OAKLAND

CITY HALL · 14TH AND WASHINGTON STREETS · OAKLAND, CALIFORNIA 94612

Office of the City Attorney
David A. Self
City Attorney

May 26, 1977

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Tentative Recommendation Relating to
Evidence of Market Value of Property

Dear Commissioners:

In reviewing your tentative recommendations on changes in the Evidence Code relating to the market value of property, the following comments are submitted:

The proposed amendment to Section 813(a)(3) states that "An officer, employee, or partner designated by . . ." may testify as to value if such person is knowledgeable as to the character and use of the property. My concern is to the appropriateness of permitting an "employee" to so testify. By logical extension, if an employee of a partnership is permitted to testify, why not an employee of a single individual? Also, the language raises the question whether a partnership as used in that section would include a husband and wife owning property or other persons as long as there were at least two owners. Also, since a partner is already an owner, there would seem no need to further state that the partner may testify as to value.

The proposed amendment to Section 819(b) would permit an expert witness to testify as to the capitalized value of the reasonable net rental value that would be attributable to the land if the property were improved so that it could be used for the highest and best use for which it is reasonably adaptable and available if two specified requirements are met. The difficulty with this amendment is that it will create more confusion than it may possibly cure. By the time an appraiser finishes testifying to the value of a hypothetical "fifty-story skyscraper" on some property that now has a two-story frame store, then showing how much the land is worth based on the rental from a fifty-story

skyscraper, it will take a most exceptional jury to understand what is happening. The matter would be too speculative. Any attorney who works for a public agency any length of time sees many actual building plans proposed which never come to fruition except as would now be permitted in the testimony of an appraiser. To attempt to determine land value based on such hypothesis would consume an extensive amount of time without sufficient benefit to the jury. We believe that appraisers at present have sufficient methods to determine value without the addition of another method of doubtful benefit.

Very truly yours,

DAVID A. SELF
City Attorney

By: Ralph R. Kuchler
Ralph R. Kuchler
Assistant City Attorney

RRK:am

EXHIBIT 11

STATE OF CALIFORNIA—BUSINESS AND TRANSPORTATION AGENCY EDMUND G. BROWN JR., Governor

DEPARTMENT OF TRANSPORTATION
LEGAL DIVISION
369 PINE STREET, SAN FRANCISCO 94104
(415) 982-3130

MAY 2 7 1977

California Law Revision Commission
School of Law
Stanford University
Stanford, CA 94305

Re: Tentative Recommendation Relating to Evidence of Market Value of Property

Dear Commissioners:

The Legal Division of the California Department of Transportation has analyzed the above proposal and makes the following comments thereon.

Proposed Section 813(a)(2) and Section 813(a)(3):

The owner of a lesser interest in the property should only be allowed to testify to the value of that interest where otherwise admissible; not the value of the entire property. While he can appropriately be presumed to have special knowledge of the value of his particular interest in the property, this presumption is not appropriate if extended to the entire sum of interests in the property.

The pernicious effect of the present provision in proposed subsection (a)(2) is heightened when taken together with the provision of subsection (2)(3) which would allow any officer, employee or partner designated by the owner of a lesser interest (if such owner is a corporation, partnership or unincorporated association) to testify to the value of the entire property without demonstrating any particular knowledge as to the value of the interest owned, much less the value of the entire property. Is the owner of each lease in a shopping center going to be permitted to testify as to the value of the entire shopping center? The effect on length of trial threatened by this proposal is obvious.

We further believe that while such agents of corporate and other associate owners can offer appropriate testimony as to use, character and operations of property, if knowledgeable thereto, as foundational matter to be considered by expert valuation witnesses, they should not be granted a presumption of knowledge of value of the property or interest therein.

To permit them to testify to value would be to permit time-consuming, confusing and unreliable evidence to go before juries and is not in the interest of judicial economy. The law provides the trial judge with broad discretion in allowing persons with special knowledge to testify to opinion on such matters. This proposal would eliminate that discretion.

Proposed Section 816(c):

We feel this provision is unnecessary in view of the judicially-developed standard that a trial court may in proper exercise of its discretion admit any sale as comparable which tends to "shed light" on the market value of the property. County of San Luis Obispo v. Bailey, 4 Cal.3d 518, 523 (Cal. Supreme Ct. 1971).

In subdivision (b) of Section 816, the Legislature has set out the factors which the Court must weigh in determining whether or not a sale is to be considered as comparable. Largely these factors were developed by the judiciary prior to codification of the Evidence Code. By proposed subsection (c), the Commission is inviting the Legislature to invade the particularly judicial province of how to exercise judicial discretion in applying the factors set forth in subsection (b). This is inappropriate. The issue cannot be evaded as attempted in the comment which implies it is the appraiser's discretion which is being addressed and not that of the judiciary. Plainly, it is the judiciary's discretion which is sought to be controlled by proposed Section 816(c).

Proposed Section 819(b):

The Department's Legal Division strongly opposes the proposed addition of subsection (b) to Evidence Code Section 819. At page 7 of the study it is implied this provision is needed because there may be no adequate market data upon which an opinion as to value of property may be based and that this is " . . . particularly true in case of special use or purpose property." This is a non sequitur. Property does not become special use property until it is developed to such special highest and best use. What proposed subdivision (b) deals with is land not yet improved to the highest and best use contended for by the owner's appraiser and for which no comparable market data is alleged to be available. The general view of the courts has been that the very lack of market activity in the area reflecting value for such contended for highest and best use is a significant indicator that such proposed use of the property is highly speculative or, at least, does not reflect a higher value being paid for undeveloped land. Proposed subdivision (b) would turn such lack of

comparable data from a disadvantage to the owner's case for speculative values into an advantageous springboard, allowing him to enter into the realm of imagination limited only by the ingenuity of his expert appraiser. The Department's experience has been that there are very few, if any, valid cases of lack of comparable market data reflecting purchases for a contended highest and best use which is real and nonspeculative.

While the study (on page 7) indicates that proposed subsection (b) provides only a "limited exception" to the general rule of Evidence Code Section 819, the limitations provided for in subsections (1) and (2) of said proposed subsection (b) are largely illusory. In reality, all that is required to walk through the looking glass into the realm of imagination is that an appraiser contends that he cannot find adequate market data reflecting the highest and best use he imagines for the property. If the trial judge accepts this premise, then the appraiser is permitted to build a value limited only by his imaginative ingenuity. As well stated in a leading case on the subject, where there was not even any dispute as to the highest and best use of the property, the final value based on such a structure will seldom have any relation to reality:

> "'In this case, the property involved is unimproved land. It is true that its highest and best use is for a shopping center. Nevertheless, there is no shopping center there today. In arriving at their values, the experts for defendant constructed and operated an imaginary shopping center; they capitalized the imaginary rents from imaginary buildings to be constructed hereafter at imaginary prices to be determined after the submission of imaginary bids, based on imaginary specifications, not yet drawn. Even the imaginary rents to be derived therefrom were calculated for the greater part on the basis of a percentage of imaginary gross business to be done in this imaginary shopping center, under imaginary, unknown economic conditions. In expropriation proceedings, no compensation is awarded for business losses, even though the business is in actual operation at the time of the expropriation proceedings. No compensation is awarded for the loss of actual rents based on a percentage of actual business being done. Still less can

> compensation be awarded for speculative and imaginary business losses. The only compensation that this court can award is the actual market value of the land taken in the condition in which it is today and not as it will be hereafter in a promoter's dream". State v. H.U.B. Realty Co., 118 So.2d 364, 369 (L.A. Supreme Ct. 1960).

This case is cited with approval in People v. Johnson, 203 Cal.App.2d 712, 717. In the Johnson case it was held that the trial court committed prejudicial error in permitting an architect-planning consultant to testify to an economic feasibility study whereby he purported to show the dollar value a purchasor could afford to pay for land after a specific improvement designed by him was built and commercially operating upon it. In holding that the admission of evidence of a specific dollar value for the land for a specific project was error requiring a reversal, the court says beginning at page 716:

> "The rule and the reasons therefore are clearly stated in the leading case, Sacramento etc. R. R. Co. v. Heilbron, 156 Cal.408, 412 [104 P. 979], as follows: ' . . . this court by its latest utterances has definitively aligned itself with the great majority of the courts in holding that damages must be measured by the market value of the land at the time it is taken, that the test is not the value for a special purpose, but the fair market value of the land in view of all the purposes to which it is naturally adapted; that therefore while evidence that it is "valuable" for this or that or another purpose may always be given and should be freely received, the value in terms of money, the price, which one or another witness may think the land would bring for this or that or the other specific purpose is not admissible as an element in determining that market value. For such evidence opens wide the door to unlimited vagaries and speculations concerning problematical prices which might under possible contingencies be paid for the land, and distracts the mind of the jury from the single question--that of market value--the highest sum which the property is worth to persons generally, purchasing in the open market in consideration of the land's adaptability for any proven use.'

"The Heilbron rule has been followed in the later cases. In Oakland v. Pacific Coast Lumber etc. Co., 171 Cal. 392 [153 P. 705], the court said (pp. 399-400): 'Appellant "takes exception" to the language of this court in the Heilbron case to the effect that the value in terms of money which a witness might think the lands would have for some speculative use to which it was not put, and to which it might never be put, was not legitimate evidence. In the Heilbron case this court was not dealing with the question of the value of land as evidenced by a present use, but solely with the problematical values [emphasis ours] sought by the witnesses to be put upon the land for problematical uses [emphasis ours]. If the exception to the exclusion of this kind of evidence is well taken, then it would be quite permissible for the witnesses to say, "if oil were discovered upon the land it would be worth twenty thousand dollars an acre", "if a gold mine were discovered upon it it would be worth ten thousand dollars an acre", "if a man wanted to buy it and establish a town site it would be worth three thousand dollars an acre", and so on, until such inquiry in a condemnation suit would bear a close affinity to Lord Dundreary's famous question, "If you had a brother would he like cheese?"'

"In Long Beach City High School Dist. v. Stewart, 30 Cal.2d 763 [185 P.2d 585, 173 A.L.R. 249], a witness in the condemnation proceeding was being interrogated concerning the value of the land 'for an industrial purpose'. The Supreme Court held "[s]uch evidence was clearly inadmissible." (P. 771.)

"That evidence of value, based upon a specific use or upon an owner's projected plan, is not admissible, see also Laguna Salada etc. Dist. v. Pacific Dev. Co., 119 Cal.App.2d 470, 476 [259 P.2d 498]; East Bay Mun. Utility Dist. V. Kieffer, 99 Cal. App. 240, 250-251 [278 P. 476, 279 P. 178]; City of Stockton v. Vote, 76 Cal.App. 369, 402-403 [244 P. 609]. For an out of state case in point, see State of Louisiana v. Hub Realty Co. (1960) 239 La. 154 [118 So.2d 364, 369].

