#63.70 9/22/77

Memorandum 77-66

Subject: Study 63.70 - Evidence (Market Value of Property)

Attached to this memorandum is a staff draft of the recommendation relating to evidence of market value of property, revised in accordance with the Commission's decisions at the September 1977 meeting. This memorandum discusses selected aspects of the recommendation.

"Owner" of Property

Section 813(a)(2) permits an opinion as to value of property to be given by the "owner" of the property. The question has arisen whether the provision applies to such persons as executors, administrators, guardians, and conservators, who have neither legal title nor a beneficial interest in the property.

As a general rule, when the word "owner" appears in a statute, it is broadly construed to effectuate as nearly as possible the purposes of the statute. The Supreme Court has stated in Miller v. Imperial Water Co. No. 8, 156 Cal. 27, 30, 103 P. 227, ___ (1909):

> The terms "owning", "owner", and "owned", depend somewhat for their significance upon the connection in which they are used. They are not technical, but general terms, and are therefore liberally construed, "the precise meaning depending upon the nature of the subject-matter and the connection in which" they are used. (See 28 Am. & Eng. Ency. of Law, p. 233; 6 Words and Phrases, pp. 5134 et seq.)

Thus, in RCA Photopone Inc. v. Huffman, 5 Cal. App.2d 401, 42 P.2d 1059 (1935), the court concluded in a tax case that the term "owner" may include others than the possessor of the legal title to property and is often used to designate persons in legal possession.

We have been unable to find any California cases construing the word "owner" in its application to executors, administrators, guardians, or conservators, although there are cases in other jurisdictions that have included such legal representatives within the meaning of "owner" for some purposes. There are California statutes that define "owner" to include such legal representatives. For example, the Sewer Right of Way Law of 1921 provides:

Govt. Code § 39006

39006. As used in this chapter, "owner" and "any person interested" include the person:

(a) Owning the fee.

(b) Whose name appears as the legal owner of real property on a deed recorded in the recorder's office of the county in which the city is situated, on the day any protest or petition is filed.

(c) In possession of real property as the executor, administrator, trustee under an express trust, guardian, or other legal representative of the owner.

(d) In possession of real property under a recorded written contract of purchase.

(e) In possession of real property as lessee under a recorded lease requiring him to pay or discharge all assessments for street or other public improvements levied or assessed against the real property.

Whether the word "owner" as used in Section 813 applies to executors, administrators, guardians, conservators, or other legal representatives depends upon the purpose of the statute. The purpose of Section 813(a)(2) is to implement the presumption that an owner knows the value of his property. Is a legal representative sufficiently familiar with the value of the property to be presumed to know the value? That will depend on the facts of the particular case. It is conceivable that a guardian or conservator may be quite familiar with the value while an executor or administrator is not, due to the difference in the length of time they manage the property. The staff believes it is advisable to leave the term "owner" undefined in Section 813 and to allow the courts discretion to implement the section on a case-by-case basis.

Offers to Purchase Subject Property

The Commission at the September 1977 meeting determined to add to Section 822(b) a provision authorizing admissibility of an offer to purchase the subject property and requested a memorandum concerning appropriate limitations on admissibility of such evidence.

The limitations worked out by the Commission in its unsuccessful 1961 proposal of such a provision were that the offer:

(a) Is an offer to purchase or lease which included the property being valued;

(b) Is a bona fide, open market transaction, not affected by the acquisition or proposed improvement and is made in writing by a person ready, willing, and able to buy or lease at the time the offer was made; and

(c) Is introduced by the owner of the property or property interest for which the offer to purchase or lease was made.

The staff believes these limitations remain sound, with a couple of exceptions. In view of the checkered history of the effort to get a provision enacted making offers admissible, it would be unwise to authorize offers to lease--their use in capitalization would render them particularly speculative. The reference to an "open market transaction" is vague and should be replaced by a more adequate description of fair market value. The requirement that the offer not be affected by the acquisition or proposed improvement is applicable only in an eminent domain proceeding, and is unnecessary in view of the subsequent enactment of Code of Civil Procedure Section 1260.330, which excludes from fair market value any increase or decrease in value attributable to the project, the proceeding, or preliminary actions by the condemnor.

The staff revision of the recommendation relating to market value amends Section 822(b) to make admissible offers to purchase the subject property if bona fide and made in writing by a person ready, willing, and able to buy but under no particular necessity for so doing. To preclude prejudicial evidence of an unduly low offer, offers may be introduced only by the property owner.

Adjustments Made in Comparable Sales

Section 822(d) precludes an opinion as to the value of any property other than the property being valued. The Commission has received a number of comments to the effect that some courts have been misconstruing this provision to preclude an appraiser from making adjustments in comparable sales. The tentative recommendation included a Comment to Section 822(d) that the provision should not be so construed, citing Merced Irrigation Dist. v. Woolstenhulme, 4 Cal.3d 478, 483 P.2d 1, 93 Cal. Rptr. 833 (1971). The responses to the tentative recommendation were that the Comment should be elevated to statutory status. The Commission instead deleted the Comment and requested further information.

The Woolstenhulme case contains an excellent discussion of Section 822(d) and holds that the provision does not preclude an appraiser, when referring to a comparable sale, from explaining any adjustments that must be made in the sale price in utilizing that sale as an indication

of the market value of the subject property. The relevant portion of the case is excerpted as Exhibit 1 (pink). The Woolstenhulme holding was followed in Glendale Fed. Sav. & Loan Ass'n v. Marina View Heights Dev., Inc., 66 Cal. App.3d 101, 144, 135 Cal. Rptr. 802, ___ (1977).

