SECTION 6

VALUATION PROBLEMS IN TRANSPORTATION-RELATED TAKINGS IN EMINENT DOMAIN

No matter what valuation method is selected for a particular parcel of real property, the Supreme Court has cautioned that the "assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety."[1]

[1] Cane Tenn., Inc. v. United States, 71 Fed. Cl. 432, 439 (2005) (citing United States v. Miller, 317 U.S. 369).

A. JUST COMPENSATION AND VALUATION

As stated in a case, just compensation requires that "the full and perfect equivalent in money" be paid by the condemnor for the property taken.[2] Just compensation, moreover, "is what the owner has lost, not what the condemnor has gained."[3] If "there is ascertainable market value,"[4] the condemnee is to be "made whole."[5] However, "'[o]vercompensation is as unjust to the public as undercompensation is to the property owner, and the landowner bears the burden of proving the value of the land.'"[6]

> The "just compensation" to which such owner is entitled has been held to be the value of the property at the time it is acquired pursuant to an exercise of the sovereign power. It has been held to be equivalent to the full value of the property. All elements of value which are inherent in the property merit consideration in the valuation process. Every element which affects the value and which would influence a prudent purchaser should be considered.[7]

The term value "includes every element of usefulness and advantage in the property…. It matters not that the owner uses the property for the least valuable of all the ends to which it is adapted, or that he puts it to no profitable use at all."[8] The highest and best use of the property must be taken into consideration. Of course, just compensation is based on "the value of the property at the time it is acquired."[9]

Value, however, is not an exact term.[10] As Justice Frankfurter stated in *Kimball Laundry Co. v. United States,*[11]

> "[v]alue is a word of many meanings." …For purposes of the compensation due under the Fifth Amendment…only that "value" need be considered which is attached to "property," but that [statement] only approaches by one step the problem of definition. The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker.[12]

"[W]here the character of the property is such as not to be susceptible to the application of market value, the courts have based their awards on a so-called actual or intrinsic value."[13] The value of a property that is "peculiar to the owner" or the owner's special use or the property's value to the condemnor generally is not the measure of value.[14] Moreover, the property's "productive value" or its value to the owner based on income that may be derived from the land is not to be used to determine value except insofar as the income is some indication of market value of the land.[15]

A condemnor may take an interest in real property such as an easement rather than a fee interest in whole or in part. As for valuation of an easement, "[i]n some cases the measure of damages for the taking of an easement by condemnation proceedings is the difference in the market value of the land free of the easement and its market value burdened with the easement."[16]

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[2] United States v. Miller, 317 U.S. 369, 373, 63 S. Ct. 276, 279, 87 L. Ed. 336 (1943). *See also* Conti v. R.I. Econ. Dev. Corp., 900 A.2d 1221, 1232 (R.I. 2006) (stating that "our conventional working rules bow, as they must, to the 'ultimate objective' that one who challenges the adequacy of a condemnation award should not receive a measure of compensation that in any way exceeds, or falls short of, 'just compensation'") (citation omitted). *See* State of Oklahoma v. Chelsea Butane Co., 2004 Ok. Civ. App. 48, at *16, 91 P.3d 656, 661 (Ok. Ct. App. 2004) ("The financial consequences are present to prevent abuse of the power of eminent domain and to insure that the condemnee is made whole when the eminent domain power is exercised."); City of New London v. Foss & Bourkie, Inc., 2002 Conn. Super. LEXIS 3624, at *17 (Super. Ct. 2002) (Unrept.) ("The question of what is just compensation is an equitable one rather than a strictly legal or technical one. The paramount law intends that the condemnee shall be put in as good condition pecuniarily by just compensation as he would have been in had the property not been taken."), *aff'd,* 85 Conn. App. 275, 857 A.2d 370 (2004), *appeal granted in part*, 271 Conn. 946, 861 A.2d 1177 (2004), *appeal dismissed*, 276 Conn. 522, 886 A.2d 1217 (2005). *See also* 4 NICHOLS ON EMINENT DOMAIN § 12.01.

[3] 4 NICHOLS ON EMINENT DOMAIN § 12.03, at 12-90. See State v. Ware, 86 S.W.3d 817 (Tex. App. 3d Dist. 2002).

[4] 4 NICHOLS ON EMINENT DOMAIN § 12.04[2], at 12-96.

[5] United States v. 6.45 Acres of Land, 409 F.3d 139, 145 n.11 (3d Cir. 2005) ("The guiding principle of just compensation…is that the owner of the condemned property must be made whole but is not entitled to more.") (internal quotation marks omitted) (citation omitted)).

[6] *Id.* at 145 (*quoting* United States v. L.E. Cooke Co., Inc., 991 F.2d 336, 341 (6th Cir. 1993).

[7] 4 NICHOLS ON EMINENT DOMAIN § 12.01, at 12-2–12-4.

[8] Alloway v. Nashville, 88 Tenn. 510, 514, 13 S.W. 123, 123 (1890) (affirming the trial court's decision refusing to permit the landowners to show the land's value for a specific purpose). *See also* Memphis Hous. Auth. v. Mid-South Title Co., 59 Tenn. App. 654, 666–67, 443 S.W.2d 492, 498 (1968) (quoting *Alloway* but holding that the landowners had no immediate plans to erect a high rise motel and that damages had to be based on the fair market value of the land in light of all purposes to which it was naturally adapted).

[9] 4 NICHOLS ON EMINENT DOMAIN § 12.01, at 12-2 (2007).

[10] *See id.* § 12 01.

[11] Kimball Laundry Co. v. United States, 338 U.S. 1, 8, 69 S. Ct. 1434, 1439, 93 L. Ed. 1765, 1773 (1948) (holding that proper measure of compensation was the rental that could have been obtained on the property during the temporary taking and for whatever transferable value their temporary use of the laundry's "trade routes" may have had).

[12] *Id.* at 4, 69 S. Ct. at 1437, 93 L. Ed. at 1771 (citation omitted) (footnote omitted).

[13] 4 NICHOLS ON EMINENT DOMAIN § 12.01, at 12-22.

[14] *Id.* at 12-26.

[15] *Id.* § 12.02[2], at 12-82.

[16] State v. Ware, 86 S.W.3d 817, at 820 (Tex. App. 2002) (the court remanding a case in which the state had acquired an easement for highway purposes but there was no evidence that the condemnation award was less than the property's full fair

However, some easements may deprive the owner of any beneficial use of the land, in which case "the landowner may recover as damages the market value of the land."[17]

In a case in which

> the condemnor already owns all interest in the land except that of the condemnee, the market value of the condemnee's interest is the sole issue[;]…[t]hus…the proper measure of damages in a case involving the taking of property burdened by an existing easement is to value the interest actually taken.[18]

A.1. Market Value as Just Compensation

Although value is a relative term, it is generally held to mean market value[19] that is based on a consideration of four factors: sales, income, cost, and use.[20] As explained in *Nichols on Eminent Domain*, "'fair market value' means the amount of money which a purchaser willing, but not obliged, to buy the property would pay to an owner willing, but not obliged, to sell it, taking into consideration all uses for which the land was suited and might be applied."[21] Thus, in the usual case, market value has been accepted as the measure of compensation.[22]

"The most advantageous use to which the property may be adapted, where such use has an effect upon the market value, may be considered."[23] "A property's highest and best use is commonly accepted by real estate appraisers as the starting point for the analysis of its true and actual value…."[24] The "highest and best use" of property is "the reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value."[25]

> "Under the general rule of property valuation, fair [market] value, of necessity, regardless of the method of valuation, takes into account the highest and best value of the land…." A property's highest and best use is commonly defined as "the *use that will most likely produce the highest market value, greatest financial return, or the most profit from the use of a particular piece of real estate.*" …The highest and best use determination is inextricably intertwined with the marketplace because "fair market value" is defined as "'the price that a willing buyer would pay a willing seller based on the highest and best possible use of the land assuming, of course, that a market exists for such optimum use.'"[26]

As stated in *United Technologies Corporation v. Town of East Windsor,*[27] "[t]he highest and best use conclusion necessarily affects the rest of the valuation process because, as the major factor in determining the scope of the market for the property, it dictates which methods of valuation are applicable."[28] In *United Technologies,* a case involving an assessment for tax purposes but using the same methods of valuation as in condemnation, the issue was whether the trial court's ruling regarding the property's highest and best use was too restrictive.[29] The plaintiff leased property used in part as an aftermarket support facility for the manufacturing, repairing, and reconditioning of jet engine fuel injectors and propellers for aircraft piston engines. The property was "not the normal run-of-the-mill plant" but one with ceiling heights as high as 26 ft and with "environmentally controlled clean rooms."[30]

The trial court concluded that the market data approach did not apply because there were no comparable sales.[31] On appeal the plaintiff argued that the trial court's decision was too restrictive "because it failed to consider that the property could be put to other industrial uses, forcing the court to ignore relevant market data…."[32] However, the appeals court affirmed the trial court's decision, holding that that in this case, "the plaintiff's continued profitable use of its East Windsor property supports the trial court's highest and best use conclusion."[33]

Expert testimony is required to prove valuation.[34] Indeed, "[t]he heart of most property valuation cases is

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market value, and the landowner thereafter sought a declaratory judgment that the unused portion of the easement had terminated).

[17] *Id.*

[18] *Id*. at 825 (citations omitted).

[19] 4 NICHOLS ON EMINENT DOMAIN § 12.01, at 12-8–12-9.

[20] *Id.* at 12-49.

[21] 4 NICHOLS ON EMINENT DOMAIN § 12.02[1], at 12-60–12-67.

[22] Marseilles Hydro Power, LLC v. Marseilles Land and Water Corp., 2004 U.S. Dist. LEXIS 25276, at *14–15 (N.D. Ill. 2004), *aff'd*, 2008 U.S. App. LEXIS 4286 (7th Cir. Ill. 2008); United States v. Miller, 317 U.S. 369, 374, 63 S. Ct. 276, 280, 87 L. Ed. 336, 342–43 (1943) ("In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value.").

[23] 4 NICHOLS ON EMINENT DOMAIN § 12.02[3], at 12-88.

[24] United Technologies Corp. v. Town of East Windsor*,* 262 Conn. 11, 25, 807 A.2d 955, 965 (2002) (citation omitted).

[25] *Id.,* n.20 (citations omitted).

[26] *Id.* at 25, 807 A.2d at 965 (emphasis in original) (citations omitted) (footnotes omitted).

[27] 262 Conn. 11, 807 A.2d 955 (2002).

[28] *Id.* at 25–26, 807 A.2d at 965.

[29] *Id.* at 12, 807 A.2d at 957.

[30] *Id.* at 14, 807 A.2d at 958–59 (internal quotation marks omitted).

[31] *Id.* at 20, 807 A.2d at 962 (holding that the income capitalization approach was the more credible method of valuation in the case).

[32] *Id.* at 22, 807 A.2d at 962.

[33] *Id.* at 28, 807 A.2d at 966.

[34] *See* Spencer Diesel Injection & Turbo, Inc. v. Sioux City*,* 2007 Iowa App. LEXIS 535, at *15 (Iowa App. 2007) (Unrept.), *aff'd*, 735 N.W.2d 202 (Iowa Ct. App. 2007), *cert. denied*, 128 S. Ct. 654, 169 L. Ed. 2d 510 (U.S. 2007); Aaron v. United States, 340 F.2d 655 (Ct. Cl. 1964); Bd. of Park Comm'rs of Wichita v. Fitch, 184 Kan. 508, 512, 337 P.2d 1034, 1039 (1959) (stating also, however, that "[o]pinion evidence is also usually admitted from persons who are not strictly experts, but who from residing and doing business in the vicinity have familiarized themselves with land values. The competency of such witnesses is

the evidence of experts regarding their professional judgments as to the fair market value of the subject property."[35] An expert usually will testify concerning the facts and reasoning that are the basis of the expert's opinion. However, it is also possible that the basis of an expert's opinion may not be elicited until cross-examination. In a condemnation trial the property must be valued first by the witnesses and then by the trier of the facts based on the evidence.[36] Whether the property has market value is generally a question of fact.[37] Although a California court has stated that "[t]he right to a jury trial…goes *only* to the *amount* of compensation" and that "[a]ll other questions of fact**,** or mixed fact and law, are to be tried…without reference to a jury,"[38] the court, nevertheless, held that the trial court improperly excluded an expert witness's testimony concerning the valuation of goodwill. According to the court, the trial court had erroneously believed that "in valuing goodwill, evidence of a lease renewal is inadmissible as a matter of law."[39] The court held that the evidence was sufficient for the jury "to determine whether there was a reasonable probability of a lease renewal given the Agency's conflicting evidence the highest and best use of the property is redevelopment in the near future."[40]

Evidence in a condemnation case may be inadmissible if the evidence is not sufficiently probative of the value of the property to be considered by the trier of fact. In an eminent domain trial a limitation on the admissibility or use of evidence of value may occur at two stages. The proffered evidence may be excluded from consideration by the trier of fact either before trial by a motion *in limine* or an equivalent motion or during the trial. Second, although certain evidence may be admitted for the jury's *consideration*, an instruction may restrict the jury in how it may consider the evidence. On the other hand, because once the jury hears the evidence a limiting instruction may not serve its intended function, such a limiting instruction may not work necessarily to the condemnor's advantage.

Limitations on the admissibility of evidence of value, or limiting instructions on how the evidence may be considered, usually work to the advantage of the condemnor because the more that an owner's evidence is restricted, the more likely it is that a condemnor will pay less. Nevertheless, although the "[r]ules relating to the fixing of damages afford convenient measures of value which are ordinarily satisfactory and conclusive," the rules are "nothing more than a means to an end and that end is complete indemnity."[41]

A.2. Methodologies to Indicate Market Value

A.2.a. The Market Data or Comparable Sales Approach

As stated recently by an Illinois court, there are three generally accepted means of estimating the fair market value of property taken by eminent domain: the income approach, the cost approach, and the market approach, the latter also known as the sales comparison approach.[42] In condemnation cases the measure of compensation generally is the market value of the property.[43] Market value is not an end in itself but a means to an end, a satisfaction of the constitutional requirement that an owner receive just compensation.[44] In most jurisdictions, prices paid for voluntary sales of similar land are admissible, with some jurisdictions holding that, if there is sufficient evidence of comparable sales on which to base an estimate of just compensa-

primarily for the court, and the weight to be given such testimony is for the jury.")

[35] Spencer Diesel Injection & Turbo, Inc. v. Sioux City, 2007 Iowa App. LEXIS 535, at *15 (citations omitted).

[36] *See* State v. Ware, 86 S.W.3d at 824 (noting that the only valuation testimony admitted was by one expert whose conclusions were accepted by the jury).

[37] *See also* Dep't of Transp. v. H P/Meachum Land Ltd. P'ship, 245 Ill. App. 3d 252, 256, 614 N.E.2d 485, 488 (Ill. App. 2d Dist. 1993) (*citing* Chicago v. Farwell, 286 Ill. 415, 121 N.E. 795 (1919) (affirming the trial court's determination of compensation and holding that whenever property has market value, evidence of profits derived from the property is neither admissible nor a basis for determining compensation and rejecting the owner's argument that just compensation included the "efficiency" value of the property resulting from its capacity for earning profits as a soap manufacturing plant)).

[38] Redevelopment Agency of San Diego v. Attisha, 128 Cal. App. 4th 357, 367, 27 Cal. Rptr. 3d 126, 134 (Cal. App. 4th Dist. 2005), *modified*, 2005 Cal. App. LEXIS 726 (Cal. App. 4th Dist. 2005), *review denied*, 2005 Cal. LEXIS 8379 (Cal. 2005) (emphasis in original).

[39] *Id.* at 370, 27 Cal. Rptr. 3d at 136.

[40] *Id.* at 373, 27 Cal. Rptr. 3d at 139.

[41] Matter of Board of Water Supply, 209 A.D. 231, 232, 205 N.Y.S. 237 (N.Y. App. 3d Dep't 1924); 4 NICHOLS ON EMINENT DOMAIN § 12.1[4].

[42] Marseilles Hydro Power, LLC v. Marseilles Land and Water Corp., 2004 U.S. Dist. LEXIS 25276, at *15.

[43] Pa. Dep't of Gen. Servs. v. U.S. Mineral Prods. Co., 587 Pa. 236, 898 A.2d 590, 596 (2006); Oxford v. Oxford Water Co., 391 Mass. 581, 589, 463 N.E.2d 330, 336 (1984) (holding also that "[w]hen the property taken by eminent domain is 'special purpose property,' …the accepted way to determine fair market value is reproduction cost less depreciation") (*citing* Commonwealth v. Mass. Turnpike Auth., 352 Mass. 143, 224 N.E.2d 186 (1966)). *See also* 4 NICHOLS ON EMINENT DOMAIN § 12.02.

[44] *See generally* Aladdin, Inc. v. Black Hawk County, 562 N.W.2d 608, 611 (Iowa 1997) ("It is difficult, if not impossible, to lay down a rule of universal application as to what may be considered as elements of damage, as the equities of the parties must more or less depend upon the particular facts and circumstances of each case.") (citation omitted); United States v. Certain Properties, etc., 306 F.2d 439, 453 (2d Cir. 1962) (stating that "[e]stimates of reproduction cost less depreciation are admissible but not conclusive" but that "each owner, landlord or tenant, is entitled to the value of what the Government took from him"); United States v. Penn-Dixie Cement Corp., 178 F.2d 195, 199 (6th Cir. 1949) ("It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose."); 4 NICHOLS ON EMINENT DOMAIN § 12.02.

tion, the comparable sales method is the preferred way to compute market value.[45] "Under the market data approach the particular property is compared with other similar properties which have been sold or are listed for sale."[46] Thus, valuation of conventional types of property usually is based on the market data or sales comparison approach.[47]

The market data or sales comparison approach arrives at an indication of the value of property by comparing the property being appraised to similar properties that have been sold recently; by applying appropriate units of comparison; and by making adjustments to the sale prices of the comparables based on the elements of comparison. Unless the purchase price of the property were to be nearly contemporaneous with the date of the taking of the property by the condemnor, "[t]he original cost of property is not a proper measure of market value;"[48] nor does the investment value of the property define its market value.[49] The market data or sales comparison approach may be used to appraise the value of improved properties, of vacant land, or of land that is being appraised as if it were vacant land. It is understood that the value of comparable sales data varies directly with the similarity of the comparable properties to the property claimed to have been taken.[50] However,

> [s]pecial opportunities for proof of value have long been afforded in cases where it is felt that there is no market value, in the sense in which, in most communities, market value is at all times reflected by a steady volume of sales of ordinary commercial and residential properties. The occasion for this difference in type of proof (permitting the use of valuation data other than those factors ordinarily bearing on market price) has been expressed in terms of absence of market value…or of market…. The courts in these cases, however, may be doing no more than recognizing that *more complex and resourceful methods of ascertaining value must be used where the property is unusual or specialized in character and where ordinary methods will produce a miscarriage of justice*. In such cases, it is proper to determine market value from the intrinsic value of the property and from its value for the special purposes for which it is adapted and used.[51]

The market data or sales comparison approach is the most common and preferred method of land valuation when comparable sales data is available.[52]

A.2.b. The Income Approach

Market value also may be determined using an income capitalization approach.[53] Appraisers develop an indication of market value by applying a rate or factor to the anticipated net income from a property based on

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[45] 4 NICHOLS ON EMINENT DOMAIN § 12B.04[3], at 12B-19–12B-22.

[46] Marseilles Hydro Power, LLC v. Marseilles Land and Water Corp., 2004 U.S. Dist. LEXIS, at *15.

[47] Spencer Diesel Injection & Turbo, Inc. v. Sioux City, 2007 Iowa App. LEXIS 535, at *9-10.

[48] Cane Tennessee, Inc. v. United States, 71 Fed. Cl. at 438 (2005) (*citing* Brooks-Scanlon Corp. v. United States, 265 U.S. 106, 123, 44 S. Ct. 471, 474, 68 L. Ed. 934, 941 (1924); United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396, 403, 70 S. Ct. 217, 221, 94 L. Ed. 195, 201 (1949) ("Original cost is well termed the 'false standard of the past' where, as here, present value in no way reflects that cost.") (footnote omitted); TVA v. Powelson, 319 U.S. 266, 284–285, 63 S. Ct. 1047, 1057, 87 L. Ed. 1390, 1403 (1943) ("The constitutional obligation of the United States…[under] the Fifth Amendment allows the owner only the fair market value of his property; it does not guarantee him a return of his investment." (citation omitted))).

[49] Olson v. United States, 292 U.S. 246, 255, 54 S. Ct. 704, 708, 78 L. Ed. 1236, 1244 (1934) (stating that the compensation owed for a taking is the "market value of the property at the time of the taking contemporaneously paid in money," that such value "may be more or less than the owner's investment," and observing that the owner "may have acquired the property for less than its worth or he may have paid a speculative and exorbitant price," and that the property's "value may have changed substantially while held" by the owner.)

[50] San Nicolas v. United States, 617 F.2d 246, 251 (Ct. Cl. 1980) ("Reliability of the market data approach to valuation is dependent upon the selection of transactions with comparable data, on the accuracy of adjustments for differences in time, size, and other variables, and upon verification of the sales data.")

[51] Newton Girl Scout Council, Inc. v. Mass. Turnpike Auth., 335 Mass. 189, 195, 138 N.E.2d 769, 774 (1956) (emphasis supplied).

[52] *See also* Norman v. United States, 63 Fed. Cl. 231, 270–71 (2004), *aff'd*, 429 F.3d 1081 (Fed. Cir. 2005), *cert. denied*, 547 U.S. 1147, 126 S. Ct. 2288, 164 L. Ed. 2d 813 (2006) (recognizing the "'comparable sales method' is the generally accepted metric for determining the economic impact [of a regulatory taking]"); Good v. United States, 39 Fed. Cl. 81, 106 (1997) ("The most reliable method of arriving at the fair market value of property, particularly unimproved property, is through the 'sales comparison approach.'"); Cane Tenn., Inc. v. United States, 71 Fed. Cl. at 438 (*citing* Fla. Rock Indust., Inc. v. United States, 18 F.3d 1560, 1563 (Fed. Cir. 1994) (discussing the use of a "standard comparable sales valuation method" in a proceeding to determine the fair market value of the property alleged to have been taken and thereby assess the economic impact of the regulatory action).

[53] Cane Tenn., Inc. v. United States, 71 Fed. Cl. at 438 (*citing* Snowbank Enters., Inc. v. United States, 6 Cl. Ct. 476, 485 (1984); Foster v. United States, 2 Cl. Ct. 426, 447 (1983) (recognizing as a method of determining market value "the capitalization of income approach (sometimes referred to as 'discounted cash flow' or the 'present worth of future income'), which relates earnings that reasonably could be expected to be derived from the property, discounted for risks and other variables, to arrive at a present value"); Whitney Benefits, Inc. v. United States, 18 Cl. Ct. 394, 408–09 (1989), *aff'd*, 926 F.2d 1169 (Fed. Cir. 1991) (approving use of an income capitalization method of property valuation in the absence of adequate comparable sales); *but see* Bassett, N.M. LLC v. United States, 55 Fed. Cl. 63, 76 (2002) (rejecting in an inverse condemnation action the plaintiff's calculation of "the fair market value of aggregate mining on [its] property prior to the taking by determining the present value of the future income stream of aggregates that Plaintiff could have mined on the property absent the taking over a twenty year period")).

a consideration of the property's actual rental income, as well as on rental income for comparable properties in the vicinity, property expenses, and allowances for vacancy and collection losses.[54]

As a Connecticut court described it in a 2006 case, there are seven steps to the income capitalization approach. The appraiser must

> (1) estimate gross income; (2) estimate vacancy and collection loss; (3) calculate effective gross income (i.e., deduct vacancy and collection loss from estimated gross income); (4) estimate fixed and operating expenses and reserves for replacement of short-lived items; (5) estimate net income (i.e., deduct expenses from effective gross income); (6) select an applicable capitalization rate; and (7) apply the capitalization rate to net income to arrive at an indication of the market value of the property being appraised…. The process is based on the principle that the amount of net income a property can produce is related to its market value. …This approach only has utility where the property under appraisal is income producing in nature….[55]

In sum, "[t]he income approach involves [an] analysis of the property in terms of its ability to generate a net annual income in dollars, which is then capitalized."[56] As noted in another Connecticut case, "[t]he rate of capitalization should be a reflection of the market rate."[57]

A.2.c. The Cost Approach

The cost approach alternatively is referred to as the replacement cost or reproduction cost.[58] The cost approach arrives at an indication of value of the fee simple interest in property by estimating the current cost to construct a reproduction of (or replacement for) the existing structure, including an entrepreneurial profit, deducting depreciation from the total cost, and adding the estimated land value. Adjustments may then be made to the indicated fee simple value of the subject property to reflect the value of the interest in the property being appraised.[59] "[T]he rationale justifying assignment of an enhanced role to building costs in special-use cases hinges on the recognition that, in the absence of comparable properties in the marketplace or income generated by the property in question, construction costs may be the only reasonably available indicator of value."[60] Thus, "[u]nder the cost approach the estimated depreciated replacement cost of improvements is added to an estimate of the land's value."[61]

In *United Technologies, supra*, involving a unique factory, the court upheld an appraisal of the property using the cost approach.[62] However, in *Pennsylvania Department of General Services v. U.S. Mineral Products, Co., supra*, although the court "recognize[d] the difficulty of quantifying depreciation in a situation in which there is little or no market for a property,"[63] it was held to be improper for the lower court to award "damages for property loss based solely upon raw replacement costs…."[64] The court held that "[o]nce the abstract figure of replacement or reproduction costs is presented as an indicator of value, …it [is] preferable to require consideration of an analogously abstract depreciation figure…."[65]

B. VALUATION OF SPECIAL PURPOSE PROPERTIES

B.1. Definition of Special Purpose Properties

As discussed, special use properties do not change hands, at least not on a regular basis, and therefore the establishment of market value may be difficult, if not impossible.[66] For appraisal purposes

> [a] limited-market property is a property that has relatively few potential buyers at a particular time, sometimes because of unique design features or changing market conditions. Large manufacturing plants, railroad sidings, and research and development properties are ex-

[54] United Technologies Corp. v. Town of East Windsor, 807 A.2d at 960 n.9 (*citing* J. EATON, REAL ESTATE VALUATION IN LITIGATION 194 (2d ed. 1995) (hereinafter cited as "Eaton." *See also* Spencer Diesel Injection & Turbo, Inc. v. Sioux City, 2007 Iowa App. LEXIS 535, at *11 (holding that Spencer Diesel's valuation of the property was too uncertain and speculative because of the lack of any income history) and United States v. 6.45 Acres of Land, 409 F.3d at 143 n.6 (reversing the trial court's judgment and agreeing with the United States that the court below impermissibly failed to apply the "unit rule" of valuation and thus erroneously valued separate interests rather than the aggregate interests in a single unit).

[55] Sun Valley Camping Coop., Inc. v. Town of Stafford, 94 Conn. App. 696, 703, 894 A.2d 349, 356 (Conn. Ct. App. 2006) (citations omitted) (the parties agreeing however that the income approach was "inappropriate").

[56] Marseilles Hydro Power, LLC v. Marseilles Land and Water Corp., 2004 U.S. Dist. LEXIS, at *15.

[57] Comm'r of Transp. v. Candlewood Valley Country Club, Inc., 2005 Conn. Super. LEXIS 3308 (Super. Ct. 2005) (Unrept.).

[58] Cane Tenn., Inc., v. United States, 71 Fed. Cl. at 438.

[59] United States v. 6.45 Acres of Land, 409 F.3d at 143, n.7 ("The cost approach (also known as the reproduction approach)…values a tract of land by estimating the value of the land as vacant, adding the cost of the improvements, and then deducting any depreciation in the improvements"); United Technologies Corp. v. Town of East Windsor, 807 A.2d at 960 n.8 (*citing* Eaton, *supra* note 55, at 157) ("Under the cost approach to valuation, the appraiser estimates the current cost of replacing the subject property, with adjustments for depreciation, the value of the underlying land, and entrepreneurial profit.").

[60] Pa. Dep't of Gen. Servs. v. U.S. Mineral Prods. Co., 587 Pa. at 250, 898 A.2d at 599.

[61] Marseilles Hydro Power, LLC v. Marseilles Land and Water Corp., LLC, 2004 U.S. Dist. LEXIS, at *15.

[62] United Technologies Corp. v. Town of East Windsor, 262 Conn. at 20, 807 A.2d at 962.

[63] 587 Pa. 236 at 252, 898 A.2d 590 at 599.

[64] *Id.* at 252, 898 A.2d at 600.

[65] *Id.* at 252, 898 A.2d at 599.

[66] Sun Valley Camping Coop. v. Town of Stafford, 94 Conn. App. at 696, at 700 and n.6, 894 A.2d 349, at 354 and n.6.

> amples of limited-market properties that typically appeal to relatively few potential purchasers.[67]
>
> Many limited-market properties include structures with unique designs, special construction materials, or layouts that restrict their utility to the use for which they were originally built. These properties usually have limited conversion potential and, consequently, are often called special-purpose or special-design properties. Examples of such properties include houses of worship, museums, schools, public buildings, and clubhouses.[68]

The term "special purpose properties" is a generic term to identify all properties that because of their unique uses and characteristics and the lack of sales of similar properties are not susceptible readily to valuation according to the rules of evidence usually applicable in condemnation cases. One court has stated that "'[a] special-purpose property is one with a physical design peculiar to a specific use, no apparent market other than sale to an owner-user, and no financially feasible alternative use. The lack of comparable sales data is generally the key in distinguishing a special-purpose property.'"[69]

> A special use property is one that "is so limited by its improvements that it cannot be converted to another use without prohibitively high cost and cannot readily be valued on the open market."[70] The term used to describe a special purpose property is not uniform.[71] In general, the evidence at trial must establish that a property has a "special purpose,"[72] a "special use,"[73] or is a "specialty"[74] property before a court will relax the methodology for measuring compensation or relax the rules for the admission of evidence to establish the value of a property.[75] For example, one court defines a special purpose property or special use property as land that is "not available for use for general and ordinary purposes."[76]

A New York court recently stated that eminent domain cases have developed a four-part criteria for such specialty properties.

