Recovery for Enhancement and Blight in California

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RECOVERY FOR ENHANCEMENT AND BLIGHT IN CALIFORNIA

Benefits or injuries expected to result from a public improvement correspondingly influence the market value of land in the neighborhood of the proposed project, causing either enhancement or blight. The question whether a condemnee may recover for either enhancement or blight is largely a progeny of the 20th century. The relatively recent flood of cases on the subject may be attributed primarily to a general increase in condemnation activities by public entities. Moreover, modern complex procedures often create substantial delays between the planning and the execution of a public project. Accordingly, it is a rare occasion when a planned public work is able to approach execution without drawing the attention of those persons living or owning property in the vicinity of the anticipated improvement. If the project is of a desirable sort it cannot help but foment a general property value rise in the neighborhood. Conversely, if the work possesses undesirable attributes, values will fall. When condemnation proceedings are finally initiated the problem thus focuses into a question of whether the condemnee is to receive the benefit of any increase in the value of his property due to enhancement or, in a proper situation, he is to receive reimbursement for any decrease in its value due to blight.

Since the question is basically a matter of what elements are to be included in compensable value, it is first necessary to give attention to the relevant California constitutional, statutory, and case law regarding the provisions for, and elements of, compensatory value. The California Constitution provides: "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 . . . ." Further, the term "just compensation" has been defined in Code of Civil Procedure section 1249 to mean "actual value" at the date of is-
suance of summons in the condemnation proceeding. Finally, through judicial construction, "actual value" has been held to mean "market value." The standard of market value, adopted by the courts of most states, is typically defined as follows: 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." Accordingly, any facts that would tend to influence the mind of a reasonable buyer or seller as to the property's value are relevant to the determination of just compensation. Further, the provisions of section 1249 that determine the date of valuation have been held to be merely procedural, thus vesting in the trial judge discretion to determine the admissibility of valuation evidence in various sets of circumstances. Also, in California the condemnee has the burden of persuasion on the issue of market value.

In light of these rather unambiguous standards, it would appear that all questions of enhancement and blight in California should be easily settled. Paradoxically, some are not. The primary reasons for the rather unsettled state of the law in this area are three: the divergence of opinion between condemning agencies and property owners regarding the elements comprising market value; the lack of any clear statement of the law by the California Supreme Court; and the failure of some of the districts of the Court of Appeal to elucidate their applications of law to the facts. The purpose of this comment, there-

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8 Cal. Code Civ. Proc. § 1249. However, if there is a delay of one year or more not caused by the condemnee, value is to be assessed as of the date of trial. Id.
9 E.g., People v. Ricciardi, 23 Cal. 2d 390, 401, 144 P.2d 799, 805 (1943).
10 See Nichols § 12.1.
12 Spring Valley Water Works v. Drinkhouse, 92 Cal. 528, 533, 28 P. 681, 683 (1891).
16 People v. La Macchia, 41 Cal. 2d 738, 264 P.2d 15 (1953), deals with a problem not involved in the more controversial issues.
17 The statement by Justice McFarland in his dissenting opinion in Spring Valley Water Works v. Drinkhouse, 92 Cal. 528, 28 P. 681 (1891), is still relevant. He said that "[t]here has been a good deal written upon the subject of value in condemnation proceedings and a good deal of loose language has been . . . used . . . ." Id. at 542, 28 P. at 685. This failure to enunciate, however, is not confined to California courts. See 1 L. Orgel, Valuation Under Eminent Domain §§ 99, 106 (2d ed. 1953) [hereinafter cited as Orgel]; 27
fore, is to attempt to classify the existing California cases regarding enhancement and blight according to their important factual differences, and to clarify any decisions that are ambiguous. Throughout the comment it will be necessary, as a point of departure, to survey the general trend of authority in the United States.

**Enhancement of Values Caused by the Public Improvement**

**Probable or Certain Inclusion**

One factual situation that presents few controversies is that in which the condemned land was certain or likely to be within the scope of the proposed project during the entire period the enhancement occurred. Here, the enhancement has arisen solely because of the prospect of the improvement's future erection on the property taken, with no prior taking of adjacent land being involved. Under these circumstances, the rule adopted by the vast majority of American courts is that the condemnee is not entitled to recover for the enhancement in the value of his property. The Supreme Court of Florida, for example, after a brief but incisive analysis of the problem, summarized the general rule as follows: "[W]hen land is definitely marked for condemnation . . . it shares none of the beneficial effects which could flow from anticipation of the proposed improvement for it will not be available for private use when the project is completed." Support for this position may also be marshalled from the texts of legal writers that have considered the question.

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18 The cases seem by nature to resolve themselves into the general classification used in the text. Accordingly, a similar scheme has been used by others. See, e.g., Nichols § 12.3151.


20 State Rds. Dep't v. Chicone, 158 So. 2d 753, 754-55 (Fla. 1963); accord, Nichols v. Cleveland, 104 Ohio St. 19, 29, 135 N.E. 291, 294 (1922).

21 See, e.g., ABA REPORT 125 & n.1 (1967); ABA REPORT 114 & n.1 (1966); Nichols § 12.3151(1), at 206 n.5 (1962, Supp. 1968) (citing cases); ORGEL §§ 99, 100; PALMER § 154.
A substantial majority of the California decisions dealing with enhancement fall into this category of probable or certain inclusion. The California courts have uniformly expressed approval of the rule adopted elsewhere in the United States.\(^22\) The fountainhead of the California position is *San Diego Land and Town Company v. Neale.*\(^23\) In *Neale* the condemnor had commenced a reservoir project that was originally designed to inundate only its own land. It was soon discovered, however, that inundation of the condemnee's upper riparian lands would be required to store sufficient water for domestic and agricultural purposes downstream. In the valuation trial, the condemnee was allowed to ask its expert witness what the value of the property would be in light of the many benefits it would provide to water consumers downstream. In essence, the witness was asked to place a value on the property as though the proposed improvement had already been completed. The trial court refused to exclude the answer of the condemnee's witness, and judgment for a substantial amount was rendered.

On appeal the Supreme Court of California held the trial court's admission of evidence of enhanced value to be reversible error. The court, referring to the witness' testimony, stated that "[t]his seems to us inadmissible as a direct element of value."\(^24\) Continuing, the


\(^{23}\) 78 Cal. 63, 20 P. 372 (1888). In *Neale* the condemnees claimed enhanced value primarily from two sources: the prior commencement of the reservoir project on adjacent property; and the fact that a reservoir was to inundate their property. The former involved a supplementary taking wherein enhancement was claimed to have arisen from the fact of adjacency to an established project. For a discussion of this particular situation, see text accompanying notes 117–19 infra. The present discussion is confined to enhancement claimed to have arisen from the fact that the reservoir project was to cover the condemnee's land.

court drew a significant distinction between direct and indirect elements of value, recognizing that the condemnee might get some benefit from [the project] indirectly. That is to say, the public knowledge of a proposed improvement might cause an actual demand in the market and a subsequent advance in the current rate of price. . . . But aside from this indirect benefit . . . 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.25

Apart from its discussion of “indirect benefits,” the court thus established the rule that compensable value of condemned property may not include an increment resulting from a direct benefit to the land by reason of the very project for which it is condemned. More concretely, the court is saying that once the site is determined, the attributes of the project for which the land was requisitioned are wholly irrelevant to the determination of the land’s market value.26

The decisions of the courts of the State of Georgia, representing the minority position in the United States,27 are directly contrary to the California position. Mere numerical strength, however, does not determine the “better rule.” Accordingly, an in-depth analysis of both the California and the Georgia positions is appropriate to probe the soundness of the California doctrine.

