

MLG

9/13/60

Memorandum No. 75(1960)

Subject: Study No. 36(L) - Condemnation (Evidence).

Attached to this memorandum is an analysis of the comments that have been made in regard to our evidence statute. General comments are placed first. The comments that relate to specific sections are arranged according to section number. Policy problems raised by the comments are numbered under each section. Staff recommendations are included. A suggested revision of each section is included at the end of the comments relating to that section.

The citations to the letters are in the following form: the source of the comment is given first, the page number is given next in parentheses and the line number is given last. For example, lines 30-32 on page 98 of Mr. Hodge L. Dolle's letter are cited: Dolle (98) 30-32. The names of public agencies and officers have been abbreviated as follows:

- State Bar of California ----- Bar
- Attorney General ----- AG
- Department of Public Works, Division
of Contracts & Rights of Way ----- PW
- County of Los Angeles, County Counsel----- LA
- County of Marin, County Counsel ----- Marin
- City of Inglewood, City Attorney ----- Inglewood
- City of Modesto, City Attorney ----- Modesto
- City of Mountain View, City Attorney ----- Mtn Vw

City of Newport Beach, City Attorney ----- Nprt Bch
City of Palm Springs, City Attorney ----- Pm Sprgs
City of San Francisco ----- SF

In addition to the comments relating to specific proposals several writers made comments relating to all of our proposals generally. From these general comments it appears that our recommendations have been well received. Some of these comments are:

"I am in full accord with many of the recommendations to be made by the Commission in this field." (Marin (67) 22-23.) "I . . . generally feel that the revisions under consideration are matters which have long been in need of review." (Marin (72) 17-20.)

"Generally speaking, I am in accord with the recommendations of the Commission and believe that they will improve the administration of justice insofar as it relates to the exercise of the power of eminent domain." (Modesto (75) 23-28.)

"In general, I feel that the proposed changes have been needed for a long time, and that, if adopted, they will produce better results in the future." (Mtn Vw (77) 25-27.) "Again, I would like to emphasize that it is gratifying to say that prospective legislation is currently underfoot to correct many of the existing abuses in this field of law." (Mtn Vw (79) 12-17.)

Naturally, the authors of the above comments disagree with certain specific recommendations. Their comments relating to these specific matters are discussed in connection with those topics.

The State Bar reports disagreement among the members of its Committee. "Members employed by public bodies tend to adhere to the status quo, while

members who have represented property owners believe in a new approach to the problems presented." (Bar (1) 34-36.) However, you will discover that the positions taken on our various statutes are not easily categorized. Both condemners' attorneys and condemnees' attorneys disagree among themselves on many of our major proposals.

We have provided in the comments that follow a brief summary and analysis of the letters received. These comments, because of their necessary brevity, do not fully develop the thoughts expressed in the letters. The letters themselves should be read to receive the full value of the remarks contained in them.

Respectfully submitted,

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Assistant Executive Secretary

(36)

ANALYSIS OF COMMENTS ON EVIDENCE STATUTE

GENERAL COMMENT

Our evidence proposals have met a mixed reaction. As stated by the State Bar, "It has not been possible to secure a harmonious expression from the members of the Committee, but most of the members not employed by public bodies are in accord with the recommendations of the Law Revision Committee [sic], with a few minor exceptions." (Bar (1) 50-53.) The Los Angeles County Counsel's office apparently objects to any effort to legislate in this field. (LA (55) 36 - (56) 49.) However, the State Department of Public Works believes that some legislation is necessary, but it objects to a comprehensive statute that would disturb existing evidentiary case law. (PW (26) 45 - (27) 12.) The Attorney General's comments parallel Public Works'. (AG Supp. 1.)

On the other hand, James E. Cox believes a broad statute admitting all evidence considered by informed persons in the market place is all that is required. In fact, he states that the original statute contained in the study is "incomparably superior" to the present tentative draft. (Cox (93) 39-43.) John F. Downey, though, states that he is "generally . . . very much in accord with" our present draft. (Downey (100) 24-25.)

Public Works suggests that the proposed statutes be placed in the general evidence sections of the Code of Civil Procedure and be made applicable to other proceedings. (PW (31) 3-13.) This would correspond to the Commission's recommendation on discovery. But the authorization is only to revise the law of eminent domain. Therefore, it is recommended that the statutes be left where they now are.

SECTION 1248.1

1248.1. The amounts to be ascertained under subdivisions 1, 2, 3 and 4 of Section 1248 may be shown only by the opinions of witnesses qualified to express such opinions. The owner of the property is presumed to be qualified to express such opinions.

1. Independent Evidence of Value

The first sentence of this section expresses the Commission's conclusion that valuation data should not be independent evidence of value. There is disagreement among both private and public attorneys on this question. Public Works believes that the principle is sound. (PW (27) 58 - (28) 14.) Moreover, it states that the belief of a number of judges that valuation data is independent evidence of value has lengthened the trial of eminent domain cases. (PW (28) 28-39.) However, the Los Angeles County Counsel thinks that comparable sales should be treated as independent evidence. (LA (63) 52 - (64) 43.) Among the individuals submitting comments on the proposal, two that represent or have represented condemners believe that valuation data should be independent evidence (Lawrence (86) 20-25; McNamee (89) 43 - (90) 17) while one who represents condemnees believes that valuation data should not be independent evidence of value. (Dolle (21) 7-13.) The remainder of the attorneys submitting comments have not commented specifically on this proposal, but it may be inferred that those who expressed general approval of the statute do not disagree with the Commission on this matter because they do not mention it among the items with which they disagree.