A specialty property is defined as 1) a unique property specially built for the specific purpose for which it is designed, 2) with no market for the type of property and no sales of property with such a use, 3) used for the special purpose for which it was designed, and 4) constituting an appropriate improvement with a use that is economically feasible and reasonably expected to be replaced….[77]

The classification of a property as a specialty or similarly described property is quite important with respect to the admissibility of the methodology used to appraise the property's value. A special use property, however, is "[n]ot to be confused with 'special purpose' buildings. The latter are designed for a particular special use, whereas 'special use' buildings are not so designed originally but at the time in question are being put to a special use."[78]

Courts may define a special purpose property as one that is "unique"[79] or "unusual."[80] It has been held that a

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[67] THE APPRAISAL OF REAL ESTATE 25 (12th ed. 2001).

[68] *Id.* at 26.

[69] United Technologies Corp. v. Town of East Windsor, 262 Conn. at 26, 807 A.2d at 965 (*quoting* Eaton, *supra* note 55, at 242).

[70] State v. KQRS, Inc., 2004 Minn. App. LEXIS 84, at *13 (Minn. App. 2004), *review denied*, 2004 Minn. LEXIS 211 (Minn. 2004).

[71] *See* Sun Valley Camping Coop., Inc. v. Town of Stafford, 94 Conn. App. at 714 n.20, 894 A.2d at 362 n.20 (noting that the various legal nomenclature used for "special use properties" does not make a precise distinction between the terms).

[72] *Id.*

> (It is likely that on retrial, a court would find that the plaintiff's property is a special purpose property because of the limited likelihood of any sale, the fact that the sites have individual hookups for water, sewage and utilities, and the paucity or lack of any comparable sales of an entire recreational cooperative campground. No single method of valuation is controlling for the finding of fair market value for a special purpose property, at least in eminent domain cases.)

Creason v. the Unified Gov't of Wyandotte County, Kansas, 272 Kan. 482, 487, 33 P.3d 850, 853 (2001) ("Where the usual means of ascertaining market value are lacking, or other means must from necessity of the case be resorted to, it is proper to determine the market value by considering the intrinsic value of the property, and its value to the owners for their special purposes.").

[73] State v. KQRS, Inc., 2004 Minn. App. LEXIS 84, at *13.

[74] *In re city of New York (Lincoln Square Slum Clearance Project, etc.*), 15 A.D. 2d 153, 171–72, 222 N.Y.S.2d 786, 802–803 (N.Y. App. 1st Dep't 1961) (stating, however, that the "proceeding included properties of practically every kind and classification to be found within urban limits") (*id.*, 15 A.D. 2d at 160, 222 N.Y.S.2d at 792) (citations omitted).

[75] In the Matter of Consol. Edison Co. of N.Y., Inc. v. City of N.Y., 33 A.D. 3d 915, 916, 823 N.Y.S.2d 451, 452 (N.Y. App. 2d Dep't 2006) (In a tax assessment case the parties agreed that power generation units and transmission facilities were "specialty properties that must be valued using the reproduction-cost-new-less-depreciation method…because the preferred methods for determining value, comparable sales and income capitalization, fail to yield a meaningful result with respect to such property….") (citations omitted).

[76] County of Cook v. City of Chicago, 84 Ill. App. 2d 301, 305, 228 N.E.2d 183, 185 (1967).

[77] In the Matter of Consol. Edison Co. of N.Y., Inc. v. City of N.Y., 33 A.D. 3d at 919, 823 N.Y.S.2d at 454 (electric generating plant) (Goldstein, J., dissenting) (citations omitted).

[78] Chicago v. George F. Harding Collection, 70 Ill. App. 2d 254, 257, 217 N.E.2d 381, 383 (1965) (reversing for a new trial on the issue of just compensation for museum buildings).

[79] In the Matter of Consol. Edison Co. of N.Y., Inc. v. City of N.Y., 33 A.D. 3d at 919, 823 N.Y.S.2d at 455.

[80] Comm'r of Transp. v. Towpath Assocs., 255 Conn. 529, 544, 767 A.2d 1169, 1179 (2001)

> ([I]n order for the value of the plaintiff's premises to be increased by the unusual [adaptability], there must have been a showing not only that the premises were physically or specially adaptable for the particular use upon which the plaintiff solely relied…but also that there was a reasonable probability that they would be so used within a reasonable time; otherwise the special use would be too remote and speculative to have any legitimate effect upon the valuation….)

(internal quotation marks omitted) (*quoting* Connecticut Printers, Inc. v. Redevelopment Agency, 159 Conn. 407, 412, 270

property so described must have a unique value to the particular owner involved and not to others,[81] or, as another court has stated, before a property may be considered unique it must have "a value particular to the owner incapable of being passed to a third party…."[82]

Cases usually are concerned with whether the improvements to the property as distinguished from the land constitute a special purpose. However, although a market value nearly always may be found for land if it is considered as vacant land, it is also possible that land may be unique and have special value for a particular owner because of the property's physical features or unusual historical features.[83] The claimed special capability must be in the property itself "and not because of any value peculiar to the owner…."[84]

> The adaptability of the land, sought to be taken in eminent domain, for a special purpose or use may be considered as an element of value. If the land possesses a special value to the owner which can be measured in money, he has the right to have that value considered in the estimate of compensation and damages.[85]

> [T]he determination of value in condemnation proceedings is not a matter of formula or artificial rules but of sound judgment and discretion based upon a consideration of all relevant facts in a particular case.[86]

Various properties have been held to be special purpose ones not susceptible to valuation by the market data or comparable sales approach, such as schools, churches, cemeteries, parks, and utilities,[87] as well as railroads and turnpikes.[88] As for factories, a California court agreed with a condemnee manufacturer of adhesive "that due to the character of its use and its extensive fixturization with machinery and equipment which had a substantial value in excess of salvage value only to a major manufacturer of adhesives, the whole parcel constituted a special purpose property."[89] As a later California case stated, "when the government takes property…which has a preexisting special use, it may be required to compensate the owner for taking or damaging the owner's use."[90]

Because the issue is one of local law, in some jurisdictions the burden is on the owner to prove the elements necessary to constitute a special purpose property or other elements affecting value,[91] whereas in other jurisdictions the condemnor may have the burden.[92] In a case involving a special purpose property, an expert's opinion is particularly important because of the

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A.2d 549, 552 (1970). *See* Bowers v. Fulton County, 221 Ga. 731, 146 S.E.2d 884 (1966) (allowing compensation to the owner for loss of a bookkeeping and tax service); Hous. Auth. of the City of Atlanta v. Troncalli, 111 Ga. App. 515, 142 S.E.2d 93 (1965) (finding that a tune-up and brake shop was unique because of its location and applying the measure of pecuniary loss to the owner); State Roads Dep't v. Bramlett, 179 S.E.2d 137 (Fla. 1965) (applying a particular statute); Hous. Auth. v. Savannah Iron Works, Inc., Ga. App. 881, 87 S.E.2d 671 (1955) (allowing moving costs to a lessee).

[81] *See* United Airlines, Inc. v. Pappas, 348 Ill. App. 3d 563, 572, 809 N.E.2d 735, 743 (Ill. App. 1st Dist. 2004), *appeal denied*, 209 Ill. 2d 602, 813 N.E.2d 229 (Ill. 2004) (stating that although "rental of an airport terminal may be considered property of special use," the court was "not persuaded that the lease of such property is 'so unique as to not be salable'" and that the sales comparison method should have been used). *See also* 4 NICHOLS ON EMINENT DOMAIN § 12C.01.

[82] Carroll County Water Auth. v. L.J.S. Grease & Tallow, Inc., 274 Ga. App. 353, 355, 356, 617 S.E.2d 612, 616 (Ga. Ct. App. 2005) (holding that damages for business loss were proper because the loss was not speculative and because the plant was unique in that it was one not generally bought and sold on the open market).

[83] Scott v. State, 230 Ark. 766, 772, 326 S.W.2d 812, 815 (1959) (the court stating in a case involving property on which there was a historic Civil War tavern that "land may have value based on peculiar qualities, conditions or circumstances" and that "[t]he owner has a right to obtain the market value of the land based upon its availability for the most valuable purpose for which it can be used.").

[84] Chicago v. Harrison-Halsted Corp., 11 Ill. 2d 431, 440, 143 N.E.2d 40, 46 (1957) (authority questioned by some courts).

[85] *In re Grand Haven Highway*, 357 Mich. 20, 27, 97 N.W.2d 748, 751 (Mich. 1959).

[86] *Id.* at 28, 29, 97 N.W.2d at 752.

[87] *See* 4 NICHOLS ON EMINENT DOMAIN § 12C.01[4][a] (valuation of cemeteries); § 12 C.01[4][b] (valuation of churches); § 12 C.01[4][c] (valuation of parks); § 12 C.01[4][d] (valuation of schools); § 12 C.01[4][e] (valuation of miscellaneous special use properties).

[88] *See* Marseilles Hydro Power, LLC v. Marseilles Land and Water Corp, LLC, 2004 U.S. Dist. LEXIS 25276, at *16–17.

[89] City of Commerce v. Nat'l Starch & Chemical Corp., 118 Cal. App. 3d 1, 6, 173 Cal. Rptr. 176, 178 (Cal. App. 2d Dist. 1981). *See also United Technologies Corp.,* 262 Conn. at 14, 807 A.2d at 958 (lease of specialty property for reconditioning aircraft engine parts).

[90] County of San Diego v. Rancho Vista Del Mar, 16 Cal. App. 4th 1046, 1058, 20 Cal. Rptr. 2d 675, 683 (Cal. App. 4th Dist. 1993) (holding that a detention facility was a governmental function with no private sector equivalent and that the property was not a "special purpose" property), *review denied*, 1993 Cal. LEXIS 4953 (Cal. 1993); City of Pleasant Hill v. First Baptist Church, 1 Cal. App. 3d 384, 82 Cal. Rptr. 1 (Cal. App. 1st Dist. 1969) (holding that severance damages were proper based on loss for future growth of preexisting church)).

[91] Newton Girl Scout Council v. MTA, 138 N.E.2d 769 at 775. *See also* United States v. Brooklyn Union Gas Co., 168 F.2d 391, 398 (2d Cir. 1948); Davenport v. Franklin County, 277 Mass. 89, 93, 177 N.E. 858, 860 (1931); Lebanon and Nashville Turnpike Co. v. Creveling, 159 Tenn. 147, 154, 155, 17 S.W.2d 22, 24 (1929).

[92] Chicago v. George F. Harding Collection, 70 Ill. App. 2d 254 at 258, 217 N.E.2d 381 at 383 (stating that "the condemnor's burden must be construed to require, as a minimum, that there be competent evidence of value as to all the property to be taken").

absence of market data on which any expert would be able to rely.[93]

To summarize, for a property to be valued on the basis of being a special purpose property, there must be an absence of market data, the property and its improvements must be unique, and because of its unusual character the property's utility must be peculiar to the owner. Occasionally, it is held that it must be shown that the property would have to be replaced.[94]

B.2. Absence of Market Data

With respect to the legal principles and appraisal methods that apply to the valuation of special purpose properties, the issue is whether an owner has been indemnified for what the owner has lost. If adequate sales data are available, the evidence will be confined to the market data approach. An owner must show the absence of such data as well as of other elements that render the property unusual before the use of the income or cost approach is allowed.[95] On the other hand, with respect to special use properties, "market value will not generally be the measure of compensation."[96] If market data is not available, then it is appropriate "to deduce market value from the intrinsic value of the property, and its value to the owners for their special purposes."[97]

Although generally there must be an absence of market data before a court will permit use of an alternate method of valuation, the Supreme Court of Pennsylvania recently noted that it had "not categorically and immutably confined special-purpose valuation and/or the relevance of replacement or reproduction costs to instances in which market valuation is impossible."[98] Nevertheless, it is with respect to special purpose properties that because of the absence of a market for the properties or of comparable sales some courts allow the use of the income or replacement cost approach for an indication of value of the properties.[99] Accordingly, "[r]esort to other methods of valuation may also be had where there are no comparables, no market, and no general buying and selling of the kind of property in question."[100]

When the cost approach or income approach is applicable rather than the market value approach, "the term 'value to the owner' is used."[101] On the other hand, as noted in another recent case, "[t]he market value concept excludes any special value to the owner for his particular purpose or any special value to the condemnor for its special use."[102] With respect to special purpose properties, the rationale is that they are not "amenable to conventional market-valuation assessment." Thus, an alternate methodology is appropriate to determine due compensation for associated loss or destruction of an owner's property,[103] because "an injured plaintiff should not be deprived of fair recompense merely because there is some degree of uncertainty associated with the calculation of damages."[104]

Special purpose properties usually have unusual improvements that are of value only to the owner or to a few owners and are properties that are rarely bought and sold. Consequently, the usual evidence of market data that would be admissible to establish the value of the property may be lacking, if not completely nonexistent. As a matter of necessity, legal rules concerning allowable methods of valuation and proof thereof have to be relaxed.[105]

Of course, a business may be conducted on a special purpose property. If so, and if the condemnor is taking a fee interest, then "evidence of business profits is generally inadmissible as an independent element of damage or as [being] relevant in determining the value of the land because it is too uncertain and depends upon too many contingencies."[106] The rationale also is that the

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[93] Woburn v. Adams, 187 F. 781, 784 (1st Cir. 1911) (stating that "ascertainments of reasonable value are made upon the best evidence of which the case is susceptible").

[94] *In re City of N.Y. Lincoln Square Slum Clearance Project,* 15 A.D. 2d at 171, 222 N.Y.S.2d at 802 (court stating that "[r]eproduction cost as a measure of value, except to establish the maximum value that can be placed on a building for purposes of taxation…is limited to specialties" but that "[i]t must be shown that the [lighthouse] would reasonably be expected to be replaced") (citation omitted).

[95] Atlantic Refining Co. v. Dir. of Pub. Works, 102 R.I. 696, 703–04, 233 A.2d 423, 427–28 (1967) (holding that the trial court did not err in holding that there was no evidence of a comparable sale); *see also* United States v. Benning Hous. Corp., 276 F.2d 248, 251 (5th Cir. 1960) ("Isolated comparable sales, though themselves admissible as tending to show fair market value, are not sufficient to render reproduction cost evidence inadmissible in a case where admission is otherwise appropriate.")

[96] 4 NICHOLS ON EMINENT DOMAIN § 12C.01[1], at 12C-2.

[97] *Id.* at 12C-6.

[98] Pa. Dep't of Gen. Servs. v. U.S. Mineral Prods. Co., 587 Pa. at 250, 898 A.2d at 598.

[99] *See* Marseilles Hydro Power, LLC v. Marseilles Land and Water Corp., LLC, 2004 U.S. Dist. LEXIS 25276, at *16–17.

[100] Spencer Diesel Injection & Turbo, Inc. v. Sioux City, 2007 Iowa App. LEXIS 535, at *8–9 (Unrept.) (citations omitted).

[101] 4 NICHOLS ON EMINENT DOMAIN § 12C.01[2], at 12C-19.

[102] Chicago & I. M. Ry. v. Crystal Lake Indus. Park, 225 Ill. App. 3d 653, 588 N.E.2d 337, 343 (Ill. App. 3d Dist. 1992), *appeal denied,* 146 Ill. 2d 624, 602 N.E.2d 448 (1992) (reversing and remanding for a new trial because expert's valuation testimony regarding methodology that was used differed from expert's pre-trial deposition). *See* Dep't of Transp. v. Keller, 149 Ill. App. 3d 829, 830, 500 N.E.2d 982, 983 (Ill. App. 5th Dist. 1986) (affirming judgment based on income approach because there were no comparable sales and landowners were not advancing a theory of "special use" but contending that the subject property had a special value based on its ability to produce a specialty crop), *appeal denied*, 505 N.E.2d 352 (Ill. 1987).

[103] Pa. Dep't of Gen. Servs. v. U.S. Mineral Prods. Co., 587 Pa. at 248, 898 A.2d at 597.

[104] *Id.*

[105] THE APPRAISAL OF REAL ESTATE 63, 64 (12th Ed. 2001).

[106] Spencer Diesel Injection & Turbo, Inc. v. Sioux City, 2007 Iowa App. LEXIS 535, at *8–9 (citations omitted) (emphasis supplied).

condemnor is not acquiring the business, which indeed may be relocated elsewhere by the owner.[107] "If the property must be duplicated for the business to survive, and if there is no substantially comparable property within the area, then the loss of the forced seller is such that market value does not represent just and adequate compensation to him."[108] One court noted that a property owner may not "recover loss of profits because of damages caused by business interruption" but could recover expenses "occasioned by business interruption."[109] The court, furthermore, held that "the evidence introduced in [the] condemnation proceeding showing expenses occasioned by business interruption was properly introduced for consideration as to value and weight by the commissioners making the award" but that the proof "must not be speculative and must possess a reasonable degree of certainty."[110] A later case similarly stated that "damages may not be recovered…for 'loss of profits' due to interruption of business and that in the case of 'interruption of business,' the recovery will be limited to the amount of the 'expenses' attributable to the interruption."[111] Damages, however, are not precluded in a case in which the "'loss of a particular location may destroy business altogether, for want of access to any other that is suitable for it.'"[112] Finally, the income capitalization approach also may be permitted "when the property taken is a leasehold or land used for agricultural purposes…."[113]

B.3. Rules of Evidence Regarding Special Purpose Properties

The courts have tried to resolve the problems of special use properties in one of two ways. One approach is to apply the conventional market data or comparable sales approach but relax the rules of evidence to accommodate the special situation.[114] As one court stated,

> [g]enerally, existing sales data concerning similarly situated and comparable properties serve to exclude the use of other methods for deducing fair market value. …We have allowed for the departure from this preferred method, however, at the discretion of the trial justice, when the fair market value established through comparable sales did not adequately reflect "just compensation" because the condemned property was "unique or suited for a special purpose…." Either way, "[t]he availability of such comparable sale is a question addressed to the discretion of the trial justice whose determination will be reversed only if 'palpably or grossly wrong.'"[115]

In cases involving special purpose property cases the courts have made broad statements about the evidence that will be permitted to establish value.

> To assist the trier of the fact of value to reach a just result when such a property is taken by eminent domain, it frequently will be necessary to allow much greater flexibility in the presentation of evidence than would be necessary in the case of properties having more conventional uses. In such cases, for example, detailed knowledge by expert witnesses of local prices of land for ordinary resi-

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[107] *See In the Matter of the City of N.Y., Relative to Acquiring Title to Real Property for Clinton Urban Renewal Project, etc*., 59 N.Y.2d 57, 64, 449 N.E.2d 1246, 1249 (1983) (Fuchsberg, J. (dissenting)

> ([I]t is the realty and not the business which is condemned, the incidental damages to good will wrought by removal of a business conducted on premises taken for a public purpose is to be seen as one of the burdens, if that it be, that is balanced by the benefits of government….)

(*citing* Banner Milling Co. v. State, 240 N.Y. 533, 148 N.E. 668, 670 (1925)

> (While it may be as in this case that removal from one place to another may cause some loss, yet the elements making up that loss are so highly speculative that the courts have not considered it an appropriation or damage for which the State should pay as commanded by the Constitution.)

cert. denied, 269 U.S. 582, 46 S. Ct. 107, 70 L. Ed. 423 (1925)). *See also* 4 NICHOLS ON EMINENT DOMAIN § 13.3.

[108] Carroll County Water Auth. v. L.J.S. Grease and Tallow Inc., 274 Ga. App. 353, at 355, 617 S.E.2d at 616 (holding that business loss damages were proper because the loss was not speculative and because the plant was unique as it was one not generally bought and sold on the open market) (citation omitted) (footnote omitted).

[109] *In re Grand Haven Highway,* 357 Mich. at 30–31, 97 N.W.2d at 753 (stating also that "[t]here may be cases when the loss of a particular location may destroy business altogether, for want of access to any other that is suitable for it. Whatever damage is suffered, must be compensated.").

[110] *Id.* at 31, 97 N.W.2d at 754.

[111] Mich. State Highway Com. v. L & L Concession Co., 31 Mich. App. 222 at 236, n.17, 187 N.W.2d 465, 472, n.17 (Mich. Ct. App. 1971) (*quoting In re Grand Haven Highway*, 357 Mich. at 30, 97 N.W.2d at 753). The court also observed that "[w]here the condemnee's business has been destroyed, recovery of the value of the business has been awarded" (*L & L Concession Co*., 31 Mich. App. at 230, 187 N.W.2d at 469); that "[i]n a large number of cases owners and lessees have recovered going-concern value where the condemned property could not be realistically valued apart from the business there conducted, or, as it is sometimes said, the business for which the property is best 'adapted'" (*id*., 31 Mich. App. at 232, 187 N.W.2d at 470); and that "where the value of the leasehold as an estate in land and the value of the business there conducted cannot readily be separated, the valuation ascribed to the leasehold may reflect the value of the business there operated…." (*id*., 31 Mich. App. at 234, 187 N.W.2d at 471).

[112] *Id.* at 236, 187 N.W.2d at 472 (footnote omitted).

[113] Spencer Diesel Injection & Turbo, Inc. v. Sioux City, 2007 Iowa App. LEXIS 535, *8 (citations omitted).

[114] 4 NICHOLS ON EMINENT DOMAIN § 12 C.01 [2] at 12C-14.

[115] Conti v. R.I. Econ. Dev. Corp., 900 A.2d 1221, at 1237 (some citations omitted) (*citing J.W.A. Realty, Inc.*, 121 R.I. at 381, 384, 399 A.2d at 483, 484 (apartment project with "no comparable sales that reflected [its] special characteristics"). *See also*, *e.g.*, Warwick Musical Theatre, Inc. v. State, 525 A.2d 905, 910 (R.I. 1987) (structure used as a musical theater); Trustees of Grace and Hope Mission of Baltimore City, Inc. v. Providence Redevelopment Agency, 100 R.I. 537, 538, 543, 217 A.2d 476, 477, 479 (1966) (structure used as a religious and benevolent mission); Assembly of God Church of Pawtucket, R.I. v. Vallone, 89 R.I. 1, 10–11, 150 A.2d 11, 15–16 (1959) (building used as a parsonage); Hall v. City of Providence, 45 R.I. 167, 168–69, 121 A. 66, 66–67 (1923) (highly improved country estate that was one of the first in the area)).

> dential or commercial use may be far less helpful than knowledge of conditions (relevant to this particular type of property) over a wide geographical area and of the demand for and use of comparable specialized properties by a particular industry or class of users or customers. The property may be of a character where, within fairly wide limits, geographical location has less effect on its value than its adaptability for a particular use. The properties may be of a type, not frequently bought or sold, but usually acquired by their owners and developed from the ground up, so that the cost of land plus the reproduction cost (less depreciation where appropriate) of improvements may be more relevant than in the ordinary case….[116]

The second approach is to reject the market data or comparable sales approach in favor of the income or replacement cost approach.[117] The cases stating that market value is not the measure of compensation often contain statements to the effect that liberality will be permitted regarding the proof needed to establish the value of the subject property.[118] If the market data or comparable sales approach is not applicable, one court has stated that "[w]hat we use is largely a matter of judgment and circumstance."[119] If an owner has applied a property to the owner's use that is of particular value to the owner, then the value to the owner is to be ascertained and allowed as just compensation.[120] Moreover, the court may state that the objective is to put the owner in as good a financial condition as the owner was before the taking.[121] Compensation may take the form also of providing the owner with substitute property.

B.4. Partial Takings of Special Purpose Properties

When dealing with a partial taking, except when the doctrine of substitution is applied, "the valuation is the difference between the fair market value of the entire property before the taking and the fair market value of the remainder after the taking."[122] The valuation will reflect damages to the remaining property as well as to the value of the part taken.[123] Depending on the jurisdiction, some courts may value the property that is taken and then apply the before and after evaluation to the remainder.[124] Some argue that the cost to cure is competent evidence because it is relevant to the diminution of the value of the remainder caused by the taking.[125] In California, severance damages are either 1)

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[116] Newton Girl Scout Council, Inc. v. Mass. Turnpike Auth., 138 N.E.2d 769, at 773.

[117] *See* Marseilles Hydro Power, LLC v. Marseilles Land and Water Corp., 2004 U.S. Dist. LEXIS 25276, at *15–17; *but see* United Airlines, Inc. v. Pappas, 348 Ill. App. 3d 563, at 572, 809 N.E.2d at 743 (holding that as airport terminal being rented was not "so unique as to not be salable," the sales comparison method should have been used).

[118] Orleans Parish Sch. v. Montegut, Inc., 255 So. 2d 613, 615 (La. App. 4th Cir. 1971) ("Market value is not the constitutional objective and requirement; just compensation is."); United States v. Two Acres of Land, etc., 144 F.2d 207, 209 (7th Cir. 1944)

> (In the case of nonprofit, religious or service properties, cost of replacement is regarded as cogent evidence of value although not in itself the only standard of compensation. But people do not go about buying and selling country churches. Such buildings have no established market values. Consideration must be given to the elements actually involved and resort had to any evidence available, to prove value, such as the use made of the property and the right to enjoy it.).

[119] Onondaga County Water Auth. v. N.Y.W.S. Corp., 285 A.D. 655, 662, 139 N.Y.S.2d 755, 763 (N.Y. App. 4th Dep't 1955). *See also* Marseilles Hydro Power, LLC., 2004 U.S. Dist. LEXIS 25276, at *15–17 (noting that in cases where property does not have a reasonable market value, the law permits resort to any evidence available to prove value.)

[120] *In the Matter of the Superintendent of Highways of the Town of Frankfort*, 193 Misc. 617, 619, 84 N.Y.S.2d 78, 80, 81 (N.Y. Cnty. Ct. 1948) (holding that determination of value of the property of transit corporation had to consider any special intrinsic quality of the property taken).

[121] *See* State *ex rel.* DOT v. Chelsea Butane Co., 2004 Ok. Civ. App. 48, at *16, 91 P.3d 656, at 661 ("The financial consequences are present to prevent abuse of the power of eminent domain and to insure that the condemnee is made whole when the eminent domain power is exercised."); *Foss & Bourkie, Inc.*, 2002 Conn. Super. LEXIS 3624, at *17 ("The question of what is just compensation is an equitable one rather than a strictly legal or technical one. The paramount law intends that the condemnee shall be put in as good condition pecuniarily by just compensation as he would have been in had the property not been taken.").

[122] Ala. Dep't of Transp. v. Land Energy, LTD., 886 So. 2d 787, 794 (Ala. 2004).

[123] Cemeterio Buxeda v. People of Puerto Rico, 196 F.2d 177, 180 (1st Cir. 1952) (stating that "given a single tract under the test of unitary use and a taking of part of it, there may or there may not be severance damages depending upon whether the taking of the part operates to reduce the market value of what remains"); Laureldale Cemetery Co. v. Reading, 303 Pa. 315, 324, 154 A. 372, 374 (1931) (holding that there was "nothing in this case which justifies the application of an exceptional measure of damages to the land appropriated"). *See* DeBoer v. Entergy Ark., 82 Ark. App. 400, 404, 109 S.W.3d 142, 144 (Ark. App. 1st Div. 2003)

> (When the sovereign exercises its right to take a portion of a tract of land, the proper measure of compensation is the difference in fair market value of the entire tract immediately before and after the taking. …When another entity such as a railroad, telephone company or, in this case, an electric company, exercises the right of eminent domain, just compensation is measured by the value of the portion of the land taken plus any damage to the remaining property.)

(citation omitted).

[124] 4A NICHOLS ON EMINENT DOMAIN § 14 A.03.

[125] Dep't of Transp. v. 2.953 Acres of Land, 219 Ga. App. 45, 47, 463 S.E.2d 912, 915 (Ga. Ct. App. 1995)

> ("The proper measure of consequential damages to the remainder is the diminution, if any, in the market value of the remainder in its circumstance just prior to the time of the taking compared with its market value in its new circumstance just after the time of the taking. …In a partial taking case, evidence as to the cost to cure may be admissible as a factor to be considered in determining the amount of recoverable consequential damages to the remainder."

(citations omitted)); State *ex rel.* Dep't of Highways v. Neyrey, 260 So. 2d 739, 744–45 (La. App. 4th Cir. 1972) (stating that

the diminution in fair market value of the remainder after the taking, or 2) the cost to cure, whichever is less.[126]

Because of the taking, the use to which the remainder is adaptable may be changed from a special purpose to a general purpose. If so, the value to the owner or other relaxed rule of evidence may be used to determine the value before the taking for the property as a special purpose property, and the market approach may be used to determine the value of the remainder after the taking. An example is a situation in which a school or church has lost all its capability for its special use (and hence its value for such use) because of the property's proximity to a railroad or highway.[127] In such a case, the property's improvements may lose their special value as a result of the taking, with the improvements having only scrap or salvage value.

For a recognized change in the use of the property after the taking, the evidence must establish the impossibility, for example, of conducting a school on the property and the owner's efforts to overcome the effect of the taking.