The Georgia Constitution commands that private property shall not be taken for public use without “just and adequate compensation.”28 Although this provision is similar to that of the California Constitution, there is a substantial policy divergence between the two states. Illustrative of Georgia’s policy approach is the rather literal interpretation given by the Georgia courts to the language of that state’s “just compensation” provision.

In *Hard v. Housing Authority*29 the site for an urban redevelopment project had included the condemnee’s land throughout the pe-

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25 Id. at 74–75, 20 P. at 377. The significance of this distinction to California law will be discussed subsequently in text accompanying notes 74–77 infra.

26 See Nichols § 12.3151(1), at 206 n.5. The treatise cites Neale to support the proposition “that in valuing the land, the effect of the proposed improvement must be ignored.” Id.

27 See, e.g., cases cited note 19 supra.


29 219 Ga. 74, 80, 132 S.E.2d 25, 29–30 (1963). Georgia’s present position on this issue was not crystallized without some recalcitrance from one of its appellate courts. In *Housing Authority v. Hard*, 106 Ga. App. 854, 128 S.E.2d 533 (1962), the appellate court, in interpreting an earlier decision, *Gate City Terminal Co. v. Thrower*, 136 Ga. 456, 71 S.E. 903 (1911), held that the court in *Gate City* was faced with a situation quite different from that in *Hard*. The court said *Gate City* involved enhancement arising prior to the designation of a project site, and, as such, it was properly allowed. But the court refused to allow recovery of the enhancement in *Hard* because the project site was certain during the period in which enhancement arose. This decision was reversed by the Supreme Court of Georgia, the court holding that *Gate
period in which enhancement allegedly arose. Nevertheless, the condemnee claimed that he was entitled to the market value of the property as of the date it was actually taken by court proceedings. In sustaining this contention as being within the intent and purpose of the "just and adequate" provision of the Georgia Constitution, the supreme court held that "[a]nything that actually enhances the value must be considered in order to meet the demands of the Constitution that the owner be paid before the taking, adequate and just compensation." It is clear from this decision and from its aftermath that to the Georgia court "just and adequate" means just and adequate solely to the condemnee. The policy implicit in such an approach is the protection of the condemnee from a discrimination that would disallow him the enhancement while allowing adjacent owners to reap such benefits merely because they were fortunate enough not to have their land condemned. The principle underlying this policy is defeated, however, to the extent that the property owners nearby are specially assessed for the improvement.

By contrast, the California case of People ex rel. Department of Public Works v. Pera explicitly held that "[t]he term 'just compensation' means 'just' not only to the party whose property is taken for public use but also 'just' to the public which is to pay for it." In accordance with this interpretation of Article I, section 14 of the California Constitution, the California courts have uniformly denied compensation for enhancement accruing after the project site has been definitely determined. This is proper. Using as a "cutoff point" the date on which the site is clearly established draws a proper balance between the private right and the public good. Moreover, such exclusion of enhancement evidence does not subvert section 1249 of the California Code of Civil Procedure because, as previously indicated, section 1249 has been termed a procedural statute that creates no vested rights. If such evidence of enhancement arising subsequent to the definite plotting of the project were admitted by the trial

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City's facts were identical to those in Hard. Subsequently, the Georgia Legislature, in defiance of the decision by the supreme court, passed a statute denying recovery by the condemnee of any enhancement caused by the project for which the property was condemned. The law was held unconstitutional in Calhoun v. State H'way Dep't, 223 Ga. 65, 67, 153 S.E.2d 418, 420-21 (1967), as contrary to the "just and adequate" provision of the Georgia Constitution. See GA. CONST. art. I, § 3.

31 The holding in this case precipitated some adverse legislative activity.

See note 29 supra.
32 See Orgel § 98.
33 See id.
35 Id. at 499, 12 Cal. Rptr. at 150.
36 See cases cited note 22 supra.
37 See cases cited note 13 supra.
judge, it might well be held to be an abuse of discretion. By determining market value as of the day before the property was certain or likely to be requisitioned the condemnor is not penalized, as it would be in Georgia, for implementing the desirable practice of appraising the public of a specific site. This is not to say that a public authority should be given a license to condemn a definite site and then, in typical bureaucratic fashion, unreasonably delay the official proceedings. The provision in the Code of Civil Procedure setting valuation as of the date of trial was not designed to protect against this type of delay.

While market value is utilized by both states as the indicia of just compensation, it is plain that the Georgia court, applying the minority rule, will encounter difficulty in arriving at the amount of the award. It is questionable whether there is, in the first place, any true market for property that has been labeled as a site for a public work. Nevertheless, there are several methods by which the Georgia court could arrive at a figure. One method would be to construct, through the use of sales evidence of "similar" nearby property, a hypothetical sale of the property condemned so as to compute its "quasi-market value" as of the time of the taking. Since this is patently a fictional approach, imputing to the property benefits that it would never possess, this quasi-market value approach has not been accepted by the Georgia Supreme Court, and the procedure is disapproved of by authorities generally.

Another alternative would be to "allow proof of any element... that entered into fixing its value right up to the time it was taken." While this approach was approved by the court in Hard, it does not reflect true market value and, moreover, is based on unsound policy.

39 Official proceedings ordinarily commence with the service of summons.
40 Id. It is interesting to note that the Court of Civil Appeals of Texas, in an analogous situation, has provided a remedy for this problem by holding that, if the public agency unnecessarily delays, the condemnee shall be entitled to the market value of the property at the time it was taken including any enhancement. Uehlinger v. State, 387 S.W.2d 427, 432 (Tex. Civ. App. 1965). The facts in Uehlinger, however, are distinguishable from those in cases presently discussed to the extent that the site was designated and then condemned in a piecemeal fashion. In Hard and other cases considered in this section the entire site was taken in one action.
42 See State Rd. Dep't v. Chicone, 158 So. 2d 753 (Fla. 1963). "Once selected for condemnation the marketability, both sale and rental, and to some extent the use, of property is sterilized..." Id. at 755.
True market value of property, as defined above, includes consideration of a purchaser who is willing to buy the property "with knowledge of all the uses" to which the property could be put. These uses referred to are "ordinary" uses, for if the property is destined for condemnation the only long-term "use" for which it is available is as a medium through which to speculate upon a large condemnation award. Once it is known that the property is to be included in the improvement, its actual marketable attribute—that of adjacency to the project—has been extinguished, thus denying the property's participation in the general rise in land values in the area. As one author has stated:

The owner [and a fortiori a purchaser] of land taken for improvement cannot put it to any use or enjoy its benefits, and any increase in its value is due, not to its increased use by the owner or any benefits he may get, but merely to speculation as to what the condemnor might be willing or forced to pay for the property.

To call this speculative subterfuge a "use" runs counter to the generally accepted definition of market value. It forces the court to engage in one of the practices against which the market value definition was intended to protect—the "vicious circle" of attempting to estimate compensatory value in terms of expectation of the award finally to be granted by the court.

