Urban Law Annual ; Journal of Urban and Contemporary Law

Volume 1973

January 1973

Housing and Land Use—Eminent Domain and "Project Enhanced Value"

EMINENT DOMAIN AND "PROJECT ENHANCED VALUE"

Advance publicity of proposed public improvement projects often results in a general rise[1] in property values in the region of the announced project.[2] Upon the ultimate taking for eminent domain purposes, the question arises whether and to what extent such increases in land value attributable to the potential project comprise a proper element of the just compensation to be paid to the landowner.[3] The Supreme Court of California in *Merced Irrigation District v. Woolstenhulme*[4] interpreted the just compensation clause of the California Constitution[5] to permit consideration of the "project enhanced value" which accrued to condemnee's property prior to the time that it was reasonably probable that the property would be taken for the improvement.

Defendant landowner in the instant case owned a ranch adjacent to an artificial lake which had been created by plaintiff. Sometime during the late 1950's, plaintiff formulated plans for a new water project which, *inter alia,* would increase the size of the lake and provide recreational facilities such as fishing, boating and camping. The trial court found that by January 1, 1963, the certainty of the potential project was general public knowledge and that the consequent enhancement of neighboring lake property values had commenced, despite the fact that the actual areas to be designated for recreational purposes were as yet undetermined. By January 1, 1965, the project had progressed to a point where it was reasonably probable[6] that 189

1. This comment will be restricted to the effect of project enhancement on just compensation. *See generally,* Note, *Recovery for Enhancement and Blight in California,* 20 HASTINGS L.J. 622 (1969).

2. 4 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 12.3151 (rev. ed. 1962) [hereinafter cited as NICHOLS].

3. *See generally* Annot., 147 A.L.R. 66-103 (1943).

4. 4 Cal. 3d 478, 483 P.2d 1, 93 Cal. Rptr. 833 (1971).

5. CAL. CONST. art. I, § 14. "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner . . . ." *Id.*

6. This was an arbitrary date set by the trial judge in applying a probability standard to settle the dispute as to whether January 1, 1965, was the date at

acres of defendant's land[7] would be taken for the project. Evidence of comparable sales was admitted[8] and defendant was awarded $250 per acre.

On appeal, plaintiff objected to the trial court's valuation rulings and sought to exclude from the computations that increment of enhancement value attributable to the pending project. Secondly, the Irrigation District asserted that the sales admitted into evidence as comparable sales did not qualify as such under the California Evidence Code.[9]

California law provides that private property shall not be taken for eminent domain purposes without just compensation.[10] Although the measure of just compensation is not explicitly defined, the Code of Civil Procedure establishes it as the actual value at the date of the issuance of summons.[11] Actual value has, through judicial interpretation, been held to be the market value.[12] This term, defined as

---

which the inclusion of defendant's land became "definite" or just "reasonably probable." 4 Cal. 3d at 485 n.3, 483 P.2d at 5 n.3, 93 Cal. Rptr. at 836 n.3.

7. The recreational aspect concerned only 72 of the 189 acres, the remaining 117 acres were known to have been included in the project long before 1965. However, because of the difficulties posed for the jury in drawing this distinction, both parties agreed to modification of the instruction to relate to the entire 189 acres. *Id.* at 485 n.4, 483 P.2d at 5 n.4, 93 Cal. Rptr. at 837 n.4.

8. Pre-improvement land sales brought a maximum of $125 per acre, while post-1965 sale prices ranged from $250 to $600 per acre. *Id.* at 485, 483 P.2d at 5, 93 Cal. Rptr. at 837.

9. CAL. EVID. CODE § 816 (Deering 1967):

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

10. CAL. CONST. art. I, § 14.

11. CAL. CIV. PRO. CODE § 1249 (Deering 1967). However, if there is a delay in excess of one year not caused by the condemnee, the value will be assessed as of the trial date. *Id.*

12. *See* 4 NICHOLS § 12.1. *E.g.*, People v. Al G. Smith Co., 86 Cal. App. 2d 308, 311, 194 P.2d 750, 753 (1948).