The Los Angeles County Counsel apparently does not recognize that People v. Nahabedian, 171 ACA 335 (1959) states the proposition that an

expert's reasons are not independent evidence of value. (LA (64) 12-16.) However, he apparently overlooked the statement: "It must be remembered that the facts stated as reasons for the opinion of the witness do not become evidence in the sense that they have independent probative value upon the issue as to market value."

City of Los Angeles v. Morris, 74 Cal. App. 473, 484-485 (1925) is cited by the Los Angeles County Counsel for the proposition that the jury may arrive at a verdict outside the scope of the opinion evidence under present law. That case involved a partial taking. The jury apparently relied upon the opinion of one witness to determine the value of the entire parcel, but relied on other opinion evidence to determine the percentage of depreciation caused by severance. This is not quite the same thing as permitting the jury to return a verdict above or below the experts' opinions on the basis of raw valuation data.

Robert McNamee's assertion that Brady v. Carman, 179 ACA 77 (1960) holds that comparable sales are independent evidence of value (McNamee (89) 43-47) is not sustained by a reading of the case. This case was a fraud case, not a condemnation case. All that was held was that the court must deny a motion for nonsuit made at the close of the plaintiff's case if there is any evidence to sustain the plaintiff's case even though the matter is being tried by the court without a jury and the court doesn't believe the plaintiff's witnesses. The court did state that valuation data are evidence on the question of value, but this statement was made in the course of a discussion of an expert's failure to consider certain comparable sales, and the court merely held that such failure may reflect on the weight of his testimony.

None of the writers advocating the use of valuation data as independent evidence of value recognize the dilemma which would be created. Either the hearsay rule must be abandoned in this area or the jury must be subjected to a very technical and confusing instruction which separates out the hearsay testimony and relegates it to credibility. Moreover, the Commission rejected the use of valuation data as independent evidence of value because of the problems encountered in attempting to draft a statute covering the reproduction and capitalization methods of valuation. None of the letters indicates an awareness of these problems.

It is submitted that no compelling reasons have been brought forth in the comments indicating a need for changing the basic policy decision adopted by the Commission.

2. Owners' Opinions

The Department of Public Works (at (31) 15-23) believes that the word "presumed" should not be used in the second sentence of this section. It points out that People v. LaMacchia, 41 Cal.2nd 738, 753 (1953) held that it was error to give the following instruction: "Owners are presumed to know the value of their property, and being permitted to testify thereto, their evidence in that regard is entitled to be weighed and considered by the jury." The Supreme Court held this instruction to be erroneous because it "informs the jury that the testimony of an owner is entitled to greater weight than that of other witnesses on value." The court went on to comment that although the word "presumed" should not have been used, the jury was adequately informed by other instructions as to its responsibilities in determining the value and, in any event, the actual verdict was far below the owners' estimates. The Department of Public Works suggests that the

second sentence be altered to read: "The owner of the property or property interest sought to be condemned should be permitted to express such opinions."

The instruction held erroneous in People v. LaMacchia was a direct quotation from Los Angeles County Flood Control District v. Abbott, 24 Cal. App.2d 728, 737 (1938) (hearing denied by Supreme Court). The cases do not appear to hold that an owner is always qualified to express opinions as to the value of his property. However, no case has been found where an owner was held not qualified to express such an opinion. The leading case in California is Spring Valley Water Works v. Drinkhouse, 92 Cal. 528 (1891). There the court held the owner qualified to express an opinion of value because she was the owner and had been a resident upon the land for over 20 years. "The natural presumption would be that she had, during that long period, acquired sufficient acquaintance with it, and the value of the land in that neighborhood to be able to give an 'intelligent estimate as to her own property'." The leading recent case is Long Beach City High School District v. Stewart, 30 Cal.2d 763, 772 (1947). The Supreme Court there commented that the witness was qualified by his ownership and residence on the property for a number of years. Even in People v. LaMacchia it is stated in 41 Cal.2d at 746 that "a property owner . . . is generally considered competent to estimate the value of his property upon a showing that he has resided thereon for a number of years."

The LaMacchia case, which without citing authority held the instruction quoted above to be error, apparently believed the instruction was erroneous merely because it over emphasized the testimony of the owners. The court did not say that the law was misstated in the instruction. From the

language of the Spring Valley Water Works and Los Angeles County Flood Control District cases, it appears that the instruction was a correct statement of the law.

The cases cited indicate that there is not a special rule of admissibility for owners' opinions. Any one who has some peculiar means of forming an intelligent and correct judgment as to the value of the property beyond what is possessed by men generally is qualified to express an opinion as to value. (Spring Valley Water Works v. Drinkhouse, 92 Cal 528, 534 (1891).) An owner qualifies under the general rule. In the Long Beach City High School case, supra, it is said that an owner by virtue of ownership and residence qualifies "as a person entitled to express an opinion as to its value." As we have not undertaken to define the qualifications of persons entitled to express opinions generally, and as an owner of property has been held to be qualified to express opinions under the general rule, it appears that the entire problem may be obviated by deleting the second sentence. This will continue the law as it is, and will eliminate the problem of determining whether an owner is "presumed" to be qualified or is "deemed" to be qualified.