A final method that could be used to measure enhancement to property definitely within the ambit of a proposed project would be to value the property based upon either the need of the condemnor or the beneficial aspects of the intended use by the condemnor. This, clearly, would not reflect "true" market value because that value contemplates private, not public use. Further, this approach mirrors the direct element of value that was excluded by the California Supreme Court in Neale and its successors. Consider, for example, the following cases. In People ex rel. Department of Natural Resources v. Brown, a case involving condemnation for an earthfill dam, the condemnee's claim for a valuation based upon the condemnor's need for his land in the project was rejected. In Pasadena v. Union Trust Co. the appellate court affirmed the exclusion of the

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47 See Orgel § 106; Palmer § 154.
48 Palmer § 154 (emphasis added).
49 See text accompanying note 46 supra.
50 Cf. Orgel § 106.
51 See cases cited note 22 supra.
52 255 A.C.A. 697, 63 Cal. Rptr. 363 (1967). The facts as stated by the court are sketchy. However, in the respondent's reply brief to a petition for rehearing it is revealed that the land was within the scope of the project at all times. See Reply Brief for Respondent for Petition for Rehearing at 14, People ex rel. Department of Natural Resources v. Brown, 255 A.C.A. 697, 63 Cal. Rptr. 363 (1967).
condemnee's evidence of his land's potential as a dam site\textsuperscript{54} where joiner of his parcel with neighboring ones for this purpose would not have been practical except for the imminence of the plaintiff's reservoir project. Finally, as the court in \textit{Oakland v. Adams}\textsuperscript{55} stated:

the fact that the city intended to acquire [the] property and use it for park purposes should not cause it to be penalized, or that the increment in value which might attach to it because of the fact that the city desired to acquire it to convert it into a city park should raise its value to the city for that purpose\textsuperscript{56}.

As the above cases indicate, it is repugnant to one's sense of justice that a condemnor must include in its award an increment of value stemming from the property being enhanced \textit{directly} by the improvement to be placed thereon\textsuperscript{57} to attempt to value property in this manner has also been considered to be quite speculative.\textsuperscript{58} Thus, if the condemnor has not unreasonably delayed proceedings and if, from the beginning of the project it was certain or highly probable that the condemnee's property was to be included in the improvement, the better rule, and that adhered to in California, is that the property is to be valued as of the date that this certainty or probability arose.

\textbf{Uncertain Inclusion}

\textit{General Principles}

On many occasions prior to the determination of a definite site for the proposed public work, property values will rise in a broad area, reflecting the anticipation of continued private ownership adjacent, or at least proximate, to the improvement.\textsuperscript{59} The instant problem arises when, within that broad area, a specific site is finally chosen upon which to construct the improvement. The question is whether the condemnee's award should include the increment stemming from the anticipatory rise in values before the exact site is determined. Unfortunately, many courts\textsuperscript{60} have failed to distinguish between this situation where the enhancement arose \textit{before} a definite site for the improvement was selected and the situation discussed previously where the enhancement arose \textit{after} a definite site had been established. As a consequence, the bulk of the American decisions seems buried in a morass of irreconcilable conflict. This confusion could have been avoided by means of detailed statements of facts coupled with incisive applications of law. As put by one writer:

As to the enhancement in value resulting from the anticipated bene-

\textsuperscript{54} Id. at 26, 31 P.2d at 466.
\textsuperscript{55} 37 Cal. App. 614, 174 P. 947 (1918).
\textsuperscript{56} Id. at 622, 174 P. at 950.
\textsuperscript{57} See ORGEL § 106. "Market value at the time of taking" is the verbal standard of compensation, but \ldots the courts do not rigidly adhere to this standard when \ldots the dictates of justice require a different rule." Id.
\textsuperscript{58} See PALMER § 154.
\textsuperscript{59} 2 J. LEWIS, EMINENT DOMAIN § 745 (3d ed. 1909).
\textsuperscript{60} See note 17 supra.
fits from the public project, the judicial decisions are at variance, and the failure of most courts to distinguish sharply between the enhancement arising before the definite choice of a site for the project and the increment accruing thereafter leaves it uncertain whether the different holdings are the result of different rules or whether they are applications of the same rule to varying states of fact.\textsuperscript{61}

Enough courts, however, have made such a distinction to indicate that there is a definite split of authority on this issue in the United States.\textsuperscript{62}

Jurisdictions allowing recovery of the enhancement base their decisions on the reasoning that such an increment is a bona fide component of market value. For example, in \textit{Kerr v. South Park Commissioners},\textsuperscript{63} the United States Supreme Court approved the following instructions:

A number of witnesses testified that the agitation of the park project, the anticipation that the legislature would authorize the appropriation of lands to establish a park in the vicinity of the present South Park, and the introduction of the bill into the legislature . . . materially enhanced the value of lands embraced in the present park lines, as well as the lands adjacent thereto and in that vicinity. Any resulting benefit to the lands within the proposed park from this . . . you should take in account in determining the amount that will fairly compensate the owner.\textsuperscript{64}

The instructions went on to deny compensation for any “special

\textsuperscript{61} ORGEL § 106, at 449-50 (emphasis added).
\textsuperscript{62} E.g., Kerr v. South Park Comm'rs, 117 U.S. 379, 387 (1886) (approved instructions allowing recovery for this type of enhancement); State Rd. Dep't v. Chicone, 158 So. 2d 753, 754 (Fla. 1963) (dictum); Sunday v. Louisville & N.R.R., 62 Fla. 395, 397, 57 So. 351, 351 (1912); Housing Authority v. Hard, 106 Ga. App. 854, 857, 128 S.E.2d 533, 535 (1962), rev'd, 219 Ga. 74, 132 S.E.2d 25 (1963); Sanitary Dist. v. Loughran, 160 Ill. 362, 370, 43 N.E. 359, 361 (1896); Snouffer v. Chicago & N.W. Ry., 105 Iowa 681, 683, 75 N.W. 501, 502 (1898); Guyandotte Valley Ry. v. Buskirk, 57 W. Va. 417, 423, 50 S.E. 521, 523 (1905); see NICHOLS § 12.3151(2), at 210 n.9. Contra, Tharp v. Urban Renewal & Community Dev. Agency, 389 S.W.2d 453, 456 (Ky. 1965); Congressional School of Aeronautics v. State Rds. Comm'n, 218 Md. 236, 249-50, 146 A.2d 558, 565 (1958); Alden v. Commonwealth, 351 Mass. 83, 85-86, 217 N.E.2d 743, 745-46 (1966) (statutory interpretation); Cole v. Boston Edison Co., 338 Mass. 661, 157 N.E.2d 209, 212 (1959) (statutory interpretation); NICHOLS § 12.3151 (4), at 212 n.14 (citing cases). The relative scarcity of cases allowing or disallowing recovery for this “anticipatory enhancement” may be attributed, primarily, to the failure of most courts to distinguish between enhancement before and after designation of the improvement site. Cf. text accompanying note \textsuperscript{61} supra. Unquestionably, many cases have involved “anticipatory enhancement,” and it is not unlikely that recovery has been allowed for such in some instances. However, the disposition of a court to allow this recovery is often camouflaged by broad statements seemingly intended to deny any type of project-caused enhancement. \textit{Id.} To elucidate this significant distinction requires a substantial effort by the court, and, in this light, it would not be unfair to conclude that many courts are at times rather indolent.