> To authorize a finding that the property is wholly destroyed for school purposes, the evidence must make it appear that it is impractical to continue the school by reason of the construction and operation of the railroad. By this is not meant that it must be shown to be utterly impossible to conduct a school, but what is meant is that it must appear that, after reasonable effort and diligence upon the part of the board of education and the teachers to avoid the physical dangers and to overcome the interference from the operation of the trains, it is no longer practical to conduct the school. So long as these things may be overcome by reasonable effort, the efficiency and safety of the school is only impaired, and not wholly destroyed. Until that destruction is shown, appellant cannot legally be required to pay for the full value of the property, but can be required only to make good the damages caused by its interference of the conduct of the school.[128]

The court also indicated in the foregoing case that in determining whether there was a full loss in value of the school building, the school board's abandonment of the use could not be considered.[129]

As stated, an owner may claim proximity damages to the property because of the highway improvement's interference with the owner's use and enjoyment caused by the taking.[130] Proximity damages for noise, dust, fumes and the like are evaluated on a case-by-case basis. Such damages may not be speculative in nature and must be based on a "reliable methodology."[131] If a reduction in area damages the remaining property, a remedy may be to apply the principle of substitution or to a more limited extent the cost to cure.[132] The cost of curing defects caused by a taking may affect the value of the property after the taking. For example, the costs of reconstructing entryways and replacing shrubs have been allowed in a partial taking of a cemetery.[133] Another example is that just compensation may mean the

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> under certain exceptional circumstances the "before and after test" will not adequately compensate the owner for his damage and the courts will resort to the 'cost to cure' method of computation, not for the purpose of restoration, but to gauge the diminution in market value as would be reflected in a lower purchase price that a well-informed buyer would be willing to pay).

[126] People *ex rel.* Dep't of Public Works v. Hayward Bldg. Materials Co., 213 Cal. App. 2d 457, 465, 28 Cal. Rptr. 782, 787 (Cal. App. 1st Dist. 1963) (stating that

> "[e]vidence of damage falls into two classes: (1) Evidence of the decrease in market value of the owner's land as it stands on account of the construction of the public work; (2) Evidence of the cost of restoring the injured property to the same relative position to the public work in which it stood before its construction")

(citation omitted) (internal quotation marks omitted)).

[127] Bd. of Educ. v. Kanawha and M.R. Co., 44 W.Va. 71, 72, 29 S.E. 503, 504 (1897).

[128] San Pedro, L. A. & S. L. R. Co. v. Bd. of Educ. of Salt Lake City, 32 Utah 305, 312, 90 P. 565, 567 (1907).

[129] *Id.* at 315, 90 P. at 568.

[130] State Highway Dep't v. Hollywood Baptist Church, 112 Ga. App. 857, 146 S.E.2d 570 (Ga. Ct. App. 1965) (indicating that such factors must be continuous and permanent incidents of the improvement) (*questioned by* State Highway Dep't v. Thomas, 115 Ga. App. 372, 377, 154 S.E.2d 812 (1967)). *See also* State Highway Dep't v. Augusta Dist. of N. Ga. Conference of Methodist Churches, 115 Ga. App. 162, 164, 154 S.E.2d 29, 30 (Ga. Ct. App. 1967) (holding in a case involving noise and other elements that "[i]f…the condemnee has designed and built an improvement on the property for a special purpose and has been deprived of its use, just and adequate compensation may include the cost or its value to condemnee for the particular purpose for which it was constructed") (citation omitted).

[131] N.C. Dep't of Transp. v. Haywood County, 360 N.C. 349, 352, 626 S.E.2d 645, 647 (2006) (agreeing with the trial court and rejecting a claim for proximity damages in a condemnation action by the transportation department against the county). *See also* County of Cook, 84 Ill. App. 2d 301, 228 N.E.2d 183 (holding that as a matter of law a condemned school property was not to be valued on a market value basis but by the cost of supplying necessary substitute facilities to restore the same facilities for school purposes); Idaho-Western Ry. Co. v. Columbia Conference of Evangelical Lutheran Augustana Synod, 20 Idaho 568, 579, 119 P. 60, 63 (1911)

> (The constitution and the law require that the owner of property shall receive such compensation that he will be as well off after the taking as he was before. To do that it is necessary to determine what the property is worth to the owner, and unless he receives what it is worth to him he does not receive just compensation.).

[132] First Nat'l Stores, Inc. v. Town Plan and Zoning Comm'n, 26 Conn. Supp. 302, 222 A.2d 228 (Conn. Super. Ct. 1966). *See* PA. STAT. ANN. 26, § 1-705(2) (v) (allowing consideration of "[t]he cost of adjustments and alterations to any remaining property made necessary or reasonably required by the condemnation.").

[133] State *ex rel.* State Highway Comm'n v. Barbeau, 397 S.W.2d 561 (Mo. 1965); Mount Hope Cemetery Ass'n v. State, 11 A.D. 2d 303, 203 N.Y.S.2d 415 (N.Y. App. 3d Dep't 1960), *aff'd*, 10 N.Y.2d 752, 177 N.E.2d 49 (1961); *see also* State v. Assembly of God, 230 Or. 67, 368 P.2d 937 (1962); State v. Lincoln Memory Gardens, Inc., 242 Ind. 2d 206, 177 N.E.2d 655 (1961).

cost of remodeling an owner's facility when a taking has resulted in total or partial loss of use of the property.[134]

> Where severance damages have occurred, it may sometimes prove possible for the property owner to perform certain actions upon the property to rectify the injuries in whole or in part, thus decreasing the amount of severance damages and correspondingly increasing the parcel's market value. These actions constitute a "curing" of the defects, and the financial expenditures necessary to do so constitute the condemnee's cost to cure.[135]

However, an owner may recover cost-to-cure damages only to the extent that the damages do not exceed the diminution in the value of the remainder parcel, and "the total damages awarded may not exceed the fair market value of the whole parcel before the taking."[136] Not all damages that may result in inconvenience to the owner are compensable. The damages must be real and affect the value of the property;[137] subjective damages have been denied.[138]

B.5. The Measure of Compensation for Special Use Properties

As can be seen from the foregoing discussion of special use properties, there is no absolute rule on how they are to be valued. A good understanding of the problems and their solutions can be gained, however, by studying takings of different types of special use properties. As a general rule, however, only the market data approach or the cost approach will apply.

B.5.a. Churches

The market data approach has been accepted in some takings as a proper method of valuing churches or of church property such as parking lots. In a given case there may not have been any sales of churches or church property in the area, or the highest and best use of the property is no longer as a church. The absence of data does not mean that the market data approach may not be used but rather that an appraiser may value the property at its current highest and best use. In a case in which the condemned property was located in a business zone and had been improved with a structure that had been used as a Masonic Hall, as recreational type property, and as a church, the court held that the property was a "specialty property,"[139] however, the court also held that the highest and best use of the property was as a single-story commercial development. Thus, valuation based on comparable sales was the most appropriate method of valuation.[140]

Although churches may not be bought and sold frequently, the comparable sales approach should not be disregarded. As one court has noted,

> sales of church property are scarce. For that very reason, when there *is* one that is reasonably susceptible of comparison, it has high evidentiary value. It is our opinion that the factual and opinion evidence tendered by the highway department's witnesses indicated a sufficient similarity between the properties here in question to warrant consideration by the jury, and that the exclusion of it was a prejudicial error.[141]

If there are no comparable sales that may be used, then the method of valuation most often used is the cost-less depreciation approach.[142] However, the approach is difficult to apply to church properties because of concerns with measuring functional depreciation, as well as physical depreciation.[143] As stated in *Common-*

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[134] City of Elkhart v. NO-BI Corp., 428 N.E.2d 43 (Ind. App. 3d Dist. 1981) (loss of use of loading dock). *See also* Div. of Admin., State Dep't of Transp. v. Frenchman, Inc., 476 So. 2d 224, 227 (Fla. App. 4th Dist. 1985 (holding that cost to cure may be used to mitigate the amount of the award when it exceeds the difference in market value), *review dismissed*, 495 So. 2d 750 (Fla. 1986); B&B Food Corp. v. New York, 96 A.D. 2d 893, 893, 466 N.Y.S.2d 60, 60 (App. Div. 2d Dep't 1983) (holding that the cost to cure approach may not be used when the cure must be accomplished by going outside the tract in controversy)).

[135] Dep't of Transp. v. Sherburn, 196 Mich. App. 301, 305, 492 N.W.2d 517, 520 (Mich. Ct. App. 1992).

[136] *Id.* at 306, 492 N.W.2d at 520.

[137] *See* 4A NICHOLS ON EMINENT DOMAIN § 14.1, *et seq*.

[138] State v. Wilson, 103 Ariz. 194, 197, 438 P.2d 760, 763 (1968) (holding that testimony regarding loss of business went to the issue of the reduction in highest and best use of the property and that the "trial court correctly instructed the jury that it was not to consider any claim of loss or impairment of business 'inasmuch as the law permits damages to be awarded for injury to property but not injury to business conducted thereon'") (no citation for internal quotation); State v. Wemrock Orchards, Inc., 95 N.J. Sup. 25, 29, 229 A.2d 804, 806 (N.J. Super. Ct. 1967 (reversing judgment below as the excessive verdict must have been based on the land's uniqueness for historical reasons for which there was no evidence), *cert. denied*, 50 N.J. 92, 232 A.2d 153 (1967); Syracuse Univ. v. State, 7 Misc. 2d 349, 353, 166 N.Y.S.2d 402, 405 (1957) (holding that esthetic, sentimental, and historical aspects were not compensable)).

[139] Town of Bloomfield v. The Masonic Hall Ass'n, 2006 Conn. Super. LEXIS 904, at *6 (Conn. Super. 2006) (Unrept.).

[140] *Id.*; *see* State Highway Dep't v. Hollywood Baptist Church, 112 Ga. App. at 859, 146 S.E.2d at 572 (reversing a judgment for the landowner and holding that the property was no different from any other property zoned for residential or commercial use and that the determination of market value for this purpose was just compensation).

[141] Commonwealth, Dep't of Highways v. Oakland United Baptist Church, 372 S.W.2d 412, 413–14 (Ky. 1963) (emphasis in original) (citation omitted) (holding that the comparable sale was not too distant to exclude its consideration).

[142] Commonwealth, Dep't of Highways v. Congregation Anshei S'Fard, 390 S.W.2d 454 (Ky. Ct. App. 1965) (holding that cost less depreciation of improvements could be used as the condemnees were entitled to be able to replace their facility and holding that testimony regarding the undepreciated cost of constructing a replica of the building was not prejudicial when considered with other evidence of depreciation). *See Marseilles Hydro Power, LLC*, 2004 U.S. Dist. LEXIS 25276, at *15–17 (noting alternative measures of damages but not rejecting the market value measure).

[143] Trustees of Grace and Hope Mission v. Providence Redevelopment Agency, 100 R.I. 537, 544, 217 A.2d 476, 480 (1966)

wealth, Dep't of Highways v. Congregation Anshei S'Fard,[144]

> there may be circumstances in which evidence as to the cost (less depreciation) of improvements may be received. For example, if it is shown that a particular improvement is well adapted to the location and tends to adapt the property to the use to which it could most advantageously be put, and there is nothing to show that the cost of the improvement was not paid in good faith and under normal conditions, the cost of the improvement, less depreciation, may be considered as proper evidence of the amount by which the improvement enhances the market value of the property.[145]

In a case in which half of a church's parking lot was taken, the court similarly observed that "[w]hen the property is such that evidence of fair market value is not obtainable, necessarily some other formula for fixing the fair value of the property must be devised."[146]

Thus, in the valuation of churches "[m]arket value as a measure of compensation has been accepted and rejected in cases involving churches…. In some cases, the cost approach has been used…."[147]

B.5.b. Cemeteries

The courts generally have adopted the market value approach as the appropriate measure of compensation for the taking of cemetery land in eminent domain proceedings.[148] However, vacant cemetery property presents a unique problem in valuation and is a situation in which the income approach or some variation thereof may be used.[149] Because cemeteries are not bought and sold commonly on the open market, some states have adopted an income approach similar to a "cost of development" method to determine the value of the land taken.[150] As in the traditional income approach, the problem is ascertaining the appropriate discount or capitalization rate to be applied. Finally, the cost of replacement approach has been used as well in the valuation of cemeteries.[151]

B.5.c. Parks

When a public park or a portion thereof is taken, it may be difficult to determine its value. However, "the usual method of compensation is market value," especially for public parks.[152] In some cases, however, the courts have allowed damages based on the cost of re-

(holding that the trial court did not err in "excluding evidence of functional depreciation on a theory of obsolescence").

[144] 390 S.W.2d 454 (Ky. Ct. App. 1965).

[145] *Id.* at 455–56.

[146] First Baptist Church of Maxwell v. Neb. Dep't of Roads, 178 Neb. 831, 836, 135 N.W.2d 756, 759 (1965) (holding however that the witnesses were not shown to be qualified to give an opinion as to value and were "not examined in the area of the total cost of the property, its reproduction or replacement cost with allowances for depreciation"). *See also* State Highway Dep't v. Augusta District of No. Ga. Conference of Methodist Churches, 115 Ga. App. at 164, 154 S.E.2d at 30 (holding that "in some instances market value is not the fairest or most accurate method of measuring" a property's value and that in this case because "the condemnee has designed and built an improvement on the property for a special purpose and has been deprived of its use, just and adequate compensation may include the cost or its value to condemnee for the particular purpose for which it was constructed.")

[147] 4 NICHOLS ON EMINENT DOMAIN § 12C.01[4][b], at 12C-43–44.

[148] Annotation, *Damages for Condemnation of Cemetery Lands*, 42 A.L.R. 3d 1314, 1317 (2007 Supp.). *See, e.g.*, Bd. of Comm'rs v. Trustees of St. Patrick's Cathedral, 78 A.D. 2d 644, 432 N.Y.S.2d 246, 247 (N.Y. App. 2d Dep't 1980) (holding that the record did not justify a conclusion that the value of each grave site should be diminished by 10 percent for purported sales and administrative expenses as these expenses were already included in the valuation of each site); Green Acres Mem'l Park, Inc. v. Miss. State Highway Comm'n, 246 Miss. 855, 864, 153 So. 2d 286, 290 (1963) (holding that the jury was properly instructed on the before and after rule and that the trial court correctly excluded opinion evidence of the sale price of similar, comparable cemetery property as a "going concern"); Laureldale Cemetery Co. v. Reading Co., 303 Pa. 315, 329, 154 A. 372, 376 (1931) (holding that the jury must not determine how the land "could best be divided into building lots, nor conjecture how fast they could be sold, nor at what price per lot" and that "[t]he land must be valued as land like any other land in its vicinity, and not as sepulture lots to be turned into cash in the future").

[149] Dep't of Transp. v. Bouy, 69 Ill. App. 3d 29, 38, 386 N.E.2d 1163, 1169 (1979) (holding that in a partial taking of cemetery for a highway the value of the property taken and value of a temporary easement were properly determined by the income approach).

[150] State *ex rel.* State Highway Comm'n v. Mt. Moriah Cemetery Ass'n, 434 S.W.2d 470, 473 (Mo. 1968)

> (Since it is common knowledge that cemeteries are not sold on the market and evidence of the usual fair market value of land is not available, some other measure must be used. The capitalization method is evidence to show such values, but it is not a rigid formula for mathematical determination of the damages.).

[151] County of Erie v. St. Matthew's United Church of Christ, 116 A.D. 2d 973, 498 N.Y.S.2d 710 (N.Y. App. 4th Dep't 1986) (holding that the trial court erred in using the income method, as damages under the replacement cost method were almost three times larger than under the income method); St. James Roman Catholic Church Soc'y of Jamestown v. State, 50 A.D. 2d 193, 376 N.Y.S.2d 347 (N.Y. App. 4th Dep't 1975) (holding that the cost of replacement was the proper method of valuation for a cemetery with a large inventory of gravesites and a slow rate of sales).

[152] 4 NICHOLS ON EMINENT DOMAIN § 12C.04[4][c], at 12C-46. *See* People, *ex rel.* Dep't of Pub. Works v. City of L.A., 220 Cal. App. 345, 350–51, 33 Cal. Rptr. 797, 799–800 (Cal. App. 2d Dist. 1963) (holding that with respect to the park land in question, "damages must be measured by the market value of the land at the time it is taken" and "*that the test is not the value for a special purpose, but the fair market value of the land in view of all the purposes to which it is naturally adapted*") (emphasis in original) (internal quotation marks omitted) (citation omitted)).

placing the land taken or on the "rule of substitution."[153] For example,

> [w]here property already devoted to public use by one agency of government is condemned by another such agency for some unrelated public purpose, just compensation consists in paying the cost of providing equivalent substitutes or necessary replacements for the property taken. …
>
> The rule requiring the payment of the cost of substitute facilities is an application of the principles controlling the determination of just compensation and is not an exception to those principles. …
>
> "The 'substitute facilities' doctrine is not an exception carved out of the market value test; it is an alternative method available in public condemnation proceedings. …"[154]

The court held that the

> [a]pplication of the foregoing principles justifies the cost of the substitute or replacement land to be obtained by the Board for use for park purposes in the place of the 7.72 acres of park land taken by the road commission as just compensation to which the board was entitled for the land taken.[155]

The court in *United States v. Certain Land in Borough of Brooklyn*[156] applied the doctrine of substitution to vacant playground land:

> We see no reason a priori for treating a public street as more deserving of compensation for its replacement than a public playground might be, and the cases relied upon below do not suggest any. … Both may serve vital public functions and the absence of either might cause serious strain on other public facilities. In this case, the City authorities had decided that an adequate playground was more important for the area than was an untruncated Cook St. Under this view, if a playground is found to be "necessary," the City may well be entitled to the amount needed to acquire and prepare the additional land, less the value of the land still held, if any, that was not a necessary part of the playground.[157]

The *Brooklyn* case involved a taking of land with buildings when the property was purchased by the owner; however, the buildings had been removed prior to the condemnation. Nevertheless, the court held that the original cost including improvements was material to the market value of the property if the substitution doctrine was not applicable.[158] In remanding the case, the court stated that the trial court would decide

> whether a new playground is in fact necessary, how much land would be needed if it is, the expense involved in such a project, whether the 15,000 [square feet] not taken could be part of the substitute, and what is its value. Even if a new playground is not "necessary," there must be a new trial to determine just compensation to the City for the value of the property taken, giving consideration to the evidence we find improperly disregarded.[159]

As Justice White stated in *United States v. 564.54 Acres of Land*,[160] "[t]he substitute-facilities doctrine is unrelated to fair market value and does not depend on whether fair market value is readily ascertainable; rather, it unabashedly demands additional compensation over and above market value in order to allow the replacement of the condemned facility."[161]

With respect to takings of parkland, an appraiser should be aware also of 23 C.F.R. § 771-35 (2007), promulgated pursuant to 49 U.S.C. § 303 (2007). Section 303(a) provides that "[i]t is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites." Section 303(d)(3) states that with respect to parks, recreation areas, and wildlife or waterfowl refuges, the Secretary of Transportation

> may make a finding of de minimis impact only if—
>
> (A) the Secretary has determined, after public notice and opportunity for public review and comment, that the transportation program or project will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge eligible for protection under this section; and
>
> (B) the finding of the Secretary has received concurrence from the officials with jurisdiction over the park, recreation area, or wildlife or waterfowl refuge.

The regulations set forth guidelines on when publicly owned parks and historic sites may be acquired.[162] Although there is no language governing valuation in § 303 or the regulations, an appraiser should be aware of federal policy that could affect the valuation of any remainder.

With respect to private parks, as well as special purpose properties in general, a leading case is *Newton Girl Scout Council v. Massachusetts Turnpike Authority,*[163] involving a taking of a strip of land through a Girl Scout camp for use as part of a freeway project. The trial court excluded testimony of damages based on use of the land for camp purposes and refused to instruct on

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[153] State Road Comm'n of W. Va. v. Bd. of Park Comm'rs of the City of Huntington, 154 W. Va. 159, 167–68, 173 S.E.2d 919, 925 (1970) (citations omitted) ("'Where the highest and best use of the property is for municipal or governmental purposes, as to which no market value properly exists, some other method of arriving at just compensation must be adopted, and the cost of providing property in substitution for the property taken may reasonably be the basis of the award.'" (*id*., 154 W. Va. at 169, 173 S.E.2d at 926) (citations omitted)).

[154] *Id.* (*quoting* United States v. Certain Property Located in the Borough of Manhattan, 403 F.2d 800, 801 (2d Cir. 1968) (some citations omitted).

[155] 154 W. Va. at 170, 173 S.E.2d at 926–27.

[156] 346 F.2d 690 (2d Cir. 1965).

[157] *Id.* at 695 (citations omitted).

[158] *Id.* at 693.

[159] *Id.* at 695–96 (footnote omitted).

[160] 441 U.S. 506, 99 S. Ct. 1854, 60 L. Ed. 2d 435 (1979).

[161] *Id.* at 517, 99 S. Ct. at 1860, 60 L. Ed. 2d at 445 (White, J., concurring).

[162] *See* 23 C.F.R. § 771-35 (2007).

[163] 335 Mass. 189, 138 N.E.2d 769 (1956).

assessing damages based on such purposes.[164] The taking included land that shielded the camp from the existing highway, with a resulting loss of privacy.[165] The Supreme Judicial Court of Massachusetts held that damages could be proved by a method other than the comparable sales method and that although market value remained the test, the property was to be valued based on the use that would result in the most money. "In such cases, it is proper to determine market value from the intrinsic value of the property and from its value for the special purposes for which it is adapted and used."[166] The court held that it was permissible to allow for more flexibility with respect to the evidence.[167] However, the owner had the burden of showing that it was impossible to prove the value of the property without using an alternative method of valuation.[168]

Other than for takings of private parks, owners have been compensated for the value of a variety of recreational uses of their land[169] based on the property's "peculiar qualities, conditions, or circumstance"s;[170] its "intrinsic value arising out of its uniqueness"s;[171] or its use for only one specific purpose.[172] For example, one court approved a valuation based on "actual or intrinsic value" in terms of reproduction cost less depreciation.[173]

B.5.d. Golf Courses

With respect to golf courses the cost approach has been applied, including the cost of substitute facilities and the cost to cure.[174] In *Sun Valley Camping Cooperative, Inc. v. Town of Stafford,*[175] although involving a taxpayer's appeal of the valuation of a cooperative campground for a property tax assessment, the court observed that "[a] special purpose property is defined as real estate appropriate for only one use or a limited number of uses, whose highest and best use is probably a continuation of its present use."[176] Such a property has a "limited demonstrable market" and "is usually defined in terms of buildings with a special purpose, but also includes theme parks and golf courses,"[177] for which the reproduction cost approach is often used to indicate a value.[178] However, the court further stated that "[a] valuation must sometimes involve more than one single theory or methodology of assessment because of the particular facts"[179] and that "[n]o single method of valuation is controlling for the finding of fair market value for a special purpose property, at least in eminent domain cases."[180]

In *State Highway Department v. Thomas,*[181] the court held in a partial taking of property leased for a golf course

> that the jury was authorized to find from the other evidence adduced on the trial that the leasehold interest in the property had a special value to the lessee which could not be adequately compensated by an award of damages based on the mere fair market value of the land itself.[182]

Testimony properly was disallowed that would have suggested that the lessee could have minimized its damages by reconstructing some of the course on other property not already leased to the lessee.[183] The court

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[164] 335 Mass. at 193, 138 N.E.2d at 772.

[165] *Id.* at 192, 138 N.E.2d 772.

[166] *Id.* at 195, 138 N.E.2d 774.

[167] *Id.* at 194, 138 N.E.2d 773.

[168] *Id.* at 197, 138 N.E.2d at 775.

[169] Sun Valley Camping Coop. v. Town of Stafford*,* 94 Conn. App. at 696, 707, 894 A.2d at 359 (holding in an appeal of a property tax assessment of a recreational cooperative campground that the court improperly adopted a comparable sales method of valuation, which used the average individual unit value multiplied by the number of units of which the cooperative was comprised, rather than valuing the property as a whole).

[170] Scott v. State*,* 230 Ark. at 772, 326 S.W.2d at 815 (historical tavern, museum, and park); *cf. Wemrock Orchards, Inc*., 95 N.J. Sup. at 29, 229 A.2d at 806 (1967) (holding that there was no evidence of uniqueness and that an excessive jury verdict was based apparently on the jury's knowledge of property's "historical significance").

[171] State *ex rel.* Herman v. Wilson, 103 Ariz. 194, at 197, 438 P.2d 760, at 763 (unusual rock formations).

[172] Cent. Ill. Light Co. v. Porter, 96 Ill. App. 2d 338, 339, 239 N.E.2d 298, 299, 300 (1968) (noting that the only use of the property was for duck hunting purposes).

[173] Keator v. State, 23 N.Y.2d 337, 340, 244 N.E.2d 248, 249 (1968) (holding in a case involving the Isaac Walton League clubhouse that the trial court's verdict would be reinstated because the evidence showed that the property was a specialty and that an award based on the actual or intrinsic value was more appropriate because the property was not susceptible to valuation based on fair market value), *modified*, 26 A.D. 2d 961, 274 N.Y.S.2d 671 (N.Y. App. 3d Dep't 1966).

[174] Comm'r of Transp. v. Candlewood Valley Country Club, Inc., 2005 Conn. Super. LEXIS 3308, at *16, *29, *31 (condemnation action to acquire a fee simple interest in and to a strip of land from the club, permanent easements, and a temporary construction easement during the completion of the work, in which appraisers used a combination of the market sales data, income and cost approaches, as well as cost to cure). *See* Albany Country Club v. State, 19 A.D. 2d 199, 201, 241 N.Y.S.2d 604, 606 (N.Y. App. 3d Dep't 1963) (holding that a country club was specialty property and that the valuation of the property should have been based on replacement value but also holding that acreage labeled as "club purpose land" should have received a higher valuation because of "an exceptional number of trees" that enhanced the course). *See also* 4 NICHOLS ON EMINENT DOMAIN § 12C.01[4][c], at 12C-48–49.

[175] 94 Conn. App. 696, 894 A.2d 349 (Conn. Ct. 2006).

[176] *Id.* at 713, 894 A.2d 362 (citation omitted).

[177] *Id.*

[178] *Id.*

[179] 894 Conn. App. at 714, 94 A.2d 362–63.

[180] *Id.* (*citing* Brothers, Inc. v. Ansonia Redevelopment Agency, 158 Conn. 37, 255 A.2d 836 (1969). *See* Rustici v. Stonington, 174 Conn. 10, 12, 14, 381 A.2d 532, 534, 535 (1977) (holding that town assessor correctly used a combination of comparable sales and cost of improvement methods to value property operated and developed as a golf course).

[181] 115 Ga. App. 372, 154 S.E.2d 812 (1967).

[182] *Id.* at 378, 154 S.E.2d 817.

[183] *Id.* at 380, 154 S.E.2d 818.

held that "[t]he condemnor could not compel [the lessor] to lease other portions of her land to [the lessee] against her will merely for the purpose of minimizing the condemnees' damages resulting from the condemnation."[184]

It should be noted that the existence of trees and other improvements may result in an unusual application of the cost approach. Although the separate valuation of trees has been the subject of some literature on valuation,[185] trees generally are valued as part of the land. One source suggests valuation based on trunk area, kind, and condition.[186] The application of such a formula may result in more than adequate compensation, but there is nothing in the formula to indicate any correlation to actual or market value. Finally, in takings involving golf courses damages may be permitted for loss of screening and the cost to cure damaged fairways and greens.[187]

B.5.e. Schools

With respect to takings of schools, the courts have applied the market value approach to takings of private school property and the substitute property approach to takings of public school property.[188] For example, in a recent case involving a taking of 41 percent of the land used for a private school and its athletic facilities, but leaving the building intact, the court found that the existing use of the school, which had a special exception to operate in a residential area, was "more analogous to a commercial use than a residential use," as the private school competed against other private schools to attract students.[189] The court accepted the plaintiff's expert's pre-taking valuation of the property based on values of similarly sized commercial lots in proximity to the property,[190] but did not accept the same expert's post-taking valuation of the property based on residential home sites on the theory that the property was no longer suitable for use as a school.[191]

Notwithstanding the substantial taking of the school's property, the court agreed with the state that the highest and best use of the property was its continued use as a school. The court held that the plaintiff failed to prove that after the taking the remaining parcel was unsuitable for use as a school and that its highest and best use was as a single family residence.[192] In particular, the owner failed to support its allegations that the property was no longer suitable for use as a school because of increased noise and pollution, decreased safety, insufficient ground, and a decline in the student population. With respect to severance damages, as noted, the owner argued that the highest and best use of the property was not as a school but provided no evidence regarding the diminished value of the remaining parcel. The court stated that "one…alternative theory is the introduction of evidence of 'restoration or replacement costs' to restore the property owner to the position he would have occupied had the taking not occurred."[193] Although the state offered no evidence of severance damages, it was the owner's burden to prove "any diminished value to the remaining school parcel," a burden the owner failed to satisfy.[194] Thus, for an institution to be destroyed for school purposes, there must be a showing that it is impractical and unreasonable to continue the school after reasonable efforts and diligence to overcome the destructive effects caused by the taking.[195]

In another case, the petitioners sought compensation for a decrease in fair market value of property because of an appropriation of a portion of their property for highway purposes.[196] The court held that specific adverse effects to the property "are not separate items of damage, recoverable as such, but are relevant only as circumstances tending to show a diminution in the over-all fair market value of the property."[197] It should be noted that the court stated that it did not rule out the fair market approach to valuing the property which was used as a Bible college.[198] On the other hand, the courts have recognized the necessity of liberalizing the proof permitted to establish just compensation for a taking of school property.[199] An Illinois court has held

[184] *Id.* at 380, 154 S.E.2d at 817.

[185] Long Island Lighting Co. v. State, 28 A.D. 2d 1014, 1015, 283 N.Y.S.2d 806, 808 (N.Y. App. 3d Dep't 1967) (considering replacement cost of trees).

[186] *Shade Tree Valuation*, National Shade Tree Conference (1957).

[187] Knollwood Real Estate Co. v. State, 33 Misc. 2d 428, 430, 227 N.Y.S.2d 112, 114 (N.Y. Ct. Cl. 1961) (allowing cost of restoration, including cost to restore "screen planting").

