VALUATION PROBLEMS IN CONDEMNATION

Valuation and Condemnation of Special Purpose Properties

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INTRODUCTION AND GENERAL CONSIDERATIONS

Because of the lack of data usually acceptable as evidence to determine "just compensation" in the trial of a condemnation action, certain types of property cannot be valued by the usual methods or proof allowable in such actions. Some of these properties are schools, churches, cemeteries, parks, utilities, and similar properties.[1] Such properties may be referred to as "special purpose properties," "special use properties," or "specialties"; or no name may be given to them and the rules of evidence may still be relaxed. This paper does not intend to select any particular name or criteria as being preferable but uses the term "special purpose properties" as a generic term to identify all such properties that, because of their unique uses and characteristics and the lack of sales of similar properties, are not readily adaptable to valuation under the rules of evidence usually applied in condemnation trials.

Research has been concerned with the following:

1. Legal principles in terms of allowable valuation methods and evidentiary proof applicable to such properties.
2. Appraisal principles applicable to such properties.
3. An attempt to correlate legal and appraisal approaches.
4. Limited comments with respect to the preferable approach, subject to the caveat that "policy matters or editorialization is not desired." [2]

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[1] 4 Nichols, EMINENT DOMAIN, § 12.32; 1 Orgel, VALUATION UNDER EMINENT DOMAIN, § 38 (2d ed.).

[2] Problem statement in the contract with Highway Research Board, National Academy of Sciences, includes:

Sometimes this paper indicates a preference where divergent positions are taken by authorities. An example is whether market value is an appropriate measure of valuation for special purpose properties owned by public or nonprofit agencies.

Concerning methods used, cases and legal treatises relating to special purpose properties were briefed, appraisal articles and texts on the subject were read and digested, and an attempt was made to correlate these two sources. Correspondence and discussions were undertaken with appraisers and attorneys experienced with special purpose properties, and finally, consideration was given to what might be done to clarify valuation methods and the proof of value allowable in condemnation trials.

An attempt was made to consider all cases concerned with properties generally classified as special purpose. Not all cases in valuing utilities were reviewed. Cases dealing with mineral deposits were not considered, because they usually can be valued by a consideration of the market value of the land taken. The problem of whether a property must be valued as a whole or may be valued in parts has been avoided. Possible solution of problems by statutes is ignored; statutes cannot cover all situations that arise in dealing with unusual properties. Cases not concerned with special purpose properties are cited where appropriate; however, most cases cited are concerned with special purpose properties.

There is little material on valuation of special purpose properties in appraisal publications. Cemeteries, factories, and utilities are exceptions. Appraisal articles, except those that essentially are examples of appraisals of a particular property, tend to be general. Often these generalities cannot be applied to specific problems relating to specific properties. Legal opinions provided a better source of particular information about particular properties; they also control the appraisal devices that can be used. Principal emphasis, therefore, is on the legal aspect of the problem.

Approach to the subject matter was made from two directions. The first, concerning general principles, presents evidentiary rules and valuation principles more or less applicable to all special purpose properties. The second classifies types of property according to the

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Accordingly, it is desired that research be undertaken to clarify the special purpose property field illustrated by the taking of cemeteries, parks, schools, and churches, or portions thereof. The research is to assemble and analyze the case law applicable to this class of property; the present state of appraisal practice in the field involving these special use properties; and a clear exposition of the correct theory and practice, in terms of a series of alternatives applicable to such properties.

Policy or editorialization is not desired; rather, what is expected is a factual and practical approach to the problem of the valuation of these special purpose properties, thoroughly reconciled with existing ground rules as laid down by the decisions of the courts.

types of special purpose property and the valuation principles and rules of evidence applied in the cases concerned with each type. The second section of the report presents cases on types of property. Additional authority on a legal principle involved in a particular case is presented under the appropriate heading in the first section.

It is assumed that the reader has a basic knowledge of the law of eminent domain and the manners in which the market data, cost, and income methods of appraising are applied. An attempt has been made to avoid basics and to concentrate on special purpose problems and the rules, legal and appraisal, applicable to them.

General Considerations

Both the federal and state constitutions require that private property shall not be taken for public use without the payment of just compensation to the owner.[3] In many states the constitutional requirement of just compensation extends to the damaging of private property.[4] Due process also requires the payment of compensation properly determined.[5]

General statements on the condemnor's obligation to pay just compensation focus on the owner's position, in that he must be indemnified or "made whole."

> Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.[6]

> Rules relating to the fixing of damages afford convenient measures of value which are ordinarily satisfactory and conclusive. They are, however, nothing more than a means to an end and that end is indemnity.[7]

Generally, the measure of compensation is market value.[8] Market value is not an end in itself, but a means to an end, a satisfaction of the

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[3] U.S. CONST., AMEND. V. For analysis of provisions of various state constitutions, *see* 1 Nichols, EMINENT DOMAIN, § 1.3; 1 Orgel, VALUATION UNDER EMINENT DOMAIN, § 1.6.

[4] 2 Nichols, EMINENT DOMAIN, § 6.44; 1 Orgel, VALUATION UNDER EMINENT DOMAIN, § 6.

[5] 2 Nichols, EMINENT DOMAIN, § 4.8; 1 Orgel, VALUATION UNDER EMINENT DOMAIN, § 6.

[6] United States v. Miller, 317 U.S. 369, 87 L.Ed. 369, 63 Sup. Ct. 276, 147 A.L.R. 55 (1943); *see* Chicago v. George F. Harding Collection, 70 Ill. App. 2d 254, 217 N.E.2d 381 (1965); 4 Nichols, EMINENT DOMAIN, § 12.1[4]. To award more than the owner's indemnity is unjust to the public that must pay the bill. Bauman v. Rose, 167 U.S. 548, 42 L.Ed. 270, 17 Sup. Ct. 966 (1897); United States v. 3.71 Acres of Land, etc., 50 F. Supp. 110 (E.D. N.Y. 1943).

[7] Matter of Board of Water Supply, 209 A.D. 231, 205 N.Y.S. 237 (1924); 4 Nichols, EMINENT DOMAIN, § 12.1[4]; *cf.* Dolan, *Just Compensation: Indemnity or Market Value?* 34 APPRAISAL J. 353 (July 1966).

[8] United States v. Miller, 317 U.S. 369, 87 L.Ed. 369, 63 Sup. Ct. 276, 147 A.L.R. 55 (1943); United States v. Petty Motor Co., 327 U.S. 372, 90 L.Ed. 729, 66 Sup. Ct. 596 (1946); Commonwealth v. Massachusetts Turnpike Authority, 352 Mass. 143, 244 N.E.2d 186 (1966); 1 Nichols, EMINENT DOMAIN, § 12.2; *cf.* Dolan, *supra* note 7.

constitutional requirement of payment of just compensation to the owner.[9] This measure breaks down when dealing with special purpose properties because of the absence of market data; therefore, other measures [10] must be used, and the rules of evidence relaxed to allow proof beyond that usually allowed to establish market value.[11]

Another general statement often made is that just compensation is based on what the owner has lost, not what the condemnor has gained.[12] Value of the property to the condemnor for its particular use is not the criterion; the owner must be compensated for what is taken from him.[13] In limited situations this rule of compensation for the owner's loss is used to justify compensation for business taken.[14] In these cases the condemnor usually gains this business. Generally, the owner's loss is disregarded where the taking has the incidental effect of destroying his business located on the premises. The reason occasionally given is that the government is not acquiring or "gaining" this business, and it may be located elsewhere by the owner.[15]

In evaluating both legal and appraisal principles relating to special purpose properties, the question is: Has the owner been indemnified for what he has lost insofar as his property is concerned? This view does not assume that an owner should receive what he asks. It does not assume that he will receive compensation for sentimental value and other losses that courts have not recognized as compensable.

In terms of relevance, the principle that an owner is entitled to "a full and perfect equivalent in money" for what he is losing would permit proof of any element that affects the value of the property.[16]

> It [market 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 ends to which it is adapted, or that he puts it to no profitable use at all. All its capabilities are his and must be taken into the estimate.

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[9] United States v. Certain Properties, etc., 306 F.2d 439 (2d Cir. 1962); United States v. Penn-Dixie Cement Corp., 178 F.2d 195 (6th Cir. 1949); 1 Orgel, VALUATION UNDER EMINENT DOMAIN, § 18; 4 Nichols, EMINENT DOMAIN, § 12.2; *cf.* Dolan, *supra* note 7.