\textsuperscript{63} 117 U.S. 379 (1886).
\textsuperscript{64} Id. at 385.
benefit" to the property, such benefit arising from the specific earmarking of the property for the improvement. The court thus distinguished between enhancement accruing before the site was determined and enhancement accruing thereafter, allowing recovery for the former but not the latter. This case emphasizes the fundamental proposition that during the period of uncertainty the true market value of all property in the area rises because of bona fide expectations of adjacency, whereas once a site has been chosen, enhancement to property lying therein occurs only because of speculation concerning the amount the condemnor will pay.

Some courts in denying this "anticipatory enhancement" have argued that the condemnor should not be forced to pay for any increment stemming from the project, while others have reasoned that since "the landowner is not to be penalized for any depreciation in value attributable [to the project] the condemnor [is not] to be required to pay for any enhancement . . . ." The Supreme Judicial Court of Massachusetts in Cole v. Boston Edison Company indicated that if the original scheme raised even a possibility that the subject parcel would be taken, there was to be no allowance for an increment attributable to the indefinite plan. In Tharp v. Urban Renewal and Community Development Agency, the Kentucky court, reaching the same result, stated that the property was to be valued "at the time just before it was generally known that the public project would be performed."

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65 Id.
66 See Nichols § 12.3151(2), at 77 (Supp. 68).
70 338 Mass. 661, 157 N.E.2d 209 (1959). The court interpreted statutory language which said that value was to be fixed "before the taking" to mean "before the beginning of the entire public work which necessitates the taking." Id. at 665, 157 N.E.2d at 212.
71 Id. at 666, 157 N.E.2d at 212. The court cited May v. Boston, 158 Mass. 21, 31, 32 N.E. 902, 904 (1893), as support for this proposition. Subsequently, United States v. Miller, 317 U.S. 369, 379 (1943), was cited as a better statement of the rule the court was applying. The relevant passage in Miller, however, spoke in terms of "probability" of being taken and not mere "possibility." Accordingly, the test set down by the court was somewhat ambiguous.
72 389 S.W.2d 453 (Ky. 1965).
73 Id. at 456.
The California Position

Unfortunately, the California courts, with one exception, have not clearly indicated their position on this controversy. The one exception is San Diego Land and Town Company v. Neale, an 1888 decision of the California Supreme Court that drew a sharp distinction between “direct” and “indirect” benefits to the condemned property. Of the latter the court stated that “the public knowledge of a proposed improvement might cause an actual demand in the market and a subsequent advance in the current rate of price.” Unmistakable in this excerpt is the notion that, prior to the designation of the improvement site, property values in a wide area will rise because of the expected benefits to be derived from owning property proximate to the improvement. This interpretation of the passage in Neale is substantiated by reference to a jury instruction recommended as proper for California condemnation cases:

You are instructed that it is improper for you to base your award in this case, for the value of the part taken, on any direct increase ... in value arising from the construction of [the proposed project].

On the other hand, advance public knowledge of the proposed project may or may not have had some effect upon the general market in the area, and therefore, an indirect effect upon the value of the property being taken. You may not speculate what that effect may or may not have been, but you are to consider the general market as you find it, and if there has been such an indirect effect upon the market, the property owner is still entitled to the full and fair market value of his property upon such market.

You are to determine the value the land being taken would have had, if no action had been taken toward acquisition of this particular property for the project. The Neale case is cited as authority for this instruction. However, Neale was decided in 1888 and Richard L. Huxtable, the author of this proposed instruction, noted the following:

The second paragraph of the above instruction is believed by the author to be a proper statement of the present law under the cases cited . . . . But more recent cases dealing with resulting increase in market value might be construed as requiring exclusion of both direct and indirect effect upon the market.

This is indeed a hint, if not more, of the rather murky and unsettled state of California law on this subject.

As mentioned in the above comment, some cases might be construed as excluding evidence of both indirect and direct effects on the value of the property; but in several cases the language relating to

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\[74\] 78 Cal. 63, 20 P. 372 (1888).

\[75\] Id. at 74-75, 20 P. at 377; see text accompanying notes 24-26 supra.


\[78\] Id. at 261-62 (emphasis in the original) (citing no cases).
such exclusions could be construed either as dictum, or as a very unclear statement of the applicable law. For example, in *Pasadena v. Union Trust Co.* the condemnor offered evidence of his land's suitability for a dam site. The proffered evidence was excluded by the trial court and this result was affirmed on appeal. The issue was one of direct valuation, i.e., whether or not it was proper to value the land as a dam site merely because the plaintiff had determined to build a dam there. Nevertheless, the Court of Appeal went on to say: "Any rise in value before the taking, not caused by the expectation of that event, is to be allowed, but . . . it must be a rise in what a purchaser might be expected to give." If the court here was referring, by use of the phrase "[a]ny rise in value . . . not caused by the expectation of that event", to an indirect increase of the property value before a definite site is determined because of advance public knowledge of the improvement, the statement is indeed dictum. This must be so because the issue on appeal was not alleged error in denying evidence of indirect enhancement. The more plausible conclusion, however, is that the court was merely rejecting evidence of direct enhancement with an ambiguous application of the Neale rule. Support for this conclusion is found in the last clause in the above-quoted statement of the court: "but . . . it must be a rise in what a purchaser might be expected to give." This phrase implies that, although direct elements of enhancement must be excluded, it is proper to admit elements of value that a purchaser in the open market would consider, which would certainly include a purchaser's anticipation or hope of eventually owning land next to a public improvement, the exact site of which is still unknown. Whereas *Union Trust*, therefore, is basically consistent with *Neale*, the ambiguity of the language used could erroneously cause one to conclude otherwise. Nor is *Union Trust* alone. There are other decisions, more recent than *Union Trust*, that also might be construed as requiring the exclusion of both direct and indirect benefits.

In *Los Angeles County v. Hoe* the condemnor was endeavoring to acquire property for a civic center governmental office site. The condemnor's expert witness testified over the condemnor's objection that the City of El Monte had selected the lot adjacent to that of the condemnor for its city hall. On appeal the condemnor contended that it was error to admit the testimony because it allowed the condemned property to be valued in light of the project to be built thereon. The basis of this contention was the alleged fact that Los Angeles County had joined with the City of El Monte to construct a complete governmental center, which would include the adjacent parcel designated for the El Monte City Hall. The condemnor's witness testified, however, that he had no knowledge of such a joint effort. In addition he stated

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80 Id. at 26, 31 P.2d at 466 (emphasis added).
81 Id.
that he did not consider the county project in valuing the land, recognizing that it would be improper to do so. The court affirmed the decision, finding that there was only a prospective or contingent joint effort between Los Angeles County and the City of El Monte, and further stated, "It is the law, as stated by appellant, that in arriving at a determination of the market value of [the] land . . . it is not proper to consider the increase, if any, in the value of such land by reason of the proposed improvement which is to be made on the land by the condemnor." 83

Does this rather broad statement disallow any recovery for "indirect enhancement" as defined by Neale? One reason for concluding that it does not is supplied by a close scrutiny of the facts. The condemnor was arguing that there was only one large project, encompassing both the condemnee's property and the adjacent property, so that any consideration of the condemnee's property as enhanced by the city hall project would be improper as allowing evidence of direct enhancement. This the court rejected, finding that there was no joint undertaking. The court, therefore, in making the above statement was merely informing the appellant that, although it stated the law correctly, the proposition was not applicable to the present case because there was no question of direct enhancement. 84 Further, the court in Hoe cited Neale as authority for its ruling. It is quite doubtful that the court intended to state a proposition that was contrary to the very case cited to support it, and in this light Neale and Hoe are reconcilable.