3. Jury Views, Physical Evidence, Opinion Evidence on Collateral Matters Recommendation

Several letter writers expressed concern over the status of jury views, maps, photographs, other physical evidence, testimony as to the construction of the improvement in the manner proposed, engineering testimony, geologists' testimony, and other expert testimony relating to technical aspects of the case. This evidence is introduced, of course,

upon the questions of value, damages and benefits. The fear is expressed that Section 1248.1 as recommended will exclude such evidence, for the section states that value may be shown only by the opinions of qualified witnesses.

A fair reading of Section 1248.1 will reveal that such evidence is not excluded by the section. It merely states that the "amounts" to be ascertained must be shown by opinion evidence. Under this section, the view and other evidence as to the nature of the property and the improvement to be constructed are not direct evidence of such "amounts." The section merely requires that, sometime during the presentation of the case, an expert must be called to testify as to the "amounts" to be ascertained. Nothing in the section precludes the preliminary introduction into evidence of some of the matter upon which the expert opinion must be ultimately based.

In view of the concern shown over the status of this evidence, however, it is suggested that the section be amended to make it clear that evidence may be introduced to supplement and explain the opinion testimony on value.

It is suggested that 1248.1 be amended to read:

"1248.1. (1) The amounts to be ascertained under subdivisions 1, 2, 3 and 4 of Section 1248 may be shown only by the opinions of witnesses qualified to express such opinions. [~~The owner of the property or property interest sought to be condemned is presumed to be qualified to express such opinions.~~]

(2) Nothing in this section prohibits a view of the property or the admission of any other evidence, including but not limited

to evidence as to the nature and condition of the property and 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 apply the testimony given under subdivision (1) of this section; and such evidence is subject to impeachment or rebuttal.

SECTION 1248.2 (1) (INTRODUCTORY CLAUSE)

1248.2. (1) Subject to Section 1248.3, the opinion of a witness as to the amount to be ascertained under subdivisions 1, 2, 3 or 4 of Section 1248 is admissible only if the court finds that the opinion is based upon facts or data that a reasonable, well-informed prospective purchaser or seller of real property would take into consideration in determining the price at which to purchase or sell the property or property interest, including but not limited to:

"Reasonable Man" Standard

The reasonable man standard stated in the introductory clause is objected to by Public Works because it feels that the case law adequately handles the subject and the enactment of legislation may have undesirable repercussions. (PW (29) 24-37, (31) 31 - (32) 35.) It is concerned lest our statement be construed to change the definition of market value and to permit evidence to be given of personal considerations. The Attorney General makes objections similar to those of Public Works. (AG Supp. p. 2.) Mountain View believes the statute will make it difficult for an attorney

to prepare for trial, for he will not know what the court will consider proper. (Mtn Vw (77) 40-55.)

In lieu of the reasonable man standard stated in the introductory clause, Public Works suggests that a new subdivision be added stating that a witness may rely on "any other competent reasons of such qualified witness which are relevant and material." (PW (31) 31 - (32) 35.)

On the other hand, the Marin County Counsel favors a wide open rule of admissibility without specific limitations. (Marin (69) 36-49.) James E. Cox favors the same approach. (Cox (93) 39-41.)

An accepted definition of market value is "the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable." (Sacramento Southern R.R. v. Heilbron, 156 Cal. 408, 409 (1909).) Another recent definition is "the price that would be paid by a willing purchaser from a willing seller purchasing with a full knowledge of all the uses and purposes for which the property is reasonably adapted." (Daly City v. Smith, 110 C.A.2d 524, 531 (1952) (hearing denied).)

Although the presently proposed language does not seem susceptible to all of the interpretations placed upon it by Public Works, it would probably forestall some criticism of the statute if this section were reworded in terms of the existing market value definition. The suggested alternative of Public Works does not seem to say anything for no standard is given by which the court may determine what is "competent."

Recommendation

Therefore, it is recommended that the introductory clause of subdivision (1) be amended to read:

1248.2. (1) Subject to Section 1248.3, the opinion of a witness as to the amount to be ascertained under subdivisions 1, 2, 3 or 4 of Section 1248 is admissible only if the court finds that the opinion is based upon facts or data that a willing [reasonable, well-informed prospective] purchaser [or seller of real property], buying from a willing seller, with a full knowledge of all the uses and purposes for which the property is reasonably adaptable, would take into consideration in determining the price at which to purchase [or sell] the property or property interest, including but not limited to:

SECTION 1248.2(1)(a)

1248.2. (1)(a) The amount paid or contracted to be paid for the property or property interest sought to be condemned or for any comparable property or property interest if the sale, lease or contract was freely made in good faith within a reasonable time before or after the date of valuation.

1. After Sales

The Los Angeles County Counsel's office objects strenuously to the inclusion of sales after the date of valuation. (LA (60) 42 - (62) 34.) However, the remaining letters do not object to this proposal and several specifically approve it. (Dolle (19) 28-48; Lawrence (86) 35-39.) It is recommended that there be no change in the Commission's recommendation in this regard.