[10] See section on "The Measure of Compensation."

[11] See section on "Evidence."

[12] Boston Chamber of Commerce v. City of Boston, 217 U.S. 189, 54 L.Ed. 728, 30 Sup. Ct. 459 (1910); 3 Nichols, EMINENT DOMAIN, § 8.61; 1 Orgel, VALUATION UNDER EMINENT DOMAIN, § 31, *et seq.; cf.* Winston v. United States, 342 F.2d 715 (1965).

[13] United States v. Chandler-Dunbar Co., 229 U.S. 53, 57 L.Ed. 1063, 33 Sup. Ct. 667 (1913); Kimball Laundry Co. v. United States, 338 U.S. 1, 93 L.Ed. 1765, 69 Sup. Ct. 1434, 7 A.L.R. 1280 (1948).

[14] *In re* Ziegler's Petition, 375 Mich. 20 97 N.W.2d 748 (1959); see last part of section entitled, "Market Value Applied."

[15] *See* Banner Milling Co. v. State, 240 N.Y. 533, 148 N.E. 668, 41 A.L.R. 1019 (1927); 4 Nichols, EMINENT DOMAIN, § 13.3; 1 Orgel, VALUATION UNDER EMINENT DOMAIN, § 71, *et seq.*

[16] Alloway v. Nashville, 88 Tenn. 510, 13 S.W. 123, 8 L.R.A. 123 (1890) quoted in Southern Ry. Co. v. Memphis, 123 Tenn. 267, 148 S.W. 661, 41 L.R.A. 828 Ann. Cas. 1913 E. 153 (1912); 5 Nichols, EMINENT DOMAIN, § 18.11.

The range of evidence allowable at law is more restrictive, the reason being that particular evidence is not sufficiently probative of value to be considered by the trier of the facts. These exclusionary rules usually work to the advantage of the condemnor—the more restricted the proof the more likely the condemnor will pay less money.

At a trial to determine compensation, restriction of proof may occur at two stages: evidence is excluded from consideration by the trier of the facts; or the treatment of admitted evidence by the trier of the facts is restricted. In both situations where trial is to the jury, the restrictions may be in the form of instructions as well as rulings during the trial.

When dealing with special purpose properties, which are those developed with unusual improvements of value only to the owner or to a few owners and which are rarely bought and sold, proof of the sort usually admissible to establish the value of the property is lacking, if not completely nonexistent. Legal rules concerning allowable methods of valuation and proof in support of valuation are relaxed of necessity.[17]

The three general approaches, in terms of appraisal techniques, to valuation of real property are as follows:

1. The market data approach: Value is arrived at by a consideration of the prices paid in recent open market sales for properties that are similar or "comparable" to the subject property.

2. The income approach: Value is arrived at by a mathematical calculation based on an estimate of the reasonable income of the property and its improvements (usually as distinguished from the business conducted on the premises) and a reasonable rate of return from the land and the buildings, with proper allowance for replacement of the buildings.

3. The cost approach: Value is arrived at by adding the market value of the land to the cost (either replacement or reproduction cost), of the improvements, after making a proper allowance for depreciation.[18]

Conventional properties rely mainly on the market data approach. Because of the lack of sales, appraisals of special purpose properties are largely confined to the cost and income approaches. Also, because of the lack of market and sales, some courts have refused to apply the market value yardstick to special purpose properties. The special legal rules and appraisal techniques applicable to special purpose properties are the subject of this paper.

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[17] See sections on "What is a Special Purpose Property" and "The Measure of Compensation."

[18] United States v. Benning Housing Corporation, 276 F.2d 248 (5th Cir. 1960); United States v. Eden Memorial Park, 350 F.2d 933 (9th Cir. 1965); AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, *The Appraisal of Real Estate* (5th ed. 1967) (hereinafter cited as APPRAISAL OF REAL ESTATE).

The essential proof of value to determine compensation is in the form of opinion testimony.[19] The expert will usually testify concerning the facts and reasoning that are the basis of this opinion although in some jurisdictions this information may not be elicited until cross-examination. In a special purpose case, the expert's opinion is more important because of the lack of factual data upon which he can rely. *Woburn v. Adams* [20] involved valuation by witnesses

> . . . who did not base their estimates upon actual knowledge of market value, but upon the situation and resources of the property, and upon an opinion as to what such property would probably command in the market if its peculiar situation and its intrinsic qualities and properties were fully known.

The court concluded:

> It is because of the absolute right to take and the bounden duty to surrender under peculiar situations and possible conditions of no present market value that the rules of evidence are somewhat relaxed, and ascertainment of reasonable value must be made on the best evidence of which the case is susceptible.

The range of such opinion testimony in condemnation cases has been criticized and characterized as a "guess." [21] The law should afford the appraiser opportunity to make as "educated" a guess as possible when dealing with special purpose properties.

Can legislation resolve any of the problems of valuation of special purpose properties? If case law is restrictive on proof and appraisal methods allowed, legislation may overcome this. In California and Pennsylvania, for example, use of the cost and the income approaches on direct examination was authorized by legislation where previously barred by judicial opinions.[22] The Pennsylvania code provisions are quite broad, allowing the expert to state any or all facts or data considered, whether or not he has personal knowledge.[23]

Statutes can also limit the scope of inquiry. California case law allowing evidence of sales to agencies having the power to condemn was abrogated by statute.[24] Valuation has been confined to market value by statutes.[25] Capitalization of income or profit from a business con-

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[19] Aaron v. United States, 340 F.2d 655 (Ct. Cl. 1964); Board of Park Comm'rs of Wichita v. Fitch, 184 Kan. 508, 337 P.2d 1034 (1959); 5 Nichols, EMINENT DOMAIN, § 18.4; see CAL. EVIDENCE CODE § 813.

[20] 187 F. 781 (1st Cir. 1911).

[21] 1 Orgel, VALUATION UNDER EMINENT DOMAIN, § 138; Andrews v. Comm'r, 135 F.2d 314 (2d Cir. 1943).

[22] CAL. EVIDENCE CODE §§ 814, 817-820; PA. STAT. ANN. 26, § 1–705. *See also* NEV. REV. STAT. § 340.110(e); S.C. CODE § 25–120(5) (1962); Carlson, *Statutory Rules of Evidence for Eminent Domain Proceedings*, 18 HASTINGS L.J. 143 (1966).

[23] PA. STAT. ANN., 26, § 1–705.

[24] CAL. EVIDENCE CODE § 822(a).

[25] CAL. EVIDENCE CODE § 814; ANN. CODE MD., art. 33A, § 5(2); PA. STAT. ANN., 26, §§ 1–602, 603; TEX. CIVIL STATS. § 3265; WIS. STAT. ANN. § 32.09(5). Where other terms are used, they are likely to be construed as market value. LA. CIVIL CODE art.

ducted on the premises has been barred.[26] Some suggestions in this paper on changing appraisal methods would not be possible under legislation in some states.

Legislation can attempt too much. Carlson recognizes:[27]

> The science of appraising and appraisal practice, such as it is, cannot all be put into legislation. Only limited areas can be controlled by legislation.

Legislation is usually general in its application; it is satisfactory in handling the usual situation. The special purpose property, being the unusual, is overlooked. The CALIFORNIA EVIDENCE CODE, § 813, with its requirement that the opinion of value be based on the seller-purchaser concept, would bar the use of the substitute property doctrine. Use of an income approach to value cemetery lands based on net sales income probably would also be excluded under § 819. Because special purpose properties are "special," it is doubted if resolution of all the problems of valuing them, which can vary in each case, can be accomplished by legislation. Legislation may afford a method of overcoming some inequities caused by an application of general case law to special purpose properties.[28]

WHAT IS A SPECIAL PURPOSE PROPERTY?

In some jurisdictions, proof at trial must establish that the property involved is "special purpose," "special use," or a "specialty" before there will be a change in legal rules relating to the measure of compensation or admissibility of evidence to establish value. If adequate sales data are available, proof will be confined to the market data approach. Lack of such data as well as other elements rendering the property unusual must be shown before the cost or income approaches are allowed.[29]

In other jurisdictions, use of the cost or income approach is allowed without the necessity of first establishing that adequate sales data are lacking or that the property is unique.[30] Preliminary identity of the

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2633 ("true value"); MONT. REV. CODE § 93–9913 ("actual value"); N.M. STAT. § 22–9–9 ("actual value"); UTAH CODE 78–34–10 ("value"); WYO. STAT. § 1–775 ("true value").