MAY 27 1977

"[1b] We believe the error committed here in permitting Badgley to testify as to the speculative value of $728,000 was prejudicial."

The above statements from California cases and cases from other jurisdictions emphasize the misuse to which this approach to value is susceptible if allowed in eminent domain litigation. While we are not familiar with the publication of A. Ring, "The Valuation of Real Estate", relied upon in footnote 27, page 7 of the study and in the comment to proposed Section 819(b), we feel confident in stating that this method of valuation is not a standard technique in the valuation of inimproved or underimproved property in condemnation actions in the United States. "The capitalization of hypothetical income method of valuation has generally been rejected by the courts." 4 Nichols on Eminent Domain (Revised 3d Edition) §12.3121[3], page 162. (Emphasis added). See also: City of Chicago v. Provus (Ill. 1953) 114 N.E.2d 793, 795; Greenfield v. City of Philadelphia, 127 A. 768, 772; City of Chicago v. Giedraitis, 150 N.E.2d 577, 580; L'Etoile v Director of Public Works (R.I.) 153 A.2d 173, 177; Port of New York Authority v. Howell, 173 A.2d 310, 314. It should be noted that in many of these cases, the owner sought to justi the capitalization of hypothetical improvements to arrive at th value of the land on the basis that there was no adequate marke data to reflect the value of the land for the highest and best use contended for.

The use of the hypothetical income approach by those sophisticat in valuation techniques is always utilized as one of many check in arriving at a range of figures to be weighed by an expert in arriving at an informed opinion on various valuation figures which may or may not be related to fair market value as define in eminent domain procedures. It is generally restricted to actually improved property where the improvements have not greatly depreciated. See "The Appraisal of Real Estate", Sixth Edition, 1973, by the American Institute of Real Estate Appraisers, pp. 381-385. Proposed subdivision (b) and its supporting comments suggest that this method of valuation of hypothetical improvements is the one single approved method of arriving at fair market value of undeveloped land where there allegedly are not comparable sales reflecting its contended for most valuable use. Not only is the technique the sole one presented, but its simplistic exposition in the comment would overcompensate the owner and thereby encourage owners to seek its use in eminent domain proceedings. Accordir to the comment, based on Ring, one would simply apportion the net income imagined to be derived from the hypothetical improve ment between the imagined improvement and the land and capitali that amount apportioned to the land. No mention is made of entrepreneur's profit and risk which is never reflected in the fair market value of unimproved or undeveloped land before development.

> "In applying this technique [the land residual technique] the residual income to the land may, in fact, be imputable not only to the land, but also to entrepreneurial increment or developer's profit. Care must be taken that the portion of the net income assigned to these items is not capitalized into an indication of added residual land value." The Appraisal of Real Estate, supra, at p. 391.

Juries will either be unaware that the residual attributable to the land by the property owner's appraisal reflects return for entrepreneur's risk, profit and carrying charges which should not be attributable to the value of the land before its development or will improperly compensate the owner for values reflecting such income flows on the basis of lost expectancies of the owner because the land is being taken from him by the agency. Thus, the owner who can successfully persuade the trial court to allow the theory of valuation suggested in proposed subdivision (b) and the comment thereto would generally receive greater compensation than the owner who relies on comparable sales or other reliable methods of arriving at the fair market value of the land in its unimproved or undeveloped condition.

In addition to its potential for causing verdicts reflecting speculative and imaginary values, proposed subsection (b) presents severe procedural problems and questions unaddressed in the study or the comment. In requiring the court to make t preliminary finding that there are no comparable sales reflect ing the highest and best use for which the property is reasona adaptable and available, proposed subsection (b) is requiring judicial determinations of a preliminary fact normally solely for the jury to determine in eminent domain cases, i.e., what is the highest and best use for which the property is reasonab adaptable and available? The requirement of this preliminary finding brings into play Sections 401-403 of the Evidence Code. Questions that remain unanalyzed in the study and the comment to the proposal and, hence, unanswered are:

1. Is the question of highest and best use taken away from the jury by preliminary finding of the court pursuan to the matters required to be found by the court in subsection (1) and (2) to subsection (b) of proposed §819?

2. After the court has made such preliminary determinations, can the condemnor still contend for a differen highest and best use than covered by the court's finding and introduce the comparable sales data reflecting such use; or

3. Does the court's finding force the condemnor to value the land on the basis of the highest and best use for which the property is reasonably adaptable and available as included in the court's finding under subsections (1) and (2) and, hence, force the condemnor into the same capitalization of imaginary improvements as utilized by the owner's appraiser?

If the latter is the case, then the right to jury trial on valuation in cases dealing with differences in contended for highest and best use of unimproved or undeveloped property is severely fractured, if not destroyed, by the proposal.

For all the above reasons, we feel quite strongly that the final recommendation to the Legislature on revisions to the Evidence Code as relating to eminent domain should delete the proposed addition of subsection (b) to Section 819.

As always, we appreciate the opportunity of presenting our comments to the tentative proposals of the Law Revision Commission in the field of eminent domain law.

Very truly yours,

Harry S. Fenton

HARRY S. FENTON
Chief Counsel

Memorandum 77-52

#63.70

EXHIBIT 12

WANDA UNDERHILL
2079 Market Street, No. 27
San Francisco, California 94114

To: Calif. Law Revision Commission May 30, 1977
From: Wanda Underhill
Re: Comments relating to evidence of Market Value of property —

Letter of Transmittal - statement of legislative purpose - to revise and extend the code ...

Is it the intent of the Commission to recommend the inclusion of "intangible personal property"? line 4

There is a need for uniform standards and a single set of rules.

Page 4 ¶ 1, line 4 - tangible or intangible or both?

typos -

Cross Ref. P. 13 ¶ 4 "intangible personal property. For uniformity and clarity in the application of the law, would it be possible to cover real property, tangible personal property and intangible personal property with uniform standards and one set of rules in one place in the code?

There is continual use in the Recommendation of the phrase "opinion by an expert witness."

An expert might introduce facts, data, and tangible evidence which is more than opinion.

How would valuations based on highest or best use be applied uniformly to tangible and intangible personal property?

Page 8, line 4 — "date" Should be data.

P. 14 § 813 (a) Is "only" necessary?

The value of property may be shown ... by —

P. 17 ¶2 - Positive rather than negative language.

The existence of project enhancement or blight on comparable sales ~~shall~~ may ~~have~~ not affect their relevance under this section. ...

How will the highest and best use ultimately be determined? What about acts of nature, water supply etc.? If property has a windmill on the roof, will it effect market valuation?

P. 21 (5)

This commentator does not think traded property should be inadmissable. In fairness it should be admitted, but it need not be given the same weight as actual sales.

P. 21. Comment - why shouldn't it apply in tax assessment cases.

If case law permits testimony regarding sales, then the statute should be consistent.

Wanda Underhill

EXHIBIT 13

The Metropolitan Water District of Southern California

Office of General Counsel

May 31, 1977

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Tentative Recommendation Relating to
Evidence of Market Value of Property

Gentlemen:

We approve of your basic recommendation that there be uniformity in property valuation in judicial proceedings and that the provisions of the Evidence Code relating to market value in condemnation and inverse condemnation cases be made applicable to all proceedings involving property valuation. However, we object to two of the revisions to the code which you propose. They are the changes you recommend in Evidence Code Sections 816 and 819.

In our opinion, proposed Evidence Code Section 816(c) would, as a practical matter, nullify the salutary effect of subdivision (b). With the mandate of subdivision (c) that "The provisions of this section be liberally construed...", it is difficult to believe that any court would disallow the introduction into evidence of any comparable sale used by any witness who has been qualified to testify as to market value as an expert. It has been our experience that under the present law, judges have construed "comparability" liberally, and we fear that if the code is revised as proposed, there will no longer be any judicial check.

We feel that the proposed change in Evidence Code Section 819 would permit highly speculative opinions of market value. It would be extremely difficult for a court to "restrict" the recommended extension of the capitalization approach to valua-

tion to "appropriate cases", as contemplated by the Commission, when an expert testifies that the requirements of subdivisions (a) and (b) have been met so as to make such evidence admissible.

Very truly yours,

Robert P. Will
General Counsel

John B. Read
Deputy General Counsel

EXHIBIT 14

OFFICE OF
CITY ATTORNEY
CITY HALL EAST
LOS ANGELES, CALIFORNIA 90012

BURT PINES
CITY ATTORNEY

June 8, 1977

California Law Revision Commission
Stanford Law School
Stanford, California 94305

re: Comments Re Tentative Recommendation Relating to Evidence of Market Value of Property

Honorable Members:

The following are the comments of the undersigned relating to the subject "tentative recommendation."

My comments are as follows:

There appears to be no reason why the rule relating to determination of real property valuation in eminent domain should not apply to real property valuation when other issues are involved. Therefore, the changes in Sections 810 and 811 appear to be desirable.

We question the use of the words "'market value' or its equivalent" in Section 811. Your comments make it clear that you are speaking of other words which are used to describe "value of property." Perhaps that would be a better phrase. I would suggest that the section read "This article is not intended to alter or change the existing substantive law, whether statutory or decisional relating to the determination of the value of property, whether denominated 'market value', 'market price', 'actual value', or similar term."

Section 813 as it now reads and as it is proposed to be amended is a strange section. Subsection (a) (2) and (3) purports to allow a person to testify as an

"expert witness" because He is an owner even though he has no knowledge of the subject of his testimony, but because he falls within a particular category of "owner." Prior to Section 813 becoming effective, the courts prohibited an "ignorant" owner from testifying. (See Layne vs. Malmgren, 99 Cal.App.742, 745 (1929). An owner is generally permitted to testify as to value because such owners generally have some familiarity with property values in the neighborhood of their property. But a person who did not have such knowledge was not permitted to testify.

Therefore, I would suggest that a qualification be inserted in Section 813 to allow a court to reject the testimony of an owner who is not familiar with property values. Perhaps, the owner's testimony should be permitted unless the opposing party establishes, by voir dire or otherwise, that the prospective witness does not have adequate knowledge to express an opinion of value.

Similarly, a corporate officer or employee should have knowledge of the value of the property under consideration. It is not merely enough to have knowledge of the "character and use of the property."

I believe the staff is incorrect insofar as it states in the text of the recommendation that the owner of a lesser interest than a fee may "find it necessary to testify to the value of the entire property." (See page 5 of "Tentative Recommendation") To the contrary, Section 1260.220(b) of the Code of Civil Procedure provides that:

> "Nothing in this subdivision limits the right of a defendant to present during the first stage of the proceeding evidence of the value of, or injury to, his interest in the property."