[188] 4 NICHOLS ON EMINENT DOMAIN § 12C.01[4][d], at 12C-49.

[189] West Bay Christian Sch. Ass'n, Inc. v. R.I. Dep't of Transp., 2007 R.I. Super. LEXIS 24, at *12 (R.I. Super. Ct. 2007).

[190] *Id.*

[191] *Id.* at *16–17 and n.8.

[192] *Id.* at *18.

[193] *Id.* at *27 n.12.

[194] *Id.* at *28.

[195] San Pedro, L.A. and S.L.R. R. Co. v. Bd. of Educ., 32 Utah 305, at 312, 90 P. 565, at 567 (1907).

[196] Gallimore v. State Highway and Pub. Works Comm'n, 241 N.C. 350, 353, 85 S.E.2d 392, 395 (1955). *See* County of Cook v. Chicago, 84 Ill. App. 2d at 306, 228 N.E.2d at 186 (holding that "market value is not the basis for valuation when special use property is involved," that the trial court was correct "that the defendant was entitled to acquire substitute facilities, and that the cost of adjacent land to replace the property taken was properly admitted into evidence") (citation omitted)); Idaho-W. Ry. Co. v. Columbia Conference, etc., 20 Idaho 568, 583, 119 P. 60, 65 (1911) ("Whenever the property is of such character and nature that it has no market value, its value for the uses and purposes to which it is being devoted and to which it is peculiarly adaptable may be shown, and the authorities above cited fully sustain and justify this position.").

[197] 241 N.C. at 355, 85 S.E.2d 396.

[198] *Id.* at 355, 85 S.E.2d 397.

[199] West Bay Christian Sch. Ass'n, Inc. v. R.I. Dep't of Transp., 2007 R.I. Super. LEXIS 24, at *12 ("In takings cases involving special use property, a trial court has the discretion

that as a matter of law, condemned school property "is not to be valued on a market value basis, but by the cost of supplying the necessary substitute facilities for those taken to restore the same facilities…."[200]

As summarized in *Nichols on Eminent Domain*, if "a portion of the property was taken and the remainder so damaged that it could not be used for school purposes, the before valuation was made in terms of value for school purposes and the after valuation in terms of market value."[201] However, in other instances, "the cost approach has been used in lieu of the substitution approach so that depreciation may be taken into account."[202] Factors affecting the use of the property for institutional purposes should be recognized.[203] Also, "damages to improvements on the remaining property have been recognized, usually in the form of cost to cure."[204] If a taking is extensive then the valuation of public school property usually involves the application of the substitute property doctrine.[205]

B.5.f. Functional Replacement

Notwithstanding the difficulties of establishing the value of schools and other publicly-owned facilities such as a fire station or other government buildings, an alternative method of satisfying just compensation may be available under 23 C.F.R. § 710.509 (2007).

Section 710.509(a) states that

> [w]hen publicly owned real property, including land and/or facilities, is to be acquired for a Federal-aid highway project, in lieu of paying the fair market value for the real property, the State may provide compensation by functionally replacing the publicly owned real property with another facility which will provide equivalent utility.[206]

In cases where the doctrine of substitution is overly expensive, such as massive restoration costs, functional replacement may be an alternative preferable to both parties.

C. VALUATION AS AFFECTED BY RECOGNITION OF BENEFITS TO THE REMAINDER

C.1. Distinguishing Between General and Special Benefits

There are two classifications of benefits—general and special. In most states only special benefits may be considered as a proper offset against compensation for the value of the land taken or against damages to the

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to depart from traditional valuation methods to properly compensate the party whose property has been taken.")

[200] County of Cook v. Chicago, 84 Ill. App. 2d at 308, 228 N.E.2d at 187. *See also* State v. Waco Indep. Sch. Dist., 364 S.W.2d 263, 268 (Tex. Civ. App. 1963) (affirming the trial court's verdict that held "that the property remaining after [the] taking has value to the school district only to the extent that it is a starting point from which to rebuild a high school campus that is absolutely necessary to the Waco School District" and "that, therefore, *the before* and *after value* to the premises to the school would be solely dependent upon the cost of acquiring or constructing reasonable substitute facilities…." *Id*. at 266) (emphasis in original).

[201] 4 NICHOLS ON EMINENT DOMAIN § 12C.01[4][d], at 12C-49–50.

[202] *Id.*

[203] Harvey School v. State, 14 Misc. 2d 924, 926, 180 N.Y.S.2d 724, 727 (N.Y. Ct. Cl. 1958)

> (Assuming one wanted to purchase the entire property to continue using it as a boarding school…he would consider the construction of the buildings, whether brick or frame; he would consider the exterior aspects of the buildings and their state of repair; he would closely examine the interior of the buildings, especially the condition of ceilings, walls, floors, electrical equipment, type and condition of heating equipment, the number of rooms and adequacy thereof for the purposes intended; the possibility of continuing unimpaired the services presently provided, all with reference, in his mind, to the contemplated capital investment and, more so, to the function thereof as well as to the maintenance expenses.)

Gallimore, 241 N.C. at 356, 85 S.E.2d at 397

> ([T]he application of our concept of fair market value does not depend upon the actual availability of one or more prospective purchasers, but assumes the existence of a buyer who is ready, able and willing to buy but under no necessity to do so…. "Of course, the market value of a church could not be determined by saying just what somebody would give for that piece of property, because the ordinary citizen does not want to own a church, but what would a congregation that desired a church give for the church. In like manner, a college campus must have its value determined by what somebody who wanted a college would give for the property with that campus.")

(citation omitted)).

[204] 4 NICHOLS ON EMINENT DOMAIN § 12C.01[4][d], at 12C-50.

[205] People *ex rel.* Dir. of Finance v. YWCA, 74 Ill. 2d 561, 572, 387 N.E.2d 305, 311 (Ill. 1979) (holding that a women's facility that included kitchens, a swimming pool, a gymnasium, locker rooms, and a meeting room held not to be a special use property requiring application of the "substitute-facilities measure of compensation"), *overruled on other grounds*, People v. Ortiz, 196 Ill. 2d 236, 752 N.E.2d 410 (Ill. 2001); County of Cook v. City of Chicago, 84 Ill. App. 2d at 307, 228 N.E.2d at 186 (holding that the city had had to replace the school property by acquiring another site for the same special use); City of Wichita v. Unified Sch. Dist. No. 259, 201 Kan. 110, 439 P.2d 162 (1968); *Waco Indep. Sch. Dist.,* 364 S.W.2d at 265, 266.

[206] 23 C.F.R. § 710.509 (b) (2007) states:

> *Federal participation*. Federal-aid funds may participate in functional replacement costs only if:
>
> (1) Functional replacement is permitted under State law and the STD elects to provide it.
>
> (2) The property in question is in public ownership and use.
>
> (3) The replacement facility will be in public ownership and will continue the public use function of the acquired facility.
>
> (4) The State has informed the agency owning the property of its right to an estimate of just compensation based on an appraisal of fair market value and of the option to choose either just compensation or functional replacement.
>
> (5) The FHWA concurs in the STD determination that functional replacement is in the public interest.
>
> (6) The real property is not owned by a utility or railroad.

remainder, or both. Courts use different terminology in an effort to distinguish between general and special benefits and often become hopelessly entangled in a theoretical explanation of the difference between the two kinds of benefits. One could argue that the courts lose sight of the principal objective, i.e., determining whether the remainder in fact has been benefited, in seeking to find language distinguishing the two categories of benefits.[207] Although the court observed in *Missouri ex rel. State Highway Commission v. Gatson*[208] that "[t]he distinction between general and special benefits has been carefully delineated," the court also stated that "[t]he distinction in practical application however is shadowy…. [T]rained legal minds have difficulty in distinguishing between the two types of benefits and as a consequence it is necessary to make submissions to the jury with 'all possible clarity.'"[209] It may be noted that California no longer distinguishes between general and special benefits.[210]

General benefits are those that increase values of land throughout the community[211] and are enjoyed by the public at large.[212]

> "General benefits," those accruing to the owners of property in a neighborhood or vicinity generally, are not deductible from the damages; to make such a deduction would be to require the landowner whose property is taken in part to liquidate his damages by contributing his share of the benefits which inure to the public as a whole.[213]

Unlike general benefits, special benefits attach because of a property's relationship to the highway improvement.[214] "'Special benefits'…accrue directly and proximately to the particular land remaining by reason of the construction of the public work on the part taken. Such benefits must, of course, be reflected in an increase in the market value of the land."[215]

Consequently, the benefit that accrues to the property is unlike or is different in kind from a benefit or benefits that accrue to properties in the area.[216] Benefits must, therefore, be special[217] or peculiar[218] to the owner.

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[207] *See* Bassett v. United States, 55 Fed. Cl. 63, at 77 (rejecting the federal government's claim in an inverse condemnation case arising out of the government's deposit of large quantities of hazardous waste on the owner's property that the government's actions allegedly conferred a special benefit).

[208] 617 S.W.2d 80, 83 (Mo. App. E. Dist. 1981) (holding that a landowner with access to a county gravel road before the taking had access after the taking via a greatly improved paved road that enhanced the owner's property).

[209] *Id.* at 82.

[210] L.A. County Metro. Transp. Auth. v. Continental Dev. Corp., 16 Cal. 4th 694, 941 P.2d 809 (Calif. 1997) (abolishing the distinction).

[211] Podesta v. Linden Irrigation Dist., 141 Cal. App. 2d 38, 55, 296 P.2d 401, 412 (Cal. App. 3d Dist. 1956) (finding no special benefit); L.A. County v. Marblehead Land Co., 95 Cal. App. 602, 615, 273 P. 131, 137 (Cal. App. 2d Dist. 1928) (holding that "special benefits must be such as are reasonably certain to result from the construction of the work" and stating that the evidence showed a benefit resulting from the access and transportation facilities that would increase the value of the land fronting thereon, including the affected ranch).

[212] N.C. Bd. of Transp. v. Rand, 299 N.C. 476, 481, 263 S.E.2d 565, 569 (1980) (holding that the "State *has* produced evidence of benefit to defendants' land" and that "[s]uch evidence should be credited with a jury instruction") (emphasis in original); Phoenix Title and Trust Co. v. State, 5 Ariz. App. 246, 253, 425 P.2d 434, 441 (Ariz. Ct. App. 1967) (holding that it was "error to permit testimony to the effect that the property experienced general benefits which could be used to offset the severance damages" because "'[t]o charge a tract of land with the value of general benefits is to require its owner to pay for a benefit common to others who are themselves exempt from such payments'" (citation omitted); Kirkman v. State Highway Comm'n, 257 N.C. 428, 433, 126 S.E.2d 107, 111 (1962) (stating that it is

> "generally agreed that only those benefits can be taken into consideration which arise from the particular improvement for the purpose of which the owner's land [that] is taken or damaged and not those which have no causal connection with such improvements but are derived from other previous or subsequent improvements….")

(citation omitted)).

[213] State *ex rel.* Mo. Highway & Transp. Comm'n v. Delmar Gardens, 872 S.W.2d 178, 180 (Mo. App. E. Dist. 1994).

[214] The Central Puget Sound Reg'l Transit Auth. v. The Heirs and Devisees of Jack K. Eastey, 135 Wash. App. 446, 459, 144 P.3d 322, 328 (Wash. Ct. App. 2006) (holding that the trial court properly excluded "project influence" damages); E-470 Pub. Highway Auth. v. Revenig, 91 P.3d 1038, 1039, 1042 (Colo. 2004) (holding that special benefits may reduce an award of compensation for damages to a landowner's remaining property and that just compensation does not require only payment in cash). *See also* Daniels v. State Road Dep't of Fla., 170 So. 2d 846 (1964) (holding that the setoff would not have been allowed because the enhancements did not benefit the property directly but that the landowners had failed to preserve the issue by not objecting to the testimony); Kirkman v. State Highway Comm., 257 N.C. at 433, 126 S.E.2d at 111 (stating that "'[a] benefit once allowed cannot be reasserted in a further proceeding to condemn'") (citation omitted)).

[215] State *ex rel*. Mo. Highway & Transp. Comm'n v. Delmar Gardens, 872 S.W.2d at 180.

[216] State v. Pope, 228 Mo. App. 888, 74 S.W.2d 265, 269 (Mo. Ct. App. 1934) (stating that "'[t]he benefit to a particular parcel by its being left in a desirable size or shape or in fronting upon a desirable street is the peculiar benefit'" to the property owner); State v. Jones, 321 Mo. 1154, 1159, 15 S.W.2d 338, 340 (1929) (explaining that "[s]pecial benefits…accrue directly and proximately to the particular land remaining by reason of the construction of the public work on the part taken" but that "[s]uch benefits must of course be reflected in an increase in the market value of the land"); Jones v. City of Clarksburg, 84 W. Va. 257, 266, 99 S.E. 484, 488 (1919) (holding that if "the grading and paving of a public street have especially benefitted an abutting property…the jury…should consider and include therein the value of such special benefits, thereby deducting them from the damages inflicted).

[217] Stanley v. City of Salem, 247 Or. 60, 65, 427 P.2d 406, 408 (1967) (stating that

> "[w]hen a local improvement produces a special benefit…the mere fact that [the improvement] also results in [a] benefit to the general public…does not deprive it of its character as a local improvement nor prevent the imposition of at least a portion of its cost as a special assessment against such land")

> All the land in the community may not—almost certainly will not—receive the same general benefits in a monetary sense; and the general benefits derived by the particular tract in litigation might be greater than those enjoyed by any other land, and would be reflected in its increased value. But only that part of the increase resulting from special benefits—those, if any, arising from the land's position directly on the highway improvement, such as availability for new or better uses, facilities for ingress and egress, improved drainage, sanitation, flood protection, and the like—would be chargeable.[219]

As with general benefits, special benefits must occur because of the construction of a public improvement for which the land is taken.[220] A special benefit "connotes an enhancement more localized than a general improvement in community welfare, but not necessarily unique to a given piece of property. A special benefit is one going beyond the general benefit supposed to diffuse itself from the improvement through the municipality."[221]

No single case provides a definitive explanation of what is or is not a special benefit. However, "[c]ases involving the condemnation of a right of way for highway construction often cite changes in available uses or in the facilities for direct access that enhance the value of the residual land as paradigm examples of special benefits."[222]

The benefit to be special or specific need not be shared only by one property. If other properties have a close relationship to the improvement and are benefited specially and peculiarly, then such properties similarly situated are specifically benefited. Thus, special benefits is an improvement that enhances the value of remaining land such that its value may be determined and offset against the damages for the part taken.[223]

It is only when special benefits may be offset that most problems will arise. No presumption of special benefits arises merely because of a taking for the improvement of a street or highway.[224] The condemnor has the burden of distinguishing general from special benefits and of proving the value of the claimed special benefits to the remainder.[225] For example, street improvements may decrease the value of residential property.[226] Although each situation is different, the courts have

(citation omitted)). Smith v. State Highway Dep't, 105 Ga. App. 245, 246, 124 S.E.2d 305, 306 (1962) (holding that there was insufficient evidence to submit a charge on "consequential benefits" to the property); People v. Loop, 127 Cal. App. 2d 786, 804, 274 P.2d 885, 898 (Cal. App. 2d Dist. 1954) (holding that the instruction on special benefits must address the benefit that is "reasonably certain to result from the construction of the work").

[218] City of Springdale v. Keicher, 243 Ark. 161, 166, 419 S.W.2d 800, 803 (1967) (finding that there was not evidence that a sewer line was a benefit and not a detriment to the subject property); Richardson v. Big Indian Creek Watershed Conservancy Dist., 181 Neb. 776, 780–81, 151 N.W.2d 283, 287 (1967) (holding that there was no error in refusing to give a jury instruction on special benefits and stating that "[i]f a special benefit exists, it must be material and capable of measurement by computation, and should be reflected in the value of the remaining land immediately after the taking"); *Podesta*, 141 Cal. App. 2d at 54, 296 P.2d at 411 (holding that action of irrigation district in sending water across the owner's property constituted a taking and there was no special benefit to the owner in connection with the taking).

[219] State *ex rel.* State Highway Comm'n v. Tate, 592 S.W.2d 777, 779 (Mo. 1980) (citation omitted) (internal quotation marks omitted) (holding that the exclusion at trial of evidence of special benefits constituted prejudicial error as "changes in direct access onto a landowner's property and changes in the highest and best use of the property are elements of special benefits which may be set off against the amount of damages in determining the amount of compensation due the landowner." (*id*. at 780)).

[220] N.C. Bd. of Transp. v. Rand*,* 299 N. C. at 482, 263 S.E.2d at 569 (holding that "evidence of benefit here was clearly not hypothetical and speculative"); Town of Sumner v. Fryar, 146 Wash. 607, 610, 264 P. 411, 413 (1928) (holding that benefits were derived from the improvement for which the land was condemned and were properly considered in assessing damages).

[221] Haynes v. City of Abilene, 659 S.W.2d 638, 641–42 (Tex. 1983) (failure to prove that benefits conferred were special) (citation omitted).

[222] State *ex rel.* State Highway Com. v. Tate, 592 S.W.2d 777, 779 (Mo. 1980) (citations omitted).

[223] State Dep't of Highways v. Miller, 182 So. 2d 155, 157 (La. App. 3d Cir. 1966) (holding that possibilities noted in the case were "too speculative to sustain a finding of special benefits"); Hootman v. Indiana, 237 Ind. 72, 143 N.E.2d 666 (1957); State v. McCann, 248 S.W.2d 17 (Mo. App. 1952) (reversing and remanding for a new trial because jury instruction that stated that compensation could be paid in the form of benefits failed to distinguish between general, specific, and speculative benefits). *See* Juliet E. Cox*, Assessing the Benefits of California's New Valuation Rule for Partial Condemnations*, 88 CAL. L. REV. 565 (2000).

[224] City of Grand Prairie v. Sisters of the Holy Family of Nazareth, 868 S.W.2d 835, 839, 840 (Tex. App. 5th Dist. 1993) (holding in a case arising out of the city's assessment of a property owner for street improvements based on a study of the value of benefits to abutting property owners that the city's special assessment ordinance was not supported by substantial evidence of special benefit.)

[225] N.C. State Highway Comm'n v. Thomas, 2 N.C. App. 679, 682, 163 S.E.2d 649, 651 (N.C. Ct. App. 1968) (condemnation of defendants' entire parking lot for use as a ramp leading to Interstate 40); Richardson v. Big Indian Creek Watershed Conservancy Dist., 181 Neb. 776, 151 N.W.2d 283 (1967); McMahan v. Carroll County, 238 Ark. 812, 814, 384 S.W.2d 488, 489 (1964)

> (We have repeatedly held that where the public use for which a portion of a man's land is taken so enhances the value of the remainder as to make it of greater value than the whole was before the taking, the owner in such case has received just compensation in benefits….) (citations omitted);

Thomson v. Kansas City, 379 S.W.2d 194, 198 (Mo. App. Kansas City Dist. 1964) (noting that there is "authority holding that certain improvements give rise to a presumption of benefit" but that "the burden of proving the existence and amount of special and peculiar benefits is on the party seeking to condemn the land" (citation omitted)).

[226] City of Grand Prairie v. Sisters of the Holy Family of Nazareth, 868 S.W.2d at 840.

attempted to identify criteria for determining when a property has been specifically injured or benefited. For example, the Supreme Court of Texas has stated:

> [An] analysis of whether an injury or benefit was common to the community involved consideration of the location of the landowner's property, the condemnor's project, and the effects of the latter. However, the concept of community injury and benefit is not primarily geographical. It is always true that the injury or benefit from a public project increases with proximity. While injury to several landowners on the same street is not community injury simply because they all suffer alike, it is also not special injury simply because others farther away do not suffer at all. Whether an injury is community cannot be decided simply by setting the size of the relevant area. "Community" in this context means not only where, but, more importantly, what kind. It is the nature of the injury rather than its location that is critical in determining whether it is community.[227]

The Supreme Court of Nebraska has stated

> [t]he right to setoff is usually allowed if it is found that special benefits result to the property owner after the construction, but the same does not follow if the benefits are merely general to the entire area…. A determination must be made by the trier of fact whether site prominence, increased traffic and possible change in use of the property after the taking, all or singularly, have increased the value of the land after the taking. The trier of fact must then determine whether the benefits, if any, are general or special. If special, they must be setoff against the damages occasioned by the taking.[228]

As for the constitutionality of state statutes requiring the deduction of the value of special benefits, the Supreme Court of Colorado has held that Colorado Revised Code Section 38-1-114(2)(d) —requiring that a trial court reduce a landowner's compensation for property taken by the amount of special benefits to the remaining property—did not conflict with the just compensation guarantee of Article II, Section 15 of the Colorado Constitution.[229] The court noted that

> [t]he General Assembly's new method requires a trial court to apply special benefits not only to reduce the amount of damages to the landowner's remaining property, which has long been approved as a form of just compensation under article II, section 15, but also to reduce the amount of compensation for property taken, which we have never before tested against our constitutional guarantee of just compensation.[230]

The court noted that the petitioners had argued that the majority of states do not "permit an award of compensation for property taken to be reduced by the amount of special benefits to the remaining property."[231] The court, however, observed that "most of the states that do not permit an award of compensation for property taken to be reduced by the amount of special benefits to the remaining property have statutes to that effect, which supports the principle that it is the General Assembly's prerogative to provide the method for calculating just compensation."[232] The court stated that its decision was based on Colorado's just compensation clause and that "both federal law and a substantial minority of states allow compensation for property taken to be reduced by the amount of special benefits to the remaining property."[233]

C.2. Rules Applicable to Deduction of Benefits

It appears that the states follow one of five rules with respect to general and special benefits.

1. In some states, benefits, whether special or general, may not be considered.
2. In other states, special benefits may be offset only against damages to the residue but not against the value of the land taken.
3. In some states, both special benefits and general benefits may be offset against damages to the remainder but not against the value of the land taken.
4. On the other hand, in some states special benefits may be offset against both the damages to the remainder and the value of the land taken.
5. Finally, some states recognize a rule that special and general benefits may be offset against both damages to the remainder and the value of the land taken.[234] A recent decision from Missouri held that it was error for the trial court to exclude at trial the Commission's evidence that the "landowners' property was suitable

[227] State v. Schmidt, 867 S.W.2d 769, 781 (Tex. 1993) (holding that no damages could be awarded for diversion of traffic, construction disruption, and decreased visibility that affected the community).

[228] State *ex rel.* Dep't of Highways v. Haapanen, 84 Nev. 722, 724, 448 P.2d 703, 705 (1968) (citations omitted).

[229] E-470 Pub. Highway Auth. v. Revenig, 91 P.3d 1038, 1041 (Colo. 2004).

[230] *Id.* at 1043.

[231] *Id.* at 1044 (*citing* State v. Enter. Co., 728 S.W.2d 812 (Tex. Ct. App. 1986) (disallowing a reduction in compensation for property taken by the amount of special benefits to the remaining property under the "adequate compensation" guarantee of the Texas Constitution); Kane v. City of Chicago, 392 Ill. 172, 175, 64 N.E.2d 506, 508 (Ill. 1946) (reasoning that "the rule has been long settled" in Illinois that compensation for property taken may not be reduced by the amount of special benefits to the remaining property).

[232] *Id.* at 1044 n.7.

[233] *Id.* at 1044 (*citing* Bauman v. Ross, 167 U.S. 548, 574, 574–75, 17 S. Ct. 966, 976, 42 L. Ed. 270, 283 (1897) (holding that the compensation for property taken may be reduced by the amount of special benefits under the Fifth Amendment's guarantee of just compensation because a landowner "is entitled to receive the value of what he has been deprived of, and no more"); State *ex rel.* Chicago B. & Q. R. Co. v. City of Kansas, 89 Mo. 34, 39, 14 S.W. 515-16 (Mo. 1886) (holding that an award of compensation for property taken may be reduced by the amount of special benefits to the remaining property).

[234] State *ex rel.* State Highway Comm'n v. Pelletier, 76 N.M. 555, 560, 417 P.2d 46, 49 (1966), (*citing* Bd. of Comm'rs of Dona Ana County v. Gardner, 57 N.M. 478, 482, 260 P.2d 682, 684 (1953) (holding that "benefits, both general and special, should be set off against damages to the remainder and against the part taken").

for residential development before the highway improvement and then commercial development after the improvement."[235] The court explained that "special benefits to the residue of a landowner's property may be set off against the award of compensation for a taking in a condemnation suit, but general benefits may not be set off."[236]

On the other hand, a different rule is stated in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corporation,*[237] in which the court held that the value of benefits may be offset against severance damages without reference to whether the benefits are general or special.[238] The court stated:

> [W]e overrule *Beveridge* [*v. Lewis,*, 137 Cal. 619, 70 P. 1083 (1902)], to the extent it holds that only "special" benefits may be offset against severance damages. We hold that in determining a landowner's entitlement to severance damages, *the fact finder henceforth shall consider competent evidence relevant to any conditions caused by the project that affect the remainder property's fair market value*, insofar as such evidence is neither conjectural nor speculative.[239]

In doing so the court acknowledged that the rule it had adopted was not the "majority view in the United States," but that the court was joining "a quite respectable minority" of jurisdictions that follow the rule now adopted by California.[240]

Of the five rules, two rules have been adopted by a majority of states, with one group of states having adopted Rule 2 and another group having adopted Rule 4. A small minority of states have adopted one of the other three rules. If one of the above rules has been adopted, then the other rules do not apply. An extensive annotation discusses which rule the states follow.[241]

A condemnor may be confronted with the question of which issues to ask that the court determine and which issues to leave for the jury's consideration. The cases do not always indicate clearly when it is for the court or the jury to determine whether a benefit is a specific or general one. Although there is authority holding that it is a question of law for the court to determine, it appears that the majority rule is that it is for the jury to decide the extent and amount of the benefit.[242] If, however, testimony is admitted and the court rules later that the item is not a special benefit, then the evidence should be stricken.

C.3. Methods of Valuation of Special Benefits

Although the courts have had difficulty distinguishing general from special benefits, the courts have formulated rules regarding the admissibility of evidence to prove value. Once again, the three approaches to the determination of value most commonly accepted are the market data or comparable sales approach, the cost approach, and the income approach.[243] The rules governing the use of these approaches may vary from one ju-

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[235] State *ex rel.* Mo. Highway and Transp. Comm'n v. Delmar Gardens, 872 S.W.2d at 181.

[236] *Id.* at 180 (citations omitted).

[237] 16 Cal. 4th 694, 941 P.2d 809 (1997).

[238] In a condemnation action the transit agency sought to prove that the landowner's remaining property would increase in value as a result of proximity to the station.

[239] 16 Cal. 4th at 718, 941 P.2d at 824 (footnote omitted) (emphasis supplied).

[240] *Id.* (*citing* Ill. State Toll Highway Auth. v. Amer. Nat'l Bank & Trust Co. of Chicago*,* 162 Ill. 2d 181, 642 N.E.2d 1249 (1994); Mich. State Highway Comm'n v. Frederick, 32 Mich. App. 236, 188 N.W.2d 193 (1971); Brand v. State, 21 A.D. 2d 727, 250 N.Y.S.2d 158 (N.Y. App., 3d Dep't 1964). *See also* N.C. GEN. STAT. § 136-112 (stating that when the North Carolina State Board of Transportation exercises power of eminent domain to condemn private property for public use, both general and special benefits may be deducted from owner's condemnation award).

[241] 145 A.L.R. 1 (2007 Supp.).

[242] State v. Fullerton, 177 Or. App. 254, 266, 34 P.3d 1180, 1186 (Ore. Ct. App. 2001) (holding that there must be some evidence, other than the fact of the improvement itself, that demonstrates special benefits to reduce damage to the property not taken and that in this case the evidence did not provide a basis for a jury instruction on special benefits) (citing Selbee v. Multnomah County, 247 Or. 390, 430 P.2d 561, 563 (1967)); Big Pool Holstein Farms, Inc. v. State Roads Comm'n, 245 Md. 108, 117, 225 A.2d 283, 288 (1967) (stating that "general rule in condemnation proceedings [is] that the jury should *not consider either increases or diminution in value because of the public project* for which the condemned property is acquired" (emphasis supplied)); Martin v. Newton County, 239 Ark. 769, 770, 394 S.W.2d 133, 135 (1965) (stating that question of whether enhancement "special and peculiar to the particular [to the] property remaining…after the taking is a question of fact"); Thomson v. Kansas City, 379 S.W.2d 194, 197 (Mo. Ct. App. Kansas Cty. Dist. 1964) (explaining that jury must "consider the quantity and value of the land taken by the [condemnor] for a right of way and the damages to the whole tract by reason of the road running through it…and deduct from these amounts the benefits, if any, peculiar to the said tract of land, arising from the running of the road through the same"); State v. Ellis, 382 S.W.2d 225, 235 (Mo. Ct. App.,Springfield Dist. 1964) (holding that condemnor failed to prove special benefits); State v. Vorhof-Duenke Co., 366 S.W.2d 329, 337–38 (Mo. 1963) (holding that "a highway constructed where none had been before presumptively conferred a special benefit on the adjoining land, but whether it actually did was a question for the jury to determine"); Hawaii v. Mendonca, 46 Haw. 83, 85, 375 P.2d 6, 8 (1962) (noting that in Hawaii, "except in projects involving the widening or realignment of existing ways, the [condemnor] has the statutory right to offset special benefits to the remaining land in partial taking cases against the total damages to the property owner, including the value of the land taken"); Backer v. City of Sidney, 165 Neb. 816, 821, 87 N.W.2d 610, 616 (1958) (holding that there was prejudicial error in submitting issue of special benefits to the jury because evidence failed to show "any special benefits accrued to the plaintiffs' property by virtue of the construction of the [underpass]….").