> 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[13]

has, with slight variations, been generally accepted as the standard.[14] The market value is to be determined in view of all the facts which would naturally affect its value in the minds of purchasers generally,[15] *e.g.*, the character of the neighborhood.[16] Inherent in the attributes of the neighborhood would be the bona fide expectancy of being located in the proximity of the improvement. It follows logically, therefore, that project enhanced value should be considered a valid component of market value.[17]

This superficially unambiguous standard must, however, be reexamined in light of a long line of California cases whose dicta suggest that any rise in value before the taking which is caused by the expectation of that event is disallowed in computing just compensation.[18] Thus, the *Merced* court was forced to elucidate further the concept of project enhanced value in an effort to reconcile its earlier decisions. A trilogy of types of project enhanced value was enumerated. They were, briefly, that augmentation of land values can be expected where:

(1) there is probable or certain inclusion of the land within the scope of the project;

(2) there is speculation based upon the imminence of taking; and

---

13. Sacramento So. R.R. v. Heilbron, 156 Cal. 408, 409, 104 P. 979, 980 (1909).

14. *See* 4 NICHOLS § 12.2[1]. *See also* 1 L. ORGEL, VALUATION UNDER EMINENT DOMAIN § 17, at 79 (2d ed. 1953).

15. Spring Valley Water Works v. Drinkhouse, 92 Cal. 528, 533, 28 P. 681, 683 (1891).

16. 4 Cal. 3d at 488, 483 P.2d at 7, 93 Cal. Rptr. at 839.

17. *Id.* at 492, 483 P.2d at 10, 93 Cal. Rptr. at 842.

18. *E.g.*, People *ex rel.* Dep't of Pub. Works v. Shasta Pipe, 264 Cal. App. 2d 520, 539, 70 Cal. Rptr. 618, 630 (1968); People *ex rel.* Dep't of Water Resources v. Brown, 255 Cal. App. 2d 597, 599, 63 Cal. Rptr. 363, 364 (1967); Community Redev. Agency v. Henderson, 251 Cal. App. 2d 336, 343, 59 Cal. Rptr. 311, 315 (1967); County of Los Angeles v. Hoe, 138 Cal. App. 2d 74, 78, 291 P.2d 98, 100 (1955); City of Pasadena v. Union Trust Co., 138 Cal. App. 21, 26, 31 P.2d 463, 466 (1934).

(3) property which is expected to remain outside the development is subsequently taken.[19]

Reconciliation of the *Merced* holding with past controlling decisions was made on the basis of these distinctions. The fountainhead of the California position for cases in the first classification is *San Diego Land & Town Co. v. Neale*,[20] which held that "it seems monstrous to say that the benefit arising from the proposed improvement is to be taken into consideration as an element of the value of the land."[21] Taken in context, the benefit referred to in *Neale* is the increase in value which a condemned tract gains when valued as part of the proposed project.[22] Clearly, that incremental value is one which should never be considered a legitimate element of just compensation since compensation is based on the loss imposed on the owner, not on the benefit received by the taker.[23] Likewise, the exclusion of enhancement value is proper in situations which fall within the second aspect noted above, where property value increases are based on a purchaser's conjecture of what the condemnor could be compelled to pay.[24] Otherwise, the speculator would effectively be allowed to set just compensation through his own purchase price.[25] The third category, however, is distinguishable from the other two in that it encompasses factual situations like *Merced* where the gain results from the expectation that the land will *not* be taken, and thus will enjoy the benefits of the proposed improvement. Here, the project enhanced value which accrued prior to the time when it became probable that the land would be needed for the improvement is properly included in computing the market value[26] since proximity to the project is a factor which would be considered by a prospective purchaser.[27]

In so resolving the issue, the court essentially adopted the standard

---

19. 4 Cal. 3d at 490, 483 P.2d at 8, 93 Cal. Rptr. at 840.

20. 78 Cal. 63, 20 P. 372 (1888).

21. *Id.* at 75, 20 P. at 377.

22. 4 Cal. 3d at 491, 483 P.2d at 9, 93 Cal. Rptr. at 840.

23. United States v. Chandler-Dunbar Co., 229 U.S. 53, 81 (1913).

24. United States v. Miller, 317 U.S. 369, 377 (1943).

25. 1 L. ORGEL, *supra* note 14, § 83 at 358.

26. 317 U.S. at 376.