I believe it is not necessary and not desirable that a lessee be permitted to testify as to the value of a property in which he has only a small interest, and when he has no special knowledge of the property value. In such case, and if he is knowledgeable as to value, he should be permitted to testify as to the value of his leasehold estate.

Therefore, Section 813 should not be broadened to the extent proposed in the tentative recommendation.

Though we are in agreement that the "comparable sales" which an appraiser may utilize in reaching his opinion of value should not be unduly restricted, we are not in agreement with the term "wide discretion in the selection of comparable sales" proposed for insertion in Section 816. Though such sales are intended to be only the "reasons" for the expert's opinion of value, they are placed into evidence and often considered by the court or jury as direct evidence of value.

At the same time, we believe appraisers should be permitted a wide discretion in the selection of appraisal methods. Often such methods require reliance upon sales of properties which are not comparable. (See Retlaw Enterprises Inc., 16 Cal.3d 473). Where the appraisal process dictates use of "unconventional methods" the appraiser should be permitted to use same, to explain them to the jury, but not necessarily to place the sale prices or other data into evidence. Of course, this should be subject to intense cross-examination, and the limitations on direct examination should not apply to cross-examination.

However, I believe the major problem with the recommendation relating to Section 816 is that it attempts to correct a limitation contained in Section 816(b) by a statement in 816(c) that a limitation is not intended. I would suggest that Subsection (b) should be rewritten in entirety. Essentially, it should provide that sales may be relied upon in reaching an opinion of value if they "shed light" on the value of the property in litigation. Properties which are dissimilar in size, or in improvements, or which are distant from the property being valued are often relevant to the value of a subject property, depending upon the nature of the property being appraised. For example, the prices at which industrial properties in West Los Angeles sell for affects the value of such properties in Central Los Angeles, and can help an appraiser determine the value of a Central Los Angeles property if closer properties have not recently sold.

In short, the expert witness is the person best able to determine what should be considered in reaching an opinion of value. The court must, in each individual

circumstance, determine whether the opinion is adequately supported and whether the person is, in fact, an expert. Legislative limitations upon what the expert may or may not consider are intrusions into the expertise of the profession involved.

Section 819 seems to have been intended by the original drafters and by the Law Revision staff as a "catch-all" to permit the use of "non-conventional" appraisal methods when the more common appraisal methods do not furnish an adequate basis for valuation. The section, as it now reads and as proposed to be modified, contains several ambiguities and inconsistencies. They are:

1. Is the "net rental value attributable to the land and existing improvements" to be used as a basis for valuation, even though there is a different "rent reserved" in an existing lease (Section 817)? It would appear that appraisal practice would require that the appraiser determine that the existing rent does not represent "rental value" before being able to use some "imputed" rent.

2. Though the added sections broaden the discretion of the appraiser in selection of appraisal methods, we do not believe they go far enough. You may have selected the least reliable alternative, i.e. capitalization of income from an imaginary building. Another method used to determine land value is a "subdivision study." This is more reliable than capitalization of income from an imaginary building because it involves two less steps. A "subdivision study" involves a determination of what the property would sell for if developed and/or improved, such as a single-family residence subdivision with conventional wood frame and stucco homes, and then deducting from the imputed proceeds the cost of construction, development, and holding costs. "Capitalization of income" requires, in addition, an estimate of rental and of expenses. "Subdivision Studies" are used quite often as a check upon the comparability of acreage sales. It allows the appraiser, with the assistance of an engineer, to determine whether a particular property is capable of being developed in the same manner as the comparable properties. We believe this method is used more commonly than capitalizing the rental value "if improved."

Section 822 contains limitations upon the material an appraiser may rely upon in reaching his valuation conclusion. Insofar as these exclusions relate to public policy rather than legal opinions as to what is or is not reliable evidence of value, they are appropriate. For example, the assessed value of property is not a proper basis for an opinion because it is a "hearsay" opinion of value, an opinion of an unknown appraiser made at an unknown time and involving considerations which may not be present in the subject acquisition. The prohibition against considering certain noncompensable items is also based upon a legal determination that certain items of loss or certain items which add value are not compensable. However, the prohibitions against use of listings or offers to purchase, the prohibition against use of opinions of other property, and the prohibition of consideration of trades seems to me to be unwarranted intrusions into the appraisal profession.

For example, a market is made by offers to sell and offers to buy. The offers to sell establish the upper limits of price, because persons will not pay more for property than the price for which similar properties are listed. Sellers will not accept less than the amount offered for similar properties. Proper appraisal practice allows listings and offers to be considered for those limited purposes. Because they can be misused and have been misused in the past does not justify a total prohibition against a proper use.

With respect to the appraisal not being based upon "an opinion of value," appraisers always do this when they analyze comparable property. The appraiser must determine whether the subject is better or worse than the comparable. This involves reaching an opinion of the value of the comparable property, even though not so stated. Often, the appraiser would be greatly assisted if he were able to consider an improved sale when valuing a vacant property, and "appraise out" the improvements to determine the land price. This procedure is often much more accurate than attempting to value a vacant parcel in a fully-improved area by reference to parcels located a substantial distance from the subject property.

Regarding trades or exchanges of property, often there need not be an appraisal of the other property. Often the property which was traded is thereafter

sold for cash and a monetary sale price established. Even when it is not, there may be situations where it is easy to appraise one property involved in the exchange so that the equivalent cash consideration is determined without substantial conflict. In such case, the appraiser should be permitted to rely upon the exchange as a basis for his opinion.

In other words, some of the prohibitions of Section 822 eliminate acceptable methods of appraising real property because of opportunity for abuse by some appraisers. The exclusion of such methods, however, also inhibits the ability to rebut an unsupported or invalid appraisal.

Should your Commission desire further thoughts upon any of the matters expressed above, please do not hesitate to call upon me. I will be pleased to appear before your Commission and/or to amplify my remarks by a further report, should you feel it necessary.

Yours very truly,

BURT PINES, City Attorney

By Norman L. Roberts
Norman L. Roberts
Assistant City Attorney

NLR:jm
485-5414

THE TAX SECTION

OF THE STATE BAR OF CALIFORNIA

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May 16, 1977

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Gentlemen:

This letter responds to the Commission's request for comment on its tentative recommendation that the Evidence Code rules on value be extended to all cases where the market value of real property and intangible personal property is in issue.

The State Bar subcommittee on Property, Sales, and Local Tax is opposed to such an extension in property tax matters without considerable further study of the consequences of such a change in the law.

First, it does not believe that the statement in your letter of transmittal of March 15, 1977, referring to "intangible personal property" is correct. The context and the law would appear to refer to tangible personal property only.

In addition, the following considerations should be dealt with:

1. The appeals in property tax matters are made in the first instance mostly by laymen (usually homeowners) to an administrative body which is composed of laymen (members of county boards of supervisors or assessment appeals boards). Certainly the applicants for reductions in assessment and generally even the members of the administrative bodies are not technically able to restrict their considerations or presentations of evidence in the legalistic manner required by the Evidence Code.

2. The hearing officer procedures provided in Revenue and Taxation Code Section 1636 et seq. are specifically required

to be conducted in an informal manner and are meant to provide owners of residential property with a non-legalistic setting.

3. Revenue and Taxation Code Section 1609 specifically provides that the technical rules of evidence will not apply and the standard of admitting "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs" was consciously adopted by the Legislature because of the nature of those proceedings.

4. It does not appear that the Law Revision Commission has given adequate consideration to the overall effects of some of the stringent provisions of the Evidence Code on quasi-judicial proceedings and the type of persons and presentations involved in property tax matters.

The Committee would be pleased to cooperate with the Commission in its consideration of these consequences.

Sincerely yours,

Kenneth A. Ehrman, Chairman
Committee on Property, Sales
and Local Tax

KAE/cf

County of San Diego

OFFICE OF
COUNTY COUNSEL

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County Counsel

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SAN DIEGO, CALIFORNIA 92101
(714) 236-2681

May 31, 1977

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Gentlemen:

Pursuant to your request to Mr. E. C. Williams, County Assessor, for comment on the tentative recommendation to apply the Evidence Code provisions relating to valuation of property in eminent domain and inverse condemnation proceedings to other types of actions in which market value of property is an issue, we wish to express our deep concern as to the effect of your recommendations on property tax matters. To require the application of technical rules of evidence in Assessment Appeals Board proceedings, contrary to Revenue and Taxation Code § 1609, would work a considerable hardship on home owner applicants for equalization and would unduly restrict the informal process of hearing officer proceedings as set forth in Revenue and Taxation Code § 1636 et seq. Additionally, we note your recommendations do not address the issue of modification of the procedural rules of hearings of the State Board of Equalization wherein the Assessor may appear as a party. We suggest further review be given to the full effect of implementation of your recommendations in property tax matters before those recommendations are submitted to the Legislature. We would be pleased to provide further comment on specific issues dealing with property tax matters if you so desire.

Very truly yours,

DONALD L. CLARK, County Counsel

By
JACK LIMBER, Deputy

JL:bf

cc: E. C. Williams,
County Assessor

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May 31, 1977

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Tentative recommendation relating to evidence of market valu of property.

Gentlemen:

Having studied your proposed revisions for Sections 810-822 of the Evidence Code, we have received one impression that causes us some reservation. It appears from the introductory comments and the comments to Sections 810 and 811 that it is the Commission's intent that these rules be made applicable to hearings before county boards of equalization or assessment appeal boards. However, it does not appear from the proposed revisions or comments thereto that the Commission is fully appreciative of the statutory and factual context in which these boards must function.

Article XIII, Section 16 of this state's Constitution provides for the creation of county boards of equalization or assessment appeal boards and specifically provides that the county board of supervisors shall "adopt rules of notice and procedures for those boards as may be required to facilitate their work and insure uniformity in the processing and decision of equalization petitions." The applicability of the Evidence Code to the conduct of hearing before one of these boards would, then, be a matter to be determined by the county board of supervisors. Section 1609 of the Revenue and Taxation Code states:

> The hearing need not be conducted according to the technical rules relating to evidence and witnesses. Any relevant evidence may be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existance of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions.

Consistent with this constitutional and statutory authority, th Board of Supervisors for Riverside County has specifically made th rules of evidence inapplicable to hearings before the two assessmen appeal boards for this county..

The principal consideration for the Board of Supervisors in makin the rules of evidence inapplicable is the informality of such hear ings. All matters are heard by three member board consisting of la individuals. In ninty percent of the hearings, the applicant repre sents himself, and a representative from the assessor's office make his presentation without benefit of counsel. To make the rules o evidence applicable to what is essentially a lay hearing would serv to frustrate one of the more important purposes of the assessmen appeal board - to provide a forum at which the taxpayer, without th need of representation by counsel, may challenge the assessed valua tion of his property.