In San Diego v. Boggeln 85 the situation was analogous to that in Hoe. Boggeln involved condemnation efforts by the City of San Diego for a park and recreation area. Proceedings began in 1945 but were dismissed in 1952. In the interim a new project was begun in conjunction with the federal government. At trial, the city offered evidence to show that the land in question had been encompassed in the project since 1945. If admitted, such evidence would have denied the condemnee any compensation for enhancement that arose prior to the official commencement of the joint project. The appellate court affirmed the decision excluding the evidence, holding that the evidence was unnecessary because the parties had stipulated that the property was within the project's ambit since 1945, and the instructions of the trial court effectively charged the jury to ignore any enhancement resulting from its definite inclusion. The appellant cited Hoe, 86 but

84 The question involved, although not made perfectly clear by the court, was one of supplementary taking by an established project. See text accompanying notes 114-16 infra. This is substantiated by reference to respondent's reply brief. Reply Brief for Respondent at 7, Los Angeles County v. Hoe, 138 Cal. App. 2d 74, 291 P.2d 98 (1955).
86 See text accompanying note 83 supra.
the court, while agreeing with its statement of law, held that it was not applicable because both the stipulation and the trial court instructions effectively excluded any danger of direct enhancement. The court, therefore, although approving the sweeping language of Hoe, was doing so only to the extent that it was the correct rule as stated in Neale for the exclusion of direct enhancement evidence.

A final case in which the broad language of Hoe is indiscriminately cited is Community Redevelopment Agency v. Henderson. The condemned property had been included in the scope of a redevelopment project from its inception. Accordingly, the court adhered to the general rule and held it was proper for the trial court to prohibit the cross-examination of the condemnor's expert witness when "[s]uch inquiry would have elicited evidence bearing upon the enhancement of defendant's property as a result of the redevelopment." Again, this broad language although intended to state only the rule disallowing direct enhancement, casts doubt upon the "direct-indirect" distinction drawn in Neale.

Two quite recent cases pose even greater barriers to any attempt to synthesize California law on this subject. In Redevelopment Agency v. Ziverman instructions proffered by the condemnee distinguishing between direct and indirect benefits were rejected by the trial court. The instructions were substantially the same as those set out in Huxtable's article, and believed by him to be a correct statement of the law of California according to the Neale case. In affirming the decision of the trial court, the appellate court stated the "general rule" that the condemnation project was not to be a factor in determining the market value of the condemned property and to support this conclusion cited Pasadena v. Union Trust Co. As was

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88 See text accompanying note 83 supra.
89 251 Cal. App. 2d 336, 59 Cal. Rptr. 311 (1967). The Hoe quotation was also used in People ex rel. Department of Pub. Works v. Di Tomaso, 248 Cal. App. 2d 741, 57 Cal. Rptr. 293 (1967). The court made it clear, however, that the quotation's applicability was limited to the exclusion of direct enhancement. In the opinion, the quotation was prefaced by the following: "Condemnor equates . . . [its contention] with an attempt to increase the value of the property being taken by considering its value as though the improvement was made." Id. at 767, 57 Cal. Rptr. at 310.
91 The case of People ex rel. Department of Pub. Works v. Pera, 190 Cal. App 2d 497, 12 Cal. Rptr. 129 (1961), using language comparable to that in Neale, held that the trial court properly instructed that "enhancement in value arising solely and directly from the proposed public improvement" is not to be considered. Id. at 500, 12 Cal. Rptr. at 130-31 (emphasis added).
93 See text accompanying note 77 supra.
previously demonstrated, *Union Trust* was a case in which the court approved the trial court's exclusion of evidence of direct enhancement. The proffered instructions in *Ziverman* purported to do just that, namely, to exclude evidence of direct enhancement. In addition to this, however, the proffered instructions would have allowed the jury to compensate for indirect enhancement. Nevertheless, if the court relied on *Union Trust* as authority for the proposition that an indirect enhancement in value could not be considered, *Union Trust* was improperly cited. The court equivocated, however, and nullified its citation of *Union Trust* by stating that since there was no evidence introduced at trial as to any effect of the prospect of condemnation, the instruction was not pertinent to any issue in the case. Its exclusion, therefore, was not prejudicial and the court did not have to decide whether the proffered instruction was correct. It is doubtful, therefore, that the court in *Ziverman* was attempting to destroy the distinction in *Neale*.

In the case of *People ex rel. Department of Public Works v. Arthofer*, a rather anomalous situation was presented wherein the court stated a rule, yet purported to rely on authority directly contrary to the rule stated. The case involved condemnation for freeway purposes. The condemnee purchased property near a major boulevard three months prior to the commencement of the condemnation. Although the parcel was zoned R-1 (single family dwellings) the condemnee intended to use it for R-3 purposes (apartments, etc.), hoping to obtain a zone change. While such changes had been allowed in the general area, the purchaser was unable to obtain any such variance. The State's witness testified that any zone changes in the area since 1956 were due to knowledge of the contemplated freeway and that, without the freeway, there would have been no such changes. The opinion noted that the subject property had been within the scope of the freeway project since 1960. The appellate court held that the trial judge did not abuse his discretion in not permitting the condemnee's witness to express an opinion regarding the reasonable probability of a zone change. One of the reasons given for affirming the ruling was the witness' "inability to establish that . . . [zoning changes in nearby property] had occurred prior to knowledge of the construction of the freeway . . . ." Continuing, the court stated:

The law is likewise clear that in forming an opinion as to reasonable probability of a zone change, a witness must exclude all consideration of the effect of the proposed improvement, and knowledge of the impending improvement may not be considered as a factor in determining the fair market value [citing *Neale*] . . . . [A]ny testimony of reasonable probability of zone change may not take into account the proposed freeway or any influence arising therefrom.

There was no dispute at trial that the property in question was not

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97 Id. at 464, 54 Cal. Rptr. at 885.
98 Id. (emphasis added).
99 Id. at 465, 54 Cal. Rptr. at 885 (emphasis added).
likely to be within the scope of the project until 1960 and that zoning changes had occurred, in anticipation of the freeway, since 1956. In light of these facts a comparison is warranted between the above quotation from Arthofer and the statement in Neale that a condemnee could derive an indirect benefit from the fact that “the public knowledge of a proposed improvement might cause an actual demand in the market and a subsequent advance in the current rate of price.”

The apparent conflict between these two statements might be dispelled by interpreting “knowledge” in the Arthofer quotation to mean the “knowledge of the witness,” thus applying the Neale rule excluding evidence of direct enhancement, i.e., the witness may not value the property by reference to his knowledge of the condemnor’s project to be erected thereon. This position, however, is untenable for two reasons. First, the Arthofer quotation goes on to say that testimony of enhanced value because of a reasonable probability of a zone change “may not take into account the proposed freeway or any influence arising therefrom,” which would include both the knowledge of the valuation witness (direct enhancement) and the knowledge by the general public of the advent of the freeway before its boundaries had been determined (indirect enhancement). Yet, indirect enhancement is precisely the element that Neale held may be considered.