2. Foundational Requirements

Richard L. Huxtable suggests that evidence of market data be admitted only after an extensive foundation has been laid. (Huxtable (103) 41 - (105) 50.) Specifically, he suggests that an additional section should be adopted defining the foundation required for the showing of a sale or offer in evidence, somewhat as follows:

(1) Before the consideration paid, fixed or offered in any sale, rental transaction, or offer, may be received in evidence, it must be shown that:

(a) Such sale or offer was made, or said rental was fixed, within a reasonable time before or after the date of valuation, and said transaction did effect or was intended to effect use, possession or title of the property to which it related, within a reasonable time before or after the date of valuation;

(b) It was freely made in good faith;

(c) It was unaffected by the pendency of the action in which offered as evidence, or by the actual or proposed construction of the public improvement upon the property being taken;

(d) The price fixed in said transaction is one based on the market value of the property, estate or interest transferred, or to be transferred, and not effected by the economic or personal circumstances or necessities of the parties to the transaction;

(e) The property which is the subject of said sale, rental or offer is similar in character, situation, usability, and improvement to the property being valued;

(f) The parties to the transaction or the offeror were reasonably informed concerning the character, situation, usability, and improvement of the property being transferred or intended to be transferred;

(g) The purchase price, rental, or price offered was actually paid, reasonably secured, or otherwise reasonably sure of payment;

(h) The transaction was free of collateral inducements to either of the parties;

(i) In the case of an offer, that such offer is a bona fide offer to buy or sell the identical property being valued, or a portion thereof, in writing, in such form that its acceptance would have, or will, result in a contract to buy and to sell, contingent only upon events or determinations reasonably certain to occur in the immediate future, and such offer was made by a person ready, willing and able to buy or to sell the property.

(j) In the case of a rental, that said rental is fixed in the sum certain, or a mathematically ascertainable portion of the gross receipts of a business, but not fixed by profits of a business.

(2) Testimony of a witness, otherwise qualified to express his opinion as to value of the property being valued

(a) That he has examined all available public records relating to said transaction and found them consistent upon their face with a true form and substance of said transaction as revealed by other investigation of the witness;

(b) That he has made inquiry specifically relating to each of the factors enumerated as (a) through (j) of subsection (1) hereof;

(c) That said inquiry was made of one or both of the parties to said transaction, or of an agent or employee of either or both of the parties and who were instrumental in said transaction;

(d) That the inquiry was made in such manner as to elicit the whole knowledge of the party of whom such inquiry is made, relating to each of the factors enumerated; and

(e) That such inquiry disclosed that each and all of the applicable factors were present;

shall constitute a prima facie showing with respect to each and all of said applicable factors.

(3) A party objecting to the showing of the consideration paid, offered or fixed in any such transaction, shall, upon request, be entitled to reasonable and immediate voir dire examination of the witness from whom such testimony is sought, respecting each and all of the applicable elements of said foundation.

He states:

Each of the above fundamental elements, although numerous, is formulated in the light of particular applications encountered

in the trial of condemnation cases by the undersigned and other members of our firm and are designed to result in as equitable and clearcut a foundation as possible.

It is submitted that the courts will apply these standards of competency under the general language we have proposed. The basic proposition -- that such evidence may not be received in the absence of the foundation -- is contrary to the Commission's approach. The Commission believes that the basic problem is what the expert may consider and not what may be introduced. Anything that he considers should be admissible so that it may be known whether he has considered incompetent matter and what weight should be given his opinion.

3. Sales Contracts

Mr. Huxtable has also suggested that contracts shall be excluded from evidence unless the title to or occupancy of the property is effected within a reasonable time before or after the date of valuation. (Huxtable (7) 44 - (8) 3.) The Los Angeles County Counsel's office would exclude sales contracts altogether. (LA (62) 54 - (63) 16.) It is suggested that this problem be left to the courts to work out on the basis of comparability. Newport Beach would exclude contracts relating to the subject property made after the date of valuation. (Nprt Bch (80) 29-39.) It is suggested that any contract or sale of the subject property made after the valuation date should be excluded. It would be an extraordinary case where such a sale or contract to sell would not be affected by the condemnation proceeding.

Public Works suggests that instead of using the amount paid or contracted to be paid the term "price" should be used since it encompasses

both the amount paid and the amount promised to be paid. (PW (33) 1-12.) In this same connection Public Works suggests that the phrase "or other terms" be added to the word "price" so that the language will be similar to that used in 1248.3. This, too, would make it clear that such things as liability for taxes, insurance, the interest rate, etc., are included in the statute.

Public Works' phrase appears to be a little narrow in that "the price and other terms of any sale" may not include a contract to sell. Therefore, it is suggested that its phrase be modified to read: "The price and other terms of any sale or contract to sell"

4. Sales of the Larger Parcel

Public Works also suggests that the language relating to sales of property be broadened so that it includes sales of property that include the property sought to be condemned. This is needed to make it clear that the price paid for an entire parcel is competent even though only a part of the parcel is being taken by eminent domain. (PW (33) 1-42.) The Public Works' suggestion helps to clarify the matter and it is recommended that it be incorporated in the statute.

5. Leases

Apparently there has been some misunderstanding concerning the use of the word "lease" in this subdivision. The Los Angeles County Counsel's office objects strenuously to the use of the word (LA (60) 17-35) and Public Works is uncertain as to its meaning (PW (33) 23-26). The Commission intended by the use of the word "lease" to make the terms of

leases on comparable property admissible for the purpose of determining the value of a lease on the subject property. The Commission did not intend that income from leases on comparable property might be capitalized to show the value of the comparable property. To make this clear, perhaps, as suggested by Public Works, a separate subdivision should be adopted to express this idea.

Recommendation

In view of the foregoing comments it is suggested that subdivision (a) be amended to read:

(a) The [~~amount-paid-or-contracted-to-be-paid-for~~] price and other terms of any sale or contract to sell which included the property or property interest sought to be condemned or any part thereof [~~or-for-any-comparable-property-or-property-interest~~] if the sale [~~r-lease~~] or contract was freely made in good faith within a reasonable time before [~~or-after~~] the date of valuation.