Beyond the statutory and factual context of such hearings are th rules of valuation set forth in Title 18 of the California Adminis trative Code and made applicable by Rule No. 1 of that code to count boards of equalization and assessment appeal boards when equalizin property values. Whether these rules of valuation, which do encom pass the comparative sales, reproduction and replacement cost an income approaches to value, are to be termed "special rules relatin to value" which would pervail over those provisions in Article 2 c Chapter 1 of Division 7 of the Evidence Code (Sections 810-822) is matter that deserves comment by the Commission.

Because of the volume of matters heard annually by either count boards of equalization or assessment appeal boards, we feel tha some comment as to the applicability of the proposed revisions c Evidence Code to such hearings and their relationship to the valua tion rules in Title 18 of the Administrative Code is needed.

More specific objections by members of our office have been:

1. Subdivision(c) of Section 816 and subdivision(b) of Section 819 are felt to open the door to excessive speculation as to value of property. While the courts presently have great discretion as to the admissibility of evidence indicating comparable value, to expressly state that the court has such discretion is likely to result in the court's exercising little, if any, discrimination in admitting such evidence. Subdivision(b) to Section 819 is felt to allow too much speculation as

to value even given the proposed guidelines presently incorporated.

2. Subdivision(c) of Section 822 appears to allow an applicant contesting his assessed valuation to use the assessed values of other properties as comparable indicators of value. Because all properties in a county are not reappraised annually but rather are appraised in small sectional units once every four or five years, it is possible for an applicant pursuant to this subdivision to cite an assessed value which is not truly reflective of current market values. This would allow a basis for comparable valuation that is not presently recognized either by the Revenue and Taxation Code or Title 18 of the California Administrative Code.

Very truly yours,

RAY T. SULLIVAN, JR.
County Counsel

By
Timothy J. Davis
Deputy County Counsel

TJD:paj

RICHARD M. BETTS, MAI, SRPA, ASA
PROPERTY ANALYSIS

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May 31, 1977

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Tentative Recommendation #63.70
Evidence of Market Value of Property

Dear People:

I wish to express sharp concern about the above-referenced recommendation. Fundamentally, I seriously doubt the advisability of applying the existing Evidence Code restrictions on valuation evidence to appraisals for property tax purposes. In my opinion, the Code is too restrictive, (even with the proposed amendments), whether for eminent domain or elsewhere. This restrictiveness is exacerbated, in my view, ~~the~~ by the types of properties (special purpose; personal property) often argued in property tax hearings, but which are commonly settled out in eminent domain.

As examples of excessive restrictiveness, I cite section 819(b), a amended, and comment that the admissability of a hypothetical inco analysis should be based upon the judgment of the expert witness, not upon the court's attempt to determine whether or not the marke data is "adequate." This should be a matter of the weight of the evidence, in my opinion. I quote favorably the commission's language on page 6 about a similar issue : "it is better to have all relevant evidence available to the trier of fact than to have insufficient evidence."

I cite section 822(b) as being similarly restrictive, in blocking use of options, offers, and listings as a basis for an opinion of value. I have had several appraisal experiences where such evi dence, (typically at a time of sharp market change, with an absenc of sales), was critical to reaching any estimate of value. I woul again favorably quote the commission's p.6 language cited above. See also, The Appraisal of Real Estate, A.I.R.E.A., 6th edition, A.I.R.E.A., Chicago, 1973, p.273: "The market data approach... is a process of comparing market data; that is , prices paid for similar properties, prices asked by owners, and offers made by prospective purchasers or tenants willing to buy or lease." See also, General Appraisal Manual, Assessor's Handbook AH501, Assessment Standards Division, California State Board of Equalization, Sacramento, 1975, p.39: "The comparative sales approach...uses direct evidence of the market's (people's) opinion of the capital value of the property...the approach may consider listings, offers options, and the opinions of owners, realtors and appraisers as to the selling prices properties could command." (emphasis added.)

Further, I believe that the amendments proposed here may conflict with existing language of the Revenue and Tax Code, and with provisions in the Property Tax Rules and Regulations of the Admini trative Code. If these recommended changes would apply the revise code to property tax hearings, should not possible conflicts with the R & T Code and Property Tax Rules be carefully discussed in th recommendations?

Next, allow me to point out that the language of existing section 822(e) is needed to handle eminent domain cases, but could cause confusion when applied to property tax cases. Application to suit involving alleged property damages would also be confusing.

Finally, section 822 (d) precludes using, as a basis for an opinio of value, an opinion as to the value of any other property or property interest. This language is, in my judgment, either ambiguou or else erroneous. One example is the occasional need to estimate the leasehold interest, by first valuing the fee and the leased fee interests, and subtracting them. I interpret 822(d) as blocki this accepted appraisal technique. A worse example is the need to adjust a sale for, say, seller financing. The process, very simpl is to arrive at an opinion of what the comparable would have sold for if it had been sold for cash . Again, this is not allowed, under an exact interpretation of 822(d). In fact, any adjustment to a sale, consists of an opinion as to the value of that portion of the property, be it an extra room or an extra lot. The latter apparently would not be admissible under 822(d),even if backed by substantial comparable sales evidence.

Since Section 822(g) rests upon 822(d), I must also challenge it. No appraiser will deny that trades or exchanges can be very mislea ing sales. However, I again cite the commission's language on p.6 such evidence should not be precluded, rather, the emphasis should be on proper cross-examination to challenge the weight of the evidence.

In the hope that knowledge of my qualifications may assist you in evaluating this letter, a copy of them is appended.

Very sincerely,

Richard M. Betts

Encl: qualifications.

QUALIFICATIONS OF RICHARD M. BETTS

EDUCATION - ACADEMIC

Bachelor of Science and Master of Business Administration Degrees, Real Estate and Urban Land Economics major, University of California, Berkeley, 1962 & 1963.

EDUCATION - PROFESSIONAL

Education Seminars and Conferences: University of Calif. Extension American Institute of Real Estate Appraisers, including AIREA exa or courses 1,2,4&8; Educare course I; Society of Real Estate Appraisers; American Society of Appraisers; Calif. Real Estate Ce

PROFESSIONAL AFFILIATIONS

Member, American Institute of Real Estate Appraisers (MAI #4840)
Senior Member, American Society of Appraisers (ASA) (Real Estate)
Senior Real Property Appraiser, Soc. of Real Estate Appraisers (SR
Member, Panel of Arbitrators, American Arbitration Association
Author, "The Essentials of Real Estate Economics," with Dennis McKenzie, John Wiley & Sons, 1975.
Instructor, Real Estate subjects, School of Business, University o California, Berkeley; Extension Divisions, U.C. Berkeley and U.C. Santa Cruz; Merritt Community College; and Society of Real Estate Appraisers.

PROFESSIONAL ACTIVITY

AIREA, member, National Editorial Board, 1975 and 1977; chair, Chapter Academic Liaison Committee 1976.
SREA, President, East Bay Chapter 54, 1976-77; V.P. 1974-75 and 1975-76; Director 1971-74.
ASA, member, National Education Committee, 1972-1977.

APPRAISAL EXPERIENCE

Since 1963, appraisals in excess of $321 million:
Commercial - volume over $32 million
Industrial - volume of $15 million in value
Apartments - over $11 million in large complexes
Special Purpose - valuation of 19 miles of coastline when develope valuation of $4 million convalescent hospitals
Expert Witness - Testimony in Alameda, Contra Costa, San Francisco, San Mateo, and Santa Clara Counties. Property tax appeals, emine domain and damage suits.

CLIENTS

Either individually or associated with other appraisers including: City of Berkeley; City of Foster City; Wells Fargo Bank; Union Ba Central Bank; First National Bank of San Jose; Singer Company; SC Corporation; Lee Hotel Corp.; Coopers and Lybrand, CPAs; Homequity Inc.; Executrans; and numerous private clients.

2-28-77

STATE OF CALIFORNIA

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Executive

May 31, 1977

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Commissioners:

Re: Tentative Recommendation Relating to Evidence of Market Value of Property

In accord with your note that forwards the subject Recommendation we are responding with this general request for further revision. Although we agree in principle that commonality in the market value standard is both essential and desirable and that the rules of evidence leading to the determination of that standard should also be of equal application, we find that two significant problem areas have been overlooked in the draft of the Tentative Recommendation.

First, it should be pointed out that the Commission has not expressed any reference to Part 3, Chapter 1, Articles 1 through 4, of the Revenue and Taxation Code. This Part deals with the initial quasi-judicial appeal of local assessment made for the purpose of ad valorem taxation. These hearings are indispensable to the ultimate determination of value and are mandated by the judicial requirement of exhaustion of administrative remedy prior to the commencement of litigation. You will note that section 1609 specifically calls for an informal hearing and in essence restates the business hearsay rule. In fact, the majority of hearing applicants are single family homeowners that appear in pro per although the hearings are equally applicable to attorney represented, sophisticated taxpayers.

The Recommendation does not expressly state whether the proposed statutes would apply directly to these assessment appeals nor does it address the quandry which would be faced by a reviewing court attempting to apply the statutes to an informal record within the confines of the substantial evidence rule.

Secondly, proposed Evidence Code Sections 816 through 822 deal with very specific methods of valuation that conflict with existing rules in the area of ad valorem taxation. We would invite your attention to Title 18, California Administrative Code, Subchapter 1, sections 1 through 60, which control the existing methods of local assessment employed by County Assessors and similar assessment of public utilities and other state assessees that are assessed by the State Board of Equalization. We have presently undertaken an intense study of these conflicts by our technical staff and upon completion we will submit a detailed report and recommendation for your consideration.

We would like to express our appreciation for the opportunity to forward these initial comments and request that you delay further implementation of the proposal pending receipt of our comprehensive report. In light of our constitutional and statutory duties relating to ad valorem taxation, we would appreciate direct communication on further progress of the Recommendation as it proceeds to fruition.

Very truly yours,

J. J. Delaney

J. J. Delaney
Chief Counsel

JJD:fp

cc: Mr. Joseph Kase, Jr.
Assistant County Counsel, San Diego County
Chairman, Taxation Study Section, County Counsels Association

Mr. Kenneth A. Ehrman, Chairman
Property, Sales and Local Tax Committee
The Tax Section of the State Bar of California

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Controller, Sacramento

W. W. DUNLOP
Executive Secretary

June 28, 1977

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Commissioners:

Re: Tentative Recommendation Relating to Evidence of Market Value of Property

In furtherance of Mr. J. J. Delaney's May 31, 1977, letter to you, attached please find our staff's Report and Recommendations concerning effects the proposed amendment and extension of Evidence Code Sections 810 through 822 would have upon existing rules in the area of ad valorem property taxation.