[243] Nat'l Auto Truckstops, Inc. v. State of Wis., Dep't of Transp., 263 Wis. 2d 649, 667, 665 N.W.2d 198, 207 (2003) (the court noting that Wisconsin law holds that income evidence is never admissible if there is evidence of comparable sales).

risdiction to another, but the proper use of one or more of these approaches is the key to proving benefits or disproving damages.

C.3.a. Comparable Sales Approach

The key is to use comparable sales to establish both the value of the whole and the value of the remainder.[244] Sales reflecting enhanced values resulting from the improvement can be used to rebut a claim of damages, as well as to show possible benefits. The usual rules of comparability apply in both valuations. Characteristics of the comparison property, such as size, shape, terrain, distance from the subject remainder, and time of the sale, must be examined to determine comparability. In a particular jurisdiction, it may be largely discretionary with the court concerning whether a sale has the necessary elements of comparability. An appraiser's opinion that the remainder will sell for more or less because of the improvement's construction or proposed construction carries far less weight if the opinion is not supported by market data.

C.3.b. Cost Approach

The most likely use for the cost approach would be with respect to the cost of building a road that was necessary for the development of a property. For example, if a remainder were commercial in nature but could not be developed until a road was constructed providing access to the property, then the condemnor may be permitted to show the cost of building a road on the property taken if it in fact provided such access. Even if the appraiser is not permitted to testify regarding the cost of the road, the appraiser should be permitted to testify concerning the increased value of the remaining land if new access were provided.[245]

C.3.c. Income Approach

The income approach will be of limited application in establishing benefits as there will be little or no data on the income of the property remaining after the improvement.[246]

One court has stated that

> unquantified lost business profits are a fact that can be *generally* considered in determining whether there has been a diminution in value in the land that remains after a partial taking…. [A]lthough the jury may consider adverse effects resulting from condemnation that decrease the value of the remaining property, these effects "are not separate items of damage, recoverable as such, but are relevant only as circumstances tending to show a diminution in the over-all fair market value of the property…." "[D]iminished value of [condemned] land…constitutes a proper item for inclusion in the award, but a business *per se* is not 'property'…requiring compensation for its taking under the power of eminent domain…." Allowing the jury to consider that the land may be less valuable due to the condemnation's effect on the landowner's business does not require quantified evidence of lost profits also be admitted.[247]

As discussed previously, the income approach converts net income attributable to the real estate into an indication of value by the use of a capitalization rate. For example, a property used for a service station that has experienced an increase in gasoline sales because of a highway improvement presumably would experience a corresponding increase in land value. However, the income approach is very sensitive and seemingly minor adjustments to income and expenses may result in major changes in the indication of value. If the income approach to determine the value of benefits is applied, one must be careful to separate the influences on income that are caused by the improvement from other influences.

In sum, the distinction between general and special benefits is difficult to articulate. The attorney and witnesses should concentrate on the value of the remaining land and the reasons for it so that the court and the jury will be able to comprehend and find a value for whatever benefits have accrued.

D. EXCLUSION OF INFLUENCE CAUSED BY THE PUBLIC IMPROVEMENT ON VALUATION

D.1. General Rules

Usually public improvements are planned and announced several years in advance of actual construction. Public knowledge of a projected improvement may affect the value of land needed for an improvement, as well as the land in proximity to it. The influence may be positive and increase property values or negative and decrease property values. If enhancement in value because of the project is allowed, the condemning authority presumably will pay more for property that must be acquired.

In some states enhancement in value caused by the public improvement is a proper element of just compen-

[244] *Id.* at 666, 665 N.W.2d at 207 (holding in a partial taking that resulted in access via only a frontage road that it was error to exclude appraisals that considered change in access but it was proper for the trial court to exclude that evidence of income, which is never admissible if there is evidence of comparable sales).

[245] Comm'r of Transp. v. Candlewood Valley Country Club, Inc., 2005 Conn. Super. LEXIS 3308, at *21, 28 (utilizing cost approach in part); Comm'r of Transp. v. Jarvis Realty Co., 2002 Conn. Super LEXIS 4022, at *21 (Dec. 13, 2002) (Unrept.) (Although the cost method was used in part the defendant's traffic engineer conceded that its patrons were safer in that they had "easier access because of the traffic signal [and he agreed that the department of transportation had] accomplished its mission by making Route 83 safer for bowling alley customers coming in and out of that bowling alley.") (internal quotation marks omitted).

[246] Dep't of Transp. v. M. M. Flower, Inc., 361 N.C. 1, 13, 637 S.E.2d 885, 894 (2006) ("While the comparable sales method is the preferred approach, the next best method is capitalization of income when no comparable sales data are available.")

[247] Dep't of Transp. v. M. M. Fowler, Inc., 361 N.C. at 14, 637 S.E.2d 895 (citations omitted) (emphasis in original).

sation and may not be denied to the landowner. The rationale is that it is inequitable for the owners of land taken for the improvement to be denied the increased value that inures to the benefit of the neighboring owners whose land is not taken. In other states it is held that the public should not be required to pay a property owner for enhancement caused by an improvement that has increased the land's value. It may be argued that an increase in value of the land taken is not because of benefits accruing to the land but rather because of speculation concerning what the government eventually may pay for the land.

The general rule when there is an enhancement because of project influence is that such enhancement in value is not admissible.[248] As stated in *City of San Diego v. Barratt American Inc.,*[249]

> [a]lthough a property owner is entitled to receive the fair market value of the property condemned, the owner is not entitled to more…. Accordingly, when assessing fair market value (including its highest and best use and the reasonable probability of a zoning change), any increase or decrease in the property's value *caused by the project for which the property is condemned* may not be considered…. [S]uch project-caused increases or decreases must be excluded from the just compensation calculus…. The probability of rezoning or even an actual change in zoning which results from the fact that the project which is the basis for the taking was impending cannot be taken into account in valuing the property in a condemnation proceeding…. Therefore, changes in land use, to the extent that they were influenced by the proposed improvement, [are] properly excluded from consideration in evaluating the property taken.'" [250]

However, as discussed below, "under limited circumstances, a property owner *may* properly be compensated for the increase in value the property experienced in anticipation of the benefits of a proposed improvement, so long as it was not *reasonably probable* the property being evaluated was anticipated to be taken for the improvement."[251] Thus, in the majority of cases a determination of whether enhancement will be allowed or denied depends on what some courts refer to as the "probability of inclusion" test or rule.[252]

First, as held by the U.S. Supreme Court in the early case of *Shoemaker v. United States*,[253] if in the case of a condemnation of land for a single unenlarged project the probability exists at the outset of the project that the land will be included, all enhancement in value caused by the improvement will be denied.[254] The recent Michigan case of *Department of Transportation v. Rooks Family Trust*[255] involved Section 20(1) of the Uniform Condemnation Procedures Act, Michigan Compiled Laws 213.70(1) [256] and a dispute over whether the defendants "were entitled to compensation for the increased land value from speculation surrounding the M-6 [highway] project over the two decades that the project was under development." [257] The court rejected the defendants' argument that "these provisions precluded compensation for any increase in land value after general knowledge of the *imminence of the M-6 project*." [258] The "[d]efendants argued that the plain language of the statute only precludes the increase in value after general knowledge of the *imminence of the condemnation of their property in particular*."[259]

However, the court held that "our courts have long recognized that '[w]here condemnation proceedings tend to increase the value of property, the property

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[248] *See* City of San Diego v. Barratt Am. Inc., 128 Cal. App. 4th 917, 943, 27 Cal. Rptr. 3d 527, 544 (Cal. App. 4th Dist. 2005) (stating that "enhancement value should not be includable in 'just compensation' whenever the condemned lands 'were probably within the scope of the project from the time the Government was committed to it'") (citation omitted), *review denied*, 2005 Cal. LEXIS 8751 (Cal. 2005). *See also* Dep't of Transp. v. Family Trust, 2006 Mich. App. LEXIS 2943, at *9 (Oct. 5, 2006) (Unrept.), *appeal denied*, 2007 Mich. LEXIS 387 (Mich. 2007).

[249] 128 Cal. App. 4th 917, 27 Cal. Rptr. 3d 527 (Cal. App. 4th Dist. 2005).

[250] *Id.* at 934, 27 Cal. Rptr. 3d at 537 (citations omitted) (emphasis in original).

[251] *Id.* at 934, 27 Cal. Rptr. 3d at 537–38 (emphasis supplied).

[252] *Id.* at 944, 27 Cal. Rptr. 3d at 545.

[253] 147 U.S. 282, 13 S. Ct. 361, 37 L. Ed. 170 (1893).

[254] 147 U.S. at 303–04, 13 S. Ct. at 392–93, 37 L. Ed. at 186–87; City of San Diego v. Rancho Penasquitos P'ship, 105 Cal. App. 4th 1013, 1039, 130 Cal. Rptr. 2d 108, 127 (Cal. App. 4th Dist. 2003), *review denied*, 2003 Cal. LEXIS 3061 (Cal. 2003); Valdez v. 18.99 Acres, 686 P.2d 682, 689 (Alaska. 1984) ("'If the condemned land was probably within the scope of the governmental project for which it is being condemned at the time the Government became committed to that project, then the owner is not entitled to any increment in value occasioned by the Government's undertaking the project.'") (citation omitted). *See also* City and County of Denver v. Smith, 152 Colo. 227, 381 P.2d 269 (1963); Williams v. City and County of Denver, 147 Colo. 195, 363 P.2d 171 (1961); Cole v. Boston Edison Company, 338 Mass. 661, 157 N.E.2d 209 (1959); Olson v. United States, 292 U.S. 246, 54 S. Ct. 704, 78 L. Ed. 1236 (1934); R.I. Hosp. Trust Co. v. Providence County Court House Comm'n, 52 R.I. 186, 189, 159 A. 642, 643 (1932) ("The rule is that the owner of land taken by right of eminent domain is not entitled to recover any increase in the value of this land, due to the fact that the land was known to be within the area designated for condemnation and was certain to be taken.").

[255] 2006 Mich. App. LEXIS 2943 (Mich. Ct. App. 2006) (Unrept.), *appeal denied*, 477 Mich. 1032, 727 N.W.2d 611 (2007).

[256] The section provides:

> A change in the fair market value before the date of the filing of the complaint which the agency or the owner establishes was substantially due to the general knowledge of the imminence of the acquiring by the agency, other than that due to physical deterioration of the property within the reasonable control of the owner, shall be disregarded in determining fair market value. Except as provided in section 23, [MCL 213.73] the property shall be valued in all cases as though the acquisition had not been contemplated.

[257] 2006 Mich. App. LEXIS 2943, at *2.

[258] *Id.* at *3 (emphasis in original).

[259] *Id.* (emphasis in original).

owner is not entitled to the increased value'"[260] and that the statutory provision "prohibits consideration of any changes in market conditions that are 'substantially due' to the 'general knowledge' of the 'imminent' condemnation of the property…. 'Instead, with the exception of enhancement in value of the remainder of a partially taken parcel, [MCL 213.73,] the property shall be valued in all cases as though the acquisition had not been contemplated.'"[261]

The second situation arises when the subject property is not included within the scope of the original project but the scope is enlarged subsequently to include the condemned land. Whether enhancement in value is allowed depends on the probability at the outset that the project would be enlarged subsequently to include the subject land. Some courts have held that if at the outset of the public improvement it was probable that the initial project would be enlarged and that land adjacent thereto would be taken for the enlarged project, then no increase in value may be allowed to owners of land subsequently taken because of the project's enlargement.

> If a distinct tract is condemned, in whole or in 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. If, however, 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 any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.[262]

Similarly, as held more recently in *Valdez v. 18.99 Acres*,[263]

> whenever it becomes likely that the property will be condemned—whether or not the property was originally within the project's scope—project-enhanced value ceases to be compensable…. The rule thus prevents property owners from receiving many unjustified windfalls, as when, for example, formal condemnation of property which everyone knows will be taken is delayed…. We believe that this rule properly separates general government-caused value enhancement from the specific situations in which a government may well have to pay twice for its preliminary project work—once directly, and again as compensation for the value the preliminary work adds to condemned property.[264]

On the other hand, if an enlargement of a project is determined to be an independent project that was not conceived as part of the original improvement, then the owners of land taken later are entitled to enhancement in value caused by the original improvement.[265] As held by the U.S. Supreme Court,

> [t]he question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities.[266]

Thus, the issue of whether enhanced value is allowable depends on whether at the time of the project's announcement land that is later taken probably would be taken as part of the original project.

The third situation is presented when the general location of the improvement is known from the outset but the probability that the subject land will be included does not appear until a later stage in the planning and development of the improvement. There is some authority holding that enhancement in this instance will be allowed until the date that it became evident that the subject land would probably be taken for the project; thus, enhancement in value is denied for the period after the date that it is known that the subject land will be taken for the project.

In this connection, in *Merced Irrigation Dist. v. Woolstenhulme,*[267] involving condemnation to improve a lake to prevent seasonal fluctuation in its water level, the trial court permitted the jury to consider enhancement in value resulting from public knowledge of the project prior to January 1, 1965, but instructed the jury that it was not to consider any enhancement in value caused by public awareness of the project that occurred afterward.

In upholding the action of the trial court, the Supreme Court of California stated:

> If, on the other hand, when plans for the proposed project first became public and when the consequent enhancement of land values began, the probability was that the land in question would not be taken for the public improvement, the landowner would be entitled to compensation for some "project enhancement." During that period when it was not likely that his land would be condemned,

[260] *Id.* at *8 (citation omitted).

[261] *Id.* at *11 (some internal quotation marks omitted).

[262] United States v. Miller, 317 U.S. 369, at 376–77, 63 S. Ct. 276, at 281, 87 L. Ed. 336, at 344. *See also* United States v. 2353.28 Acres of Land, 414 F.2d 965, 969, 971 (5th Cir. 1969) (allowing enhancement in value).

[263] 686 P.2d 682 (Alaska. 1984).

[264] *Id.* at 689 (citations omitted).

[265] *See* City of San Diego v. Barratt Am. Inc., 128 Cal. App. 4th at 934, 27 Cal. Rptr. 3d at 537. *See also* United States v. Goodloe, 204 Ala. 484, 86 So. 546 (1920); Nichols v. City of Cleveland, 104 Ohio St. 19, 135 N.E. 291 (1922); Virginia & T.R.R. v. Lovejoy, 8 Nev. 100 (1872).

[266] United States v. Miller, 317 U.S. at 377, 63 S. Ct. at 281, 87 L. Ed. at 345. *See also 2353.28 Acres of Land*, 414 F.2d at 969, 971.

[267] 4 Cal. 3d 478, 483 P.2d 1 (1971).

> the fair market value of the property may have appreciated because of anticipation that the land would partake in the advantages of the proposed project. The owner would be entitled to such increase in value. On the other hand, once it becomes reasonably foreseeable that the land is likely to be condemned for the improvement, "project enhancement," for all practical purposes, ceases. *Thus, in computing "just compensation" in such a case, a jury should only consider the increase in value attributable to the project up until the time when it became probable that the land would be needed for the improvement.*[268]

The court in the *Woolstenhulme* case refined the rule that a property owner is never entitled to compensation resulting from enhancement in value caused by the project "by distinguishing three different types of project-enhanced value."[269]

> (1) the worth of *property known to be within the project* may rise when the land is valued *as part of* the proposed improvement rather than as a separate tract of land; (2) the value of *property expected to be condemned* may rise because of the anticipation that the condemner will be required to pay an inflated price for the land at the time of condemnation; and (3) the value of *property expected to be outside of the proposed improvement* may rise because it is anticipated that the land will reap the benefits resulting from *proximity* to the coming project.[270]

As a California appellate court later held, "a property owner is entitled to be compensated for appreciating property value under the third scenario."[271] Several courts follow the *Woolstenhulme* exception or at least cite it with apparent approval.[272]

In *City of San Diego v. Barratt American Incorporated, supra,* in a partial taking case, the trial court "ruled in favor of the property owners as to the method of valuation, disregarding the impact of the project on value…."[273] The property taken was in the North City Future Urbanizing Area (NCFUA), a mostly undeveloped area established to avoid premature urbanization. Two interesting methodologies were advanced. The owners' approach or "hypothetical construct for disregarding the impact of the Project on the value of the taken property was founded on the fiction that the Project had never been conceived or planned (the no Project construct)."[274] The owners argued "that development pressures and the need to implement a long list of City's land use priorities would have caused City to remove the NCFUA and subarea III from its agricultural *holding* status to permit higher density development even without the Project…."[275] The city, on the other hand, presented a different "hypothetical construct for factoring out the impact of the Project on the value of the taken property, the abandoned Project construct, [which] was founded on the fiction that the Project was abruptly abandoned on the November 16, 2001 valuation date."[276]

The owners relied on the *Woolstenhulme* exception, discussed above, with respect to valuation and project enhancement. In *Barratt American, Inc*., the appellate court held that the

> trial court did not abuse its discretion by excluding the City's abandoned Project construct because that construct did *not* disregard the impact of the Project on the value of the taken property. To the contrary, this construct posited that the Project's *existence*—e.g., its presence up to November 16, 2001, and the consequences caused by its abandonment (the five-to-seven year moratorium)—negatively impacted the probable upzoning of Owners' land because the Project's existence preempted the development of the alternative transportation plans essential to making it reasonably probable the taken property

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[268] *Id.* at 497, 483 P.2d at 13–14 (footnote and citations omitted) (emphasis supplied).

[269] City of San Diego v. Barratt Am. Inc., 128 Cal. App. 4th at 935, 27 Cal. Rptr. 3d at 538, quoting from 4 Cal. 3d at 490.

[270] *Id* (citation omitted) (internal quotation marks omitted) (emphasis in original).

[271] *Id.*

[272] *Valdez v. 18.99 Acres,* 686 P.2d at 690 n.15 ("To guard against interminable wrangles over the instant at which a particular property is 'selected,' and to recognize that property may be likely to be condemned long before formal 'selection' takes place, we adopt Woolstenhulme's "probability" test.") (citation omitted)); City of Phoenix v. Clauss, 177 Ariz. 566, 569, 869 P.2d 1219, 1222 (Ariz. Ct. App. 1994)

> (The "project influence doctrine" (also referred to as "project enhancement") holds that property may not be charged with a lesser or greater value at the time of taking, when the change in value is caused by the taking itself or by anticipation of appreciation or depreciation arising from the planned project…. The doctrine applies only to properties that were "probably within the scope of the project from the time the government was committed to it.")

City of Kenai v. Burnett, 860 P.2d 1233 (Alaska 1993); State *ex rel.* State Highway Dep't v. Shaw, 90 N.M. 485, 486, 565 P.2d 655, 656–57 (N.M. 1977) ("'If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating a probable increase in value due to the Government's activities.'") (*quoting Miller*, 317 U.S. at 377, 63 S. Ct. at 281, 87 L. Ed. at 344 and *citing* United States v. 2,353.28 Acres of Land*,* 414 F.2d 965 (5th Cir. 1969)). *See also* State, Dep't of Highways v. Colby, 321 So. 2d. 878 (La. App. 1st Cir. 1975), application denied, 325 So. 2d 278 (La. 1976); Merced Irrigation Dist., 4 Cal. 3d 478, 93 Cal. Rptr. 833, 483 P.2d 1; United States v. 172.80 Acres of Land, etc., 350 F.2d 957 (3d Cir. 1965).

In Texas, for example, the rule is somewhat different.

> The date upon which the market no longer allows project enhancement is delineated by variant tests. In some jurisdictions the landowner is entitled to recover project enhancement only until his property is probably within the scope of the project…More is required under Texas law: enhancement is allowed up to the time that the condemnor manifests a *definite purpose* to take the particular land.

Ft. Worth v. Corbin, 504 S.W.2d 828, 831 (Tex. 1974) (citations omitted) (emphasis supplied). *See also* Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623, 627 (Tex. 2002) (*citing Corbin*).

[273] City of San Diego v. Barratt Am. Inc., 128 Cal. App. 4th at 917, 27 Cal. Rptr. 3d at 527, 529 (Syllabus).

[274] *Id.* at 928, 27 Cal. Rptr. 3d at 532.

[275] *Id.*

[276] *Id.*

would have been upzoned by (or shortly after) the November 16, 2001 valuation date.[277]

In sum,

> when assessing fair market value (including its highest and best use and the reasonable probability of a zoning change), any increase or decrease in the property's value *caused by the project for which the property is condemned* may not be considered. Thus, to the extent the fair market value of the property condemned increases or decreases because of the project for which it is condemned, or the eminent domain proceeding in which the property is taken, or any preliminary actions of the condemnor relating to the taking of the property, such project-caused increases or decreases must be excluded from the just compensation calculus.[278]

Thus, the third situation presented is when the general location of the improvement is known from the outset but the probability that the subject land will be included does not appear until a later date in the planning of the project. Enhancement in value may be allowed until that date in the project's planning that it becomes evident that specific land probably will be taken for the project; appreciation in value of such land after the said date should be denied.[279] Consequently, in California an "owner *may* properly be compensated for the increase in value the property experienced in anticipation of the benefits of a proposed improvement, so long as it was not reasonably probable the property being evaluated was anticipated to be taken for the improvement."[280]

D.2. Effect of 42 U.S.C. § 4651(3)

Congress addressed the problem of project influence in the URA. Section 4651(3) (2007) provides:

> Before the initiation of negotiations for real property, the head of the Federal agency concerned shall establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property. The head of the Federal agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount he established as just compensation. Where appropriate the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

The foregoing section is mandatory in nature but is qualified by 42 U.S.C. § 4655(a)(1) (2007):

> a) Notwithstanding any other law, the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with, an acquiring agency under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property on and after January 2, 1971, unless he receives satisfactory assurances from such acquiring agency that—
>
> (1) in acquiring real property it will be guided, to the greatest extent practicable under State law, by the land acquisition policies in section 4651 of this title and the provisions of section 4652 of this title….

It appears that 42 U.S.C. § 4655(a)(1) would allow a federal agency to approve an amount that is in conflict with § 4651(3) if the law of the affected state permitted it to do so.[281] As of 2007, there still have been no cases interpreting the interaction of these two sections and the meaning of the words "greatest extent possible under state law." Apparently the interaction of the two sections does not appear to have presented an issue.

E. EFFECT OF ZONING AND PROPERTY RESTRICTIONS ON PROPERTY VALUES

In *Michigan Department of Transportation v. Haggerty Corridor Partnership,*[282] a partial taking case, the issue was whether the trial court properly allowed defendants to present evidence that their property had been rezoned from residential to commercial after the taking.[283] The court held that the evidence was "irrelevant to the issue of the condemned property's fair market value at the time of the taking."[284] The defendants at trial had sought to establish that they and other knowledgeable persons in the real estate market knew at the time of the taking that the property "was likely to be rezoned to allow for its planned use as an office park."[285]

The court held that

> because information concerning events occurring after the condemnation could not possibly have influenced the conduct of a willing buyer on the date of the taking, it can never be logically, and thus legally, relevant in determining the price that the theoretical willing buyer and seller would have agreed upon on the date of the taking.[286]

Furthermore, "[a]lthough it is true that some courts have, indeed, permitted the introduction of posttaking

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[277] *Id.* at 937, 27 Cal. Rptr. 3d at 540.

[278] 128 Cal. App. 4th at 934, 27 Cal. Rptr. 3d at 537.

[279] *Id.* (stating that "to the extent the fair market value of the property condemned increases or decreases because of the project for which it is condemned, or the eminent domain proceeding in which the property is taken, or any preliminary actions of the condemnor relating to the taking of the property, such project-caused increases or decreases must be excluded from the just compensation calculus").

[280] 128 Cal. App. 4th at 934, 27 Cal. Rptr. 3d at 537–38 (emphasis in original).

[281] *See also* 23 C.F.R. pt. 710 (2007).

[282] 473 Mich. 124, 700 N.W.2d 380 (Mich. 2005).

[283] *Id.* at 126, 700 N.W.2d at 381.

[284] *Id.* at 126, 700 N.W.2d at 382–83.

[285] *Id.* at 128, 700 N.W.2d at 382–83.

[286] *Id.* at 142, 700 N.W.2d 390.

rezoning evidence, for the reasons we have expressed, we reject the reasoning employed by these courts."[287]

In *City of San Diego v. Rancho Penasquitos Partnership,*[288] also a partial taking case, the city maintained at trial

> that because it had a zoning restriction in place prohibiting higher density development of properties such as [the Rancho Penasquitos Partnership's] that were in the potential path of SR-56 until the SR-56 project was approved, a zoning change was not possible absent the SR-56 project, and therefore the property must be valued at its current zoning for agricultural use."[289]

The court disagreed:

> Here, we have a zoning restriction imposed by the City, the express purpose of which was to prevent development in areas that might later be condemned for the SR-56 project. Thus, this zoning restriction falls squarely under the rule set forth in *Southern Pacific* that evidence of a zoning restriction is inadmissible to show a lower value to the condemned property where (1) the restriction is imposed to freeze or depress the value of land that a governmental agency seeks to condemn, and (2) the same entity is both the condemner and the authority responsible for that restriction.[290]

The court held that the city could not "enact restrictions on property it seeks to condemn for the express purpose of preventing development and thereby freeze or depress property values" and thereafter argue that the zoning restriction prevents a higher and best use of the property.[291]

F. VALUATION OF CONTAMINATED PROPERTY

F.1. Evaluating Possible Contamination Prior to Acquisition

Because state transportation agencies increasingly are encountering hazardous waste when acquiring property for highway construction, they should consider the appropriate method for determining the value of such property.[292] Although it may be possible to align a highway project to avoid contaminated property, a transportation agency may have no option other than to acquire contaminated property for the project. If so, an evaluation of whether property may be contaminated should be made as soon as possible in the planning process.

Some states have standards for evaluating the environmental condition of property prior to its acquisition.[293] The U.S. Environmental Protection Agency (EPA) maintains a database of potentially contaminated sites pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act[294] (CERCLA), known as the CERCLA Information System

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[287] *Id.* at 144, 700 N.W.2d 391 (*citing* State by State Highway Comm'r v. Gorga, 26 N.J. 113, 118, 138 A.2d 833 (1958)).

[288] 105 Cal. App. 4th 1013, 130 Cal. Rptr. 2d 108 (Cal. App. 4th Dist. 2003).

[289] *Id.* at 1017, 30 Cal. Rptr. 2d at 111.

[290] *Id.* at 1032, 130 Cal. Rptr. 2d at 122–23.

[291] *Id.* at 1033, 1035–37, 130 Cal. Rptr. 2d at 123, 124–6, (*citing* United States v. Certain Lands in Truro, 476 F. Supp. 1031 (D. Mass. 1979); Dep't of Pub. Works & B. v. Exchange Nat'l Bank, 31 Ill. App. 3d 88, 334 N.E.2d 810, 818 (Ill. Ct. App. 1975); Bus. Ventures, Inc. v. Iowa City, 234 N.W.2d 376 (Iowa 1975); Bd. of Comm'rs v. Tallahassee Bank and Trust Co., 108 So. 2d 74 (Fla. App., 1st Dist. 1959)). *See* Annotation, *Zoning as a Factor in Determination of Damages in Eminent Domain*, 9 A.L.R. 3d 291 (2007 Supp.).

[292] With respect to access to contaminated properties, see James S. Teel, Problems of Access to Contaminated Properties for Evaluation, Transportation Research Board, 74th Annual Meeting (Jan. 1995).

[293] *See* The Real Properties Group, *USEPA Creates New Standard for Pre-Acquisition Due Diligence to Replace ASTM Phase I ESA's*, *available at* http://www.gibbonslaw.com/news_publications/articles.php?action=display_publication&publication_id=1588 (last accessed on Aug. 30, 2007). *See also*, U.S. Environmental Protection Agency, *All Appropriate Inquiries Criteria Analysis / Comparison to State, Federal, and Commercial Assessment Approaches*, *available at* http://www.epa.gov/swerosps/bf/aai/assessappr.htm (last accessed on Aug. 30, 2007). *See* Standards and Practices for All Appropriate Inquiries, 70 Fed. Reg. 210 (Nov. 1, 2005); U.S. Environmental Protection Agency, Standards and Practices for All Appropriate Inquiries, 40 C.F.R. § 312 (2007).

[294] As noted in City of Mishawaka v. Uniroyal Holding Inc., 2006 U.S. Dist. LEXIS 4372, at * 11 (N.D. Ind. 2006),

> CERCLA creates two distinct causes of action for cost incurred in cleaning up hazardous waste: § 107(a), 42 U.S.C. § 9607(a), establishes liability and permits a cause of action for direct cost recovery by a party that incurs cost in cleaning up a contaminated site; § 113(f) governs the apportionment of liability and permits a cause of action for contribution among the parties responsible for the contamination.

(Citation omitted).

Although beyond the scope of this chapter on valuation, it may be noted that CERCLA imposes liability for costs on four categories of "persons" in regard to cleaning up hazardous wastes:

> (1) current owners or operators of a facility; (2) owners or operators at the time of disposal; (3) persons who arranged for disposal or treatment, or for transportation for disposal or treatment; and (4) transporters. 42 U.S.C. § 9607(a). …Because CERCLA is a remedial, rather than a fault-based statute, a person, including the government, may be held fully liable for clean-up costs based solely on their status as a potentially responsible party, even if the person neither caused nor contributed to the release of hazardous substances at the site.