[26] CAL. EVIDENCE CODE § 819; PA. STAT. ANN., 26, § 1–705(2)(iii).

[27] Carlson, *supra* note 22, at 159.

[28] For legislative provisions affecting special purpose properties, see: CAL. HIGHWAY CODE § 103.7 (public parks); MD. CODE ANN., art. 33A, § 5(2)(d) (churches); NEB. REV. STAT. § 76–703 (utilities); VT. STAT. ANN. §§ 12–1404A, 19–221(2) (business generally).

[29] Atlantic Refining Co. v. Director of Public Works, 102 R.I. 696, 233 A.2d 423 (1967); *see* United States v. Benning Housing Corporation, 276 F.2d 248 (5th Cir. 1960); 1 Orgel, VALUATION UNDER EMINENT DOMAIN, § 190; Sackman, *The Limitations of the Cost Approach*, 36 APPRAISAL J. 53, 58 (Jan. 1966); De Graff, *Criteria for Use of Cost Approach With Special Purpose Property*, 34 APPRAISAL J. 23 (Jan. 1963).

[30] Buffalo v. William Dechert and Sons, Inc., 57 Misc. 2d 870, 293 N.Y.S.2d 821 (1968); 1 Orgel, VALUATION UNDER EMINENT DOMAIN, § 190; Sackman, *supra* note 29.

property as a "specialty" or by similar designation is of less importance. Even in such States, lack of sales data and unique qualities of the property involved may afford a basis for the application of more liberal rules of evidence or a different measure of value.[31]

Relaxation of rules may take various forms:

1. Modification of the yardstick of compensation.[32]
   a. The market value measure applied but rules of evidence relaxed.
   b. Use of measures other than market value.
2. Use of appraisal methods other than the market data approach.[33]
   a. Use of the cost approach and evidence of costs allowed.
   b. Use of the income approach and income data, which may include business done and profits earned, allowed.
3. Variations and proof more or less peculiar to special purpose properties.

The variation last referred to will generally be a form of those preceding it. Some cases contain very general language as to what proof will be allowed when dealing with a special purpose property.

The term used to describe a special purpose property is not uniform. "Specialty" is used in New York.[34] In Illinois the term "special use" has been used.[35] In one case the court indicates that such a property is:[36]

> Not 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.

Reference is also made to whether or not the property is "unique" or "unusual"; or, as indicated by most special purpose property cases, no term may be used.

Because identity of the property as a "specialty," or otherwise, is important in relation to the measure of compensation and proof allowed in some jurisdictions, it is desirable to consider what the requirements of such a property are. The cases are not uniform. One New York case concludes:[37]

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[31] *See* United States v. 2.4 Acres of Land, 138 F.2d 295 (7th Cir. 1943); United States v. Benning Housing Corporation, 276 F.2d 248 (5th Cir. 1960).

[32] See section on "The Measure of Compensation."

[33] See section on "The Cost Approach."

[34] *In re* Lincoln Square Slum Clearance Project, etc., 15 A.D.2d 153, 222 N.Y.S.2d 786 (1961), and other New York cases cited in this section.

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

[36] Chicago v. George F. Harding Collection, 70 Ill. App. 2d 254, 217 N.E.2d 381 (1965).

[37] *In re* Lincoln Square Slum Clearance Project, etc., 15 A.D.2d 153, 222 N.Y.S.2d 786 (1961).

> A specialty has been variously defined. The definition most generally accepted is a building designed for unique purposes. . . . A more inclusive definition is a building which produces income only in connection with the business conducted in it. . . . Definitions must be given in context. . . . [21] One other factor remains to be considered. It must be shown that the building would reasonably be expected to be replaced.

A more general definition contained in *County of Cook v. City of Chicago* [38] is the following:

> A "special use" of property has been defined as a situation where the land is not available for general and ordinary purposes.

All cases do not lay down the same requirements; each case emphasizes different points. Therefore, it does not follow that every requirement stated in every case must be met before a property will be found to be a special use property and afforded special treatment.

Textual material also is not in complete agreement. Schmutz and Rams, CONDEMNATION APPRAISAL HANDBOOK,[39] states:

> Identifying features. Special purpose properties can be classed and typed as non-typical land improvements having a very limited or non-existent market. Three basic conditions usually are prevalent to aid in any problem of identification. These are:
> 1. Property has physical design features peculiar to a specific use.
> 2. Property has no apparent market other than to an owner-user.
> 3. Property has no feasible economic alternate use.

In indicating situations in which the use of the cost approach should be allowed, Julius Sackman [40] said:

> In summary, the rule to be followed is that cost, as evidence of market value, should be restricted to those cases where:
> 1. The property involved is unique.
> 2. Or, it is a specialty.
> 3. Or, there is competent proof of an absence of market data.

Cherney [41] defines "special purpose properties" as:

> Properties designed for a special purpose, which because of their peculiar construction and location and appurtenances, are not suitable for other purposes without extensive alterations, and therefore do not lend themselves to general use. Examples of such properties would be theatre buildings, grain elevators, power plants, railroads, etc.

It has been held [42] that the property must have unique value to the particular owner involved and not to others.

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[38] 84 Ill. App. 2d 301, 228 N.E.2d 183 (1967).

[39] Schmutz and Rams, CONDEMNATION APPRAISAL HANDBOOK 163 (Prentice-Hall 1963).

[40] Sackman, *supra* note 29.

[41] Cherney, APPRAISAL AND ASSESSMENT DICTIONARY 252 (Prentice-Hall 1960); see AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, APPRAISAL TERMINOLOGY AND HANDBOOK (5th ed. 1967).

[42] Lebanon and Nashville Turnpike Co. v. Creveling, 159 Tenn. 147, 17 S.W.2d 22, 65 A.L.R. 440 (1929).

> The test is not whether the property possesses peculiar characteristics of itself, or is of a class infrequently traded in, but whether it has elements of value peculiar to the owner exclusively.

Contrast these with the following, indicating that the claimed special capability must be in the property itself and not result from the owner's operations: [43]

> . . . the reference of the court in these cases to special value is to a value which the property itself has because of a claimed special capability and not because of any value peculiar to the owner. . . . Special value referred to is in the capability of the property and not in the operation of the owner.

Converted properties have not fared well; the act of conversion has shown that they were not designed or constructed for a peculiar use.[44] Such structures would probably not be considered unique in any event, although the activities conducted in them might be.

Absence of sales alone may not be enough.[45]

> To justify departing from the general rule as to the measure of damages the plaintiff has the burden of proving that it is impossible to prove the value of his property without dispensing with the rule. . . . This burden is not maintained merely by evidence that the property has no market value unless it also appears from the testimony that the property is of such a nature or so situated or improved that its real value for actual use cannot be ascertained by reference to market value.

To summarize, the usual requirements for property to secure the advantages of being considered a special purpose property are as follows: There must be an absence of market data, the property and its improvements must be unique, its utility because of its unusual character must be peculiar to the owner, and sometimes, it is a property that would be required to be replaced.[46]

Schools, parks, highways, utilities, railroads, and turnpikes generally have been held to be special purpose properties. Factories and ware-

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[43] Chicago v. Harrison-Halsted Corp., 11 Ill. 2d 431, 143 N.E.2d 40 (1957); see discussion of this case in section entitled, "Market Value Applied."

[44] *In re* Lincoln Square Slum Clearance Project, etc., 15 A.D.2d 153, 222 N.Y.S.2d 786 (1961) (loft building to pharmaceutical manufacture); *In re* James Madison Houses, 17 A.D.2d 317, 234 N.Y.S.2d 799 (1962) (brick building from bathhouse to church); *In re* Oakland St., City of New York, 13 A.D.2d 668, 213 N.Y.S.2d 973 (1961) (produce company); *In re* Public School 79, Borough of Manhattan, 19 A.D. 2d 239, 241 N.Y.S.2d 575 (1963) (tenement to church auditorium, office, study, and residences); *In re* West Side Urban Renewal, 27 A.D.2d 243, 278 N.Y.S.2d 243 (1967) (four-story building to funeral parlor).

[45] Davenport v. Franklin County, 277 Mass. 89, 177 N.E. 858 (1931).