While the staff believes that the law is clear that Section 822(d) does not preclude adjustments in comparable sales, the staff believes it would be helpful to point this out in the Comment since the Commission has received a number of communications on this point. The staff would restore the language of the Comment that was in the tentative recommendation:

> Subdivision (d) does not prohibit a witness from testifying to adjustments made in sales of comparable property used as a basis for an opinion. Merced Irrigation Dist. v. Woolstenhulme, 4 Cal.3d 478, 501-03, 483 P.2d 1, 16-17, 93 Cal. Rptr. 833, 848-49 (1971).

Respectfully submitted,

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EXHIBIT 1

MERCED IRRIGATION DIST. v. WOOLSTENHULME
4 C.3d 478; 93 Cal.Rptr. 833, 483 P.2d 1

The district now argues, however, that in permitting defendant's appraiser to isolate this "enhancement factor" in other, allegedly "comparable" sales, the trial court violated Evidence Code section 822, subdivision (d), which renders inadmissible "[a]n opinion as to the value of any property or property interest other than that being valued." (13) The district apparently reads section 822, subdivision (d), as precluding an appraiser, when referring to "comparable sales," from explaining any adjustments that must be made in the "comparable sale" price in utilizing that sale as an indicant of the value of the property to be taken.

Such an interpretation of section 822, subdivision (d), however, goes considerably beyond the main purposes of that section and inevitably conflicts with the practical application of the entire "comparable sale" approach of section 816. Under the comprehensive statutory scheme relating to the evidentiary procedure for eminent domain proceedings enacted in 1961 (see, generally, Cal. Law Revision Com. Recommendations Relating to Evidence in Eminent Domain Proceedings (1960) [hereinafter cited as Law Rev. Com. Report]), appraisers, in relating their "opinion" as to the value of the property, are permitted to utilize a wide variety of valuation techniques, including "income capitalization" (Evid. Code, § 819), "reproduction" costs (Evid. Code, § 820) and comparative sale data (Evid. Code, §§ 816, 818). As the drafters of section 822, subdivision (d), indicated, in excluding "opinion" evidence as to the value of property other than the condemned property, the section simply attempts to avoid the host of collateral issues, and the consequent prolongation of eminent domain trials, that would arise if appraisers were permitted to testify, under these liberalized evidentiary rules, as to their "opinion" of the value of other property. (See Law Rev. Com. Report, p. A-8.) An appraiser's testimony relating to adjustments to be made in "comparable sales," however, does not normally raise collateral issues of great magnitude.

Moreover, the procedure of which the district complains is a most natural and, indeed, necessary component of the entire "comparable sales" approach sanctioned by section 816. It is a familiar statement that no two parcels of land are precisely equivalent; the property which is the subject of a "comparable sale" will always differ in some particulars from the property being valued. Commonly a "comparable sales price" will vary in some respect from an appraiser's opinion of the condemned land's "value"; when this happens, the appraiser will most naturally want to explain the distinguishing features between the property sold and the property to be valued, which he has taken into account in inferring the value of the land under consideration from the "comparable sale." Moreover, even if the appraiser does not so testify on direct examination, he will frequently be questioned on cross-examination as to the relevant differences between the assertedly "comparable" parcel and the subject land. In

response he will be compelled to disclose how he took these relevant differences into account in deriving his valuation figure. (See, e.g., *City of Los Angeles* v. *Cole* (1946) 28 Cal.2d 509, 518 [170 P.2d 928], overruled on other grounds in *County of Los Angeles* v. *Faus* (1957) 48 Cal.2d 672, 680 [312 P.2d 680].) Such inquiries are essential if the jury is intelligently to determine the weight that should be given to such "comparable sales" evidence. (See Law Rev. Com. Report, pp. A-50–A-51.)

Our courts have accepted this "adjustment" process as an integral element of the "comparable sale" approach. In *San Bernardino County Flood Control Dist.* v. *Sweet* (1967) 255 Cal.App.2d 889 [63 Cal.Rptr. 640], for example, the court, in affirming the trial judge's admission of "comparable sales" of property three to five miles distant from the subject property, stated: "The admissibility of testimony relating to comparable sales rests largely in the discretion of the trial court. [Citations.] In the present case, the court carefully considered the question of comparability and required the witness to adjust the sales prices to the date of value of the subject property. We find no abuse of discretion in the court's ruling." (255 Cal.App.2d at p. 905.) Likewise, in *City of San Diego* v. *Boggeln* (1958) 164 Cal.App.2d 1, 7-8 [330 P.2d 74], the procedure utilized by the court in the instant case was endorsed in the context of project "enhanced" comparable sales. (See *County of Los Angeles* v. *Hoe* (1955) 138 Cal.App.2d 74, 79-80 [291 P.2d 98]; cf. *City of Gilroy* v. *Filice* (1963) 221 Cal.App.2d 259, 271 [34 Cal.Rptr. 368]. See also *United States* v. *Miller* (1943) 317 U.S. 369, 380 [87 L.Ed. 336, 346, 63 S.Ct. 276, 147 A.L.R. 55]; *State* v. *Wood* (1969) 22 Utah 2d 317, 320-321 [452 P.2d 872, 874].)