As has been noted, the tentative recommendation does not expressly state that the proposed sections are to apply to local assessment appeals or to proceedings before this Board. While this Board is of the opinion that the recommendation should not apply thereto, if your intent is otherwise, the Report and Recommendations should receive your full consideration.

If we can be of further assistance to you in this regard, please do not hesitate to call upon us. Meanwhile, we would appreciate being informed of the progress of the Commission as it proceeds with its proposal.

Very truly yours,

Douglas D. Bell
Executive Secretary

DDB RW
Attachment

cc: Members of the Board

REPORT AND RECOMMENDATIONS PERTAINING TO
CALIFORNIA LAW REVISION COMMISSION'S TENTATIVE RECOMMENDATION
RELATING TO EVIDENCE OF MARKET VALUE OF PROPERTY

The Commission tentatively recommends that Evidence Code rules relating to value in eminent domain and inverse condemnation cases be revised and extended to all cases where the market value of real property and intangible personal property is in issue. As pointed out in Mr. Delaney's May 31, 1977, letter to the Commission, the Commission has not expressed any reference to that part of the Revenue and Taxation Code pertaining to local assessment appeals or considered the effect the revision would have upon existing rules in the area of ad valorem property taxation. Additionally, the Evidence Code rules are not compatible with those presently employed by the Board in proceedings which it entertains, for example, in the assessment of the properties of state-assessees. Thus, it is possible that the Commission did not intend that these rules would apply to such administrative proceedings but rather, would be confined to proceedings before the courts. If so, consideration must be given to the relationship and operation of rules relating to value in administrative proceedings and to such rules in court proceedings. If not, substantial revision of the Evidence Code rules is necessary to preserve the integrity of administrative proceedings, as presently conducted.

Assuming that the Evidence Code rules are intended to apply to all proceedings, including administrative proceedings, in which market value is an issue we point out the following:

Section 811. Under this section, "value of property" means market value. For purposes of ad valorem property taxation, market value is not the only standard of value, however. Also pertinent is "full value", fair market value or such other value standard as prescribed by the Constitution or in the Revenue and Taxation Code (§ 110.5). Such value standards are utilized, for example, in the assessment of open-space lands, timber land preserve properties, and historical properties. Accordingly, while the comment to Section 811 indicates that the Evidence Code Sections are to be extended to all cases where a market value standard is used to determine value and references 110.5, "value of property" should be redefined to include the "full value" concept employed in conjunction with the assessment of specific types of properties.

Similarly, no mention is made of the trade level concept which is utilized in the valuation of personal property. Such concept is found in Board rule 10. For purposes of clarification, consideration should be given to the addition to the Evidence Code of language pertaining to the use of this concept.

Section 812. The section provides that it is not intended that existing statutory law interpreting the meaning of "market value" or its equivalent be changed or altered. As indicated in the comment to Section 812, the "full value" concept and applications thereof are to be included by the term "or its equivalent". To avoid any uncertainty in this regard, however, specific language concerning the "full value" concept should be added to the section.

Section 813. This section identifies those who may testify as to the value of property. However, it is unclear that certified appraisers of either assessors' staffs or of the Board's staff would be witnesses qualified to express opinions of value. To avoid any uncertainty in this regard, specific language establishing that such appraisers are witnesses qualified to express opinions of value should be added to the section.

Sections 815 and 816. These sections pertain to when a witness may take into account information concerning any sale of or contract to sell and purchase property. For ad valorem property taxation purposes, however, section 402.5 of the Revenue and Taxation Code limits the use of such sales to sales made "near in time to the lien date". sales not more than 90 days after the lien date. Presumably this would be an instance in which a special rule would prevail over the Evidence Code sections.

In considering the use of sales prices, Board rule 3(b) provides that an assessor shall consider the prices at which fractional interests in the property or comparable properties have recently sold and the extent to which such prices would have been increased had there been no prior claims on the assets [the stock and debt approach]. No provision is made for the use of the stock and debt approach in the Evidence Code sections, and an additional section should be added to recognize the use of this approach.

Section 817. Although revised, this section is not sufficient in scope or in detail to encompass the concepts and principles utilized for purposes of ad valorem property taxation.

The section provides for the use of actual rents (fixed rental amounts or rentals based on percentage of gross sales) to develop an income stream for a subject property that can be capitalized into an indicator of market value. In its present form, the section is limited to application of the income approach to rental income property types, for example, apartments, office buildings, retail stores, etc.

Proper appraisal theory, however, supports the use of the income approach on any property that will be bought and sold on the basis of its income producing capabilities. Many income-producing properties are not owned and designed for landlord and tenant relationships, for example, motels, golf courses, ski resorts, water companies, cable TV's, public utilities, etc. On such properties it is proper to develop a net income stream by starting with gross anticipated operating revenue and deducting legitimate charges against the income stream. This technique has also been commonly used in appraisals of utility properties.

The section requires major modifications to be applicable to ad valorem property taxation. Thus, all techniques for establishing or attributing an income stream to a subject property should be included in the section. See Board rules 8(e) and 25(b), third paragraph, in this regard. In addition, a precise definition of economic income should be included. Such definition would have to be broad enough to cover the effect of enforceable restrictions on income also, however. See section 423 of the Revenue and Taxation Code, for example.

Section 818. No change is contemplated in this section, which provides for the use of comparable rents to develop an income stream that can be capitalized into an indicator of market value. However, the emphasis upon whether the witness is to take into account as a basis for his opinion the rent reserved and other terms and circumstances of any lease of comparable property should be increased such that "shall" rather than "may" is utilized to describe the taking into account. Also, for ad valorem property taxation purposes, of concern is a determination of economic rent and the valuation of the fee simple unencumbered rights pertaining to an entire property, as opposed to a determination of the current value of specific rights held for eminent domain purposes and for which a value of only a portion of the entire rights is contemplated. Economic rent and pertinent considerations thereto are discussed in Board rules 21(g) and 8(e).

See also comments to Section 817 above.

Section 819. Although revised, this section also is not sufficient in scope or in detail to encompass the concepts and principles utilized for purposes of ad valorem property taxation.

Proposed subsection "b" selects only one aspect of "The Income Approach to Value" utilized by appraisers in valuing real property. Even then, the court is to determine that two qualifying requirements have been met before the use of the Land Residual Technique can be applied in estimating a property's value.

It is not uncommon for appraisers to utilize hypothetical highest and best use improvements in order to derive residual income to capitalize into land value. Typically, this occurs in areas of intense urban usage that have been fully developed for many years, for example, downtown areas of older communities. It may also be used to value vacant land in an area where little sales activity has occurred, such as in the valuation of subdivision land.

The above examples are just two Land Residual Techniques utilized in the valuation of property. Other techniques commonly used in the appraisal of income-producing properties include Direct Capitalization, Building Residual Technique, Property Residual Technique, Mortgage--Equity Analysis, and Leased Fee--Leasehold Analysis. In addition, the section should include proper methods for deriving capitalization rates to be used in the various methods of capitalization. See Board rule 8 in this regard.

Thus, all methods of capitalization accepted for ad valorem property taxation purposes should be included in the section and made available for the use of witnesses qualified to express opinions of value.

Section 820. No change in this section is contemplated. However, no recognition is given to the use of the historical cost or historical cost less depreciation approach to value. Thus, a provision similar to that of Board rule 3(d) should be added to this section or added as an additional section to recognize the use use of this approach.

Section 822. This section sets forth matter which is inadmissible as evidence and is not a proper basis for an opinion as to value of property. Most of the provisions therein set forth, however, are not compatible with practices presently utilized in the valuation of property for ad valorem property taxation purposes. Comments to the specific subsections follow:

(a) This provision would prevent consideration of the price or other terms and circumstances of an acquisition by a public utility which could take the property by condemnation, thereby eliminating public utility purchases from consideration of any kind. An exception for such purchases should be made in this provision.

(b) Occasionally, the price at which an offer or option to purchase or lease the property or property interest being valued is considered by the appraiser. This option should remain available to the appraiser.

(d) This provision has the effect of eliminating the use of the stock and debt approach (Board rule 3(b) whereby the value of stock and debt is ascertained and utilized as a measure of value of the property or property interest. This approach is particularly useful in the assessment of the properties of state-assessees.

(e). All things, including the influence upon the value of property or property interest being valued of any noncompensable items of value, are considered by the appraiser. This option should remain available to the appraiser.

(f) This provision would prevent consideration of the capitalized value of the income or rental from any property or property interest other than that being valued. The provision would seem to eliminate the assessment practice of capitalizing multi-state enterprise earnings and allocating a portion of such earnings to California properties. This method of valuation is mandatory in the assessment of properties of multi-state public utilities.

(g) Occasionally, a transaction involving the trade or exchange of property is considered by the appraiser. In instances involving public utilities, trades or exchanges rather than sales of assets do occur. Consideration of these transactions should remain available to the appraiser.

Note. In addition to the Board's rules Nos. 1-60, Valuation principles and procedures, referred to herein and a copy of which is attached hereto, of import in valuing property are the detailed descriptions of valuation principles and procedures set forth in Assessors' Handbooks prepared by the Board. Accordingly, it is suggested that an additional section which would give evidentiary weight to such handbooks be added to the Evidence Code. See Schwarzer, Judicial Review of Property Tax Valuation Methods, 65 Calif. L. Rev. 461, 470 (1977) in this regard.

H. D. WATKINS
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EXHIBIT 20

CALIFORNIA LAW REVISION COMMISSION

COMMENTS RE TENTATIVE RECOMMENDATION relating to EVIDENCE OF MARKET VALUE OF PROPERTY

Commission Members and Staff:

The undertaking of improving the proceeding for valuing real property by the administrative agencies and the courts is a very needed revision of the law. It also appears to me, as it does to others, that while improving the proceeding for valuing real property, the function could be standardized to a single method for all of the administrative agencies and courts. However, as my focus, study and experience is on the property tax assessment and assessment appeals functions and the court cases resulting therefrom and it does appear to me that the proceeding for valuing real property for those functions and for other purposes could be standardized to a single method, there may be aspects of the other functions that I am not knowledgeable about. Therefore, I speak mainly about the proceeding for valuing real property for property tax assessments. In the area of property tax assessments, it has been written that I have represented the greatest number of cases in California for valuation adjustments for taxpayers. In the above context, I wish to contribute the following comments on your TENTATIVE RECOMMENDATION relating to EVIDENCE OF MARKET VALUE OF PROPERTY:

It is my awareness from the many thousands of cases that I have been involved in, that the best method for the valuation of real property can only be arrived at by a gathering of the material data about a real property and putting same into evidence and thereafter applying general logic to the facts. In cross examining many hundreds of professional appraisers and their efforts to develop and apply formula approaches and assessors' offices, assessment appeals boards and the courts to utilize these formulas (some of which have been included in your TENTATIVE RECOMMENDATION relating to EVIDENCE OF MARKET VALUE OF PROPERTY), the only proceeding I have found that withstands testing is that of putting into evidence the factional data about the real property and thereafter applying general logic to the specific case. The intesting aspects of this proceeding is that it is supported by the real property principle that every parcel of real property is unique and the proceeding for settling claims for it is to award specific performance. The danger in formula approaches to value are they simplify real property and conflict and destroy the unique aspect that real property has in fact.