(b) The price and other terms of any sale or contract to sell of comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation.

(c) To determine the value of a leasehold interest:

(i) The rent reserved and the other terms of any lease of the property or property interest sought to be condemned or any part thereof which is in effect on the date of valuation; and

(ii) The rent reserved and the other terms of any lease of comparable property if the lease was freely made in good faith within a reasonable time before or after the date of valuation.

SECTION 1248.2 (1)(b),(c)

1248.2 (1) (b) The capitalized value of the fair income attributable to the property or property interest sought to be condemned as distinguished from the capitalized value of any income or profits from any business conducted thereon.

(c) The value of the land sought to be condemned, together with the cost of reproducing the improvements thereon, if the improvements enhance the value of the land for its highest and best use, less whatever depreciation the improvements have suffered, functionally or otherwise.

1. Capitalization and Summation

Paragraphs (b) and (c) of subdivision (1) express the Commission's recommendation that the capitalization and summation methods of determining value may be made the basis for an expert opinion in condemnation proceedings. This, too, provoked a mixed reaction. Richard L. Huxtable agrees with the recommendation (Huxtable (10) 53 - (11) 16) as does James E. Cox (Cox (96) 10-46). Los Angeles wants no change in the existing law. (LA (57) - (60) 10.) Public Works, however, has no serious objection to this evidence for it believes the proposal is within the intent of existing Code of Civil Procedure Section 1872. (PW (34) - (35) 11.) Robert McNamee, Deputy Counsel from Santa Clara County, agrees with the Los Angeles County Counsel that capitalization and replacement cost appraisals should not be used unless there is no other evidence of value. (McNamee (90) 38-54.)

The objectors have brought forth no new reasons for rejecting this evidence and it is suggested that no change be made in the recommendation.

2. "Reproduction" or "Replacement"

Public Works objects to certain language in subdivisions (b) and (c). It believes that both "reproduction" and "replacement" should be used instead of merely "reproduction." (PW (34) 33-39.) Public Works also suggests that the word "depreciation" does not include "obsolescence" in its commonly accepted meaning. "Obsolescence" should, of course, be included in the statute. The Marin County Counsel (Marin (68) 4.) and Hodge L. Dolle (Dolle (19) 7.) both indicate that the word "reproduction" should be changed to "replacement." It is suggested that "reproduction" be changed to "replacement."

3. Rental or Income

Public Works also believes that we should use the phrase "reasonable net rental attributable to the land and improvements" rather than "fair income attributable to the property." (PW (34) 21-31.) Public Works believes this phrase is more nearly descriptive of the process and is accepted in the appraisal field. The State Bar suggests that "fair rental value" be used instead of "fair income." (Bar (2) 9.)

On the other hand, the consultant's study devoted several pages to explaining why it is no longer realistic to distinguish "rent" and "income." (Evidence Study, pages 100-107.) It is suggested, therefore, that "income" be retained in this context.

4. Highest and Best Use

Hodge L. Dolle suggests that the phrase "highest and best use" be deleted. (Dolle (98) 34-46.) A similar point is made by Richard L.

Huxtable in connection with his discussion of his proposed Section 1249.1 in our Taking Possession statute. (Huxtable (112) 4-27.) Mr. Huxtable points out that improvements may enhance the value of property but not for its highest and best use. He states that the highest and best use of the property may not be practical under the circumstances because of the cost of destroying the improvement on the property. In such a case even though the full income which might be derived from the property were in the improvement upon it which is adapted to its highest and best use, the improvement which exists still has value and must be considered in appraising the property.

It is recommended, therefore, that this phrase be deleted.

Recommendation

In view of the foregoing comments, it is suggested that these paragraphs be renumbered and amended to read:

~~[(b)]~~ (d) The capitalized value of the fair income attributable to the property or property interest sought to be condemned as distinguished from the capitalized value of any income or profits from any business conducted thereon.

~~[(c)]~~ (e) The value of the property sought to be condemned as indicated by the value of the land ~~[sought-to-be-condemned]~~ together with the replacement cost of ~~[reproducing]~~ the improvements thereon, if the improvements enhance the value of the land ~~[for-its-highest-and best-use]~~, less whatever depreciation or obsolescence the improvements have suffered from all causes ~~[y-functionally-or-otherwise]~~.

SECTION 1248.2 (2)

1248.2 (2) The witness may, on direct or cross-examination, state the facts or data upon which his opinion is based, whether or not he has personal knowledge thereof, for the limited purpose of showing the basis for his opinion.

1. Necessity for This Provision

Public Works and Robert McNamee question the necessity for this subdivision and indicate that it may cause harm. (PW (35) 17-39; McNamee (90) 19-36.) Public Works fears that "unreliable" hearsay may be related and that an expert will be permitted to base his opinion as to value on the opinion of another as to value. McNamee's objections are similar.

The problem of "unreliable" hearsay, it is submitted, will be dealt with by the court under the general statement of what may be considered in subdivision (1). The question of whether an expert can base his opinion on another opinion can be handled by an addition to the exclusionary section. This subdivision helps to make it clear that an expert's reasons are in support of his opinion. Moreover, this subdivision is necessary to state the rule suggested immediately below. It is recommended that it be retained.

2. Impeachment of Valuation Data

The State Bar suggests that the words "subject to impeachment" be added to this subdivision. (Bar (1) 54 - (2) 9.) Hodge L. Dolle (Dolle (98) 48-50) and Richard L. Huxtable (Huxtable (102) 28-36.) suggest similar language.