27. People *ex rel.* Dep't of Pub. Works v. Donovan, 57 Cal. 2d 346, 352, 369 P.2d 1, 4, 19 Cal. Rptr. 473, 476 (1962).

of probable inclusion set forth by the United States Supreme Court in *United States v. Miller*[28] and subsequently adopted by the majority of jurisdictions.[29] Basically, the doctrine of probable inclusion provides that property owners whose lands were probably within the scope of the project from the time the condemning authority became committed to it will not be compensated for enhancement value. If, however, it was anticipated that the lands would be adjacent to the project, subsequent enlargement of the project to include them should not deprive the landowner of value added in the meantime by the proximity of the improvement.[30]

Under this standard, California courts now face the practical problem of defining the requisite "certainty of inclusion" that is required before project enhanced value should be excluded from just compensation computations. The task of segregating those cases in which enhancement should be compensable from those in which it should not will be minimized by utilization of the *Miller* formula which excludes project enhanced value whenever the court concludes that an informed owner could have reasonably anticipated that his land might be taken for the project.[31] Adoption of this doctrine by the Supreme Court of California exhibits judicial awareness of the sensitivity of property values to public actions.[32] It is an equitable compromise between strict adherence to the general rule which excludes all enhancement value attributable to the project and promulgation of an exception to that rule which would allow *all* enhancement value due to proximity to a definitely planned improvement which had accrued up to the date of actual taking.[33]

Difficulties regarding the valuation of properties acquired for public improvement projects are further aggrandized by evidentiary problems. Criteria concerning the admissibility into evidence of similar sales as set forth in section 816 of the California Evidence Code[34] and adopted by the courts[35] require that:

28. 317 U.S. at 377.
29. *See* 4 NICHOLS § 12.3151[2].
30. 317 U.S. at 377.
31. *Id.*
32. D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT 587 (2d ed. 1971).
33. *But see* 8 H. KALTENBACH, SUPPLEMENT TO JUST COMPENSATION 11 (1971).
34. *See* note 9 *supra.*
35. County of Los Angeles v. Faus, 48 Cal. 2d 672, 678, 312 P.2d 680, 684 (1957). The requirement of size was not included as a factor of comparability since the case was decided prior to the enactment of § 816.

(1) the comparable sales have been made freely and in good faith reasonably near in time to the date of variation;

(2) the property sold be located sufficiently near the property being valued; and

(3) the properties be similar in character, size, situation, usability and improvements.[36]

Given the unique character of real estate, this becomes a rather vague norm for comparability.[37] Consequently, the trial court has been afforded wide discretion regarding the degree of similarity necessary to make sales comparable and admissible as evidence.[38] Generally, the feeling of the court is that such evidence should not be excluded if there is some foundation for it.[39] The weight to be given it is a factual situation to be considered—or even ignored—by the jury.[40] Following this trend, the court in *Merced* permitted defendant's expert appraisal witness to support his valuation of $600 per acre[41] by offering evidence of 1965 and 1966 sales of neighboring parcels. In contrast to the pre-improvement sale price of $125 per acre, the later sales prices ranged from $250 to $600 per acre. The instant court felt, however, that the sales, though subsequent to January 1, 1965, and reflecting substantial enhancement, could be considered as "shedding light"[42] on the value of the condemned property. Furthermore, there existed other factors, such as zoning changes and freeway construction, to which at least a portion of the enhancement could possibly have been attributed,[43] and it is exceedingly difficult to isolate fluctuations in property values that are attributable to the project from fluctuations in value attributable to market

36. *See generally* Comment, *Admissibility of Evidence of Comparable Sales to Determine Market Value of Urban Renewal Property*, 1969 URBAN L. ANN. 176.

37. 5 NICHOLS § 21.3[1].

38. United States v. Reynolds, 397 U.S. 14, 20 (1970); County of Los Angeles v. Faus, 48 Cal. 2d 672, 678, 312 P.2d 680, 684 (1957).

39. People *ex rel.* Dep't of Pub. Works v. University Hill Foundation, 188 Cal. App. 2d 327, 332, 10 Cal. Rptr. 437, 440 (1961).

40. *Id.*; People *ex rel.* Dep't of Pub. Works v. Reardon, 4 Cal. 3d 507, 512, 483 P.2d 20, 25, 93 Cal. Rptr. 852, 855 (1971).

41. Having examined 1965 and 1966 sales of neighborhood parcels, defendant's expert appraisal witness evaluated defendant's land at $600 per acre after deducting $50 per acre for enhanced value arising from the lake project. 4 Cal. 3d at 486, 483 P.2d at 5, 93 Cal. Rptr. at 837.