I submit that why there is a problem and a need for improving the proceeding for valuing real property is not because of a lack of formulas but because of the efforts to apply formulas to a proceeding that the procedure should be that of putting into evidence the material data about the real property and the application of general logic being applied thereafter, and in doing so what appears to be a

problem from the lack of formulas can be resolved by understanding that each parcel of real property has a unique nature.

Please feel free to submit to me any questions arising from my comments.

Dated: June 1, 1977.

Respectfully submitted,

H. D. WATKINS

OFFICE OF THE
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COUNTY OF SANTA CRUZ

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ASSISTANTS

June 20, 1977

California Law Revision Commission
School of Law
Stanford University
Stanford, California

SUBJECT: TENTATIVE RECOMMENDATION -
EVIDENCE OF MARKET VALUE OF PROPERTY

Gentlepeople:

I have reviewed the above recommendation and wish to share with you my concern that the approach may be too technical for property taxation and the Assessment Appeals Board. I would respectfully suggest further study of the effect of said recommendation on Assessment Appeals Board proceedings.

Very truly yours,

CLAIR A. CARLSON, County Counsel

By Jonathan Wittwer
JONATHAN WITTWER
Assistant County Counsel

JW:jg

cc: County Counsel's Assn/Taxation Study Section
c/o San Diego County Counsel
Attn: Jack Limber
355 County Administration Center
San Diego, CA 92101

Peter D. Argent
2038 Bronson Hill Drive
LOS ANGELES, CA 90068

May 20, 1977

California Law Revision Commission
School of Law
Stanford University
Stanford CA 94305

Re: Tentative Recommendation relating to Evidence of Market Value of Property.

Gentlemen:

Pursuant to your solicitation of comment to the above recommendation, I take this opportunity to give you some thoughts based on more than 20 years experience as attorney, appraiser and consultant, active in the field of property law and property valuation.

Basically, I most strongly oppose the planned setting of a "uniform" standard for valuation of property for all purposes, and to adopt for such different purposes the standard of condemnation law. I respectfully submit that adopting the standard of condemnation law ("...the highest price...agreed to by a seller...and a buyer..." CCP 1263.320) for purposes of taxation, property assessment, tangible personal property assessment...and even criminal law, and to adopt it through a procedural "back-door" will result in untold harm and virtually no benefit.

To put it bluntly, it will amount to a property tax assessment increase of some 15-20%, which the California public will not agree to under any circumstances. It may also substitute complete confusion in tax assessment for personal property and inventory tax assessments. Example: What is the "highest price... (CCP 1263.320 standard) of the little widget which importer S imports from Japan at $3.00 per gross (2.1¢ apiece), which ultimately sells for 29¢ to the willing buyer contemplated by our Revenue and Taxation Code and the Code of Civil Procedure? The inventory tax on the "highest price" would exceed the cost.

Fundamentally, condemnation and eminent domain law is the creation of the constitutional requirement of "fair compensation" of the Fifth Amendment. In each case, the owner to be compensated is the seller, but the condemnor is the buyer. In olden times, when these standards of the "willing and informed" buyer and seller were established, the contract price was a realistic measure of market value. At worst, there was a 2% commission payable to a realtor.

Today, there is a difference of about 20%± between what the willing seller gets, and what the willing buyer must pay for a home or other property. Example: on a recent sale of a home contracted at $36,000., the seller received less than $31,000. after the 6% broker's commission, 5 points FHA loan, escrow charges, prepayment penalties, drawing documents, termite clearance etc., while the buyer was obligated to pay almost $38,000. (points, prepaid taxes, tax impounds, insurance impounds, escrow fees, tax stamps, etc.)

What is the true "market value"? In condemnation, the Government is the purchaser, and there is thus no objection to the statutory and decisional standard of the "highest price..." Yet would it be equitable to assess this property at $38,000. for property tax purposes? Certainly not. The agreement may have been $36,000., but the informed and willing seller knew he would get only $31,000., and hence the market value of the property, in the eyes of the informed seller was a mere $31,000. This is the the price also for income and capital gains taxation - and if "uniformity" is desired, than an artificial "highest price" would not be uniform.

Yes, the informed buyer knows that he paid $31,000. for the property, and $7,000. for "buying" the loan, and paying the various hangers-on, whose middlemen's profits certainly add nothing to the fair market value of the property.

What is true of the impact of the fallacious "uniform set of rules" when applied to property assessment, tax valuation etc., is even more apparent where we deal with inheritance taxes. If the goal would be disinheritance - it would be hardly possible to find a more effective "backdoor". This would be truly a case of the power to tax being the power to destroy.

Gradually, the appraising fraternity is waking up to the fact that "real estate values are made in the money market" (see the attached blurb from the 1977 SREA International Conference advertisement). Disregarding this trend, our Legislature has proposed and the people have adopted the revision of the constitutional valuation standard in 1973 - again for condemnation purposes. Dropping the innocent-appearing words "In terms of cash" from the constitutional requirement means - again - that wholly fictitious valuation is given the sanction of law. No one will contend seriously that desert land selling for "$1. down and $1. a day for life" represents a "fair market value". On one hand, the Attorney General goes after such promoters for their unconscionable activities. On the other hand, the tax assessor blithly takes the market value based on such fictitious contract prices for taxation purposes... and under the proposed Rules, the "highest price" rules of the law of condemnation would be applied to all purposes.

The second point, which the proposed revision has completely overlooked is related. Our Codes recognize three basic "approaches" to valuation - the market approach ("comparable sales"), the income approach, and the fundamental or cost approach. Yet the revision completely avoids what I consider the most appropriate and "fair" valuation approach - the cost approach. Ev.C. 816 is a statutory exposition of the market approach, § 817 and § 819 are two ways of applying the income approach. But where is the cost approach?

The cost approach has much to commend it - while the market approach becomes more and more the "lazy appraiser's haven". The cost approach is used for purposes of income taxation and is the generally favored accounting approach, setting forth present valuation in terms of original cost minus depreciation.

For appraisal purposes, the cost approach is often varied by establishing an estimated "reproduction cost new" and deducting therefrom observed depreciation - both obsolescence and functional depreciation. Any "informed buyer" does and should use the cost approach, rather than the fictitious market approach, based on speculation, the money market and changing conditions.

Business property, commercial and industrial property is always sold by the cost approach - and thus benefits from much more appropriate, fair (and often lower) tax rates than the artifically inflated market approach valuation.

Our laws and the Constitution require "fair" compensation and "fair" valuation --- not the maximum weight of feathers that the tax collector can pull out of the geese before they start screaming and biting.

Therefore, I submit that the simplistic approach advocated sometimes by such authorities as Whitaker and Carlson, and proposed by the Law Revision Commission, is a poor and short-sighted approach which will bring only trouble and dissent. And for what? For the sake of "uniformity"? Nowhere does the Commission staff explain its unsupported allegation (on p. 5 of the draft that "having a uniform set of rules of evidence applicable to all...property valuations outweighs any inconvenience of minor changes in existing case law rules". I certainly don't consider a 20% property tax increase -as a minimum - a "minor change".

Another rather horrible example of importing the condemnation standard of the "highest value" into other fields of law is shown by a number of recent criminal cases. CALJIC § 16(a) - enacted under the law and order syndrome of recent years - imports the "highest price" standard into criminal law. Thus, one accused with "theft of a $190. appliance is now routinely charged with grand theft (PC 170(1)), since addition of the 6% sales tax - which the "informed buyer" pays as part of his sales price - brings the goods into the felony field. A recent appellant contested the fact that his theft of 2 suits selling between $180. and $220. in different stores should be considered a misdemeanor, not a felony. The Court declined to rule on the point and beyged off by affirming the jury's finding of guilty of a felony, and did not rule on the propriety of the "highest price" instruction of CALJIC 16 ,which certainly runs counter to any idea of innocence until proven guilty.

I therefore suggest that § 810 be left intact as applicable only to eminent domain and inverse condemnation, and the other amendments "equalizing" the procedure for such unlike procedures as eminent

domain and crimes, taxation and commercial valuation be deleted.

What is needed, however, is a complete statutory expression of the "cost method" of valuation, based on two different valuations: (a) cost less depreciation (as applicable to taxation in general) and (b) Reproduction-cost-new minus depreciation.

What is also needed is a statutory expression that in all valuation and appraisal proceedings, it shall be incumbent upon the court or administrative agency to use all the applicable approaches, such as market approach, cost approach and income approach, and that the trier of fact shall (mandatory) reconcile any different valuation between these various approaches to arrive at a "fair valuation".

Except for vacant and unimproved lots, there are always at least two approaches that must be considered. This should be expressed by statute.

It should also be made clear that where there are more than two different prices paid by buyer and received by seller, for eminent domain and inverse condemnation purposes, the highest fair value should be considered; for all other purposes, the lowest fair market value must be accepted. Such a statute would make our laws more equitable ... the ultimate goal of all laws, whether substantive or procedural.

I shall be glad to expand on the above at your convenience.

Sincerely yours,

PETER D. BOGART

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KENNETH CORY

Controller of the State of California

SACRAMENTO, CALIFORNIA 95805

(916) 445-7341

May 26, 1977

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

Dear Mr. DeMoully:

This is in reply to your letter of April 29.

We have reviewed the tentative recommendation of the California Law Revision Commission, and we have no objection to extending the Evidence Code provisions relating to determination of market value of property to include inheritance tax cases where the value of property is in issue. The courts have in the past relied upon the basic rules of condemnation cases where valuation was at issue in inheritance tax proceedings. We would agree that it would be of a benefit to establish a clear statutory set of rules of evidence to be applied in inheritance tax cases where valuation is at issue.

We note that the comment to Proposed Amended Section 811 of the Evidence Code expressly lists inheritance taxation as one of the several types of cases to which the amended section would apply. Although gift taxation is not also expressly listed in the comment, we assume the Commission would agree that, as amended, Section 811 would also have application to gift taxation.

Cordially,

Kenneth Cory
State Controller

KC/lf

Memorandum 77-52

EXHIBIT 24

#63.70

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION

OF THE STATE BAR OF CALIFORNIA

601 McALLISTER STREET
SAN FRANCISCO 94102
TELEPHONE 922-1440
AREA CODE 415

June 20, 1977

Mr. John Demouly
California Law Revision Commission
Stanford University
Stanford, California 94305

Dear Mr. Demouly:

Enclosed is the report of the Executive Committee of the Estate Planning, Trust and Probate Law Section concerning the Law Revisions Commission's tentative recommendation relating to the evidence of market value of property.