The suggestion is made so that the court will not exclude evidence to show that the factual basis for an expert's opinion is erroneous on

the ground that the evidence relates to a collateral matter. It is recommended that the section be amended to make it clear that an expert's reasons may be impeached.

3. Location of Subdivision

The suggested amendment to this subdivision is similar to the suggested amendment of Section 1248.1. So that these provisions might be more closely tied together, it is suggested that this subdivision be moved to Section 1248.1 to become the second sentence of subdivision (1) of that section.

Recommendation

It is therefore suggested that the following sentence be added to Section 1248.1(1) to read:

Such a witness may, on direct or cross-examination, state the facts or data upon which his opinion is based, whether or not he has personal knowledge thereof, for the limited purpose of showing the basis for his opinion; and his statement of such facts or data is subject to impeachment or rebuttal.

SECTION 1248.3 (INTRODUCTORY CLAUSE)

1248.3. Notwithstanding the provisions of Section 1248.2, the opinion of a witness as to the amount to be ascertained under subdivision 1, 2, 3 or 4 of Section 1248 is inadmissible if it is based, wholly or in part, upon:

1. Exclusion of Specific Matters from Consideration

This is the section that precludes an appraiser from relying on sales to condemners, offers and tax assessments. Public Works believes that a

section of this sort would be necessary whether any other legislation is enacted or not. (PW (35) 47.) The Marin County Counsel thinks that this section is inconsistent with our previous recommendation that all evidence that would be considered by a reasonable man be admitted. (Marin (69) 33 - (70) 8.) Most of James E. Cox's letter is devoted to the same objection. (Cox (93) 49 - (97) 11.)

The considerations set forth in these letters have been previously considered by the Commission. In view of the amount of litigation that has been generated by doubts over whether sales to condemners, offers, etc. are admissible, it seems desirable to enact some certainty into this area of the law.

2. Inadmissible -- Opinion or Reason?

Richard L. Huxtable thinks that our approach is wrong in providing that the opinion of the witness is inadmissible. He believes that the reason should be inadmissible. (Huxtable (106) 22 - 41.) John F. Downey believes that this form of exclusion will invite inquiry into incompetent matter to get it before the jury. (Downey (100) 27 - 47.) Richard L. Huxtable further states that if the opinion is stricken virtually all owners' testimony will be stricken for owners always rely on offers and similar matters which are stated here to be incompetent. James E. Cox reiterates the same proposition. (Cox (93) 49 - (94) 24.)

The recommendation that the opinion should be inadmissible if based upon incompetent matter is not a novel recommendation. It certainly seems much more reasonable than a rule that would exclude the reasons from evidence without making the opinion based on those reasons inadmissible. To adequately

weigh an opinion, the trier of fact should have before him all of the factors that the witness considered. Chief Justice Gibson, in a dissenting opinion concurred in by Justices Edmonds and Traynor, stated the proposition quite clearly: "Where cross-examination indicates that the opinion of a witness . . . is based partially upon non-compensable items of damages which he is unable to segregate from the lawful elements of damage, a motion to strike his testimony should be granted." (Rose v. State of California, 19 Cal.2d 713, 745 (1942).) The majority in that case held that it was not reversible error to deny the motion to strike because the motion was too broad -- it covered both admissible and inadmissible testimony -- and there was no prejudice. In San Diego Land & Town Co. v. Neale, 88 Cal.2d 50, 63 (1891), it was held that an opinion should be stricken where the "witness bases his opinion entirely upon incompetent and inadmissible matters, or shows that such matters are the chief elements in the calculations which lead him to such conclusions." In Spring Valley Water Works v. Drinkhouse, 92 Cal. 528, 533 (1891), the court said that an opinion should be stricken which is based on incompetent matter such as the personal considerations of one of the parties. Where the opinion is based partially, but not principally, upon incompetent matter, there is authority for the proposition that the testimony should not be stricken. (Young v. Bates Valve Bag Corp., 52 CA2d 86, 96-97 (1942).) However, if the incompetent matter cannot be segregated, it seems that logically the opinion should be stricken.

Recommendation

In view of the foregoing considerations, no change in the introductory clause of Section 1248.3 is recommended. However, it may be desirable to

state that a witness whose opinion has been held inadmissible may give his opinion after excluding from consideration the matters found to be incompetent. Such a provision may meet some of the objections to the Commission's recommendation by making it clear that the value of an expert witness may not be totally destroyed by the revelation that he relied on some incompetent matter. Therefore, it is suggested that an additional section, Section 1248.4, be added to read:

1248.4. If the court finds that the opinion of a witness as to the amount to be determined under subdivision 1, 2, 3 or 4 of Section 1248 is inadmissible under Section 1248.2 or Section 1248.3 because it is based upon incompetent facts or data, the witness may then give his opinion as to such amount after excluding from consideration the facts or data determined to be incompetent.

SECTION 1248.3 (1)

1248.3 (1) The price or other terms of an acquisition of property or a property interest if the acquisition was made for a public use for which property may be taken by eminent domain.

Public Works, Los Angeles and Mountain View agree that sales to condemners should be excluded. (PW (30) 4 - 17; LA (54) 29 - 33; ~~Mar~~ Vw (78) 3 - 6.) Robert McNamee believes that they should be considered if there is direct evidence that they are voluntary and there are no other sales to be relied on. (McNamee (91) 5 - 13.) The Marin County Counsel would admit such sales. (Marin (68) 33 - (70) 8.) So also would those attorneys who favor no exclusionary rules providing a necessary foundation is laid. (See, for example, Huxtable (103) 41 - (105) 50.) Public Works believes that such sales never involve a willing buyer and willing seller, and hence

the prices involved do not conform to the definition of market value.