Secondly, the appellate court approved the trial judge’s ruling that not only was the condemnee’s witness precluded from expressing an opinion on project-influenced zone changes causing a rise in property values occurring subsequent to 1960, when the property was certain to be taken, but he was precluded from expressing any opinion on those zone changes occurring prior to 1960 as well. Since the zone changes in the area began in 1956, it would have been proper, under Neale, for the witness to consider the effect of the project on land values in the area as enhanced by project-caused zone changes occurring prior to 1960, the date that a definite site was established. To allow this consideration would be merely to take into account a rise in property values in a general area due to the anticipation of an improvement, the boundaries of which had yet to be designated.

Is Arthofer contrary to Neale? Although the Arthofer court mentioned the fact that the condemnee’s offer of proof failed to demonstrate that the exclusion of evidence was prejudicial, it would be erroneous to conclude that the decision rested on this minor procedural ground in light of the unmistakable and forceful language used in the opinion. Moreover, the court, although citing Neale, could not have been merely vaguely applying the Neale rule disallowing “direct” enhancement because the situation in Arthofer involved enhancement that was claimed to have arisen prior to the property’s

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102 Id. at 464–65, 54 Cal. Rptr. at 885.
inclusion in the project. Accordingly, the conclusion must be that the court misinterpreted the “direct” enhancement rule in Neale and indiscriminately applied it to a situation proper for the “indirect” enhancement rule. To the extent of this misinterpretation the cases are indeed contrary.

Thus, the question is raised as to which is the better rule to be followed in California. It is suggested that the distinction drawn in San Diego Land and Town Company v. Neale between “direct” and “indirect” enhancement be preserved, notwithstanding the age of the case. It is a workable distinction designed to assure that justice be done to both condemnor and condemnree and, in doing so, achieves a proper balance between the private right and the public good.

The Neale distinction, in addition, is one that best reflects the rule that market value is to be the index for just compensation. As previously discussed, land that is certain to be enclosed within a public improvement cannot increase in true market value, i.e., there is no potential for adjacency coupled with private ownership. Conversely, knowledge that a public improvement is likely to be constructed at some location within a vague general area cannot help but stimulate a rise in property values within that area. This increase in value, although caused by anticipation of the improvement, is an increase in true market value since property owners and those who would purchase from them consider property owned near a public improvement capable of being used in many more beneficial ways than it would be in absence of the improvement. Therefore, bearing in mind the definition of market value, an increment attaching to the property prior to its certain or highly probable inclusion in the project should be compensated for by the condemning agency. As stated by one writer,

When . . . the preliminary discussion has enhanced the value of the land in the neighborhood, the courts have not been inclined to create an exception to the general rule that market value at the time of the taking is the conclusive test and it is usually held that the owner is entitled to the benefit of the appreciation in value from the general expectation that the improvement for which it was taken would soon be constructed.

Accordingly, to exclude evidence of this enhancement would be an abuse of discretion by the trial judge sufficient to deny the condemnree the “just compensation” that is guaranteed him in California Constitution. In more practical terms, valuation is to be made as of the day before the date it became certain or probable that the property was to be condemned for the project.

103 See text accompanying notes 34-35 supra.
104 See text accompanying note 9 supra.
105 See PALMER § 154; text accompanying note 48 supra.
106 See text accompanying note 59 supra.
107 See text accompanying note 11 supra.
Property Condemned to Supplement a Previously Existing Project

Not infrequently an established public improvement must be expanded to meet greater demands. When adjacent land is condemned for this purpose, the condemnee usually requests compensation for the increment of value that has accrued to his property by reason of its past adjacency to the improvement. This situation differs from the two previously discussed situations where enhancement was claimed to have arisen from the anticipation of the project and not, as here, from its prior establishment. This situation, however, must be considered in light of two possible factual variations: (1) where it was not probable, upon original establishment of the project, that the subject parcel would be included in an expansion; and (2) where it was definite or at least probable that the condemnee's parcel would subsequently be enveloped. The great weight of authority allows recovery for the added value in the first instance,110 but denies it in the second.111

Lack of Probable Inclusion

Speaking for the United States Supreme Court in United States v. Miller,112 Mr. Justice Roberts clearly stated the applicable rule where it is not probable at the time the project is initiated that the condemned parcel would be later included:

If a distinct tract is condemned, in whole or part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the government at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity.113

Two California decisions have dealt directly with this matter. In the more recent, Los Angeles County v. Hoe,114 the plaintiff sought to condemn land for a civic center. The City of El Monte had previously acquired the property adjacent to the land in question for a city hall


111 See, e.g., United States v. Miller, 317 U.S. 369, 376-77 (1943); Tigertail Quarries, Inc. v. United States, 143 F.2d 110, 111 (5th Cir. 1944); United States v. 85.11 Acres of Land, 243 F. Supp. 423, 425 (N.D. Okla. 1965); ABA REPORT 113 (1966); NICHOLS § 12.351 (3); ORGEL § 100.

112 317 U.S. 369 (1943).

113 Id. at 376.

site. The court held\textsuperscript{115} that, since there was no evidence that Los Angeles County and the City of El Monte had originally intended to purchase jointly all the property involved, it was not improper for the condemnee's valuation witness to consider that the El Monte City Hall was to be constructed next door.\textsuperscript{116}

In the case of San Diego Land & Town Company v. Neale,\textsuperscript{117} one of the questions involved was the valuation of property in light of its adjacency to a reservoir project that later had to be expanded. The court stated, "So far as the value of the land in controversy may have been increased to purchasers generally by the construction and use of the plaintiff's dam and reservoir . . . such fact should be considered . . . ."\textsuperscript{118} The court also noted that

[t]he jury had a right to consider the fact, in determining the market value, that the land in controversy was in proximity to a dam site, and to consider its adaptability for reservoir purposes, and to determine whether or not its market value had been enhanced by improvements put upon adjoining property . . . .\textsuperscript{119}

Although the California authority on this matter is sparse, it is sound, and in accord with the majority position in the United States as postulated in United States v. Miller.\textsuperscript{120} Assuming that the project's expansion was not probable, inclusion of the enhancement is inescapable. By analogy to anticipatory enhancement of property values as the result of an undetermined project site, the market value of property adjacent to an already established project is doubtlessly increased by such adjacency.\textsuperscript{121} This increase is thus a proper element of true market value, for which compensation must be made.

\textbf{Probable or Definite Inclusion}

If it is certain or probable that the condemnee's land will be included in the original project by a future proceeding, the authorities are united in disallowing any increase in compensation by reason of the condemned parcel's adjacency to the improvement.\textsuperscript{122} The clearest exposition of the rule followed by virtually all courts\textsuperscript{123} is again

\textsuperscript{115} The holding of the court was somewhat ambiguous. However, a close analysis of the case coupled with a reference to the respondent's reply brief will indicate that the court did indeed allow the condemnee to recover for enhancement due to the adjacent city hall project. See Reply Brief for Respondent at 7, Los Angeles County v. Hoe, 138 Cal. App. 2d 74, 291 P.2d 98 (1955) (cites Miller and clarifies the holding in Hoe).