This report has not been submitted to the Board of Governors and as such does not constitute the official opinion of the State Bar. Even though the Board has not considered the report, it is forwarded to you in the belief that the comments may be helpful to the Law Revision Commission.

The report is complete in itself, however, I would like to bring to your attention a concern expressed by some members of the Committee which is not reflected in the report.

Generally the Inheritance Tax Referee does not hold hearings on the value of an asset; even though he has the authority to do so. The referee makes an independent determination of the market value and files the report with the Court. The report is presumed correct as to valuations for the purposes of the hearings.

It was some members concern that the proposed amendments to the Evidence Code (E.C§810) may result in this procedure being transformed into an "adversary" hearing, with the referee having to hold hearings and take 'evidence' on the value of real property and tangible personal property. If this is a correct interpretation, it would result in a dramatic change in the role of the Inheritance Tax Referee.

If I can be of any further assistance on this matter please feel free to contact me.

Very truly yours,

Susan Mahony

Susan Mahony
Staff Assistant

SM/cl
Enclosures

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GEORGE W. PRINCE, JR. (1887-1971)
EUGENE OVERTON (1880-1970)
EDWARD D. LYMAN (1881-1967)

June 8, 1977

TO: STATE BAR BOARD OF GOVERNORS

FROM: EXECUTIVE COMMITTEE
ESTATE PLANNING, TRUST AND PROBATE LAW SECTION

SUBJECT: LAW REVISION COMMISSION'S TENTATIVE RECOMMENDATION RELATING TO EVIDENCE OF MARKET VALUE OF PROPERTY

The secretary of the State Bar referred to our Section for study and comment the above mentioned report. The Executive Committee has comments as set forth herein.

Given the statutory procedures applicable to estates, conservatorships and guardianships, the proposed amendments to the Evidence Code would appear to have little applicability to the normal appraisal functions performed by the independent referee appointed by the Probate Court. If those sections have some applicability, it should be limited to situations where objections are filed to the report of the Inheritance Tax Referee and those objections relate to the question of valuation of property. In those limited situations where the question of market value of property is presented to a Court for determination, our Section Executive Committee has no comment about the Law Revision Commission's recommendations concerning amendments to the Evidence Code.

Pursuant to the provisions of the Probate Code relating to estates, guardianships and conservatorships, an Inheritance Tax Referee is appointed by the Court to appraise real property and tangible personal property (Probate Code Sections 605, 1550 and 1901). Property is to be valued by the Referee for taxation purposes in an estate at the market value as of the date of the transferor's death (Revenue and Taxation Code Section 13.951). The Referee is to determine the fair market value of the property subject to tax (Revenue and Taxation Code Section 14501) and in con-

nection therewith has the right to conduct hearings in reference thereto (Revenue and Taxation Code Section 14502 et seq.). As a practical matter, however, Referees normally do not hold hearings to determine the value of assets which they are appraising. When the Referee completes his report, it is submitted to the Court (Revenue and Taxation Code Section 14506). Notice is given to those interested and anyone affected by the tax can file objections to the computation of the tax and to valuations of assets subject to taxation (Revenue and Taxation Code Section 14510). The Court can hold a hearing on the objections (Revenue and Taxation Code Section 14511). The report of the Referee is presumed correct as to valuations and the computation of the tax for purposes of the hearing (Revenue and Taxation Code Section 14512).

Under Probate Code Section 1550.1 applicable to guardianships and Section 1901.5 applicable to conservatorships, when an inventory is filed (there being no tax determination in these proceedings) any interested party can file objections to those inventory values within 15 days. A hearing will be held on the objections and the Court, among other things, can simply require additional appraisals on such property as provided in said code sections.

In summary, the Executive Committee believes that the proposed amendments to the Evidence Code have very limited applicability to inventory valuations in probates, guardianships and conservatorships, and to the inheritance tax determinations in decedents estates. The statutory scheme as set forth in the Revenue and Taxation Code and in the Probate Code will cover almost all situations which arise.

Please advise us if you have any additional questions.

Very truly yours,

Edmond R. Davis
Chairman

ERD:mew

#63.70 March 15, 1977

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

EVIDENCE OF MARKET VALUE OF PROPERTY

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
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 JUNE 1, 1977.

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.

LETTER OF TRANSMITTAL

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

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

TENTATIVE RECOMMENDATION

relating to

EVIDENCE OF MARKET VALUE OF PROPERTY

Background

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

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

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

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1. Evid. Code §§ 810-822.

2. Cal. Stats. 1965, Ch. 1151, § 4.

3. See Recommendation and Study Relating to Evidence in Eminent Domain Proceedings, 3 Cal. L. Revision Comm'n Reports at A-1 (1960).

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

5. See, e.g., Matteoni, "Just Compensation," in Condemnation Practice in California, §§ 4.25-4.51, at 57-74 (Cal. Cont. Ed. Bar 1973); Dankert, "Condemnation Practice Handbook," in 14 California Real Estate Law and Practice, §§ 508.01-509.42 (1976); B. Witkin, California Evidence §§ 440-447, at 397-405 (2d ed. 1966).

6. See Highway Research Board, Rules of Compensability and Valuation Evidence for Highway Land Acquisition (1970).

7. The questionnaire results were analyzed in a consultant's report. See Matteoni, "Consultant's Comments" (March 24, 1972) (unpublished, on file in offices of California Law Revision Commission).

Application of Evidence Code Provisions

The provisions of the Evidence Code relating to valuation of property apply only to eminent domain and inverse condemnation proceedings.[8] Other actions involving the valuation of property, with a few limited exceptions,[9] 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.[10]

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

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

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

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

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

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

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

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

or inverse condemnation proceeding.[12]

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.[13] In addition to the inequity created by such a scheme, confusion among appraisers and attorneys, as well as among the courts, is generated by the existence of multiple standards.[14] And the lack of clear statutory standards in cases where the market value issue is not frequently litigated poses real problems for the parties and the court.[15]

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

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882, 90 Cal. Rptr. 608, 610 (1970) (fire insurance); DeLuz Homes, Inc. v. County of San Diego, 45 Cal.2d 546, 561-562, 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, 752-753, 192 P.2d 935, 940 (1948) (fraud damages); Pepper v. Underwood, 48 Cal. App.3d 698, 706 n.7, 122 Cal. Rptr. 343, 349 n.7 (1975) (fraud damages).

12. E.g., Code Civ. Proc. § 1263.310 (measure of compensation in eminent domain is "fair market value" of property).

13. See Carlson, Statutory Rules of Evidence for Eminent Domain Proceedings, 18 Hastings L.J. 143, 144 (1966).

14. See id.

15. See, e.g., In re Marriage of Folb, 53 Cal. App.3d 862, 868, 126 Cal. Rptr. 306, 310 (1975):

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

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

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

Broad application of the statutory evidence rules will to some extent change existing case law.[19] However, the courts have applied

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16. This has been suggested in Carlson, Statutory Rules of Evidence for Eminent Domain Proceedings, 18 Hastings L.J. 143, 144 (1967): "It may well be that the trial and appellate courts will want uniformity and may well follow the new evidence rules for all cases involving the valuation of real property."

17. 53 Cal. App.3d 862, 126 Cal. Rptr. 306 (1975).

18. See In re Marriage of Folb, 53 Cal. App.3d 862, 868-871, 126 Cal. Rptr. 306, 310-312 (1975). The court ultimately held some of the Evidence Code provisions not controlling in a marital dissolution case. Id. at 871, 126 Cal. Rptr. at 312.

19. For example, the value of property in eminent domain and inverse condemnation cases may be shown only by opinion testimony of expert witnesses or of the owner of the property. Evid. Code § 813. Evidence of sales of the subject property or of comparable sales is admissible on direct examination but only for the purpose of explaining the witness' opinion. See Evid. Code §§ 815, 816; Carlson, Statutory Rules of Evidence for Eminent Domain Proceedings, 18 Hastings L.J. 143, 149 (1966). Thus, after hearing such evidence, the jury is instructed to consider it "only for the limited purpose" of enabling it "to understand and weigh the testimony of the witnesses as to their opinion" of value and to return a verdict within the range of the expert opinions of value. BAJI 11.80 (1975 Rev.).

On the other hand, existing law applicable to other than eminent domain and inverse condemnation cases permits a verdict

many of the basic principles applicable to eminent domain cases in the other areas where valuation is important, particularly in property taxation and inheritance taxation,[20] 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.

Testimony by Owner

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

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based on a comparable sale even though the verdict is outside the range of the expert opinion of value. See Foreman & Clark Corp. v. Fallon, 3 Cal.3d 875, 886, 479 P.2d 362, 369, 92 Cal. Rptr. 162, 169 (1971); In re Marriage of Folb, 53 Cal. App.3d 862, 871, 126 Cal. Rptr. 306, 312 (1975). The application of the evidentiary rules of Evidence Code Sections 810-822 to all cases where the value of property is in issue (except cases already covered by statute--see Com. Code §§ 2723-2724) would apply the rule of limited admissibility of sales data to such cases and would thus change the rule of Foreman & Clark Corp. v. Fallon, supra, In re Marriage of Folb, supra, and similar cases.

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

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

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

Admissibility of Comparable Sales

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

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

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

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

24. Evid. Code § 816.

25. Of course, if a witness refers to sales which are too remote, the opinion is subject to a motion to strike. See also Evid. Code § 803 (opinion based on improper matter).

Capitalization of Income

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

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

Under the recommended valuation approach, the expert witness will be permitted to take into account in formulating an opinion a capitalization of income analysis based on the reasonable net rental value of the land as improved by the hypothetical improvement that would be required to be constructed to permit the property to be devoted to its highest and best use. Such an analysis could, for example, involve a determination of the reasonable net rental value of the property as improved by the hypothetical improvement, the apportionment of the reasonable net rental value so determined between the land and the hypothetical improvement and the capitalization of the reasonable net rental value apportioned to the land. This is a standard valuation technique.[27]

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26. Evid. Code § 819.