Moden v. United States, 60 Fed. Cl. 275, 277 n.1 (Ct. Cl. 2004) (dismissal of inverse condemnation claim based on a trichloroethylene (TCE) contamination plume from Ellsworth Air Force Base because the landowners could not demonstrate that the contamination of their property was the foreseeably direct, natural, or probable consequence of the Air Force's use of TCE at the base) (some citations omitted). *See* Jill D. Neiman, *Easement Holder Liability Under CERCLA: The Right Way to Deal with Rights-of-Way,* 89 MICH. L. REV. 1233, 1240 (1991) (noting that as of the time of the article no cases had been located regarding whether easement holders may be held liable as owners under CERLCA).

or CERCLIS.[295] State environmental agencies may also maintain a list of sites, as well as a list of sites being investigated for possible inclusion on a state priority list. State and local health departments may have information regarding incidents in which hazardous substances were released at a particular site.[296]

F.2. Admissibility of Evidence of Contamination and Cost to Remediate Property

F.2.a. The Majority Rule

Although "[a] majority of courts…admit evidence of [environmental] contamination in the eminent domain trial,"[297] as discussed below, some courts have taken a different approach.[298] As summarized in one article,

> [m]ost courts do admit evidence of environmental contamination, reasoning that it is relevant to the condemned property's fair market value. Some, however, exclude it entirely, reasoning that the condemnor could recover its remediation costs in an environmental law action, which is the appropriate forum for determining such liability. More recently, still other courts have taken a compromise position, limiting contamination evidence to that which is probative of the property's value in a remediated state, and then allowing some of the condemnation award to be escrowed until environmental liability has been determined.[299]

The majority rule is that evidence of contamination and the cost to remediate the subject property is admissible because contamination is relevant to determining a property's value.[300] It may be argued that "[e]xcluding contamination evidence, as a matter of law, is likely to result in a fictional property value—a result that is inconsistent with the principles by which just compensation is calculated."[301]

Thus, in the early case of *Redevelopment Agency of the City of Pomona v. Thrifty Oil Company,*[302] the city had acquired possession of a former gas station and had spent funds to clean up petroleum contamination. At trial the city's appraiser testified that the cleanup costs had exceeded the value of the property and that the property had only minimal value.[303] The property owner's appraiser, claiming that the city's costs were excessive, deducted only a nominal amount for cleanup. Based on the opinions of other experts who claimed that the cleanup could have been done for a lower price, a court-appointed appraiser deducted a sum less than that actually spent by the city.[304]

On review the appellate court stated in a footnote that

> [a]fter examining the record and digesting the expert's discussions as to the different methods of remediation and the respective costs of each, we cannot agree with Thrifty's suggestion that [the] City engaged in "wasteful

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[295] U.S. Environmental Protection Agency, *Environmental Data Registry*, available at http://www.epa.gov/edr/ (last accessed on Aug. 30, 2007).

[296] There are other considerations that may be noted. For example, if a transportation agency makes the cost solely a cost-recovery issue, the agency may risk having the court find that recovery of cost from the current property owner or the offset of the cost against the fair market value of the property in the condemnation action is barred either by the agency failing to follow applicable regulations or by the owner showing that he or she is an innocent landowner. In such a case, the agency would be left having to pay the owner the value of the property as if uncontaminated and having to incur the cost of cleanup before or during construction. Of course, if the owner is found to be an innocent landowner, the agency may still have the opportunity to pursue prior owners for the cleanup cost. On the other hand, if the cost can be dealt with as an appraisal problem the owner does not have the argument that the owner is not liable for the cleanup costs. As a practical matter, if an owner were to sell the property, a willing buyer would take into account the cost attributable to the contamination. If the owner is not responsible for the contamination, the owner's recourse is to incur the cleanup costs himself or herself and then pursue the former owner or owners and any other responsible parties for what the owner has lost.

[297] 7A NICHOLS ON EMINENT DOMAIN § 13.B.03. *See* New York v. Mobil Oil Corp., 2 A.D. 3d 77, 783 N.Y.S.2d 75 (N.Y. App. 2d Dep't 2004) (granting a motion in limine to exclude evidence of diminished value because of cleanup and remediation but ordering that the condemnation award be held in escrow pending the outcome of the companion action in which the city sought to recover costs and damages for the remediation).

[298] *See* Michael L. Stokes, *Valuing Contaminated Property in Eminent Domain: A Critical Look at Some Recent Developments,* 19 TUL. ENVTL. L. J. 221 (2006).

[299] Stokes, *supra* note 298, at 224–25.

[300] Stokes, *supra* note 298, at 225 (*citing* State *ex rel.* Dep't of Transp. v. Hughes, 162 Or. App. 414, 986 P.2d 700 (Or. Ct. App. 1999) (petroleum-related contamination); Finkelstein v. Dep't of Transp., 656 So. 2d 921 (Fla. 1995) (holding that if the owner is entitled to reimbursement of remediation costs, the condemned property should be valued as if the contamination cleanup had been completed but testimony about contamination stigma and its effect on value is allowed); State *ex rel.* Dep't of Transp. v. Brandon, 898 S.W.2d 224 (Tenn. Ct. App. 1994) (evidence of contamination and cost of reasonable steps to remedy the contamination is admissible and relevant to the issue of fair market value); City of Olathe v. Stott, 253 Kan. 687, 861 P.2d 1287 (1993) (holding that the Kansas Storage Tank Act does not preempt general statutes regarding eminent domain, meaning that evidence of contamination is admissible in determining the fair market value of the property that was taken by eminent domain); Redevelopment Agency of Pomona v. Thrifty Oil Co., 4 Cal. App. 4th 469, 5 Cal. Rptr. 2d 687 (Cal. App. 2d Dist. 1992) (condemnation of a gas station)). *See also* In re City of Syracuse Indus. Dev. Agency, 20 A.D. 3d 168, 796 N.Y.S.2d 503, 506 (N.Y. App. 4th Dep't 2005); Nat'l Compressed Steel Corp. v. Unified Gov't of Wyandotte County/Kansas City, Kan., 272 Kan. 1239, 1255, 38 P.3d 723, 735 (2001) (stating that environmental contamination is relevant to appraising the value of property sought to be condemned).

[301] Stokes, *supra* note 298, at 224.

[302] 4 Cal. App. 4th 469, 5 Cal. Rptr. 2d 687 (Cal. App. 2d Dist. 1992), *review denied*, 1992 Cal. LEXIS 2812 (Cal. 1992).

[303] 4 Cal. App. 4th at 473, 5 Cal. Rptr. 2d at 689.

[304] 4 Cal. App. 4th at 474 n.8, 5 Cal. Rptr. 2d at 689 n.8.

> cleanup." Nor are we persuaded by the contention that the remediation issue was not properly before the jury. The contamination of the property was used by all experts in determining the fair market value of the property. Extensive cross-examination was conducted as to the proper remediation procedure and the costs of different types of remediation. Inherent in this discussion was the reasonableness of the procedures taken by [the] City. As a characteristic of the property which would affect its value, *the remediation issue was properly before the trier of fact*.[305]

In *Finkelstein v. Florida Department of Transportation,*[306] the court held that "evidence of contamination is relevant and admissible on the issue of market value in a valuation trial if there is a sufficient factual predicate upon which to conclude that the contamination does affect the market value of the property taken." Similarly, in 2004 in *Northeast Connecticut Economic Alliance, Inc. v. ATC Partnership,*[307] the Supreme Court of Connecticut affirmed a trial court's decision that had calculated the "clean value of the property…and then deducted the substantial expenses that would be incurred to clean and stabilize the property to arrive at" the property's fair market value.[308]

The court noted that the trial court had made certain assumptions and findings of fact that included one that "[a] potential buyer would seek all sources of funds to reimburse or defray the environmental costs, including investigation or remediation."[309] The sources included $3 million from funds approved for the project by the state bond commission and from a former owner (American Thread) that had assumed liability to the extent required for the environmental cleanup. The trial court was held to have correctly assumed "that 80 percent of the environmental remediation costs could be recouped from the $3 million grant and 'from other potential sources, including American Thread.'"[310]

In holding that it was proper to consider the foregoing sources, the court stated:

> We cannot exclude consideration of recovery of remediation costs pursuant to environmental laws as irrelevant as a matter of law, or conclude that the trial court abused its discretion by considering them. Put differently, we cannot conclude that a prospective purchaser absolutely would not consider the reasonable possibility of such recovery.[311]

In a more recent case, citing *ATC Partnership, supra*, in a dispute over the relocation of an electric power substation that had been situated on contaminated property that was part of an urban redevelopment project, another court determined that "compensation for claims under the 'Substation Relocation Agreement' would more properly be determined through the condemnation procedures…."[312]

Although the method used most often by transportation agencies is to value the property as though it were not contaminated (i.e., to value the property as if it were clean) and subtract the cost of remediation, a transportation department may understate the cost of eventual remediation. On the other hand, "valuing property as if remediated assures just compensation insofar as it relates to the notion of highest and best use."[313] That is, "[i]f property is valued as is, its contaminated state will necessarily circumscribe its uses, concomitantly diminishing its fair market value despite the reality that it will likely be subject to cleanup."[314]

It may be more appropriate to value contaminated property as clean and deduct the cost of remediation when the cost may be quantified with some certainty, for example, when the contamination is limited and well defined. It also may be more appropriate to utilize the above method after the cleanup has been completed. However, it must be recognized that the submission of evidence of the cost of remediation in a condemnation trial does pose some risk of excessive valuation of the owner's property.

F.2.b. Criticism of the Majority Rule

The majority rule has been criticized, however, for being unfair to the condemnee. The reason is that

> landowners first receive discounted compensation in the condemnation proceeding and then are subject to the full cleanup costs, thus suffering what is colloquially denominated as a "double-take." …Under that scheme, the condemnor receives a windfall by ultimately obtaining the property in a remediated state at the condemnee's cost, yet paying a discounted price due to the contamination…. We think that is fundamentally unfair.[315]

Thus, some jurisdictions have adopted a minority rule, which is that evidence of contamination must be excluded because an eminent domain proceeding is not the proper place for determining liability for environmental contamination.[316] In recent years, the states of

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[305] 4 Cal. App. 4th at 474 n.9, 5 Cal. Rptr. 2d at 689 n.9 (emphasis supplied).

[306] 656 So. 2d 921, 922 (Fla. 1995).

[307] 272 Conn. 14, 861 A.2d 473 (Conn. 2004), *aff'd*, 284 Conn. 537, 935 A.2d 115, 2007 Conn. LEXIS 491 (2007).

[308] *Id.* at 22, 861 A.2d at 480 (internal quotation marks omitted).

[309] *Id.* at 23, 861 A.2d at 480 (quoting trial court decision).

[310] *Id.* at 23, 861 A.2d at 481 (quoting trial court decision).

[311] *Id.* at 42, 861 A.2d at 491 (citation omitted).

[312] United Illuminating Co. v. City of Bridgeport, 2006 Conn. Super. LEXIS 1466, at *17 (Conn. Super. Ct. 2006) (Unrept.).

[313] Hous. Auth. of the City of New Brunswick v. Suydam Investors, L.L.C., 177 N.J. 2, 23, 826 A.2d 673, 686 (2003) (internal quotation marks omitted). *See also* Matter of City of Syracuse Indus. Dev. Agency, 20 A.D. 3d 168, 171, 796 N.Y.S.2d 503, 506 (N.Y. App. 4th Dep't 2005) (agreeing that the best way to avoid a "double taking" was to value the property as if remediated but remitting the case to the trial court to hold any condemnation award in escrow pending the outcome of "[any] Navigation Law proceeding").

[314] 177 N.J. at 23, 826 A.2d at 686.

[315] *Id.* (citations omitted).

[316] Stokes, *supra* note 298, at 231 (*citing* Dep't of Transp. v. Parr, 259 Ill. App. 3d 602, 633 N.E.2d 19 (Ill. App. Ct. 1994) (holding that admission of evidence of remediation cost in the eminent domain proceeding deprives property owners of their

Connecticut, Michigan, and New York have adopted the minority approach or a variation of the minority rule as discussed in the next subsection.[317] One reason for the minority view is based on due process considerations.

> The first, a procedural due process argument, centers on the eminent domain trial itself, and the perceived risk of imposing liability for an environmental condition without the procedural safeguards that the landowner would have in an environmental cost-recovery proceeding. The second, a substantive due process argument, focuses on the perceived risk of an unfair outcome of the trial: that the condemnor might acquire not only the property (at a discount, because of the contamination) but also the right, as the property's new owner, to sue the condemnee for the cost of cleaning up the contamination.[318]

There are practical reasons as well for removing the issues of contamination and cost recovery from a condemnation trial. The New Jersey Supreme Court noted that one reason for the court's approach is that "[v]aluation is a relatively straightforward notion with which condemnation commissioners are familiar and experienced."[319] Another reason is that "[o]mitting the complications of contamination from the valuation process…advances the speed and efficiency" of the condemnation trial.[320] Furthermore, "dealing with environmental issues in [a] cost-recovery proceeding makes sense," as the separate proceeding "allows for third-party claims against insurers, title companies, and prior owners, none of whom have a place at the condemnation table."[321]

rights and defenses under the Illinois Protection Act) [*superseded by statute as stated in* Hous. Auth. of the City of New Brunswick v. Suydam Investors, L.L.C., 355 N. J. Super. 530, 810 A.2d 1137 (2002)]; Aladdin, Inc. v. Black Hawk County, 562 N.W.2d 608, 616 (Iowa 1997) ("We are mindful that other jurisdictions have allowed evidence of contamination and the cost of cleanup to be admitted in an eminent domain proceeding.")).

[317] *See* discussion in Stokes, *supra* note 298, at 233–39 (*citing* Ne. Conn. Econ. Alliance, Inc., 256 Conn. 813, 776 A.2d at 1076 and Silver Creek Drain Dist. v. Extrusions Div., Inc., 468 Mich. 367, 663 N.W.2d 436, 441–44 (Mich. 2003), *cert. denied*, 540 U.S. 1107, 124 S. Ct. 1062, 157 L. Ed. 2d 893 (2004)). *See also* In re City of New York v. Mobil Oil Corp., 12 A.D. 3d 77, 783 N.Y.S.2d 75 (N.Y. App. 2d Dep't 2004).

[318] Stokes, *supra* note 298, at 241. *See* Aladdin Inc. v. Black Hawk County, 562 N.W.2d at 615

> (We agree the Commission's deduction of estimated cleanup cost deprives Aladdin of 'just compensation….' If such cleanup costs are admissible and considered by a compensation commission without the procedural safeguards in chapter 455B, the procedural due process rights of the property owner are violated. A property owner has a right to have its liability established in a legal proceeding in which the owner has the opportunity to show that the owner did not cause the water pollution or hazardous condition.).

[319] Hous. Auth. v. Suydam Investors, L.L.C., 177 N.J. at 23, 826 A.2d 686.

[320] *Id.*

[321] *Id.* at 24, 826 A.2d 687.

F.2.c. A Third Approach

There is a variation of the minority view—a third approach: it is to value the condemned property as if it had been remediated and *escrow the condemnation award* as security for cleanup costs.[322] For example, in *New Jersey Transit Corp. v. Cat in the Hat, L.L.C.*[323] the New Jersey Supreme Court noted that in a companion case decided the same day, *Housing Authority of the City of New Brunswick v. Suydam Investors, L.L.C.*, *supra*, the court had

> approved a methodology for valuing contaminated property that effectively removes the contamination issue from the condemnation proceeding and reserves it for the cost-recovery action…. Under that methodology, the condemnor appraises the property as if remediated, deposits that amount into a trust-escrow account in court and reserves the right to initiate a separate action to recover remediation costs…. That scheme fully addresses the condemnees' concerns over double liability. If the value of a condemnee's property is not reduced for contamination, then the condemnee's payment for remediating the property in a subsequent cost-recovery action cannot constitute double liability.[324]

In *Cat in the Hat*, *supra*, the court also approved the trial court's condemnation judgment that had included for the condemnor's protection, "a reservation of rights provision identical to the provision in [New Jersey Transit's] proposed orders, including the preclusion of *res judicata*, collateral estoppel and the entire controversy defenses."[325]

F.3. Appraisal Methodologies and Issues

F.3.a. Use of Contaminated Comparable Sales

The use of actual or estimated cleanup cost may cover the diminution in value of the property caused by the cleanup work required to make the property developable. However, the actual or estimated cost does not account for the reduction in value due to the stigma that is usually associated with contaminated sites.[326] Property may be stigmatized by residual contamination that is below regulatory cleanup levels, by uncertainty regarding whether the standards for cleanup may be higher in the future, or by the possibility of the discov-

[322] Stokes, *supra* note 298, at 239 (*citing Suydam Investors, LLC*, 177 N.J. 2, 826 A.2d 685; *City of New York*, 12 A.D. 3d 77, 783 N.Y.S.2d at 80)).

[323] 177 N.J. 29, 826 A.2d 690 (2003).

[324] 177 N.J. at 40, 826 A.2d 697 (citations omitted).

[325] *Id.* at 37, 826 A.2d at 696.

[326] *See* discussion in City of Bristol v. Tilcon Minerals, Inc., 284 Conn. 55, 78, 931 A.2d 237, 253 (Conn. 2007) (affirming the trial court's decision in part and holding that the property owner had demonstrated that because of contaminated water from the city's landfill, the contamination would have "a chilling effect" on Tilcon's ability to develop part of the subject property for residential use for 31 years, i.e., for the duration of the city's easements "to pollute and to maintain effective control of the land thirty-one years").

ery of more contamination.[327] Both actual and potential cleanup cost and the effect of stigma may be taken into account if evidence of comparable contaminated properties is used to establish the fair market value of the property. Potential liability under CERCLA or otherwise may be a factor.[328] "'[S]tigma' amounts to considerably more than a mental attitude on the part of buyers. It is based upon a very real possibility that any commercial activity on the property might lead to regulatory prohibition or real physical danger."[329]

It may be less difficult to find contaminated comparable sales in some areas than in others. As one article states, "when a condemned property is environmentally contaminated, there are few, if any, market sales or leases to rely upon, because there are fewer such properties and they sell less readily."[330] In some cases, it may be necessary to look at sales over a wider geographic area. Sales of property in large industrial areas may have taken contamination problems into account in arriving at a sale price. The agency's appraiser may inquire into the presence or significance of any contamination when confirming a sale price. Environmental agencies' lists of potentially contaminated sites may be checked to see whether a sale property that has been sold is listed.

Contaminated comparable sales may be used in two ways. First, the sale may be used in the same manner as comparable sales would be used as evidence of the value of clean property, with adjustments for differences between the comparable property and the subject property. The comparable sales approach may be used where there are sales of property that are similar to the subject property in size, location, and highest and best use. Second, sales of the contaminated comparable properties may be used to establish a discount factor to be applied to the value of the subject property as if it were not contaminated. The approach may be appropriate when there are sales of contaminated property available but none are sufficiently comparable to the subject property in size, location, highest and best use, or other factors determining comparability.

Although a discount factor may be a range of percentages, the range likely will be narrower and more reliable if properties are used that are more comparable to the subject property. If a transportation agency finds that because there is a limited number of sales of contaminated property, not only may comparisons be difficult but larger adjustments may be necessary that in turn cause the comparisons to be less reliable.

F.3.b. Income Approach with Amortization of Cost

The income approach is obviously limited to income-producing property. When using the income approach on contaminated property, it may be necessary to modify the capitalization approach to take into account the possible effect of stigma.

In *lnmar Associates Inc. v. Borough of Carlstadt v. Borough of South Borend Brook,*[331] the Supreme Court of New Jersey addressed the question of how to value polluted property for purposes of a tax assessment. Of interest to attorneys involved with eminent domain is the standard that the tax assessor had to apply under New Jersey law—"true value."[332] In holding that the assessor must take into account the effect of pollution on the property's value, the court stated that

> if the effect of these federal and state regulatory programs is to produce the market consequence of driving down the value of commercial property potentially subject to cleanup costs, the effect of those market forces cannot be ignored in the assessment process simply because it would be counter to the environmental policy. Rather, the question that remains to be tested is whether a strong environmental cleanup policy will drive real estate values up or down.[333]

The court concluded that "it may be helpful for appraisers to view these properties as they do special purpose properties using a measure of flexibility that will aid in the determination of the 'true value' of contaminated properties."[334]

F.4. Valuation of Access Rights

Occasionally, a transportation agency may need to acquire access rights without needing to acquire an entire parcel of land, such as for a limited access facility

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[327] As one court agrees,

> [i]t is generally acknowledged that "the existence of contamination may stigmatize [a] property, making it less attractive, even after full remediation." 7A P. Nichols, Eminent Domain (3d Ed. Rev. 2007) § G13B.04 [1], p. G13B-75. This court, in particular, long has recognized the effect of stigma in significantly reducing the value of property taken by eminent domain….

Tilcon Minerals, Inc., 284 Conn. at 79, 931 A.2d at 253 (*citing* Ne. Gas Transmission Co. v. Tersana Acres, Inc., 144 Conn. 509, 514–15, 134 A.2d 253, 256 (1957) (general public belief in danger from proximity of gas transmission line properly considered by court in fixing market value of land after taking by temporary and permanent easements); Bristol v. Milano, 45 Conn. Super. 605, 622, 732 A.2d 835, 844 (Conn. Super. Ct. 1998) (prospective nature and extent of possible contamination of property and waters from adjacent landfill will create reasonable and well-founded public belief in health hazard and danger for duration of limited easements that must be taken into consideration in fixing market value of property)).

[328] Bassett v. United States, 55 Fed. Cl. 63, at 74–75.

[329] *Id.* at 74.

> [T]he Court finds that stigma associated with general contamination dramatically affected the entire Property's value. …The Court…accepts Plaintiff's argument that the Quarry's taking negatively impacted the entire Property's value on the basis of the United States' evidence. In analyzing this impact below, we accept the United States' computations regarding the Property's diminution in value as a result of the stigma associated with hazardous waste. At the same time, we leave open the possibility of additional damages resulting from the potential CERCLA liability.

Id. at 75 (citations omitted) (footnote omitted).

[330] Stokes, *supra* note 298, at 223.

[331] 112 N.J. 593, 549 A.2d 38 (N.J. 1988).

[332] *Id.* at 606, 549 A.2d at 44.

[333] *Id.* (footnote omitted).

[334] *Id.* (citations omitted).

or an area near an interchange. If a parcel is contaminated but the agency is acquiring only access rights, then the question is whether the contamination affects the value of the access. If a parcel is so severely contaminated that its value is zero or even has a negative value, then the value of the parcel's access to the highway may be questionable. However, if access is treated as one factor that affects a property's value and if contamination is treated as another factor affecting value, the problem may be less difficult to resolve. The property's access to the highway gives the property the same additional value regardless of the presence of contamination. As a practical matter, contamination simply may give some parcels a lower value than they would have had if only the access rights had been purchased.

In sum, it may be argued that if an agency is acquiring only the right of access to a contaminated parcel, then no deduction should be made for the presence of contamination; the value of the access and the effect on value of the contamination are two completely independent factors.

G. VALUATION OF AIR SPACE AND AIR RIGHTS

G.1. Air Space and Air Rights as Property

Many states have enacted statutes recognizing air space as real estate.[335] In *State ex rel. Washington State Convention & Trade Center v. Evans,*[336] the Supreme Court of Washington observed that

> [s]ince air space can be transferred, it can be taken in eminent domain. Model Act at 365, 366; *cf.* Stoebuck, *Theory of Eminent Domain, supra,* at 606 ("The conclusion is that 'property' in eminent domain means every species of interest in land and things of a kind that an owner might transfer to another private person."). *See also* Model Act at 365; 2 NICHOLS § 5.04[5][a], *supra,* at 5-298, and 3 NICHOLS § 11.02[2], *supra,* at 11-30. Some eminent domain statutes expressly reference taking air space as well. Moreover an air space estate is even fair game for an action in inverse condemnation.[337]

The condemnation of air rights or an easement with the intention of reselling or leasing the airspace to a private developer may raise a question of whether the taking of an owner's air rights is for a public use. As discussed, however, in Section 1, *supra*, the public use requirement is a constitutional limitation on the condemnation power but many courts have interpreted the limitation quite broadly. The courts, moreover, may defer to the legislature's finding of what constitutes a public use.

As a matter of state law on property rights, the owner of property adjacent to the highway may have a right to light, air, and view that the transportation agency may not infringe through joint development without the payment of just compensation. Thus, whenever a property right exists as a matter of state law, the right may not be extinguished without paying just compensation.[338]

The Model Airspace Act, Section 12, sets out a proposed method for disposition of airspace rights. If a highway is part of the federal-aid highway system, certain requirements must be satisfied to receive federal funds.[339]

G.2. Approaches to Valuation

Airspace has not been a recognizable property right long enough for there to be a method of valuation that differs from the three traditional approaches to the valuation of real estate. Some refer to the value of air rights as a percentage of the value of the fee, an approach that led to a misconception that a certain ratio may be used as a rule of thumb to value the air rights based on the value of the fee. No cases have been located in which such an approach has been accepted.

Although no specific methodology appears to have developed for the valuation of air space or air rights, there are a number of factors that may be considered. First, as with any appraisal, when appraising airspace the nature of the ownership interest being acquired will affect the outcome of the final value. For example, compensation for a flight easement would differ from compensation for a clearance easement.[340] Second, one means of determining the value of airspace is based on the right to receive income from a lease of the air rights or space.[341] Third, although compliance with zoning laws may be required, such a requirement should be no more

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[335] 4 NICHOLS ON EMINENT DOMAIN § 13.17[1].

[336] 136 Wash. 2d 811, 966 P.2d 1252 (1998).

[337] *Id.* at 840, 966 P.2d at 1267 (citation omitted) (footnote omitted). The Model Air Space Act is an attempt to codify the law with regard to airspace. It appears that Oklahoma is the only state to have substantially adopted it.

[338] If a structure planned above a highway will in any way interfere with the motorist's ordinary use of the highway, conveyance of the air rights may be an unlawful diversion of public property. The outlines of this legal prohibition are exceedingly vague, as is its legal basis. It may be a common law doctrine, a matter of statutory construction, or a limitation derived from the state constitution.

[339] *See* 23 U.S.C. § 111 (2007).

[340] *See* United States v. 64.88 Acres of Land, 244 F.2d 534, 535–36 (3d Cir. 1957)

> (On this record it must be accepted that the claimed right of clearance is merely a provision for assuring that space shall be unoccupied and vision unobstructed above a designated altitude. Unquestionably, this is in aid of avigation. But no flight easement is mentioned or to be inferred, much less claimed, in the present pleadings and, therefore, no servitude can be imposed except for the asserted and precisely limited rights of clearance.).

[341] *See* Macht and Macht v. Dep't of Assessments of Baltimore City, 266 Md. 602, 610, 296 A.2d 162, 167 (Md. Ct. App. 1972) (stating that the owners conceded

> that the revenue derived from the lease of the airspace could properly be considered, like any other rent, in reaching a valuation of the property as a whole. Under the teaching of *Susquehanna Power*, we see no reason why land, improvements and airspace could not be separately valued for assessment purposes, so long as the sum of the elements did not exceed the value of the whole. See Note, Conveyancing and Taxation of Air Rights, 64 Colum. L. Rev. 338, 350-354 (1964)).

serious than it is with any parcel of land. Fourth, how an agency uses or permits the use of the air rights may limit the value of the property to a value consistent with the permitted use. Fourth, to the extent that federal funding is available to defray a lessee's costs in a joint development project, the value of the leasehold to a lessee is increased, as is the amount of rent the lessee should pay. To the extent that federal funding is available to reimburse the cost that a state may incur in preparing for a joint development, a factor that would influence the terms of a lease, a development becomes financially more feasible for the state.

An important valuation factor is the liability of a private party carrying out joint development for the applicable property taxes, in contrast to a transportation department that is exempt from such taxes.[342] The relevance of a tax exemption to valuation is that the value of air space to a developer will be higher than if the space, i.e., property, were subject to taxation.[343]

H. VALUATION OF BILLBOARDS

H.1. Billboards and Billboard Leases as Property Rights

One must distinguish between billboards and their support structures and the billboard companies' leasehold interests or easements, referred to herein as leasehold interests, for the erection of billboards on property belonging to another. As stated in *City of Norton Shores v. Whiteco Metrocom*, "[a]lthough these cases all involve billboards, it would be incorrect to say that the property taken was billboards."[344] In *Whiteco Metrocom*, the city "did not expressly condemn *any* billboards. Rather, it condemned leaseholds that gave defendants…the right to locate on certain land several billboards they owned."[345] In contrast, in *Whiteco Metrocom* the Department of Transportation "did expressly condemn three billboards…but also condemned the easement [one defendant] owned that entitled it to place…three billboards on the top of a building at that precise location."[346]

If a transportation department actually condemns billboards, the department is obligated to pay the owner the full value of the billboards.[347] On the other hand, if a transportation department does not condemn the billboards, the department usually has the obligation to pay the costs "associated with moving [defendants'] billboards to another location," along with the value of the leaseholds unless they were terminable at will.[348] Furthermore, "a condemnee is not entitled to compensation for personal property on condemned land unless the trial court finds that it constitutes a fixture," a matter of state law and the applicable lease, as well as a question of fact.[349]

Whenever a billboard lease is for a definite term, i.e., not revocable at the landowner's will, the lease should be deemed to create an easement rather than a revocable license.[350] "[T]he term 'leasehold interest' refers to an interest in real property created by the existence of a lease."[351] "Regardless of whether a billboard is classified as personal property or a fixture, the leaseholds and air rights…are real property."[352] In general, with respect to the taking of any leasehold interest on which there is a structure belonging to the lessee billboard company, the lessee is entitled to the market value of the leasehold and the structure as a single unit.[353] Although

> evidence of the value of the unexpired portion of the lease and the [structure] separately is admissible as bearing upon the value of the two as a unit, the market value is what a buyer would be willing to pay for them as a unit and not the sum of the values of each considered separately,[354]

a rule that has been applied in billboard cases. As stated by a Missouri court, "[i]f property taken by condemnation includes a leasehold interest and buildings or fixtures which, between the owner and lessee belong to the lessee, the lessee is entitled to be compensated

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[342] In some jurisdictions the state and its agencies and departments are exempt by statute and in other jurisdictions exempt by virtue of a constitutional provision. Absent such express exemptions, sovereign immunity may render the state and its agencies and departments exempt from local taxation.