\textsuperscript{117} 88 Cal. 50, 25 P. 977 (1891). Anticipatory enhancement was also claimed. See text accompanying notes 74-77 supra.


\textsuperscript{119} Id. at 66, 25 P. at 981.

\textsuperscript{120} 317 U.S. 369 (1943).

\textsuperscript{121} See text accompanying note 59 supra.

\textsuperscript{122} See authorities cited note 111 supra.

\textsuperscript{123} But see cases cited note 29 supra.
found in *United States v. Miller*, 124 where the court stated, "If... the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken..." 125 The court here was referring to an instance in which the condemnee's land was definitely determined to be within the confines of the project from the outset. The court was careful to point out, however, that definiteness of inclusion is not always necessary to deny the owner's claim for enhancement.

If... [the parcels] were within the area where they were likely to be taken for the project, but might not be, the owners were not entitled... to an increment of value calculated on the theory that if they had not been taken they would have been more valuable by reason of their proximity to the land taken. 126

Thus, the condemning agency can avoid payment of any claimed enhancement by producing evidence showing that it was probable, from the beginning of the original work, that the condemnee's lands would be eventually included within the geographical scope of the project. 127 In supplementary takings, logical considerations require the conclusion that, once it is determined that the land was probably or definitely within the initial ambit of the overall project, its genuine market value, under the rule of *Miller* must include no consideration of enhancement by reason of the project. While the California appellate courts have yet directly to accept or reject the rule as stated in *Miller*, it is submitted that *Miller* is sound and should be followed.

However, even though expansion of the original project to encompass the condemnee's property is certain, if the condemnor unreasonably delays acquisition of the property the owner might be able to recover for adjacency enhancement. In a recent Texas case, 128 the condemnor had designated a specific area but embarked upon a piecemeal approach to acquire the necessary land, and unnecessarily delayed acquisition of certain tracts. The owner of later taken property was allowed to recover the value of the property at the date of taking, including claimed enhancement. 129 While this recovery unquestionably included enhancement elements that would not be reflected in true market value, the Texas court chose to stress the unjustifiable procrastination of the condemnor. In effect, the Texas court, in construing its pertinent constitutional provision, 130 modified the rule of *Miller* with equitable considerations. The California courts ought to take cognizance of the rule of this case in interpreting the condemn-
Depression of Values Caused by the Public Improvement—Planning Blight

The problem examined here is distinguishable from those discussed previously in that here the proposed public project, instead of enhancing property values, depresses them. Depreciation of property values by a proposed public improvement can occur in cases in which the site of the improvement is either definite or indefinite, or where the condemnee’s property is the object of a supplementary taking for an already established improvement. Frequently, long-range planning, especially in urban renewal projects, dampens any incentive to keep property within the proposed area in good repair. Owners and tenants move away, thereby inviting further deterioration through vandalism. The same results may occur even though the boundaries of the project have not been defined, but only an announcement of a proposed project has been made. The question thus arises whether the condemnee may recoup, as part of the fair market value of his property, the amount of depreciation that has occurred by reason of the project for which his land is condemned.

There is no general consensus on this issue. Indeed, the courts in the United States are sharply divided. Those disallowing the condemnee any recoupment for blight do so for a variety of reasons. For example, one court, interpreting literally a statute requiring damages to be assessed as of the date of the taking, held that any depreciation prior to the land’s official requisition simply could not be recovered. Other courts have either completely ignored any loss of value caused by the undesirable nature of the prospective improvement, or, while recognizing the existence of an injury, have held such injury to be damnum absque injuria due to the lack of a “taking.” A few cases within this group classify such damages as noncompensable “incidents of ownership.” Another approach used to deny recovery is to argue that computation of such damages would be too speculative, and deny the existence of any “method of compensating an owner for

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133 Id. at 439 & n.15; see Nichols § 12.3151.
136 Id. at 440 & n.18 (citing cases). The same has been held regarding plotting the project on a formal map. Id. at 441 & n.22.
such consequences of congressional action.” 138

Although the above authorities are still considered “good law,” there has been a significant and swelling movement toward the contrary position. Illustrative of this trend is the decision by the United States Supreme Court in United States v. Virginia Electric & Power Company, 139 involving condemnation of a flowage easement for reservoir purposes. Mr. Justice Stewart made it clear in his opinion that “[t]he value of the easement must . . . [not be] diminished by the special need which the government had for it. . . . The court must exclude any depreciation in value caused by the prospective taking once the government was committed to the project. . . .” 140

The attack waged by the authorities for this position is derived from two basic premises. The first of these is that it would be unjust, and, therefore, against public policy, to allow a public authority to depress property values in an area and then, by finally designating a site, gain an undeserved windfall through having the condemned parcel valued as of the date it is officially taken. 141 Accordingly, while “market value at the time of taking” is the standard to which lip service is given, a different rule is oftentimes used for the sake of justice. 142 The result is that various rules have been formulated by the courts to avoid the harsh effects of a literal statutory interpretation. 143

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140 Id. at 636; accord, Playa De Flor Land & Improvement Co. v. United States, 70 F. Supp. 281, 357 (D.C.C.Z. 1945). Mendes Hershman cited Virginia Electric in his address of February 18, 1965 to the New York City Bar Association, Committee on Real Property, and stated that the property owner should be protected against decrease in value caused by the project, not only when the project goes through, but if withdrawn. Nichol’s treatise takes substantially the same position. See Nichols § 12.3151(2) (Supp. 1968).
141 See 2 J. LEWIS, EMINENT DOMAIN § 745 (3d ed. 1909); ORGEL § 105. “To allow a public agency to depress market values in a particular neighborhood by threatening to erect an offensive structure in its midst, and then to take advantage of this depression in paying for the land required for the structure would be so abhorrent to the public sense of justice that it has never been seriously argued that it could be done.” Nichols § 12.3151(2), at 209. Although this statement refers only to an “offensive structure,” the same conclusions should be drawn regarding an “unoffensive structure” the advent of which caused a depreciation in property values.
142 ORGEL § 106.
The second premise, exemplified by *Foster v. Detroit*[^144], takes a position directly contrary to many authorities[^145] and holds that the actions of the [condemnor] which substantially contributed to and accelerated the decline in value of plaintiff's property constituted a "taking" of plaintiff's property within the meaning of the Fifth Amendment [to the United States Constitution], for which compensation must be paid.[^146]

Cases have arisen wherein the mere long-range planning and mapping of a project have caused a substantial decrease in property values.[^147] Taken literally, the above quotation could be construed to hold that the mere mapping of a project constitutes a "taking" for which compensation must be paid if values fall. This conclusion, however, would be erroneous. A survey of the facts of the *Foster* case indicates that the actions taken by the condemnor went far beyond a mere mapping and were so extreme as to justify the holding that there had been a "taking" even before official condemnation had been instituted.

The City of Detroit began to plan for urban redevelopment well in advance of initiating condemnation proceedings. The plan was carried just short of the point of final execution (physical taking) and then abandoned. A second plan was later begun, and nearly all the property surrounding the condemnee's parcel was condemned and buildings destroyed. The condemnee's property, never officially taken before the second plan was begun, was vandalized almost to the extent of total destruction. The property was finally condemned officially and taken for a meager sum under a "value at the time of taking" statute. The condemnee then sued to recover the alleged deficit. The extreme circumstances of this case seem to align it with others that have held, under similar facts, that justice demanded recognition of a compensable "taking."[^148] Thus, *Foster* is somewhat questionable authority for the sweeping proposition that the planning or mapping of a project is a "taking" for which compensation must be paid in the event of a fall in property values.