[46] On requirement that structure be replaced, see discussion of requisites of the cost approach in section on "The Cost Approach." *In re* Lincoln Square Slum Clearance Project, etc., 15 A.D.2d 153, 222 N.Y.S.2d 786 (1961); *In re* Polo Grounds Area Project, 26 A.D.2d 377, 274 N.Y.S.2d 805; *modified* 20 N.Y.S.2d 618, 233 N.E.2d 113 (1967).

houses have met with mixed success, depending to some extent on whether the property involved was merely floor space or actually unique.[47] Cases not discussed elsewhere in which the property has been found to be unique or a specialty [48] and those that have not been so found [49] are listed in the footnotes.

The cases are usually concerned with whether the improvement, as distinguished from the land, is special purpose. Implicit in this may be the consideration that market value can always be found for land when it is considered as vacant. It is possible that land may be unique and have special value to a particular owner because of such factors as physical features, zoning including availability for nonconforming uses, availability for expansion,[50] or unusual historical features.[51]

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[47] Cases in which factories were held as special purpose or as a specialty include: Banner Milling Co. v. State, 240 N.Y. 533, 148 N.E. 668, 41 A.L.R. 1019 (1927) (flour mill); Norman's Kill Farm Dairy Co. v. State, 53 Misc. 2d 578, 279 N.Y.S.2d 292 (1967) (dairy products processing plant); and *In re* Ziegler's Petition, 375 Mich. 20, 97 N.W.2d 748 (1959) (heavy press manufacture). Cases in which factories were held not a specialty or special include: Amoskeag-Lawrence Mills, Inc. v. State, 101 N.H. 392, 144 A.2d 221 (1958) (warehouse claimed to be "integral part of manufacturing operation"); Chicago v. Farwell, 286 Ill. 415, 121 N.E. 795 (1919) (soap plant); Chicago v. Harrison-Halsted Building Corp., 11 Ill. 2d 431, 143 N.E.2d 40 (1957) (warehouse); Kankakee Park Dist. v. Heidenreich, 32 Ill. 198, 159 N.E. 298 (1922) (burned packing plant); and United States v. Certain Properties, etc., 306 F.2d 439 (2d Cir. 1962) (newspaper plant).

[48] Properties held special purpose or specialty, or special value otherwise recognized, include: Acme Theatres, Inc. v. State, 31 A.D.2d 996, 297 N.Y.S.2d 771 (1969); (drive-in movie); Albany County Club v. State, 19 A.D.2d 199, 241 N.Y.S.2d 604 (1963) (golf course); Board of Park Commissioners of Wichita v. Fitch, 184 Kan. 508, 337 P.2d 1034 (1959) (private lakes); Central Ill. Light Co. v. Porter, 96 Ill. App. 2d 338, 239 N.E.2d 298 (1968) (duck-hunting lands); Chicago v. George F. Harding Collection, 70 Ill. App. 2d 254, 217 N.E.2d 381 (1965) (museum); Harvey School v. State, 14 Misc. 2d 924, 180 N.Y.S. 2d 324 (1958) (private school); New Rochelle v. Sound Operating Corp., 30 A.D. 2d 861, 293 N.Y.S.2d 129 (1968) (laundry); *In re* Polo Grounds Area Project, 26 A.D.2d 377, 274 N.Y.S.2d 805, *modified* 20 N.Y.S.2d 618, 233 N.E.2d 113 (1967) (stadium); Scott v. State, 230 Ark. 766, 326 S.W.2d 812 (1959) (historical tavern and museum); State v. Wilson, 103 Ariz. 194, 438 P.2d 760 (1968); State Department of Highways v. Crossland, 207 So. 2d 898 (La. 1968) (residential bomb shelter); *In re* Town of Hempstead, Inc., etc., 58 Misc. 2d 171, 294 N.Y.S.2d 911 (1968) (bank building); and *In re* West Ave., N.Y. City, 27 A.D.2d 539, 275 N.Y.S. 2d 119 (1966) (bakery).

[49] Properties held not special purpose or specialty include: Huron v. Jelgerhuis, 77 S.D. 600, 97 N.W.2d 314 (1959) (laundromat); River Park District v. Brand, 327 Ill. 294, 158 N.E. 687 (1927) (private picnic grove and amusement park); and State Highway Department v. Noble, 114 Ga. App. 3, 150 S.E.2d 174 (1966) (pond with rights to fish and water stock).

[50] As to owner's anticipated use, *see:* Jeffery v. Osborne, 145 Misc. 351, 29 N.W. 931 (1911); Producer's Wood Preserving Co. v. Comm'rs of Sewerage, 227 Ky. 159, 12 S.W.2d 292 (1928); State v. Dunclick, Inc., 77 Idaho 45, 286 P.2d 1112 (1955); and St. Louis v. Paramount Manufacturing Co., 272 Mo. 80, 197 S.W. 107 (1943).

[51] Scott v. State, 230 Ark. 766, 326 S.W. 2d 812 (1959); State v. Wilson, 103 Ariz. 194, 438 P.2d 760 (1968); *cf.* State v. Wemrock Orchards, Inc., 95 N.J. Sup. 25, 229 A.2d 804 (1967); Syracuse University

The burden of proving the elements necessary to constitute a special purpose property or other elements affecting value is a matter of local law. In some jurisdictions, the burden is on the owner.[52] It may be on the condemnor.[53] Elsewhere, the court may conclude that the only issue is establishment of value and the burden of doing so lies on neither party.[54] Also, local law may impose the burden of proving the value of the taking on one party and the damaging on the other party.[55]

If the requirements of a special purpose property or "specialty" are too restrictive, valuation might be confined to the market data approach where there is no sales data, conceivably leading to the situation of the condemnor claiming that the property has no value because there are no sales.[56] Restrictive definitions generally work to the condemnor's advantage but can work to the owner's where valuation of such properties is confined to the cost approach.[57]

THE MEASURE OF COMPENSATION

In any condemnation the property involved must be valued first by the witnesses and then by the trier of the facts based on the admissible evidence submitted.[58]

> 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.

"Value" is not an exact term and is susceptible of different meanings under different circumstances.[59] Justice Frankfurter in *Kimball Laundry Co. v. United States* [60] considers "value" as follows:

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v. State, 7 Misc. 2d 349, 166 N.Y.S.2d 402 (1957); *see* Reynolds and Waldron, *Historical Significance . . . How much is it worth?*, 37 APPRAISAL J. 401 (July 1969).

[52] 5 Nichols, EMINENT DOMAIN, § 18.5; Lebanon and Nashville Turnpike Co. v. Creveling, 159 Tenn. 147, 17 S.W.2d 22, 65 A.L.R. 440 (1929); Davenport v. Franklin County, 277 Mass. 89, 177 N.E. 858 (1931); Newton Girl Scout Council v. Massachusetts Turnpike Authority, 355 Mass. 189, 138 N.E.2d 769 (1956); United States v. Brooklyn Union Gas Co., 168 F.2d 391 (2d Cir. 1948).

[53] Nichols, EMINENT DOMAIN, § 18.5; Chicago v. George F. Harding Collection, 70 Ill. App. 2d 254, 217 N.E.2d 381 (1965).

[54] Martin v. City of Columbus, 101 Ohio St. 1, 127 N.E. 411 (1920); State v. Amunsis, 61 Wash. 2d 160, 377 P.2d 462 (1963).

[55] 5 Nichols, EMINENT DOMAIN, § 18.5.

[56] *See* United States v. Board of Educ. of Mineral County, 253 F.2d 760 (4th Cir. 1958).

[57] *In re* Polo Grounds Area Project, 26 A.D.2d 377, 274 N.Y.S.2d 805, *modified*, 20 N.Y.S.2d 618, 233 N.E.2d 113 (1967); *In re* West Ave., N.Y. City, 27 A.D.2d 539, 275 N.Y.S.2d 119 (1966); New Rochelle v. Sound Operating Corp., 30 A.D.2d 861, 293 N.Y.S.2d 129 (1968).

[58] 4 Nichols, EMINENT DOMAIN, § 12.1; *see* 1 Orgel, VALUATION UNDER EMINENT DOMAIN, § 11.