27. See, e.g., A. Ring, The Valuation of Real Estate, 266-297 (2d ed. 1970).

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

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

Lease of Subject Property

A lease of the subject property may be taken into account in forming an opinion of the value of the property.[28] In an eminent domain

28. Evid. Code § 817.

proceeding, however, such a lease of the whole property or of the part taken, if made after the filing of the lis pendens, is inherently untrustworthy, having been made with knowledge of the pendency of the action. The Commission recommends that such a lease not be a proper basis for an opinion of value.[29]

Admissibility of Unpaid Taxes

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

The apparent conflict between the two provisions is resolved by observing that the Revenue and Taxation Code provision relates only to mention of unpaid taxes.[30] The Commission believes that this distinction should be made clear, however, by relocating the taxation provision in the Evidence Code. The language of Revenue and Taxation Code Section 4986(b) concerning mistrial should be deleted.[31] The general rule will thus apply, which gives the court discretion to declare a mistrial when evidence has been presented which is inadmissible, highly prejudicial, and cannot be corrected by an admonition to the jury.[32]

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

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29. Cf. Evid. Code § 815 (sale of subject property). Likewise, the limitation in Section 815 on use of sales occurring after the filing of the lis pendens should apply only in eminent domain proceedings.

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

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

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

Admissibility of Sale or Exchange

It is improper for a valuation witness to give an opinion as to the value of property other than that being valued.[33] A particular application of this rule is to trades or exchanges involving the property being valued since a determination of the value of the property depends in part upon the value of the property for which it is traded or exchanged.[34] The Commission recommends that the statute make clear that transactions involving the trade or exchange of property are not a proper basis for an opinion as to the value of the property.[35]

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

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33. Evid. Code § 822(d).

34. See People v. Reardon, 4 Cal.3d 507, 515-516, 483 P.2d 20, 26, 93 Cal. Rptr. 852, 858 (1971).

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

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An act to amend the title of Article 2 (commencing with Section 810) of Chapter 1 of Division 7, and to amend Sections 810, 811, 812, 813, 815, 816, 817, 819, and 822 of the Evidence Code, and to amend Section 4986 of the Revenue and Taxation Code, relating to evidence in the valuation of property.

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

Evidence Code §§ 810-822 Title (amended)

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

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

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Evidence Code § 810 (amended)

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

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

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

Evidence Code § 811 (amended)

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

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

(a) Real property or any interest therein.

(b) Tangible personal property.

Comment. Section 811 is amended to broaden the application of this article to all cases where a market value standard is used to determine the value of real property or any interest therein, or of tangible personal property. These cases include, but are not limited to, the following:

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

(2) Property taxation. See, e.g., Cal. Const., Art. XIII, § 1, and Rev. & Tax. Code §§ 110, 110.5, 401 (property assessment and taxation based on fair market value or full value).

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

(4) Breach of contract of sale. See, e.g., Com. Code §§ 2708, 2713 (measure of damages for nonacceptance, nondelivery, or repudiation is based on market price). It should be noted that, where a particular provision requires a special rule relating to proof of value, the special rule prevails over this article. See, e.g., Com. Code §§ 2723, 2724.

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

(6) Other cases in which no statutory standard of market value or its equivalent is prescribed but in which the court is required to make a determination of market value.

It should be noted that this article applies only where market value is to be determined. In cases involving some other standard of value, the rules provided in this article are not made applicable by statute. See Section 810 and Comment thereto.

This article applies to the valuation of real property or an interest in real property (e.g., a leasehold) and of tangible personal property. It does not apply to the valuation of intangible personal property which is not an interest in real property, such as shares of stock, a partnership interest, goodwill of a business, or property protected by copyright; valuation of such property is governed by the rules of evidence otherwise applicable. It should be noted, however, that nothing in this article precludes a court from using the rules prescribed in this article in valuation proceedings to which the article is not made applicable, where the court determines that the rules prescribed are appropriate.

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Evidence Code § 812 (amended)

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

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

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

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Evidence Code § 813 (amended)

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

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

(1) Witnesses qualified to express such opinions; ~~and~~

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

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

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

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

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

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Evidence Code § 815 (technical amendment)

SEC. 6. Section 815 of the Evidence Code is amended to read:

815. When relevant to the determination of the value of property, a witness may take into account as a basis for ~~his~~ an opinion the price and other terms and circumstances of any sale or contract to sell and purchase 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~~ 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.

Comment. Section 815 is amended to compensate for the expansion of the scope of this article to actions other than eminent domain and inverse condemnation. See Section 810.

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Evidence Code § 816 (amended)

SEC. 7. Section 816 of the Evidence Code is amended to read:

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

(b) In order to be considered comparable, the sale or contract must have been made sufficiently near in time to the date of valuation, and the property sold must be located sufficiently near the property being valued, and must be sufficiently alike in respect to character, size, situation, usability, and improvements, to make it clear that the property sold and the property being valued are comparable in value and that the price realized for the property sold may fairly be considered as shedding light on the value of the property being valued.

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

Comment. Subdivision (c) is added to Section 816 to incorporate a policy of liberal admissibility of sales on the theory that an error of exclusion is more likely to be prejudicial than an error of admission. This policy applies only to expert witnesses. It is not intended to limit the court's discretion in placing a reasonable limitation upon the number of sales that may be admissible for any appraisal purpose so as to avoid the cumulative effect of such testimony. Nor does it affect the right of liberal cross-examination granted in Section 721. However, the right of cross-examination may not be used as a means of placing improper matters before the trier of fact. While subdivision (c) adopts a policy of liberality in the admissibility of comparable sales, this policy is subject to the basic standard of comparability set out in subdivision (b).

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

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Evidence Code § 817 (amended)

SEC. 8. Section 817 of the Evidence Code is amended to read:

817. (a) ~~When~~ Subject to subdivision (b), when relevant to the determination of the value of property, a witness may take into account as a basis for ~~his~~ an opinion the rent reserved and other terms and circumstances of any lease which included the property or property interest being valued or any part thereof which was in effect within a reasonable time before or after the date of ~~valuation.~~ 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 if it occurs 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 ~~his~~ an opinion as to the reasonable net rental value attributable to the property or property interest being valued as provided in Section 819 or determining the value of a leasehold interest.

Comment. Section 817 is amended to add the limitation that a lease of the subject property is not a proper basis for an opinion of value after the filing of the lis pendens in an eminent domain proceeding. This is comparable to a provision of Section 815 (sale of subject property).

It should be noted that subdivision (b) limits the extent to which a witness may take into account a lease based on gross sales or gross income of a business conducted on the property. This limitation applies only to valuation of the real property or an interst therein, or of tangible personal property, and does not apply to the determination of loss of goodwill. See Section 811 and Comment thereto; Code Civ. Proc. § 1263.510 and Comment thereto.

968/887

Evidence Code § 819 (amended)

SEC. 9. Section 819 of the Evidence Code is amended to read:

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

(b) When relevant to the determination of the value of property, an expert witness may take into account as a basis for an opinion the

capitalized value of the reasonable net rental value that would be attributable to the land if the property were improved so that it could be used for the highest and best use for which it is reasonably adaptable and available, but this subdivision applies only if the court determines that both of the following requirements are met:

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

(2) There is no adequate market data described in Section 816 upon which an opinion may be based as to the value of the property for the highest and best use for which the property is reasonably adaptable and available.

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

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

value so determined between the land and the hypothetical improvement, and the capitalization of the reasonable net rental value apportioned to the land. See, e.g., A. Ring, The Valuation of Real Estate, 266-297 (2d ed. 1970).

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

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

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Evidence Code § 822 (amended)

SEC. 10. Section 822 of the Evidence Code is amended to read:

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,~~ purposes or the amount of taxes which may be due on the property, but nothing in this subdivision prohibits the consideration of actual or estimated taxes for the purpose of determining the reasonable net rental value attributable to the property or property interest being valued. This subdivision does not apply in an action to ascertain the value of property as assessed for taxation purposes.

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

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

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

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

Comment. Subdivision (c) of Section 822 is amended to incorporate a provision formerly found in Revenue and Taxation Code Section 4986 and to make clear that it does not apply in tax assessment cases.

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

Section 822 does not prohibit cross-examination of a witness on any matter precluded from admission as evidence if such cross-examination is for the limited purpose of determining whether a witness based an opinion in whole or in part on matter that is not a proper basis for an opinion; such cross-examination may not, however, serve as a means of placing improper matters before the trier of fact. See Evid. Code §§ 721, 802, 803.

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Revenue & Taxation Code § 4986 (amended)

SEC. 11. Section 4986 of the Revenue and Taxation Code is amended to read:

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

(1) More than once.

(2) Erroneously or illegally.

(3) On the canceled portion of an assessment that has been decreased pursuant to a correction authorized by Article 1 (commencing with Section 4876) of Chapter 2 of this part.

(4) On property which did not exist on the lien date.

(5) On property annexed after the lien date by the public entity owning it.

(6) On property acquired prior to September 18, 1959, by the United States of America, the state, or by any county, city, school district or other political subdivision and which, because of such public ownership, became not subject to sale for delinquent taxes.

(b) On property acquired after the lien date by the United States of America, if such property upon such acquisition becomes exempt from taxation under the laws of the United States, or by the state or by any county, city, school district or other public entity, and because of such public ownership becomes not subject to sale for delinquent taxes, no cancellation shall be made in respect of all or any portion of any such unpaid tax, or penalties or costs, but such tax, together with such penalties and costs as may have accrued thereon while on the secured roll, shall be paid through escrow at the close of escrow or, if unpaid for any reason, they shall be collected like any other taxes on the unsecured roll. If unpaid at the time set for the sale of property on the secured roll to the state, they shall be transferred to the unsecured roll pursuant to Section 2921.5, and collection thereof shall be made and had as provided therein, except that the statute of limitations on any suit brought to collect such taxes and penalties shall commence to run from the date of transfer of such taxes, penalties and costs to the unsecured roll, which date shall be entered on the unsecured roll by the auditor opposite the name of the assessee at the time such transfer is made. The foregoing toll of the statute of limitations shall apply

retroactively to all such unpaid taxes and penalties so transferred, the delinquent dates of which are prior to the effective date of the amendment of this section at the 1959 Regular Session.

If any property described in this subdivision is acquired by a negotiated purchase and sale, gift, devise, or eminent domain proceeding after the lien date but prior to the commencement of the fiscal year for which current taxes are a lien on the property, the amount of such current taxes shall be canceled and neither the person from whom the property was acquired nor the public entity shall be liable for the payment of such taxes. If, however, the property is so acquired after the commencement of the fiscal year for which the current taxes are a lien on the property, that portion only of such current taxes, together with any allocable penalties and costs thereon, which are properly allocable to that part of the fiscal year which ends on the day before the date of acquisition of the property shall be paid through escrow at the close of escrow, or if unpaid for any reason, they ~~,~~ shall be transferred to the unsecured roll pursuant to Section 2921.5 and shall be collectible from the person from whom the property was acquired. The portion of such taxes, together with any penalties and costs thereon, which are allocable to that part of the fiscal year which begins on the date of the acquisition of the property, shall be canceled and shall not be collectible either from the person from whom the property was acquired nor from the public entity.

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

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

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

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

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