In California, certain districts of the Court of Appeal are embroiled in the conflict of whether a condemnee should be allowed to recover for blight. The First and Second Appellate Districts hold that the condemnee may not recoup depreciation resulting from the planned project,[^149] while the Third and Fourth hold such depreciation

[^145]: See text accompanying note 135 supra.
[^147]: See note 132 supra.
[^148]: E.g., *In re Philadelphia Parkway*, 250 Pa. 257, 95 A. 429 (1915); see Annot., 64 A.L.R. 546, 551-52 (1928).
The position taken by these latter courts was summarized in the case of Buena Park School District v. Metrim Corporation, in which the court stated:

It is a matter of common knowledge that a purchaser would not buy property in the process of being condemned except at a figure much below its actual value. It follows, therefore, that in arriving at the fair market value it is necessary that the jury disregard not only the fact of the filing of the case but should also disregard the effect of steps taken by the condemning authority toward that acquisition. To hold otherwise would permit a public body to depress the market value of the property for the purpose of acquiring it at less than market value.

This position is substantially the same as that taken by the courts of other states in denying the condemnor's claim that the property should be valued at the date of actual taking. However, neither Buena Park nor People ex rel. Department of Public Works v. Lillard argued that the depreciation in property values constituted a "taking" or a "damaging" under the condemnation section of the California Constitution; both founded their position on the idea that it is against public policy to allow a condemnor to announce a proposed improvement that causes land values to fall, then later step in and purchase the property at this depressed price.

Several California cases have expressed a view contrary to Buena Park and Lillard, the most significant of these being Atchison, Topeka & Santa Fe Railway v. Southern Pacific Company. In this case, the State Railroad Commissioner in 1927 issued an order for construction of a depot upon the condemnor's property. The condemnation proceeding was not filed until December, 1933. At trial the condemnor claimed that the order of 1927 so "stigmatized" the land that when it was finally condemned in 1933 its value was materially lower than it would have been in the absence of such order. The trial court disallowed any testimony to this effect. The appellate court affirmed the decision, stating that although the order caused a decline in appellant's property value, "[t]he law does not... lend a willing ear to speculation. . . . The market value is an effect and we are not..."
governed by the cause that brings it about in order to determine it.\textsuperscript{157}

The court quoted from \textit{San Diego Land and Town Company v. Neale} to the effect that the "benefits" arising from the proposed improvement may not be considered as an element of value,\textsuperscript{158} and went on to ask, "If the benefits may not be considered, why consider the detriment? A value so derived is too remote and speculative."\textsuperscript{159} \textit{Atchison's} reliance upon \textit{Neale} in this context has been severely criticized.\textsuperscript{160} Moreover, the court's argument that to compensate the condemnee for depressed value is to engage in speculation is open to serious question.

Concededly, it would be difficult to argue that the Commissioner's order in 1927 constituted a "taking" or a "damaging" under Article I, section 14 of the California Constitution, since the overwhelming weight of California authority is against it.\textsuperscript{161} However, it is difficult to see how the condemnee is engaging in "speculation" by endeavoring to prove the amount of his property's depreciation due to the impending project. The most plausible explanation for this argument of the court is that at the time of the \textit{Atchison} decision, evidence of sales of nearby property to prove the market value of the condemned parcel was improper on direct examination. But this rule was subsequently changed by \textit{Los Angeles County v. Faus},\textsuperscript{162} where it was held that evidence of sales of "similar" property could be elicited on direct examination.\textsuperscript{163} In light of the \textit{Faus} decision, therefore, it appears that the condemnee, in conjunction with satisfying his burden of persuasion on the issue of fair market value,\textsuperscript{164} could easily introduce sales evidence showing the value of his property just prior to the instigation of the project as compared to its value when official condemnation took place. Through this method he not only would avoid the speculation argument, but would receive truly "just compensation" by being recompensed for depreciation due to the condemnor's project.

\textsuperscript{157} Id. at 517, 57 P.2d at 581.
\textsuperscript{162} 48 Cal. 2d 672, 312 P.2d 680 (1957).
\textsuperscript{163} Id. at 676, 312 P.2d at 683; see \textit{CAL. EVI. CODE} §§ 812, 816.
\textsuperscript{164} See text accompanying note 15 \textit{supra}. 
Under these circumstances it is irrelevant to distinguish the situation in which the property is at all times certain to be included in the project from that in which the project site is indefinite. Nor does it matter that a supplementary taking is involved. If the property is definitely included, its market value is "frozen," or as one court put it, "sterilized," due to the fact that there can be no further expectation of private use and ownership. Accordingly, the market value of the property cannot decrease subsequent to the time of its designation for the project. Moreover, if the site of the value-depressing public work is uncertain for a period, causing market values in a general area to plummet, this should not be charged against the condemnee. Although he does perhaps gain a windfall at the expense of adjacent owners, the fact remains that it is his land that is being taken. The statement in Atchison that the court cannot concern itself with the causes of market value ignores that the cause of depression of market values is the condemnor, who will reap the benefit of the property owner's loss. To vest in a condemning agency, which is the moving party, even the potential power to depress values for its own windfall would create a serious impediment to justice. In such circumstances, the scales must be weighted in favor of the condemnee. In light of this, there is clearly no merit to the illogical reasoning followed by many courts, and quoted in Atchison, that "[i]f the benefits [of the project] may not be considered, why consider the detriment...?"

Conclusion

The ultimate question in determining recovery for enhancement or blight is whether or not the amount given is truly "just compensation," i.e., "just" to both condemnor and condemnee. As to enhancement, there should be no recovery for enhancement claimed to have arisen after the designation of a site. The scales must balance in favor of the condemnor in such a case, for, barring any unreasonable delay, too great a financial burden would be otherwise imposed. However, if enhancement arises prior to the determination of the site,

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165 See note 42 supra.

166 Atchison, T. & S.F.R.R. v. Southern Pac. Co., 13 Cal. App. 2d 505, 517, 57 P.2d 575, 581 (1936). That the Supreme Court of Florida is indeed concerned with the causes of market value is evidenced by its statement that "compensation shall be based on value of the property as it would be at the time of the taking if it had not been subjected to the debilitating threat of condemnation and was not being taken." State Rd. Dep't v. Chicone, 158 So. 2d 753, 758 (Fla. 1963).

167 See NICHOLLS § 12.3151(2); Anderson, Consequence of Anticipated Eminent Domain Proceedings—Is Loss of Value A Factor?, 5 SANTA CLARA LAW 35, 41 n.32 (1964); cf. ORGEL §§ 105-06.


it should be included in compensation as a genuine element of true market value. Similar considerations are involved in the case of a supplementary taking, the result depending upon whether the land subsequently enveloped was or was not likely to be needed from the inception of the overall project. Thus, with enhancement, "just compensation" is measured by the property's market value as of the day before it became certain or likely the land would be taken for the project. In the case of blight, whether or not a particular site has been determined is irrelevant. "Just compensation" here is achieved when market value in all cases is determined as of the day before news of the proposed project in general first reached the public.

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