[59] 4 Nichols, EMINENT DOMAIN, § 12.1; 1 Bonbright, *Concepts of Valuation*, THE

> As Mr. Justice Brandeis observed, "Value is a word of many meanings." Missouri *ex rel.* Southwestern Bell Telph. Co. v. Public Serv. Commission, 262 U.S. 276, 310, 67 L. Ed. 981, 995, 43 S. Ct. 544, 31 A.L.R. 807. For purposes of the compensation due under the Fifth Amendment, of course, only that "value" need be considered which is attached to "property," but that 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.

In the usual case, market value has been accepted as the measure of compensation.[61] *United States v. Miller* [62] stated:

> In an effort, however, to find some practical standard, the courts have early adopted, and have retained the concept of market value.

One definition of market value is: [63]

> By fair market value is meant 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 to which the land was adapted and might in reason be applied.

The term may contain such modifiers as "fair" and "cash." [64] The term used is not as important as the requirements contained in its definition. Market value is not an end in itself but a means of reaching just compensation.[65] Is the standard of market value adequate to provide the owner of a special purpose property his just compensation? Are the factual data available when dealing with such properties probative of market value?

The use of the term, as well as its definition, has been subjected to criticism.[66] Inherent in all definitions of market value is the aspect of

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VALUATION OF PROPERTY, pt. 1 (McGraw-Hill 1937); APPRAISAL TERMINOLOGY AND HANDBOOK, *supra* note 41, contains 40 definitions of value.

[60] Kimball Laundry Co. v. United States, 338 U.S. 1, 93 L.Ed. 1765, 69 Sup. Ct. 1434, 7 A.L.R. 1280 (1948).

[61] 4 Nichols, EMINENT DOMAIN, § 12.2; 1 Orgel, VALUATION UNDER EMINENT DOMAIN, § 17.

[62] 317 U.S. 369, 87 L.Ed. 369, 63 Sup. Ct. 276, 147 A.L.R. 55 (1943).

[63] Diocese of Buffalo v. State, 43 Misc. 2d 337, 250 N.Y.S.2d 961 (1964); 4 Nichols, EMINENT DOMAIN, § 12.1; 1 Orgel, VALUATION UNDER EMINENT DOMAIN, § 20.

[64] 4 Nichols, EMINENT DOMAIN, § 12.1; 1 Orgel, VALUATION UNDER EMINENT DOMAIN, § 17; *see* United States v. Miller, 317 U.S. 369, 87 L.Ed. 369, 63 Sup. Ct. 276, 147 A.L.R. 55 (1943).

[65] United States v. Cors, 337 U.S. 325, 93 L.Ed. 1392, 69 Sup. Ct. 1086 (1949). 1 Nichols, EMINENT DOMAIN, § 12.2; 1 Orgel, VALUATION UNDER EMINENT DOMAIN, § 18; see *supra* note 9.

[66] 1 Orgel, VALUATION UNDER EMINENT DOMAIN, §§ 17, 37; BONBRIGHT, ch. 3, *supra* note 59; Allard, *Is Market Value Just Compensation?*, 3 APPRAISAL J. 355 (July 1967); Ratcliff, *Capitalized Income is Not Market Value*, 36 APPRAISAL J. 33 (Jan. 1968); Babcock, APPRAISAL PRINCIPLES AND PROCEDURES (Richard D. Irwin, Inc. (1968); Kaltenbach, JUST COMPENSATION 12 (Feb. 1966); Proxel, *No Sale Without Purchase*, THE REAL ESTATE APPRAISER 51 (Jan.-Feb. 1970).

a sales price, agreed upon by the seller and the buyer in view of factors in the market. In dealing with an unusual property, the court is confronted with the fact that there are no sales and no market. In such a situation, the use of hypothetical buyer-seller definitions is not realistic and can fail to provide the owner with his "perfect equivalent in money." [67]

Orgel [68] states:

> But property that is not frequently bought and sold is typically property that is specially adapted to the uses to which it is devoted so that its value to the owner is likely to be much greater than its probable sale price to some other purchaser.

Some cases recognize that "market value" does not make the owner whole, but state, apparently because of the court's feeling for the need of a yardstick to be applied in all cases, that market value nevertheless constitutes just compensation. In *United States v. Petty Motor Company,*[69] for example, the court said:

> But it has come to be recognized that just compensation is the value of the interest taken. This is not the value to the owner for his particular purposes or to the condemnor for some special use, but a so-called "market value." It is recognized that an owner often receives less than the value of the property to him but experience has shown that the rule is reasonably satisfactory.

The impact of the absence of sales when applying the market value measure can be softened by an appropriate jury instruction. In *Newton Girl Scout Council v. Massachusetts Turnpike Authority,*[70] the court said:

> The judge should have made it plain that, in a case like this of a property primarily adapted for a specialized use and of a type not frequently bought or sold as such, the damages caused by the taking were not to be measured solely by the effect of the taking on the value of the property for ordinary real estate development; and that the value of the property for every reasonable present and potential use of the property was to be carefully considered, including the use of the property for the special purpose for which it had been constructed and was being employed by the Girl Scouts.

In addition to the convenience of having a single rule for everything, reasoning in favor of the application of the market value measure to special purpose properties may state that market value always assumes a "hypothetical" situation that may in reason be applied to any prop-

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[67] Some statutes require the application of market value in every condemnation; *see* note 25, *supra.*

[68] 1 Orgel, VALUATION UNDER EMINENT DOMAIN, § 38; see cases refusing to apply market value in section on "Market Value Not Applied."

[69] 327 U.S. 372, 90 L.Ed. 729, 66 Sup. Ct. 596 (1946); *see* Dolan, *supra* note 7.

[70] 355 Mass. 189, 138 N.E.2d 769 (1956). *But see* Chicago v. Harrison-Halsted Building Corp., 11 Ill. 2d 431, 143 N.E.2d 40 (1957).

erty.[71] In *Amoskeag-Lawrence Mills, Inc. v. State,*[72] the court discussed this matter as follows:

> It is urged that modern textbook writers supported by some authorities state that in cases where property is unique and seldom bought and sold and market value is impossible of ascertainment by the usual orthodox test, market value is not the measure of compensation. Regardless of whether the property is unique in character and market value difficult of ascertainment, it is generally based upon a hypothetical situation and it is never required that there should in fact have been a person able and willing to buy.[73]

In *San Diego Land and Town Co. v. Neale,*[74] the court concluded:

> The problem, then, is to ascertain what is the market value. Now, where there is an actual demand and current rate of price there can be but little difficulty. But in many instances (as in the case before us) there is no actual demand or current rate of price—either because there have been no sales of similar property, or because the particular piece is the only thing of its kind in the neighborhood, and no one has been able to use it for the purposes for which it is suitable, and for which it may be highly profitable to use it. In such case it has been sometimes said that the property has no market value, in the strict sense of the term. *Railway Co. v. Railroad Co.,* 112 Ill. 607; *Railway Co. v. Railroad Co.,* 100 Ill. 33; *Railroad Co. v. Chapman,* 16 Pac. Rep. 695, 696. And in one sense this is true. But it is certain that a corporation could not for that reason appropriate it for nothing. From the necessity of the case the value must be arrived at from the opinions of well-informed persons, based upon the purposes for which the property is suitable. This is not taking the "value in use" to the owner as contradistinguished from the market value. What is done is merely to take into consideration the purposes for which the property is suitable as a means of ascertaining what reasonable purchasers would in all probability be willing to give for it, which in a general sense may be said to be the market value, and in such an inquiry it is manifest that the fact that the property has not previously been used for the purposes in question is irrelevant.

The determiner of value is asked to assume what the owner of a similar special purpose property would pay for the subject property. Dicta in *Producers Wood Preserving Co. v. Commissioners of Sewerage:*[75]

> 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

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[71] Commonwealth v. Massachusetts Turnpike Authority, 352 Mass. 143, 244 N.E.2d 186 (1966); 4 Nichols, EMINENT DOMAIN, §§ 12.2[2], 12.32.

[72] Amoskeag-Lawrence Mills, Inc. v. State, 101 N.H. 392, 144 A.2d 221 (1958).

[73] *See* Dolan, *supra* note 7.

[74] 78 Cal. 63, 20 P. 371 (1888).

[75] 227 Ky. 159, 12 S.W.2d 292 (1928).

> 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.