[343] *See* United States & Borg-Warner v. City of Detroit, 355 U.S. 466, 472, 78 S. Ct. 474, 477–78, 2 L. Ed. 2d 424, 428–29 (1958). As the Maryland Court of Appeals pointed out in *Macht and Macht, supra*,

> [s]o long as the Machts made no use of the airspace over their property, it was not, nor could it be made the subject of an assessment. Once they denied themselves the use of it for a price, it took on value for the purposes of assessment, a value which could be derived by an appraisal based on income, the option price, or both, Bornstein v. State Tax Comm., 227 Md. 331, 337, 176 A. 2d 859 (1962). Concurrently, the Blaustein Building, as holder of the estate to which new rights became appurtenant, has the benefit of an easement, which could be reflected in its assessable basis, because the utility of its site was enhanced.

Macht and Macht, 266 Md. at 613, 296 A.2d at 168–69.

[344] City of Norton Shores v. Whiteco Metrocom, 205 Mich. App. 659, 661, 517 N.W.2d 872, 873 (Mich. Ct. App. 1994), *appeal denied*, 448 Mich. 862, 528 N.W.2d 733 (1995).

[345] *Id.* (emphasis supplied).

[346] *Id.* (footnote omitted).

[347] *Id.* at n.1 (holding that value could be "determined by estimating the cost of the billboards as 'new less depreciation'").

[348] *Id.* at 662, 517 N.W.2d 873.

[349] *See* Comm'r of Transp. v. Rocky Mountain, LLC*,* 277 Conn. 696, 730, 894 A.2d 259, 282 (2006) (citation omitted).

[350] Some cases describe the interest created by an advertising lease as a license; however, a license usually is revocable at the will of the landowner.

[351] Comm'r of Transp. v. Rocky Mountain*,* LLC*,* 277 Conn. at 734, 894 A.2d 284.

[352] City of Norton Shores v. Whiteco Metrocom, 205 Mich. App. at 662, 517 N.W.2d 873.

[353] *See* Minneapolis-St. Paul M.A.C. v. Hedberg-Freidheim Co*.,* 226 Minn. 282, 286, 32 N.W.2d 569, 572 (Minn. 1948) (condemnation of a leasehold and hangar) (citation omitted).

[354] *Id.*

for the market value of the leasehold and the building or fixture as a unit."[355]

Recently, a lessee sought to obtain compensation for the value of the lessee's *easement* and for what the lessee claimed was a separate *leasehold interest*. In *Commissioner of Transportation v. Rocky Mountain, LLC, supra,* the appraiser for Viacom Outdoor, Inc. ("Viacom"), a business selling outdoor advertising, first valued what the appraiser referred to as Viacom's "easement" based on a portion of the income generated by the billboards erected on the easement.[356] (Viacom's agreement with the property owner was called an "easement lease" with a term of 99 years that the court described as an "easement in gross" rather than an "easement appurtenant."[357]) Second, the appraiser assumed that Viacom, in addition to the easement, possessed a separate real property interest in the billboards and easement that the appraiser called a "leasehold interest."[358] However, the court did not agree with Viacom's separate or additional concept of a leasehold interest as "a real property interest generated by personal property located on an easement…."[359] The court agreed with the condemnor that the billboards and their income "are components of Viacom's outdoor advertising business, and do not constitute a separate compensable interest in real estate."[360] The court held that the trial court did not have "jurisdiction to make a separate award of damages for the billboards" and that the billboards were personal property, not compensable in eminent domain.[361] The court pointed out that the state's relocation law provided that "businesses are eligible to receive compensation for relocation expenses and losses when they are forced to remove personal property as a result of the state's acquisition of real property."[362]

In *Rocky Mountain LLC, supra,* the court held that it was proper for the trial court to consider "the presence of the billboards in determining the value of Viacom's real property interest in the easement" (as described in the case),[363] but it was error for the trial court to amend the judgment later "to include a separate award of damages for the billboards themselves…."[364] It should be noted that the condemnation notice filed by the Commissioner did not include an assessment of damages for the billboards.[365] Consequently, because there was no showing that the Commissioner intended to take the billboards (which the Commissioner later maintained were personal property), the court held that the Commissioner was not required to acquire the billboards under the state's billboard condemnation law[366] or under federal law.[367]

As discussed in the next subsection, the three basic approaches to appraising billboards and/or the leasehold interests are the comparable sales or market data approach, the income approach, and the cost-less-depreciation approach. A fourth and more controversial approach is the gross income multiplier approach.[368] However, there is a dearth of cases in recent years concerning the valuation of billboards and related leasehold interests.

H.2. Valuation Approaches for Billboards

H.2.a. Market Data or Sales Comparison Approach

As seen, a condemnor may condemn the leasehold for a billboard or may condemn both a billboard and the leasehold interest.[369] However, because billboard companies apparently do not sell billboards very often, the courts normally do not use the market data or sales comparison approach in determining the value of such leasehold interests.[370]

H.2.b. The Income Approach

In determining the value of a leasehold interest the courts tend to follow the U.S. Supreme Court's decision in *United States v. Petty Motor Corp*.[371] In *Petty Motor Corp*., the Court held that the value of a leasehold interest for its remaining term is determined by calculating the difference between what the premises would rent for in the market and the rent the lessee pays under the lease. The difference is the so-called bonus value that measures the benefit of the bargain to the tenant.[372] For instance, if a sign company is paying $100

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[355] State of Mo. *ex rel*. Mo. Highway and Transp. Comm'n v. Quiko, 923 S.W.2d 489, 493 (Mo. App. S. Dist. 1996).

[356] Comm'r of Transp. v. Rocky Mountain, LLC, 277 Conn. at 699, 894 A.2d at 264.

[357] *Id.* at 726 n.36, 894 A.2d 280 n.36.

[358] *Id.* at 700, 894 A.2d 265.

[359] *Id.* at 700 n.4, 894 A.2d 265 n.1.

[360] *Id.* at 701, 894 A.2d at 265.

[361] *Id.* at 708, 894 A.2d at 269.

[362] *Id.* at 709, 894 A.2d at 270 (citation omitted).

[363] *Id.* at 712–13, 894 A.2d at 271.

[364] *Id.* at 713, 894 A.2d at 272.

[365] *Id.,* 894 A.2d at 272.

[366] *Id.* at 713, 894 A.2d at 272.

[367] *Id.* at 716–18, 894 A.2d at 274–76.

[368] Norman v. United States*,* 63 Fed. Cl. 231, at 271 (discussing various valuation methods for real property, including comparable sales, subdivision development, and subdivision development methods); Comm'r of Transp. v. Burkhart, 2003 Conn. Super. LEXIS 3166, at *6-7 (Conn. Super. Ct. 2003) (Unrept.) (discussing methods of valuation for a billboard, including the income approach, sales comparison approach, and cost approach—the latter being a combination of the income and sales comparison approaches).

[369] *See* State *ex rel.* Mo. Highway and Transp. Comm'n v. Quiko, 923 S.W.2d at 493 (involving both billboards and/or leaseholds); Minneapolis-St. Paul M.A.C. v. Hedberg-Freidheim Co., 226 Minn. at 286, 32 N.W.2d at 572 (involving a leasehold and hangar).

[370] *Id.* at 494.

[371] 37 U.S. 372, 66 S. Ct. 596, 90 L. Ed. 729 (1946).

[372] *See In re Urban Redevelopment Auth.*, 440 Pa. 321, 325, 272 A.2d 163, 165 (Pa. 1970) (holding there was no evidence that two leases for billboards had a "'bonus' value").

per month under the lease and the rental in the market would be $300 per month, then the sign company is entitled to the difference, i.e., a $200 per month bonus value, for a comparable site the sign owner would have to lease.[373] If a billboard is condemned, the court must determine the value of the structure.[374]

In *Whiteco Industries, Inc. v. City of Tucson, supra,* the court explained that

> the only market value to a lessee…in the event of condemnation is the economic value of the rental over and above the actual rental paid reduced to present value…. This has been termed "bonus value." In determining this value, the length of time that the lease has to run, the rent to be paid, and the various obligations of the parties under the lease are relevant to the price that a willing, informed buyer and a willing, informed seller of the lessee's interest would pay for the leasehold interest. This price is fair market value or just compensation….[375]

In *City of Cleveland v. Zimmerman,*[376] in which the court accepted the income approach, the court considered the claim to be one for the leasehold and awarded anticipated income from the rental, less expenses for ground rent, maintenance, and management for the leasehold period.[377]

It will be recalled that in *Rocky Mountain LLC, supra,* Viacom, the lessee, sought damages for its easement for billboards and for a leasehold interest as Viacom attempted to define the concept. However, the Supreme Court of Connecticut held that "the trial court properly considered the income generated by the billboards as a factor influencing the value of the *easement*, but properly refused to compensate Viacom directly for the income generated by the billboards because business income is not directly compensable under Connecticut eminent domain law."[378] Thus, the court accepted the income capitalization method for valuing the 99-year "easement lease," as Viacom's agreement was called.[379] However, on Viacom's claim for damages based on a separate leasehold interest, the court rejected the gross income multiplier method that is discussed in the next subsection.[380] The court did not reject the gross income multiplier method *per se* but rejected Viacom's interpretation of what constituted a leasehold interest.[381] The court held that although the billboards were noncompensable personal property, the trial court properly considered "income from the billboards in its determination of the fair market value of Viacom's easement interest."[382]

In sum, the capitalization of the rentals under the lease is a proper way to value the billboard-leasehold interest: "income capitalization is a proper method of estimating the value of income-producing real property."[383]

H.2.c. The Cost Approach

In *Quiko*, *supra,* the court stated that "evidence of comparable sales is not the only method of establishing fair market value. *Cost of replacement minus depreciation* is also an accepted method of determining fair market value of condemned property."[384] In *Whiteco Metrocom*, *supra*, the court held that the condemnor has the obligation to pay the billboard owner "the full value of the billboards," which "can be determined by estimating the cost of the billboards as new less depreciation."[385]

In *Quiko*, the lessee maintaining billboards on the subject property argued that the trial court erroneously used "depreciated replacement cost of the structures to determine its interest" in the condemnation awards rather than comparable sales data.[386] However, for reasons explained in the next subsection, the court agreed with the trial court and held that the sales relied on by Quiko's expert, who utilized the gross income multiplier approach to calculate the value of the company's properties, were not comparable.[387]

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[373] Whiteco Indus., Inc. v. Tucson*,* 168 Ariz. 257, 260, 812 P.2d 1075, 1078 (Ariz. App. 1990) ("Under our law, the only market value to a lessee such as Eller in the event of condemnation is the economic value of the rental over and above the actual rental paid reduced to present value.").

[374] *See* City of Oakbrook Terrace v. Suburban Bank & Trust Co., 364 Ill. App. 3d 506, 518, 845 N.E.2d 1000, 1010–11 (Ill. Ct. App., 2d Dist. 2006) (rejecting the transportation department's assertion that the defendant was entitled to only the bonus value as just compensation in lieu of the fair market value of the property at its highest and best use on the date the property is condemned), *appeal denied*, 221 Ill. 2d 643, 857 N.E.2d 674 (2006). *See* Santa Fe Trail Neighborhood Redevelopment Corp. v. W.F. Coen & Co., 154 S.W.3d 432, 444 (Mo. App., W. Dist. 2005) (holding that the "proper measure of damages for condemnation of a lessee's interest in real property is the bonus value of the unexpired term of the lease as measured by the difference between the market rental and the contract rental for the use and occupancy of the affected leasehold"), (*citing* Land Clearance for Redevelopment Corp. v. Dornhoefer, 389 S.W.2d 780, 784 (Mo. 1965)).

[375] Whiteco Indust., Inc. v. Tuscon, 168 Ariz. at 260, 812 P.2d 1075, 1078 (citations omitted).

[376] 22 Ohio Misc. 19, 253 N.E.2d 327 (Ohio Ct. Cm. Pl. 1969).

[377] *Id.* at 22, 253 N.E.2d at 330. *See Rocky Mountain, LLC,* 277 Conn. at 734, 894 A.2d at 284 (upholding the use of the capitalization of income approach to value billboards).

[378] Comm'r of Transp. v. Rocky Mountain, LLC, 277 Conn. at 726, 894 A.2d 279 (emphasis supplied).

[379] *Id.*

[380] *Id.* at 734 n.31, 894 A.2d 284 n.31.

[381] *Id.* at 733, 894 A.2d 283.

[382] *Id.* at 735, 894 A.2d 284.

[383] State *ex rel.* Mo. Highway and Transp. Comm'n v. City of Norton Shores v. Whiteco Metrocom, 205 Mich. App. at 662, 517 N.W.2d 873.

[384] State *ex rel.* Mo. Highway and Transp. Comm'n v. Quiko, 923 S.W.2d 497 (emphasis supplied).

[385] 205 Mich. App. at 661 n.1, 517 N.W.2d at 873 n.1 (internal quotation marks omitted).

[386] 923 S.W.2d at 493.

[387] *Id.* at 495.

H.2.d. The Gross Income Multiplier Approach

Although the gross income multiplier approach may be used by outdoor advertising companies when selling their signs to other companies, the courts have not been inclined to accept the gross income multiplier approach. A billboard company, of course, earns its income from those individuals or companies that pay for advertising displayed on the billboard company's signs. Unless a new site is found where a billboard may be relocated, the loss of a billboard and associated leasehold may reduce a billboard company's income. Loss of business income in most jurisdictions, however, is not recoverable as part of just compensation for a taking of property.[388] As stated, income may be a relevant factor in valuing a real property interest, but the structure and the leasehold are to be valued as a unit.[389]

Billboard companies have argued that the gross income multiplier approach is an appropriate means of valuation. Under the gross income multiplier approach, the value of a sign is determined by the number of the structures sold, the gross revenue from the structures involved in each sale, and a multiplier. In the example below, the multiplier is assumed to be 3.5.

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[388] In Comm'r of Transp. v. Rocky Mountain, LLC, 277 Conn. at 733, 894 A.2d at 283–84, the Supreme Court of Connecticut, in agreeing with the trial court's analysis, stated:

> The trial court concluded that the income from the billboards is the product of Viacom's outdoor advertising business, rather than the product of its real property interest. The court reasoned that "advertising space generates income whether it is on a structure in a fixed location, on the side of a bus, or on a website" and the fact that the value of a business depends somewhat upon its location does not render the business itself real estate. Thus, the trial court declined to make a separate award for damages for the loss of the billboards and the income generated by them. In so doing, the trial court correctly interpreted our existing case law. Billboards can be removed from the condemned property and placed on another site, and the income they generate from the advertising placed on them also can be replicated on another site. Thus, *the trial court correctly determined that Viacom's attempt to obtain direct compensation for the billboards and the income they generate, in the form of a "leasehold interest," actually was an attempt to obtain direct compensation for loss of personal property and business income, neither of which is directly compensable in a condemnation action*.

(footnotes omitted) (emphasis supplied).

[389] As stated by the Supreme Court of Connecticut, "although elements of takings such as lost profits or personal property are not independently compensable because they do not constitute real property, the value of such elements nevertheless may be considered in determining the fair market value of the land…." *Id.* at 711–12, 894 A.2d at 271 (*citing* Alemany v. Comm'r of Transp., 215 Conn. 437, 446–47, 576 A.2d 503, 508 (1990) (cost of moving sign should have been considered in determining loss in value of property not taken); Seferi v. Ives, 155 Conn. 580, 583–84, 236 A.2d 83, 84–85 (1967) (loss of business not separate element of damage, but may be considered in determining value of land), *appeal dismissed*, 391 U.S. 359, 88 S. Ct. 1665, 20 L. Ed. 2d 640 (1968); Edwin Moss & Sons, Inc. v. Argraves, 148 Conn. 734, 736, 173 A.2d 505, 506 (1961) (sand and gravel on property not separately compensable but properly considered for effect on market value of land); Harvey Textile Co. v. Hill, 135 Conn. 686, 690–91, 67 A.2d 851, 853 (1949) (cost of removing property is not separate element of damage, but should be considered as evidence of fair market value of land)).

Structures	Gross Income	Multiplier	Sale Price
100	$360,000	3.5	$1,260,000

The gross income multiplier approach presents a number of issues. First, each sign is subject to a lease for a term of years, not a fee simple title; the term is variable as it depends on when the sign company acquired the lease.

Second, there is no guarantee that a landowner will renew a lease. If the remaining term of a lease is of short duration, there is no reasonable expectation of long-term income, especially if the owner of the fee is aware of an impending condemnation. For example, in *Quiko*[390] an appraiser for an outdoor advertising company testified to a value based on the assumption that the subject lease would be renewed, simply because most leases are renewed. The landowner, however, testified that it was doubtful that the lease would be renewed. The conflict in the evidence regarding the continuation of the lease was one of the reasons the court disallowed the gross income multiplier approach.

Third, the gross income multiplier formula includes a value for lost business income.[391] However, most states do not allow recovery of lost business income in determining just compensation.[392]

Fourth, in arriving at a damage figure based on the rental value, an appraiser also may include any aforementioned bonus value.

In *Quiko* the lessee that maintained billboards on the condemned parcels argued on appeal that the appropriate method of valuing the structures was the comparable sales method.[393] Although the lessee's expert relied on five comparable sales (sales involving from 1 to 82 structures), the expert had arrived at her value of the sales by using the gross income multiplier method. Although using the gross income multiplier approach, the expert referred to her "method of evaluation as the sales-comparison approach."[394]

For a variety of reasons the court rejected the approach. For example, there "was no testimony that any of the structures or locations involved in the 'comparable sales' were in fact comparable to those involved in the instant case"; it was doubtful that the leases would be renewed when they expired; and the expert's formula impermissibly "incorporate[d] a factor for lost business income."[395] Notably, the court did not reject the gross income multiplier approach as a matter of principle or as a matter of law, but the court did observe that other courts had not applied the method:

> In *Whiteco Indus., Inc. v. City of Tucson*, 168 Ariz. 257, 812 P.2d 1075, 1079 (Ariz. Ct. App. 1990), the court said that evidence of the value of billboards established by proving "four times gross income without any regard for the existence, length or terms of the leases, was incompetent and legally insufficient…." In *State Dep't of Transportation & Dev. v. Chachere*, 574 So. 2d 1306, 1311 (La. Ct. App. 1991), the court rejected the use of a gross income multiplier in valuing billboards even though, as suggested by Appellant in the instant case, it may be an accepted approach which is acted upon within the advertising industry.[396]

The gross income multiplier approach arguably is a dubious method of determining the before- and after-value of property for the purpose of just compensation. At a minimum, it appears that before the courts would be willing to accept the approach, outdoor advertising companies would have to demonstrate that a subject lease will be renewed and that there are no suitable sites for relocation of the subject billboard.

I. VALUATION OF MINERALS

I.1. Whether the Unit Times Price or Multiplication Method Is Allowable

When minerals are present they may be a necessary element of the value of the land.[397] The fact that the

[390] State *ex. rel* Mo. Highway & Transp. Comm'n v. Quiko, 923 S.W.2d 489, at 495.

[391] *Id.* (stating that the billboard owner and lessee's "evidence also indicated that using a multiple of gross income in arriving at a value for the structures effectively incorporates a factor for lost business income. Missouri has generally not permitted consideration of lost business profits in valuing property taken by condemnation") *Id*. (citations omitted).

[392] *Id.*; *see Rocky Mountain, LLC,* 277 Conn. at 732–33, 894 A.2d at 283–84.

[393] State *ex rel.* Mo. Highway and Transp. Comm'n v. Quiko, 923 S.W.2d at 494.

[394] *Id.* at 495.

[395] *Id.*

[396] *Id.*

[397] W. Va. Dep't of Transp. v. Robertson, 217 W. Va. 497, 618 S.E.2d 506 (2005) (holding that when it was determined by motion that there was more acreage being condemned, the trial court's order exposed the DOT to an additional claim for coal minerals associated with the additional acreage); Dep't of Transp. v. Bacon Farms, L.P., 270 Ga. App. 862, 865–66, 608 S.E.2d 305, 308–09 (Ga. Ct. App. 2004) (reversing the trial court because of its use of the price times unit method but not reversing on the ground that deposits of kaolin had never been sold or mined prior to the taking); Ala. Dep't of Transp. v. Land Energy, Ltd., 886 So. 2d 787, 790 (Ala. 2004) (stating that "in Alabama, a mineral interest is considered to be real property"); East Tenn. Natural Gas Co. v. Riner, 239 Va. 94, 98, 387 S.E.2d 476, 478 (Va. 1990) (holding that frustration of the owner's plans for development or future use of the property is not in itself a compensable item of damages and finding that the landowner had no present or future rights to the coal or to

mineral deposits have not been developed may not necessarily preclude their valuation.[398] However, even if there are minerals in place, a "landowner is not entitled to have all factors affecting the value of his property added together and to have the total of the additions taken as the reasonable market value of his land."[399] Because minerals are not visible, are not easily measured in terms of amount or quality, and may be undeveloped leading to possible speculation as to their value, expert testimony will be required to establish the highest and best use of the property, the minerals' value, the effect on the land if the minerals are acquired, and whether there is a market for the minerals.

The general rule is that minerals in place may not be multiplied by a per ton or per unit value to arrive at a market value, the so-called "unit times price" method or the "multiplication method."[400] The courts have given several reasons for rejecting the unit times price method, [401] including the reason that it constitutes a separate valuation of the land and minerals.[402] As one court has explained the rule,

> [a]ll we are saying is that a tract of land containing 500 tons of sand and gravel is much more valuable than a tract of land with five tons and the jury has the right to know more than that there is a sand and gravel deposit of unknown quantity below the surface.[403]

Consequently, although the value of the minerals in place may be considered, the land and the minerals are to be valued as one.

In an early case, *United States ex rel. TVA v. Indian Creek Marble Co.*,[404] a federal court stated that the unit times price method does not take into consideration the possibility of fluctuation in market, taxes, costs, or the possibilities of business disasters. Thus, the court held that "[f]ixing just compensation for land taken by multiplying the number of cubic feet or yards or tons by a given price per unit has met with almost uniform disapproval of the courts."[405] The court emphasized that the unit times price approach

> involves all of the unknown and uncertain elements which enter into the operation of the business of producing and marketing the product. It assumes not only the existence, but the continued existence of a stable demand at a stable price. It assumes a stable production cost and eliminates the risks all business men know attend the steps essential to the conduct of a manufacturing enterprise.[406]

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any royalties or other benefits the coal might ever produce); United States v. 100.80 Acres of Land, 657 F. Supp. 269, 274 (M.D. N.C. 1987) ("Existence of mineral deposits in the subject property is an element in determining fair market value.").

[398] Bassett v. United States, 55 Fed. Cl. at 74 (holding that the plaintiff had "sufficient access before the taking to exploit fully the Property's highest and best use" that included aggregate mining as well as residential development and water rights); *see also* 4 NICHOLS ON EMINENT DOMAIN § 14F.02(1).

[399] United States v. 91.90 Acres of Land, 586 F.2d 79, 87 (8th Cir. 1978), *cert. denied*, 441 U.S. 944, 99 S. Ct. 2162, 60 L. Ed. 2d 1045 (1979) (reversing a trial court's award to a landowner that was nearly eight times what the government had been willing to pay).

[400] DOT v. Bacon Farms, L.P., 270 Ga. App. 862, at 865, 608 S.E.2d 305, at 308 (approving, however, the concept that the "the unit price and quantity of the minerals are factors upon which an opinion of fair market value may be based"). *See also* United States v. 179.26 Acres of Land in Douglas County, 644 F.2d 367, 372 (10th Cir. 1981); State Highway Comm'n v. Mann, 624 S.W.2d 4, 8 (Mo. 1981); *91.90 Acres of Land*, 586 F.2d at 87; State *ex rel.* Dep't of Highways v. Nevada Aggregates & Asphalt Co., 92 Nev. 370, 374, 551 P.2d 1095, 1097 (1976); Gradison v. State, 260 Ind. 688, 694, 300 N.E.2d 67, 73 (1973); State v. Hobart, 5 Wash. App. 469, 471, 487 P.2d 635, 637 (Wash. Ct. App. 1971); Smith v. State Roads Comm'n, 257 Md. 153, 160, 262 A.2d 533, 536 (1970); Ark. State Highway Comm'n v. Hampton, 244 Ark. 49, 52, 423 S.W.2d 567, 570 (1968); State *ex rel.* State Highway Comm'n v. Nunes, 233 Or. 547, 563, 379 P.2d 579, 587 (1963); United States v. Land in Dry Bed of Rosamond Lake, 143 F. Supp. 314, 315 (S.D. Cal. 1956).

[401] State of Alabama v. Bearid, 981 So. 2d 386 (2007) (affirming a substantial verdict for the owners, who used the unit method when the State failed to offer evidence of the mineral value of the remainder property), *rehearing denied*, 2007 Ala. LEXIS 296 (Ala. 2007); Bd. of County Supervisors of Henrico County v. Wilkerson, 226 Va. 84, 89, 307 S.E.2d 450, 452 (1983) (rejecting unit times royalty method of valuation because result is based upon speculation as to continuing existence of theoretical future market); State Road Comm'n v. Noble, 6 Utah 2d 40, 48, 305 P.2d 495, 501 (Utah 1957) ("[T]he amount of the mineral deposits cannot be estimated and then be multiplied by a fixed price per unit. The reason for this rule is said to be that the estimate as to the quantity and quality of the minerals in the land constitutes mere speculation and that, furthermore, even if such amount could be exactly ascertained, the costs of mining and the profits made therefrom would still be uncertain, since the contingencies of the business could not be estimated with any fair degree of certainty.") (*quoting* 156 A.L.R. at 1423); Ga. Kaolin Co. v. United States, 214 F.2d 284, 286 (5th Cir. 1954) (rejecting the approach because of its "speculativeness" in that "whether or not the deposits would be mined and the royalties paid would depend upon the condition of the market, the uncertainty of the future, the demand for the product, 'and many other elements, on and on, in the future'") (citation omitted).

[402] Gradison v. State, 260 Ind. at 692, 300 N.E.2d at 72 (stating that "'[t]he land taken must be valued as land, with the factor of mineral deposits given due consideration. Thus, the value as stone land suitable for quarrying—but not the value of the stone separate from the land — is a proper subject for consideration, both by the witnesses and the jury in fixing the amount of just compensation to be awarded'"); Werner v. Commonwealth, 432 Pa. 280, 286, 247 A.2d 444, 448 (1968) (explaining that "the minerals may not be valued separately apart from the remainder of the tract.... [I]t is impossible to determine how much a ton of sand and gravel will be worth until it has been removed from the earth and processed for market").

[403] Werner v. Commonwealth, 432 Pa. 280 at 286, 247 A.2d 444, at 448 (1968).

[404] 40 F. Supp. 811 (E.D. Tenn. 1941).

[405] *Id.* at 822.

[406] *Id.*

The court elaborated on its reasons for rejecting the method, stating that the unit times price approach

> eliminates the possible competition of better materials of the same general description and of the possible substitution of other and more desirable materials produced or possible of production by man's ingenuity, even to the extent of rendering the involved material unmarketable. It involves the assumption that human intelligence and business capacity are negligible elements in the successful conduct of business. It would require the enumeration of every cause of business disaster to point out the fallacy of using this method of arriving at just compensation. No man of business experience would buy property on that theory of value. True it is that quality and quantity have a place in the mind of the buyer and the seller, but the product of these multiplied by a price per unit should be rejected as indicating market value when the willing seller meets the willing buyer, assuming both to be intelligent. Values fixed by witnesses on such a basis are practically worthless, and should not be accepted.[407]

Accordingly, the court concluded that "[t]o the extent the valuation fixed by any witness contains this speculative element…its value as evidence [is] reduced."[408] Thus, a majority of courts have held that the unit times price or multiplication method is simply too dependent on future conditions and too speculative.[409]

In similarly rejecting the multiplication method, the Supreme Court of Oregon, in *State Highway Commission v. Arnold,*[410] stated that

> [t]he evil of the method is not simply the danger of leading the appraiser to an inaccurate appraisal but more important, because it has the illusion of scientific certainty and validity, it is too likely to be grasped upon by the jury as the sole criterion of value even though the expert witnesses in making their estimates purport to eliminate from their computation the element of speculation.[411]

Notwithstanding the firm rejection of the unit times price method by a majority of courts, other courts have suggested that the result of the method may be considered as one factor in the overall valuation of property. For example, although the Supreme Court of Nevada agreed that "a fair estimation of value cannot be reached simply by multiplying the unit market price of a given mineral by the estimated quantity thereof contained in the condemned land,"[412] the court held that if "the product of the price-unit formula is considered *only as one of such factors*, no prejudicial error results."[413]

More recently, in *Department of Transportation v. Bacon Farms, L.P., supra,* the court agreed that

> [t]he value of land containing mineral deposits cannot be determined simply by multiplying the estimated number of units of the mineral by a fixed, projected royalty per unit. This is because, in the words of the Supreme Court of Pennsylvania, "First, the minerals may not be valued separately apart from the remainder of the tract. Second, it is impossible to determine how much [the minerals] will be worth until [they have] been removed from the earth and processed for market."[414]

However, the court held that

> evidence of the quantity and value of minerals on the land is admissible—along with all other relevant evidence—to determine the value of the land as a whole. *In other words, while "price times unit" is not itself the proper measure of damages, the unit price and quantity of the minerals are factors upon which an opinion of fair market value may be based*.[415]

Although some courts reject the unit times price approach, properly presented the approach to valuation may be acceptable in some courts. That is, it may be important how the expert testimony is presented. For example, in *United States v. 83.32 Acres of Land,*[416] the subject parcel was an estimated 44 acres "underlain by four million recoverable tons of phyllite," a "figure…amply supported by the record…."[417] According to the appeals court, "[t]he trial court…multiplied four million tons by nine cents a ton, to arrive at an award of $360,000."[418] Nevertheless, the appeals court affirmed the trial court's verdict, stating that "[t]he nine cent figure was not a royalty to be paid in connection with a lease of the minerals." According to the court, the approach

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[407] *Id.*

[408] *Id*.