42. *See* note 9 *supra.*

43. 4 Cal. 3d at 501, 483 P.2d at 16, 93 Cal. Rptr. at 848.

causes unrelated to the project.[44] An instruction was given to the jury to eliminate any enhancement value which they found arose as a result of public knowledge of the project after January 1, 1965.[45] Exclusion of the comparable sales would have deprived the jury of objective market evidence.[46]

Merced further extended the boundaries of the court's discretion by interpreting section 822 (d) of the California Evidence Code[47] as not precluding an appraiser's testimony relating to adjustments that must be made in the comparable sale price to utilize that sale as an indicant of the value of the condemned property. That an appraiser's explanation of any relevant differences which he has taken into account in inferring the value of the subject land from that of the comparable parcel is useful to the jury in weighing the evidence is without question. The *Merced* court, however, went a step further by holding that an expert appraiser is permitted to isolate the amount of the comparable sale figure which he ascribes to such adjustments. (The adjustment in the case at hand was for project enhancement.) The validity of such a holding is debatable for two principal reasons.

First, it usurps the jury's function of ascertaining market value. In eminent domain litigation, once the judge has made the preliminary determination that the proffered sale is sufficiently comparable to shed light on the value of the subject land, the evidence is sent to the jury for consideration. Accordingly, it should be for the jury to decide what portion of the proffered sale price can be imputed to factors such as enhancement value.[48] Furthermore, the jury can intelligently determine the weight to be accorded an appraiser's

---

44. *See* notes 32 & 33 *supra.*

45. 4 Cal. 3d at 487, 483 P.2d at 6, 93 Cal. Rptr. at 838.

46. CALIFORNIA LAW REVISION COMM'N, RECOMMENDATIONS AND STUDY RELATING TO EVIDENCE IN EMINENT DOMAIN PROCEEDINGS, at A-32 (1960).

47. CAL. EVID. CODE § 822 (Deering 1967):

> Notwithstanding the provisions of §§ 814 to 821, the following matter is inadmissible as evidence and is not a proper basis for an opinion as to the value of the property:
>
> . . .
>
> (d) an opinion as to the value of any property or property interest other than that being valued.

48. In a subsequent case, instruction was given to the jury to disregard the comparable sales price to the extent that it reflected project enhanced value. County of San Luis Obispo v. Bailey, 4 Cal. 3d 518, 524, 483 P.2d 27, 31, 93 Cal. Rptr. 859, 863 (1971).

opinion by considering both the comparable sale price and the reasons for his opinion.

Second, it violates section 822 (d) of the Evidence Code which bars the admission of opinions as to the value of any property or property interest other than the one being valued.[49] To permit an appraiser to testify that he has assigned a specific sum to account for variances between two properties would be tantamount to admitting his opinion as to the value of the comparable parcel. He would, in effect, be testifying that the value of the comparable parcel was the sale price less the amount he designated to explain any adjustments. Thus, the court's failure to distinguish between an explanation of property differences and the assignment of a monetary value to those differences undermines the policy considerations of section 822 (d), which are essentially to avoid collateral issues and the consequent prolongation of eminent domain trials which would arise if appraisers were permitted to testify as to their opinions of the value of other property.[50] The court's ruling appears to render the section 822 (d) exception virtually ineffectual since an appraiser's opinion as to the value of property other than that being valued will now be admissible under the guise of an explanation.

The overall effect of the *Merced* court's disposition of the evidentiary problem is to compound the uncertainties[51] already prevalent in condemnation proceedings and to thwart a commendable effort by the California legislature to eliminate some of those uncertainties by means of codification. This inducement for future litigation, however, is overshadowed by the court's resolution of the just compensation dilemma. The courts, in making future decisions, will be aided by the guidelines established in *Merced* for the inclusion of project enhanced value in just compensation computations:[52] where enhancement occurs because the property is known to be within the project or where condemnation is expected, it must be excluded; where it arises due to potential adjacency coupled with private ownership, it is included.

Janice Kromrey Corr

49. *See* note 47 *supra.*

50. California Law Revision Comm'n, *supra* note 46, at A-8.

51. *Id.* at A-5.

52. These guidelines were followed in People *ex rel.* Dep't of Pub. Works v. Reardon, 4 Cal. 3d 507, 511, 483 P.2d 20, 22, 93 Cal. Rptr. 852, 854 (1971).