In the *Newton Girl Scout Council* case,[76] the court said:

> It was open to the Girl Scouts (a) to prove the value of the property for use by a charitable or religious organization or for a school group, and the extent to which the taking had injured or prevented that use; (b) to show the extent of the market, if any, for properties adapted for such use; (c) to establish the general basis on which such properties change hands when they do change hands, the various elements of value which are given weight by organizations naturally interested in the acquisition of such properties, and the methods by which such properties are usually acquired; . . .

But such properties do not change hands. A Girl Scout camp, for example, may take years to reach its present form. In large part this development could be the result of donations of land and improvements that a similar nonprofit organization could not afford to buy. The same considerations are applicable to churches, colleges, and similar special purpose properties. The assumption of a buyer-seller exchange may not reflect the value of the special purpose property involved. It assumes a give and take on price between buyer and seller that does not exist and that usually operates to the owner's detriment in the amount of compensation he will receive.[77]

In *People v. City of Los Angeles,*[78] the court stated:

> To ask what a private buyer would pay for land which he could hold only as a public park, incapable of being sold, obviously would be a meaningless and useless question. It is self-evident as a practical matter there could be no market for land dedicated to public park use, and, thus considered, the market value would be nil.

Courts have taken two courses when confronted with the problem of valuing special purpose properties. The market value measure has been applied, but because of the lack of conventional evidence the rules of evidence have been relaxed to allow unconventional proof to establish market value. Other courts have rejected market value as a measure in special purpose property cases and have also relaxed rules with respect to evidence permissible to establish value.

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[76] Newton Girl Scout Council v. Massachusetts Turnpike Authority, 355 Mass. 189, 138 N.E.2d 769 (1956).

[77] *See* Idaho-Western Ry. Co. v. Columbia Conference, etc., 20 Idaho 568, 119 P. 60 (1911); and *supra* note 66.

[78] 220 Cal. App. 345, 33 Cal. Rptr. 797 (Cal. App. 1963). The court then proceeds to apply market value generally to arrive at the value of a portion of a public park. The following reject market value, stating that people do not go around buying and selling churches: *In re* Simmons, 127 N.Y.S. 940 (Sup. Ct. 1910) and United States v. Two Acres of Land, etc., 144 F.2d 207 (7th Cir. 1944).

Market Value Applied

The market value rule has been applied in special purpose cases although there is neither market nor sales.[79]

> Regardless of the type of property taken fair market value is still the standard to be applied which means the value of the property at the time of the taking, considering among other things the highest and most profitable use for which it was adapted and needed, or likely to be needed in the near future.

San Diego Land and Town Co. v. Neale [80] indicated: "The *consensus* of the best considered cases is that for the purpose in hand the value to be taken is the market value."

The problem presented is how to prove that when the market value measure is applied to special purpose properties. Although purporting to apply market value, value to the owner in fact may be injected into the case by an application of the rule that "all the uses to which the property is reasonably adapted may be considered." See for example the *Newton Girl Scout Council* case,[81] in which the court said:

> Although its "value for any special purpose is not the test . . . it may be considered, with a view of ascertaining what the property is worth on the market for any uses for which it would bring the most."

It is difficult to see how much difference will result if one cannot consider "value to the owner" but can consider the owner's uses of the property in arriving at its value.

Cases also state that in determining the market value consideration may be given to the intrinsic value of the property and its value to the

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[79] Assembly of God Church of Pawtucket v. Vallone, 106 N.J. Eq. 85, 150 A.2d 11 (1959); Banner Milling Co. v. State, 240 N.Y. 533, 148 N.E. 668, 41 A.L.R. 1019 (1927); Board of Park Commissioners of Wichita v. Fitch, 184 Kan. 508, 337 P.2d 1034 (1959); Central Ill. Light Co. v. Porter, 96 Ill. App.2d 338, 239 N.E.2d 298 (1968) (where property held to have ascertainable market value although its "only" use was duck-hunting land); Commonwealth v. Massachusetts Turnpike Authority, 352 Mass. 143, 244 N.E.2d 186 (1966); Gallimore v. State Highway and Public Works Commission, 241 N.C. 350, 85 S.E.2d 392 (1955); Newton Girl Scout Council v. Massachusetts Turnpike Authority, 355 Mass. 189, 138 N.E.2d 769 (1956); People v. City of Los Angeles, 33 Cal Rptr. 797 (Cal. App. 1963); St. Agnes Cemetery v. State, 2 N.Y.S.2d 37, 163 N.Y.S.2d 655, 143 N.E.2d 377, 62 A.L.R.2d 1161 (1957), ("highest and best use"); 4 Nichols, EMINENT DOMAIN, § 12.32; 1 Orgel, VALUATION UNDER EMINENT DOMAIN, § 17; *supra* note 29.

[80] United States v. Certain Properties, etc., 306 F.2d 439 (2d Cir. 1962); Lebanon and Nashville Turnpike Co. v. Creveling, 159 Tenn. 147, 17 S.W.2d 22, 65 A.L.R. 440 (1929); Ranck v. City of Cedar Rapids, 134 Ia. 563, 111 N.W. 1027 (1907); Eisenring v. Kansas Turnpike Authority, 183 Kan. 774, 332 P.2d 539 (1958); *In re* Ziegler's Petition, 375 Mich. 20, 97 N.W.2d 748 (1959).

[81] 355 Mass. 189, 138 N.E.2d 769 (1956). This case distinguishes other cases in which the property itself has special capability and not value peculiar to the owners; *see* United States v. South Dakota Game, Fish and Parks Dept., 329 F.2d 665 (8th Cir. 1964).

owners for their special purposes.[82] 27 AM. JUR. 2d, *Eminent Domain*, § 281, states:

> Thus, ordinarily, 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. . . . This is not taking the "value in use" to the owner as contradistinguished from the market value. What is done is merely to take into consideration the purposes for which the property is suitable as a means of ascertaining what reasonable purchasers would in all probability be willing to give for it, which in a general sense may be said to be the market value.

A problem considered by some cases is whether the owner's special uses or values may add to or increase the market value. Inferentially, consideration would result in an increase in value. In *City of Chicago v. Harrison-Halsted Building Corp.*,[83] which involved a loft building the court did not consider special, the court stated that "necessities peculiar to the owner could not be considered" but market value for the property's highest and best use "including any special capabilities the property might have" could be. The court also stated that it was proper to consider "a value the property itself has because of a claimed special capability and not because of any value peculiar to the owner." This fine-fuzzy line is clarified to some extent in *Producers Wood Preserving Co. v. Commissioners of Sewerage*,[84] where the court said:

> [2, 3] The expression "worth to him" and "value to him" in those opinions were but expressing "worth to his property" or "value to his property," and do not include any sentimental value not found in actual value under all the facts considered. The owner is entitled to show every cent of value his property as a whole had before the taking, and also to show, not only the value of the strip taken, but every lessening of value to what will be left after the taking that results from the taking. The owner's needs of it that are peculiar to him cannot be considered.

Also, in *United States v. Penn-Dixie Cement Corp.*,[85] the court rejected a claim that a sand deposit had special use to the owner because of the propinquity to his plant as "peculiar value to a particular owner," but concluded that "the increase in market value because of proximity to the plant of the appellee is an element properly to be considered." That an owner would not be given less than market value of his property where the value for special use could not be ascertained is indicated in *People v. City of Los Angeles*.[86] *State Highway Dep't v.*

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[82] See 1 Orgel, VALUATION UNDER EMINENT DOMAIN, §§ 43–45. In all cases in which the market value test is not applied, recognition is made in one way or another to the owner's value. See section on "Market Value Not Applied."

[83] 11 Ill. 2d 431, 143 N.E.2d 40 (1957).

[84] 227 Ky. 159, 12 S.W.2d 292 (1928).

[85] 178 F.2d 195 (6th Cir. 1949).

[86] 33 Cal. Rptr. 797 (Cal. App. 1963).

Hollywood Baptist Church states that when the market value differs from the actual value, the jury may consider the larger value.[87]

In special purpose property cases, courts, although applying the market value measure, have made broad statements about the evidence that will be permitted to establish value. In *Newton Girl Scout Council, Inc. v. Massachusetts Turnpike Authority,*[88] the court states:

> 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.

Also, in *Ranck v. City of Cedar Rapids:* [89]

> The fact that the owner is denied the ordinary right to refuse to sell his property, except at his own price and on his own terms, affords no reason for awarding him more than a just compensation; but it does afford good reason why he should be given every opportunity to disclose to the jury the real character of the property, its location, its surroundings, its use, its improvements, if any, and their age, condition, and quality, its adaptability to any special use or purpose, its productiveness and rental value, and, in short, everything which affects its salability and value as between buyers and sellers generally. . . .
>
> It is true that market value and intrinsic value are not necessary equivalents, but proof of the latter is often competent evidence for consideration in determining the former.