The considerations stated have been previously considered by the Commission. No change in this recommendation is suggested.

SECTION 1248.3 (2)

1248.3 (2) The price or other terms of any offer made between the parties to the action to buy, sell or lease the property or interest therein sought to be condemned, or any part thereof.

There were no criticisms of this rule.

SECTION 1248.3 (3)

1248.3 (3) The price at which an offer or option to purchase or lease the property sought to be condemned or any other property was made, or the price at which such property was optioned, offered or listed for sale or lease, except to the extent that an option, offer or listing to sell or lease the property or interest therein sought to be condemned constitutes an admission. Nothing in this subdivision permits an admission to be used as direct evidence upon any matter that may be shown only by opinion evidence under Section 1248.1.

1. Offers

Public Works and the Los Angeles County Counsel's office agree that offers should not be considered. (PW (30) 30 - 34, (36) 8 - 11; LA (54) 40 - (55) 29.) But Los Angeles feels that legislation is not necessary while Public Works desires legislation to clarify recent conflicting decisions. The Marin County Counsel, James E. Cox and Richard L. Huxtable believe offers should be admitted. (Marin (70) 32 - (71) 22; Cox (93) 39 - 47; Huxtable (102) 38 - (106) 14.) Mr. Huxtable would require the same extensive foundation for this type of evidence that he would require for sales data. Under his standards, listings would be inadmissible,

but the Marin County Counsel would admit even listings.

There is a certain logic to the arguments that offers are considered in the market place to determine the floor and ceiling of market value. However, an offer does not represent a price at which a willing buyer and a willing seller have agreed and hence does not represent market value. Moreover, collateral issues concerning the ability of the offeror to perform and the nature of terms that have not been agreed upon would be raised each time the matter of offers came up. Excluding them entirely will give certainty to the matters which may be considered by the appraiser. He will know before trial the matters he cannot rely upon instead of being surprised by the ruling of the judge in the midst of trial.

2. Admissions as Independent Evidence

Judge Lawrence believes that the last sentence of this subdivision, as presently drafted, precludes the use of admissions as independent evidence if the owner does not take the stand but permits such use if the owner does. (Lawrence (86) 27 - 29.) As an owner takes the stand both as an expert and as a party, apparently his prior admissions and statements as to value may be used as direct evidence of the value. But, if he does not take the stand, this subdivision provides that his extrajudicial admission cannot be used as direct evidence.

As owners are presumed qualified to express opinions as to the value of their property, it should not make a great deal of difference concerning admissibility as direct evidence of value whether the opinion is given in court or out-of-court. Moreover, the last sentence does depart from the universally recognized use of admissions as direct evidence. Therefore, it is recommended that the last sentence be deleted.

3. Options as Trust Deed Substitutes

John F. Downey points out that options are often used in lieu of trust deeds as the incidents are virtually the same. (Downey (100) 49 - (101) 20.) Hence, a rule that arbitrarily precludes consideration of such transactions is unrealistically precluding consideration of what amounts to real sales.

It is therefore suggested that language be added which would permit consideration of options if the option contract is in substance a sale of the property.

Recommendation

Therefore, it is recommended that subdivision (3) be amended to read:

(3) The price at which an offer or option to purchase or lease the property sought to be condemned or any other property was made, or the price at which such property was optioned, offered or listed for sale or lease, except to the extent that an option, offer or listing to sell the property or interest therein sought to be condemned constitutes an admission; but the opinion of the witness may be based upon the price and other terms of an option contract which is in substance a sale of the property. [Nothing in this subdivision permits an admission to be used as direct evidence upon any matter that may be shown only by opinion evidence under Section 1248.1.]

SECTION 1248.3 (4)

1248.3 (4) The value of any property as assessed for taxation purposes.

Public Works agrees that assessed valuations should be excluded generally, but believes that some modification is necessary so that they may be used as a check on comparability and as a check on capitalization studies. (PW (30) 36-44; (36) 13-18.) The Los Angeles County Counsel would favor the exclusionary rule so long as the taxes paid are admissible. (LA (63) 23-45.)

There is nothing in the language of the statute which would prevent the use of assessed valuations for the purposes stated. Certainly the amount of taxes paid could be considered. This language merely provides that an opinion of value is inadmissible if based upon the value of the property as assessed for taxation purposes. It is recommended that the language be left unchanged.

SUGGESTED ADDITIONS TO 1248.3

1. Opinions

Public Works also believes this section should be expanded to include the rule of Sacramento & San Joaquin Drainage District v. Jarvis, 51 Cal.2d 799 (1959). It was there held that a witness cannot give an opinion as to the value of comparable property. Hence, Public Works believes that a subdivision (5) should be added to read: "Any opinion as to the value of property other than that sought to be condemned." (PW (36) 20-28.)

In connection with another problem, Public Works pointed out that it is now held that an expert cannot base his opinion as to the value of the property upon other opinions as to its value. (PW (10) 27-35.) Hence,

Public Works' recommended language should be broadened to include any opinion as to the value of any property. It is recommended that additional subdivisions be added to the section to read:

(5) The opinion of another person as to the value of the property sought to be condemned.

(6) An opinion as to the value of property other than that sought to be condemned.