[409] State v. J.H. Wilkerson & Son, Inc., 280 A.2d 700, 701–02 (Del. 1971)

> (It is wrong, therefore, to view that land as though it were simply a pile of excavated gravel. Certainly, the value of the gravel in the ground may be considered; but, in doing so, it is improper to consider the value of the mineral content as if it were extracted from the ground and ready for a waiting market, at current or anticipated prices, in order to reach the fair market value of the property. The law does not permit the finders of fact to speculate as to the availability of a market, the status of prices, or the net margin of profit.)

United States v. 620 Acres of Land, 101 F. Supp. 686, 691 (W.D. Ark. 1952) ("'The separate valuation of timber or rock attached to land, or valuations arrived at by a process of multiplying the number of cubic feet or yards by a given price per unit, are not approved bases for evaluation.'") (citation omitted); Ga. Kaolin Co. v. United States, 214 F.2d at 286 (also stating that the "rule has been applied to limestone deposits, gold ore, fire clay, coal, stone, and sand and gravel").

[410] 218 Or. 43, 341 P.2d 1089 (Or. 1959). Note that the evidence is not being admitted as a *method of valuation*; rather, it is being admitted as one factor in ascertaining the value of the property. *See also* DOT v. Bacon Farms, L.P., 270 Ga. App. at 865, 608 S.E.2d at 308.

[411] State by State Highway Comm'n v. Arnold*,* 218 Or. 43, 75, 341 P.2d 1089, 1104 (1959).

[412] Nevada v. Nev. Aggregates & Asphalt Co., 92 Nev. 370, 375, 551 P.2d 1095, 1097 (1976).

[413] *Id.* (emphasis supplied).

[414] DOT v. Bacon Farms, L.P.*,* 270 Ga. App. at 865, 608 S.E.2d at 308 (footnote omitted).

[415] *Id.* (footnote omitted) (emphasis supplied).

[416] 480 F.2d 1143 (5th Cir. 1973).

[417] *Id.* at 1144.

[418] *Id.*

> represented the accepted method of calculating the value of a fee simple interest in the land itself, as opposed to the value of the minerals, and was derived by taking one-half of a reasonable royalty per ton (twenty-five cents per ton) and making further deductions for the cost of mining and transportation. This method of computing the value of the land itself had been employed in several comparable sales in the area.[419]

In *Bacon Farms*, *supra*, the court agreed with the Fifth Circuit's statement in *United States v. 83.32 Acres of Land*, *supra*, that "[t]he value of land containing mineral deposits cannot be determined…by a fixed, projected royalty per unit."[420] The court explained in *Bacon Farms* that the owners' experts' problems were that they "apparently made no deductions or other allowances for the cost of mining and transportation of the kaolin, nor did they account for future market uncertainties. Rather, they simply averaged the royalty fees from existing lease agreements, with no reductions."[421]

Based on the foregoing cases, it appears that some courts will permit the unit times price approach if it is properly adjusted. Some courts appear to go even further and allow the use of the unit times price method.[422] In *In re Lee,*[423] the court did not reject the method but still found the evidence to be too speculative.

> *The trial court did not err in admitting this "unit times price" valuation evidence*, as the rule on expert testimony allows testimony based upon data learned from reliable scientific technique and absolute certainty is not required.... The testimony substantiated that the test hole data used by petitioner's experts was relied upon in the field of sand and gravel mining. We do hold, however, that standing alone this evidence was insufficient to support any award for petitioner. The evidence was too speculative and petitioner's case lacked several critical elements necessary to allow a jury to make a reasoned decision as to the value of petitioner's interest in the condemned land. There was no evidence presented on the cost of extraction of the minerals. No evidence was offered tending to show the costs of processing or transporting the minerals.[424]

The court in *In Re Lee* did recognize that the "'unit times price' method of valuing minerals in place has been soundly rejected" by courts in other jurisdictions, in particular when "mining operations have not even begun...."[425] The court, moreover, stated that "[t]he rationale underlying this rule is that such evidence is simply too speculative, as it is based upon unknown and uncertain elements which enter into the operation of mining, processing and marketing the minerals."[426] As said, however, although the unit times price method may not be acceptable in most jurisdictions, the method, if properly adjusted, may be allowed in some jurisdictions.

Thus, it appears that a majority of courts, except in special situations, reject the use of the unit times price or multiplication method, in essence to prohibit what could amount to a separate valuation of minerals vis-à-vis the property.[427] As one article states,

> [t]he traditional statement of the unit rule is that "condemned land containing minerals is to be valued as including the minerals, the value of which cannot be shown separately." This rule has been harshly criticized since a willing buyer would at least want to be informed of the mineral content of the land, whereas this rule holds such evidence inadmissible.[428]

Consistent with the foregoing discussion, the article suggests that there is a "more liberal, modified unit rule" that "allows the parties to admit evidence of the separate value of minerals in the subject property *provided certain criteria are fulfilled*...."[429]

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[419] *Id.*

[420] DOT v. Bacon Farms, L.P., 270 Ga. App. 862, at 865, 608 S.E.2d 305, at 308.

[421] *Id.* at 865, 608 S.E.2d at 309.

[422] *See* United States v. 103.38 Acres of Land*,* 660 F.2d 208, 21–14 (6th Cir. 1981) (holding that the unit times price formula is competent evidence if and only if market value exists for the mineral in place and the valuation witness possesses the requisite industry expertise); City of St. Louis v. Union Quarry & Constr. Co., 394 S.W.2d 300, 307 (Mo. 1965) (holding that the unit times price approach is permissible as a last resort when the only use of property is for the exploitation of minerals); Ark. State Highway Comm'n v. Cochran, 230 Ark. 881, 883, 327 S.W.2d 733, 734 (1959) (holding that the unit times price approach is a permissible method of valuation when the land taken is leased at a royalty rate for mining).

[423] 85 N.C. App. 302, 354 S.E.2d 759 (N.C. Ct. App. 1987).

[424] *Id.* at 308, 354 S.E.2d at 763–64 (citation omitted) (emphasis supplied).

[425] *Id.* at 307, 354 S.E.2d at 763 (*citing* United States v. 339.77 Acres of Land, 420 F.2d 324 (8th Cir. 1970); H.E. Fletcher Co. v. Commonwealth, 350 Mass. 316, 214 N.E.2d 721 (1966)).

[426] 85 N.C. App. 307, 354 S.E.2d at 763.

[427] DOT v. Bacon Farms, L.P., 270 Ga. App. at 865, 608 S.E.2d at 308 (rejecting the unit times price method of valuation but holding also that unit price and quantity of minerals are factors to consider in the overall valuation of property).

[428] Robert A. Dunkelman, *Student Symposium on Oil & Gas: Consideration of Mineral Rights in Eminent Domain Proceedings*, 46 LA. L. REV. 827, 835 (1986) (footnotes omitted).

[429] Dunkelman, *supra* note 428, at 835 (emphasis supplied). The author states that "Louisiana courts have followed the more liberal unit rule which allows evidence of the value of minerals underlying the surface, provided adequate jury instructions are given to prevent jurors from simply adding the mineral value rather than considering mineral value as merely an element of the land's value." *Id*. at 836 (footnote omitted). The criteria are

> (1) The existence and quantity of the minerals can be accurately determined (technological advances have gone far in the elimination of guesswork in this area);
>
> (2) The expenses of production and marketing are taken into consideration in valuing the minerals;
>
> (3) This element of value is clearly significant;
>
> (4) The exploitation of the minerals is not inconsistent with the highest and best use of the land; and most importantly;

In sum, although it seems that a majority of courts prohibit admission of evidence based on the unit times price method, there is some judicial authority either permitting the use of the method or permitting the use of the method to arrive at a value of the minerals in place as one factor to be considered in determining the value of the subject property.[430] It is suggested also that the unit times price method may be acceptable if "certain criteria are fulfilled," including taking into consideration "[t]he expenses of production and marketing…."[431]

I.2. Use of Comparable Sales or Income Approach

The determination of the value of land having mineral deposits necessarily involves an approximation.[432] The courts have attempted to reduce the speculative nature of the valuation of minerals in place by limiting such evidence to comparable sales of similar property with mineral deposits to establish market value.[433] The courts tend to prefer evidence of comparable sales because such evidence is less speculative and more closely approximates the marketplace.[434]

In the absence of comparable sales a court must resort to other means of determining fair market value, such as the income approach.[435]

> [W]hen lacking evidence of comparable sales, other evidence in support of other methods of valuation may be sufficient for determination of value. In *United States v. Corbin*, 423 F.2d 821 (10th Cir. 1970), this Court specifically recognized that where no comparable sales were available, the capitalization of net income approach to determine fair market value of a fish farm was appropriate. *Sowards* and *Corbin* are consistent with *Sill Corporation v. United States*, 343 F.2d 411 (10th Cir. 1965), *cert. denied*, 382 U.S. 840, 86 S. Ct. 88, 15 L. Ed. 2d 81 (1965), where we said:
>
> …the law is not wedded to any particular formula or method for determining the fair market value as the measure of just compensation…. It may be based upon comparable sales, reproduction costs, capitalization of net income, or an interaction of these determinants.[436]

If evidence of comparable sales is not available, the approved method is the capitalization of income approach, which relates the value of the land to the present value of the income the land produces.[437] As held in *State Highway Commission v. Jones,*[438] if "income is produced from the sale of minerals or other soil materials, then the 'income approach' for valuing land with its incumbent use of the capitalization method is proper where such is the best method for ascertaining the fair market value."[439]

Likewise, in a case in which there were no comparable sales, it was held that "the fair market value of a coal deposit is determinable by multiplying the recoverable tonnage of mineral by a given royalty per ton, and by discounting the sum thus obtained to present value."[440] The court stated that the royalty capitalization method is an appropriate means of valuing mineral deposits

> if, and only if, the offering party can establish: 1) that an active market exists for the mineral in place; 2) that transactions between willing buyers and sellers in that market commonly take the form of royalty payments; and 3) that the figures on which an award might be based represent the conclusions of an industry expert.[441]

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(5) The jury should be instructed that the evidence of separate value is only a factor to be considered in determining the total value of the land itself.

Id. at 835–36 (footnote omitted).

[430] DOT v. Bacon Farms, L.P., 270 Ga. App. at 865, 608 S.E.2d at 308 ("First, the minerals may not be valued separately apart from the remainder of the tract.") (citation omitted) (internal quotations omitted).

[431] Dunkelman, *supra* note 428, at 835 (footnote omitted).

[432] *See generally* Jeremy Eyre, *The San Rafael Swell and the Difficulties in State-Federal Land Exchanges*, 23 J. LAND RESOURCES & ENVTL. L. 269 (2003).

[433] DOT v. Bacon Farms, L.P., 270 Ga. App. at 862, 608 S.E.2d at 306 (noting that the DOT's appraiser used comparable sales of other property in the county containing kaolin but also concluded that the kaolin deposits were cost-prohibitive to mine). *See also* United States v. Bassett, 55 Fed. Cl. at 78 (finding comparable sales method was more "persuasive"); Dawson v. Papio Natural Res. Dist., 206 Neb. 255, 292 N.W.2d 42 (1980); State v. Hobart, 5 Wash. App. 469, 487 P.2d 635 (Wash. Ct. App. 1971); Ark. State Highway Comm'n v. Hampton, 244 Ark. 49, 423 S.W.2d 567 (1968); *H.E. Fletcher Co.*, 350 Mass. 316, 214 N.E.2d 721 (1966); Hoy v. Kan. Turnpike Auth., 184 Kan. 70, 334 P.2d 315 (1959); Tenn. Gas Transmission Co. v. Mattevi, 144 N.E.2d 123 (Ohio 1956) (price paid earlier for same property inadmissible when property and market conditions have changed).

[434] United States v. 103.38 Acres of Land, 660 F.2d 208, 212 (6th Cir. 1981).

[435] *Id.* at 211.

[436] United States v. 179.26 Acres of Land in Douglas County, 644 F.2d 367 at 372.

[437] Whitney Benefits, Inc. v. United States, 18 Cl. Ct. 394, 408 (1989), *aff'd,* 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 952, 112 S. Ct. 406, 116 L. Ed. 2d 354 (1991) (affirming the use of future income stream analysis only on the basis of a finding by the lower court that reliable comparable sales data was lacking at trial); *but see Bassett*, 55 Fed. Cl. at 79 (The court rejected the plaintiff's income approach, stating that "[c]omparable sales data derived from comparison of land analogous to the Property was available based upon the evidence presented in the United States' appraisals. Thus, the Uniform Appraisal Standards would not support the use of future income stream analysis in the present case.").

[438] 173 Ind. App. 243, 363 N.E.2d 1018 (Ind. Ct. App. 1977).

[439] *Id.* at 245, 363 N.E.2d at 1025.

[440] United States v. 103.38 Acres of Land*,* 660 F.2d at 212.

[441] *Id.* at 213. *See* State v. Bearid, 981 So. 2d 386, at 391; *Bacon Farms, L.P.*, 270 Ga. App. at 865, 608 S.E.2d at 308 (rejecting the royalty capitalization method but holding that price and quantity of mineral deposits were factors to consider when determining the value of property); *Bassett*, 55 Fed. Cl. at 76-79 (rejecting a "production royalty" capitalization method in favor of the comparable sales method).

Another court has stated that if evidence of comparable sales is unavailable and "if the proof is not deficient, a present value for mineral interests taken in eminent domain proceedings may be determined by estimating the anticipated income that might be derived from the sale of the minerals over a period of time, and capitalizing that income in terms of its present worth."[442] The court distinguished the income method from the impermissible and simplistic unit times price method on the basis that "[m]any other factors were developed in the evidence and used in the landowners' demonstration of the contributory value of the limestone in place."[443]

Notwithstanding the foregoing authorities, the Supreme Court of Missouri has considered the income approach to be too speculative and an attempt to aggregate the value of land and minerals. The court rejected the use of the income method even when valuing leased land that was currently being mined.[444]

In sum, although the case law in a particular jurisdiction must be consulted, the use of the income approach appears more likely to be allowed when the condemned property is currently used for mineral production or if there is an existing lease or royalty agreement providing a similar basis for an expert's calculations.

I.3. Valuation Issues When Only Taking the Surface or Easement

If only the surface estate or easement is condemned, the measure of just compensation is the value of the land taken plus the damages to the remainder because of the taking. A condemnee must establish the real and actual damages accruing to the remainder due to a partial taking.[445] If an owner does not claim severance damages or if the court fails to find severance damages, the before-and after-value rule does not apply; the owner's damages are limited to the market value of the land taken.[446]

The damages usually represent the difference between the fair market value of the entire property immediately before the taking and the fair market value of the remainder after the taking.[447] In establishing the before and after fair market value in partial takings, the courts consider the highest and best use of the property, the value of minerals that enhance the property's value, and the property's value as a whole as if the entire property were being condemned.[448] If property has minerals, the owner has the right to use the surface estate as may be reasonably necessary to extract the minerals.[449] Thus, a landowner may be entitled to damages based on the impossibility of extracting minerals from an entire tract if a condemnation severs the land so as to make mining commercially unfeasible.[450] A condemnee's loss is measured by the diminution in the value of the mineral estate caused by the taking.[451]

If mineral deposits are the subject of a condemnation, then there is an exception to the rule that the land and the mineral deposits may not be valued separately. In such cases, the owner of the mineral rights is entitled to the separate value of the minerals, as they are treated as merchandise rather than as being a part of the land.[452] Also, the land and minerals may be valued

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[442] United States v. 179.26 Acres of Land in Douglas County, 644 F.2d at 373 (*citing Corbin*, 423 F.2d 821 (10th Cir. 1970); United States v. 158.76 Acres of Land, 298 F.2d 559 (2d Cir. 1962); United States v. 1,629.6 Acres, 360 F. Supp. 147 (D. Del. 1973), *aff'd in part, rev'd in part on other grounds*, 503 F.2d 764 (3d Cir. 1974); United States v. Whitehurst, 337 F.2d 765 (4th Cir. 1964)).

[443] *179.26 Acres of Land in Douglas County*, 644 F.2d at 373.

[444] State *ex rel.* State Highway Comm'n v. Mann, 624 S.W.2d at 7–9 ("A mineral deposit is a factor to be considered in determining the fair market value of land…. A mineral deposit or other factors affecting the market value of land, however, may not be valued separately and added together to determine the fair market value of the land.") (numerous citations omitted).

[445] State Highway Comm'n v. Antonioli, 145 Mont. 411, 418–19, 401 P.2d 563, 567 (1965).

[446] Ark. State Highway Comm'n v. DeLaughter, 250 Ark. 990, 999, 468 S.W.2d 242, 247 (1971); Ruth v. Dep't of Highways, 145 Colo. 546, 549–50, 359 P.2d 1033, 1035 (1961).

[447] Highway Comm'n v. Ullman, 88 S.D. 492, 499–500, 221 N.W.2d 478, 482 (1974); *DeLaughter*, 250 Ark. at 999, 468 S.W.2d at 247; *H.E. Fletcher Co.*, 350 Mass. at 320–21, 214 N.E.2d at 724; *Argraves*, 149 Conn. at 204, 177 A.2d at 678.

[448] State v. Bearid, 981 So. 2d 386, at 389; Hultberg v. Hjelle, 286 N.W.2d 448, 455 (N.D. 1979) (value of minerals not to be determined separately from and added to value of land); *91.90 Acres of Land*, 586 F.2d at 86–87 (holding that one may not estimate tonnage of clay in ground and then multiply times fixed unit price, but one may establish that presence of clay enhances the value of property); State Highway Comm'n v. Ullman, 88 S.D. at 501–02, 221 N.W.2d at 482–83 (value of gravel deposits relevant to value of land only if deposits affect land's market value); H.E. Fletcher Co. v. Commonwealth, 350 Mass. at 324, 214 N.E.2d at 725–26 (holding that it is within the discretion of the trial court to exclude capitalization of income evidence as overly speculative when determining before and after value of the condemned property); Commonwealth, Dep't of Highways v. Gearhart, 383 S.W.2d 922, 923, 925–26 (Ky. App. 1964) (proof of valuable mineral deposit relevant but insufficient to support verdict); *Argraves*, 149 Conn. at 205, 177 A.2d at 678 (evidence of net profits from gravel business inadmissible even when the nature of the property condemned is such that profits derived therefrom are the chief source of its value); *but see Mann*, 624 S.W.2d at 10, in which the Missouri Supreme Court distinguished a partial taking from a complete taking. The court held that computing the present value by capitalization of an income stream is more speculative in cases involving a partial taking, because the starting date of the income stream from the area taken is unknown.

[449] 981 So. 2d at 390-91; Lomax v. Henderson, 559 S.W.2d 466, 467 (Tex. Civ. App. 1977).

[450] *See* Tenn. Gas Transmission Co. v. Mattevi, 75 Ohio Abs. 396, 144 N.E.2d 124, 126 (Ohio App. 7th Cir. 1956).

[451] Lomax v. Henderson, 559 S.W.2d at 467. *But see* Gulf Interstate Gas Co. v. Garvin, 368 S.W.2d 309, 313 (Ky. Ct. App. 1963) (damages based on diminution in fair market value of land as a whole).

[452] State Highway Comm'r v. Fegin, 2 Mich. App. 698, 704, 141 N.W.2d 312, 315 (1966)

separately when a lessee is entitled to remove minerals pursuant to a lease.[453]

If the ownership of land and mineral deposits is severed, the fair market value of the land may be determined and the damages apportioned between the owner of the land and the owner of the mineral rights.[454] In *Lomax v. Henderson, supra,* the court valued all interests in the condemned property; however, the court refused to divide the award between the owners of the separate estates because the owners of the mineral estate failed to prove that the minerals had any market value.[455] On the other hand, in *Valls v. Arnold Industries, Inc*.,[456] even though the owners presented no evidence of the actual presence of minerals or to prove that the value of the land would be enhanced by the presence of minerals, the court awarded compensation to the owners of the mineral estate.[457] Because a mineral estate has market value and often commands a substantial price in the market, the court held that the owners could not be deprived of their estate without just compensation, even though an award of compensation for them diminished the sum awarded the owner of the surface estate.[458]

("The second exception to the general rule is applied where the mineral deposit itself is the subject of the condemnation. In such case the deposit is treated as so much merchandise rather than as land. The rule applicable to personal property is invoked and the condemnor is liable for the market value of the mineral deposit as separately evaluated.'")

(*citing* 4 NICHOLS ON EMINENT DOMAIN (3d ed), § 13.22 (1), at 422); State *ex rel.* State Highway Comm'n v. Foeller, 396 S.W.2d 714, 719 (Mo. 1965) (*per curiam*) (stating that "[w]here there is a mineral deed, the subsurface rights conveyed create a separate, distinct interest apart from the surface rights") (citations omitted); Bd. of County Comm'rs of Roosevelt County v. Good, 44 N.M. 495, 499, 105 P.2d 470, 472 (1940) (holding that the owner "had the right to have the jury hear the evidence and determine the actual market value of the caliche rock taken from his land, without reference to the value of the land itself").

[453] Smithrock Quarry, Inc. v. State, 60 Wash. 2d 387, 390, 374 P.2d 168, 171 (1962) (holding that

> where the only valuable incident is the right to remove materials from the land, and the amount and value of the materials can be definitely ascertained…the trial court properly permitted the jury to find that the plaintiff's damages were equal to the value of the rock materials which had been severed and could be sold at the date of the taking and removed before the expiration of the lease).

[454] Commonwealth v. Haydu*,* 1 Pa. Commw. 561, 570, 276 A.2d 346, 350 (Pa. Commw. Ct. 1971).

[455] Lomax v. Henderson*,* 559 S.W.2d at 467.

[456] 328 So. 2d 471, 474 (Fla. App. 2d Dist. 1976).

[457] *Id.* at 474.

[458] *Id.* (stating that "[i]t makes no difference that without evidence of the likelihood of minerals in the property, the jury would not have been entitled to consider the speculative possibility that the property might be more valuable because of the existence of minerals").

It should be noted, however, that in *The Village of Tequesta v. Jupiter Inlet Corporation,*[459] the Supreme Court of Florida clarified that "the right of the owner to *ground water* underlying his land is to the usufruct of the water and not to the water itself. The ownership of the land does not carry with it any ownership of vested rights to underlying ground water not actually diverted and applied to beneficial use."[460] The court overruled the *Valls* case, *supra*, to the extent that the court in *Valls* declared that water beneath property is a property right to the same extent as oil, minerals, and other substances that may not be "divested under any circumstances without…just compensation."[461] The court in *Village of Tequesta* held rather that "[t]he right to use water does not carry with it ownership of the water lying under the land" and that "[t]he right of [a] user is not considered 'private property' requiring condemnation proceedings unless the property has been rendered useless for certain purposes."[462]

In summary, the valuation of mineral rights is a difficult issue. However, the proper considerations in the valuation of mineral rights appear to include, for example, the nature of the estate or interest being acquired, whether comparable sales data is available, whether the minerals are subject to an existing lease, whether the minerals are being mined as of the date of taking, and whether there actually exists a market for the minerals.[463]

J. VALUATION OF TREES OR SHRUBS

J.1. Valuation as Part of the Land

Section 103(10) of the Uniform Eminent Domain Code defines "any form of vegetation such as…fruits, vegetables, trees, …[and] nursery stock…intended to be used for commercial purposes." As with the valuation of mineral deposits, the majority view is that trees or shrubs are not to be valued separately from the land and the value thereof then added to the value of the land.[464] In *Deboer v. Entergy Arkansas, Inc*.,[465] in which

[459] 371 So. 2d 663 (Fla. 1979), *cert. denied,* 444 U.S. 965, 100 S. Ct. 453, 62 L. Ed. 2d 377 (1979).

[460] *Id.* at 667 (emphasis supplied).

[461] *Id.* at 667–68.

[462] *Id.* at 668 (holding that the village "was only subjected to…consequential damages incurred when it was required to draw water" from one aquifer rather than another).

[463] State Highway Comm'r v. Fegin, 2 Mich. App. at 704, 141 N.W.2d at 315 (stating, however, that the court did "not believe it is necessary to establish that a market exists warranting commercial exploitation of the materials" as it was "sufficient…if [there were] occasional demand from the contractors, and county road commission [that] has established a general price in the area….")

[464] City of Gunnisson v. McCabe Hereford Ranch, Inc., 702 P.2d 768, 770 (Colo. Ct. App. 1985); People v. Gianni, 29 Cal. App. 3d 151, 156, 105 Cal. Rptr. 248, 251 (Cal. App. 1st Dist. 1972).

[465] 82 Ark. App. 400, 109 S.W.3d 142 (Ark. Ct. App. 2003).

a utility company mistakenly cut trees on the owners' land, the court held that the owners were not entitled to the claimed replacement cost of the trees but to the difference in the before and after value of the property, the measure of damages in inverse condemnation being the same as in direct condemnation.[466] "Even though the improvements may have possessed a certain amount of aesthetic value to the landowners, [the owners] are entitled to recover only what is required to place them in as good position pecuniarily as they would have been if the property had not been taken."[467]

Likewise, in *Ventres v. Goodspeed Airport, LLC*, *supra*, the Supreme Court of Connecticut, although identifying three possible ways to measure the damages for the loss of a tree, held that

> "[r]eplacement value is not a proper measure of damages in tree cutting cases because such a measure of damages…would lead to unreasonable recoveries in excess of the market value of the land …[,] would raise impossible issues in resolving the replacement values of healthy or partially damaged trees…[and] cannot be practically applied."[468]

The accepted approach to valuation seems to be based on the diminution in property value as a result of the cutting of trees "determined by the cost of repairing the damage, provided…that that cost does not exceed the former value of the property and provided also that the repairs do not enhance the value of the property over what it was before it was damaged."[469]

J.2. Valuation in Unique Situations

J.2.a. Income Producing Trees

In exceptional or unique situations it appears that trees and shrubs may be valued separately from the land.[470] Trees that bear fruit or nuts may have such value that they also enhance the value of the property.[471] In *Ventres v. Goodspeed Airport, LLC,*[472] the court noted that

> [a]lthough the court in *Maldonado* concluded that the cost of replacing the trees was not a proper measure of damages, it stated that "it is…well established that [the diminution in property value as a result of cutting the trees] may be determined by the cost of repairing the damage, provided, of course, that that cost does not exceed the former value of the property and provided also that the repairs do not enhance the value of the property over what it was before it was damaged."[473]

J.2.b. Veneer Logs and Timber

The term "veneer logs" means a special type of tree suitable for making veneered furniture. The term "timber" denotes trees suitable for conversion into lumber.[474] If property being acquired has timber of such quality and quantity that it enhances the property's value, then the owner should be allowed to present evidence of the value of the enhancement.[475] Three commonly used scales for the valuation of logs are the Doyle Scale, the Scribner Scale, and the Herring-Devant Log Scale.[476]

J.2.c. Decorative Trees and Shrubs

As a general rule, "trees and shrubbery are not to be appraised independently of the land. It is only when they have some unique value that such items are valued in addition to the fair market value of the property…."[477] In a case in which an owner who was a landscape architect had planted shrubs not merely for decoration but as samples clients could see, the court allowed evidence of enhancement in value to the property because of the shrubs.[478]

In sum, for an owner to obtain enhancement in value because of trees, shrubs, or other vegetation, it appears that the owner will have to prove some unique circumstances or some special need for or use of the claimed enhancement to the subject property. Although state law may vary, even in a case of the wrongful cutting or misappropriation of trees the accepted method of valuation does not appear to be the replacement value of the trees.

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[466] *Id.* at 405, 109 S.W.3d at 145.

[467] State v. Miltenberger, 344 So. 2d 705, 710 (La. App. 1st Cir. 1977) (citations omitted).

[468] Ventres v. Goodspeed Airport, LLC, 275 Conn. 105, 159, 881 A.2d 937, 971 (2005), *cert. denied,* 547 U.S. 1111, 126 S. Ct. 1913, 164 L. Ed. 2d 664 (2006) (citations omitted).

[469] 275 Conn. at 159, 881 A.2d at 972 (citations omitted).

[470] State v. Miltenberger, 344 So. 2d at 710 ("It is only when they have some unique value that such items are valued in addition to the fair market value of the property….") (citation omitted).

[471] Uniform Eminent Domain Code § 1010(a).

[472] 275 Conn. 105, 881 A.2d 937 (2005), *cert. denied,* 547 U.S. 1111, 126 S. Ct. 1913, 164 L. Ed. 2d 664 (2006).

[473] *Id.* at 160–61, 881 A.2d at 971–72.

[474] M & I Timber Co. v. Hope Silver-Lead Mines, 91 Idaho 638, 642–43, 428 P.2d 955, 959 (1967).

[475] Bishop v. Miss. Transp. Comm'n, 734 So. 2d 218, 222 (Miss. Ct. App. 1999).

[476] United States v. 2,175.86 Acres of Land, 687 F. Supp. 1079, 1085 (E.D. Tex 1988) ("The most generally accepted log scale utilized in the East Texas timber market upon which timber is bought and sold is the Doyle Scale. Scribner Scale is also common. The Herring-Devant Log Scale is unique to Kirby.").

[477] State *ex rel*. Dep't of Highways v. Miltenberger, 344 So. 2d at 710 (citation omitted); *see also* Ventres v. Goodspeed Airport, 275 Conn. at 160, 881 A.2d at 971–72 (noting that damages may be awarded for replacing cut trees but the full value may not exceed the former value of the property and may not enhance the value of the property over what it was before it was damaged).

[478] State v. Blair, 285 So. 2d 212, 213, 215 (La. 1973).