In re Ziegler's Petition [90] indicated that:

> . . . 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 the relevant facts in the particular case.

As indicated later in this paper, specific holdings allow use of the cost approach,[91] the income approach, including a consideration of profits,[92] and other matters of evidence [93] in establishing the market value of special purpose properties where such evidence would not otherwise be allowed.

Market Value Not Applied

As previously indicated, application of the market value measure to special purpose properties has been subjected to criticism. Defining just compensation in terms of market price where there is neither market nor price for the property can be detrimental to the owner.[94]

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[87] State Highway Department v. Hollywood Baptist Church, 112 Ga. App. 857, 146 S.E.2d 570 (1965).

[88] 355 Mass. 189, 138 N.E.2d 769 (1956).

[89] 134 La. 563, 111 N.W. 1027 (1907).

[90] 375 Mich. 20, 97 N.W.2d 748 (1959).

[91] See section on "The Cost Approach."

[92] See section on "The Income Approach."

[93] See introductory statements and section on "Substitution."

[94] *See dissent,* Chicago v. Farwell, 286

Recognizing that, in regard to special purpose properties, some market value cannot be found or does not result in the owner's receiving his constitutional equivalent in value, courts have held that market value is not applicable.[95] In *Sanitary District of Chicago v. Pittsburgh, Ft. W. and C. Ry. Co.*,[96] the court stated:

> Where lands proposed to be taken have a market value, such value is the standard of just compensation because it will give to the owner all he is entitled to under the law. But that method of valuation cannot be applied to property which has no market value. 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. It is a matter of common knowledge that such property as this and devoted to such a use is not bought and sold in the market or subject to sale in that way, and that such property has no market value in a legal sense. The property being devoted to a special and particular use, the general market value of other property was not a criterion for ascertaining compensation, although it might throw some light on the actual value.

Whether the property has market value is generally a question of fact.[97]

If the market value standard is rejected, what is the measure? A number of phrases are applied, the most common being "value to the owner."[98] As indicated by Orgel,[99] all phrases are directed to values peculiar to the owner:

> All of them suggest that the peculiar value of the property to the owner is a significant fact for consideration: all of them are likewise used without any intent to identify the value of the property to the owner

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Ill. 415, 121 N.E. 795 (1919); 1 Orgel, VALUATION UNDER EMINENT DOMAIN, § 37, *et seq.*

[95] Wichita v. Unified School District No. 259, 201 Kan. 110, 439 P.2d 162 (1968); County of Cook v. City of Chicago, 84 Ill. App. 2d 301, 228 N.E.2d 183 (1967); Graceland Park Cemetery Ass'n v. City of Omaha, 173 Neb. 608, 114 N.W.2d 29 (1962); Idaho-Western Ry. Co. v. Columbia Conference, etc., 20 Idaho 568, 119 P. 60 (1911); Onondaga County Water Authority v. N.Y.W.S. Corp., 283 A.D. 655, 139 N.Y.S.2d 755 (1955); Southern Ry. Co. v. Memphis, 123 Tenn. 267, 148 S.W. 661, 41 L.R.A. 828, Ann. Cas. 1913 E. 153 (1912); State v. Waco Independent School District, 367 S.W.2d 263 (Tex. 1963); State *ex rel.* State Highway Comm. v. Mount Moriah Cemetery Ass'n, 438 S.W. 2d 470 (Mo. 1968); State Highway Department v. Augusta District of N. Georgia Conference of Methodist Churches, 115 Ga. App. 162, 154 S.E.2d 29 (1967); State Highway Department v. Hollywood Baptist Church, 112 Ga. App. 857, 146 S.E.2d 570 (1965); United States v. Certain Land in Borough of Brooklyn, 346 F.2d 690 (2d Cir. 1965); 1 Orgel, VALUATION UNDER EMINENT DOMAIN, §§ 38 *et seq.*

[96] 216 Ill. 575, 75 N.E. 248 (1905).

[97] Chicago v. Farwell, 286 Ill. 415, 121 N.E. 795 (1919); 1 Orgel, VALUATION UNDER EMINENT DOMAIN, § 38.

[98] 1 Orgel, VALUATION UNDER EMINENT DOMAIN, §§ 19, 38–39; 4 Nichols, EMINENT DOMAIN, § 12.22.

[99] *Id.*

> with the adverse value of *all* of the injuries which he may have sustained by virtue of the taking.

Assuring compensation to the owner is accomplished by the same devices used in applying the market data rule: use of appraisal methods other than the market data approach; more liberality in the evidence that is allowed; and, to a limited extent, the application of the special technique of "substitution."

The cases stating that market value is not the measure of compensation contain statements that liberality regarding proof to establish the value of the property will be permitted.[100] The *Onondaga* case indicates that where market value is not applicable other tests will be applied and "what we use is largely a matter of judgment of circumstance."[101] Reference is also made to a consideration of all uses to which the property can be applied. This, of course, includes the owner's use.[102] Most pertinent cases make reference in one form or another to a consideration of the peculiar value the property may have to the owner.[103]

> Where property, by reason of being applied to a particular use, is of particular value to the owner, that value is to be ascertained and allowed as compensation.

Reference is also made to putting the owner back in as good financial condition as he was before.[104] This may take the form of providing the owner with the cost of a substitute.[105] Not all values to the owner are compensable, however.[106]

There is some tendency to depart from the market value rule in cases involving other than special purpose properties. In *Housing Authority of the City of Atlanta v. Troncalli,*[107] the court found that a tune-up and brake shop was unique because of its location, and the measure of pecuniary loss to the owner was applied. *Housing Authority v. Savannah Iron Works, Inc.,*[108] allowing moving costs to a lessee, and *Bowers v. Fulton County,*[109] another Georgia case, allowing business loss to the owner of a

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[100] *See* United States v. Two Acres of Land, etc., 144 F.2d 207 (7th Cir. 1944).

[101] Onondaga County Water Authority v. N.Y.W.S. Corp., 283 A.D. 655, 139 N.Y.S.2d 755 (1955)

[102] Banner Milling Co. v. State, 240 N.Y. 533, 148 N.E. 668, 41 A.L.R. 1019 (1927); Elbert County v. Brown, 16 Ga. App. 834 S.E. 651 (1915).

[103] Sanitary District of Chicago v. Pittsburgh F.W. & C. Ry. Co., 216 Ill. 575, 75 N.E. 248 (1905); Montgomery County v. Schuylkill Bridge Co., 110 Pa. 54, 70 A. 407 (1885); Southern Ry. Co. v. Memphis, 123 Tenn. 267, 148 S.W. 661, 41 L.R.A. 828, Ann. Cas. 1913 E. 153 (1912); State Highway Department v. Hollywood Baptist Church, 112 Ga. App. 857, 146 S.E.2d 570 (1965) ("actual value").

[104] Chicago v. George F. Harding Collection, 70 Ill. App. 2d 254, 217 N.E.2d 381 (1965).

[105] See section on "Substitution."

[106] See section on "Market Value Applied."

[107] 111 Ga. App. 515, 142 S.E.2d 93 (1965).

[108] 91 Ga. App. 881, 87 S.E.2d 671 (1955).

[109] 221 Ga. 731, 146 S.E.2d 884 (1966). *See also* State Roads Department v. Bramlett, 179 S.E.2d 137 (Fla. 1965), which

bookkeeping and tax service, both recognized values peculiar to the owners. In *City of Gainsville v. Chambers,*[110] another Georgia case, involving a duplex and a single-family house constructed mainly by the owner's labor, the court held the evidence insufficient to show that the property had a pecuniary value to the owner exclusively; and considering the holding of *Troncalli,* the court said:

> We reject it as being too generally exclusive of almost all real property. Moreover, this case is distinguishable from Troncalli on the facts involved.