2. "As If" Values

Judge Lawrence believes that some statement should be included which would prevent reliance upon "as if" values, that is, opinions based upon the value of the property "as if" it were already subdivided or combined with other land or in any other way different from its actual status.

(Lawrence (86) 31-33.) James E. Cox thinks that such evidence should be admitted as that is the way subdivision property is sold on the open market at the present time. (Cox (93) 32-37.)

It is recommended that this matter be left to the courts to be worked out under the general rule stated in 1248.2.

On the pink sheets following the analysis is a revision of the entire evidence statute which incorporates the suggested changes.

An act to add Sections 1248.1, 1248.2, 1248.3 and 1248.4 to, and to repeal Section 1845.5 of, the Code of Civil Procedure, relating to eminent domain.

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

SECTION 1. Section 1248.1 is added to the Code of Civil Procedure, to read:

1248.1. (1) The amounts to be ascertained under subdivisions 1, 2, 3 and 4 of Section 1248 may be shown only by the opinions of witnesses qualified to express such opinions. ~~[The owner of the property or property interest sought to be condemned is presumed to be qualified to express such opinions.]~~ Such a witness may, on direct or cross-examination, state the facts or data upon which his opinion is based, whether or not he has personal knowledge thereof, for the limited purpose of showing the basis for his opinion; and his statement of such facts or data is subject to impeachment or rebuttal.

(2) Nothing in this section prohibits a view of the property or the admission of any other evidence, including but not limited to evidence as to the nature and condition of the property and 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 apply the testimony given under subdivision (1) of this section; and such evidence is subject to impeachment or rebuttal.

SEC. 2. Section 1248.2 is added to the Code of Civil Procedure,
to read:

1248.2. ~~[(1)]~~ Subject to Section 1248.3, the opinion of a witness as to the amount to be ascertained under subdivision 1, 2, 3 or 4 of Section 1248 is admissible only if the court finds that the opinion based upon facts or data that a willing [reasonable, well-informed-prospective] purchaser [ex-seller-of-real-property], buying from a willing seller, with a full knowledge of all the uses and purposes for which the property is reasonably adaptable, would take into consideration in determining the price at which to purchase [ex-sell] the property or property interest, including but not limited to:

~~[(a)]~~ (1) The [amount-paid-ex-contracted-to-be-paid-for] price and other terms of any sale or contract to sell which included the property or property interest sought to be condemned or any part thereof [ex-for-any-comparable-property-ex-property-interest] if the sale [,-lease] or contract was freely made in good faith within a reasonable time before [ex-after] the date of valuation.

(2) The price and other terms of any sale or contract to sell of comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation.

(3) To determine the value of a leasehold interest:

(a) The rent reserved and the other terms of any lease of the property or property interest sought to be condemned or any part thereof which is in effect on the date of valuation; and

(b) The rent reserved and the other terms of any lease of comparable property if the lease was freely made in good faith within a reasonable time before or after the date of valuation.

~~[(*)]~~ (4) The capitalized value of the fair income attributable to the property or property interest sought to be condemned as distinguished from the capitalized value of any income or profits from any business conducted thereon.

~~[(*)]~~ (5) The value of the property sought to be condemned as indicated by the value of the land [sought-to-be-condemned] together with the replacement cost of [~~reproducing~~] the improvements thereon, if the improvements enhance the value of the land [~~for-its-highest-and-best-use~~], less whatever depreciation or obsolescence the improvements have suffered from all causes [, ~~functionally-or-otherwise~~].

SEC. 3. Section 1248.3 is added to the Code of Civil Procedure, to read:

1248.3. Notwithstanding the provisions of Section 1248.2, the opinion of a witness as to the amount to be ascertained under subdivision 1, 2, 3 or 4 of Section 1248 is inadmissible if it is based, wholly or in part, upon:

(1) The price or other terms of an acquisition of property or a property interest if the acquisition was made for a public use for which property may be taken by eminent domain.

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

(3) The price at which an offer or option to purchase or lease the property sought to be condemned or any other property was made, or the price at which such property was optioned, offered or listed for sale or lease, except to the extent that an option, offer or listing to sell the

property or interest therein sought to be condemned constitutes an admission; but the opinion of the witness may be based upon the price and other terms of an option contract which is in substance a sale of the property. [~~Nothing in this subdivision permits an admission to be used as direct evidence upon any matter that may be shown only by opinion evidence under Section 1248.1.~~]

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

(5) The opinion of another person as to the value of the property sought to be condemned.

(6) An opinion as to the value of property other than that sought to be condemned.

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

1248.4. If the court finds that the opinion of a witness as to the amount to be determined under subdivision 1, 2, 3, or 4 of Section 1248 is inadmissible under Section 1248.2 or Section 1248.3 because it is based upon incompetent facts or data, the witness may then give his opinion as to such amount after excluding from consideration the facts or data determined to be incompetent.

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

~~1845.5.--In an eminent domain proceeding a witness, otherwise qualified, may testify with respect to the value of the real property including the improvements situated thereon or the value of any interest in real property to be taken, and may testify on direct examination as~~

to-his-knowledge-of-the-amount-paid-for-comparable-property-or-property
interests.---In-rendering-his-opinion-as-to-highest-and-best-use-and
market-value-of-the-property-sought-to-be-condemned-the-witness-shall
be-permitted-to-consider-and-give-evidence-as-to-the-nature-and-value
of-the-improvements-and-the-character-of-the-existing-uses-being-made
of-the-properties-in-the-general-vicinity-of-the-property-sought-to-be
condemned.]