Partial Taking

When dealing with a partial taking from a special purpose property, except where the doctrine of substitution is applied, the difference between the values (however denominated) of the property before the taking and after the taking usually is the measure of compensation. This will reflect damages to the remaining property as well as to the value of the part taken.[111] Expressions of this rule vary locally, some courts valuing the taking and then applying the before and after evaluation of the remainder.[112] The use to which the remainder is adaptable may be changed from a special purpose to general purposes as a result of the taking. In this situation, value to the owner or similar measure or relaxation of rules of evidence may be used to determine the before value for the special use, and market value may be used in the usual sense to arrive at the value of the remainder after the taking.[113] A claim that a school or church has lost all utility for its special use (hence its value for such) because of proximity to a railroad or highway is an example of this.[114] In such a case, improvements may lose their special value as a result of the taking, resulting in their after value being only for scrap or salvage. *San Pedro L.A. and S.L. Ry. Co. v. Board of Education* [115] indicated that for such a change in use to be established, substantial proof of impossibility of conducting the school and efforts of the owner to overcome the effects of the taking must be shown:

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turned on particular statute involved. On treating business as "property," see *In re* Ziegler's Petition, 375 Mich. 20, 97 N.W. 2d 748 (1959), and Priola v. City of Dallas, 234 S.W.2d 1014 (Tex. Civ. App. 1950).

[110] 118 Ga. App. 25, 162 S.E.2d 469 (1968).

[111] Cemeterio Buxedo v. People of Puerto Rico, 196 F.2d 177 (1st Cir. 1952); Forest Lawn Lot Owners Association v. State, 248 S.W.2d 793 (1952), *rev'd* on other grounds 254 S.W.2d 87 (Tex. 1953); Laureldale Cemetery Co. v. Reading, 303 Pa. 315, 154 A. 372 (1931). Inclusion of the values, before and after, of the entire property has been held not necessary where there is no claim of damages to the remainder. Gallimore v. State Highway and Public Works Commission, 241 N.C. 350, 85 S.E.2d 392 (1955); 4 Nichols, EMINENT DOMAIN, § 14.23.

[112] 4 Nichols, EMINENT DOMAIN, § 14.23.

[113] See section on "Market Value Not Applied."

[114] Board of Education v. Kanawha and M.R. Co., 44 W.Va. 71, 29 S.E. 503 (1897).

[115] 32 Utah 305, 96 P. 275 (1967); State Highway Dep't v. Augusta Dist. of N. Ga. Conference of Methodist Churches, 115 Ga. App. 154 S.E.2d (1967).

> 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.

This case also indicated that in determining whether or not there was a full loss in value of the school building, abandonment of such use by the school board could not be considered.

Proximity damages to the property due to the interference with the owner's use and enjoyment caused by the condemnor's use may be claimed.[116] That the damages are to the owner's special use is no grounds for denying them. In *Idaho-Western Ry. Co. v. Columbia, Conference, Etc.*,[117] the court said:

> *A* may be using his property for a purpose that would in no manner be disturbed or damaged by reason of the construction and operation of a railroad along and over a portion of such property, while *B* may be using his property for a purpose which would be partially or wholly destroyed by reason of the construction and operation of a railroad along and over a part of such land. So the question of the use to which the property is to be applied, the nature of the improvement, and the manner in which the improvement is to be made and the use carried on becomes important.

In *Durham N.R. Co. v. Trustees of Bullock Church*,[118] the property of the church was held to be damaged because, to prevent trains from frightening horses, it became necessary to erect stalls and screening; in addition, the congregation would be disturbed and distracted. In concluding that such items were not incidental to the personal enjoyment of the owners but related to the value of the property, the court said:

> Injury to such property in a respect that impairs its usefulness for the purpose to which it is devoted, constitutes an element of damage,

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[116] Newton Girl Scout Council v. Massachusetts Turnpike Authority, 355 Mass. 189, 138 N.E.2d 769 (1956); *see* State Highway Dept. v. Augusta Dist. of N. Ga. Conference of Methodist Churches, 115 Ga. App. 162, 154 S.E.2d 29 (1967); First Parish in Woodburn v. County of Middlesex, 73 Mass. 106 (1856); *see* State Highway Department v. Hollywood Baptist Church, 112 Ga. App. 857, 146 S.E.2d 570 (1965), indicating that such factors must be continuous and permanent incidents of the improvement.

[117] 20 Idaho 568, 119 P. 60 (1911).

[118] 104 N.C. 525, 108 P.2d 761 (1890).

> recoverable when such injury is the direct cause of the acts complained of, or when it flows directly from the act or consequence.

Costs of curing defects caused by the taking may affect the after value. The costs of reconstructing holes and screening on golf courses are examples.[119] Reconstructing entry ways, replacing shrubs, etc., have been allowed in a partial taking of a cemetery.[120]

A reduction in area may cause damage to the remaining property.[121] A remedy may be available by application of the principle of substitution or, to a more limited extent, by a cost to cure.[122] The taking of an area that was withheld in anticipation of expansion of a plant (the plant was originally constructed in anticipation of this expansion), has been held to constitute a damage to the remaining property and not a damage to the business conducted upon it.[123] A distinction has been drawn between "fully projected but only partially executed plans" and "wholly unexecuted plans," damages to the latter not being compensable.[124]

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.[125] Subjective damages, such as those based on sentiment, have been denied.[126] Also denied has been ". . . The anticipated annoyance of worshipers in the meeting-house, by noisy and dissolute

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[119] Albany Country Club v. State, 19 A.D. 2d 199, 241 N.Y.S.2d 604 (1963); Knollwood Real Estate Co. v. State, 33 Misc. 2d 428, 227 N.Y.S.2d 112 (1961); Re Brantford Golf and Country Club and Lake Erie and N.R.W. Co., 32 Ont. L. Rep. 141 (1914).

[120] Mount Hope Cemetery Association v. State, 11 A.D.2d 303, 203 N.Y.S.2d 415; *aff'd* 12 A.D.2d 705, 208 N.Y.S.2d 737 (1960); *see* State *ex rel.* State Highway Commission v. Barbeau, 397 S.W.2d 561 (Mo. 1965); State v. Lincoln Memory Gardens, Inc., 242 Ind. 2d 206, 177 N.E.2d 655 (1961); State v. Assembly of God, 230 Ore. 67, 368 P.2d 937 (1962).

[121] *Supra* note 50.

[122] See section on "Substitution." On cost to cure, see *supra* notes 119 and 120; First National Stores, Inc. v. Town Plan and Zoning Commission, 26 Conn. Super. 302, 222 A.2d 229 (1966); PA. STAT. ANN. 26, § 1–705(2)(v) allows consideration of "The cost of adjustments and alterations to any remaining property made necessary or reasonably required by the condemnation."

[123] St. Louis v. Paramount Shoe Mfg. Co., 237 Mo. App. 200, 168 S.W.2d 149 (1943); Edgcomb Steel of New England v. State, 100 N.H. 480, 131 A.2d 70 (1957); Jeffery v. Osborne, 145 Misc. 351, 29 N.W. 931 (1911); Johnson County Broadcasting Corp. v. Iowa State Highway Commission, 256 Iowa 251, 130 N.W.2d 707 (1964); State v. Assembly of God, 230 Ore. 67, 368 P.2d 937 (1962).

[124] Producer's Wood Preserving Co. v. Commissioners of Sewerage, 227 Ky. 159, 12 S.W.2d 292 (1928); *see* WIS. STAT. ANN. (W.S.A.) § 32.19(5) allowing: "Expenses incurred for plans and specifications specifically designed for the property taken and which are of no value elsewhere because of the taking."

[125] See 4 Nichols, EMINENT DOMAIN, § 14.1, *et seq.*

[126] Syracuse University v. State, 7 Misc. 2d 349, 166 N.Y.S.2d 402 (1957), holding esthetic, sentimental, and historical aspects not compensable; State v. Wemrock Orchards, Inc., 95 N.J. Sup. 25, 229 A.2d 804 (1967), *Contra* on historical, State v. Wilson, 103 Ariz. 194, 438 P.2d 760 (1968), and Scott v. State, 230 Ark. 766, 326 S.W. 2d 812 (1959).

persons riding for pleasure, ...'' The court also stated that damages cannot be assumed from unlawful acts of travelers.[127] A claim of damage caused by heavy traffic changing ''the quietude and tranquility of the cemetery'' has been denied as speculative and theoretical.[128] As previously indicated, the line is not clear between the owner's values that are compensable and those ''peculiar'' values that are not compensable.

EVIDENCE

This section does not pretend to be a review of the rules of evidence peculiar to eminent domain proceedings. It is concerned with such rules of evidence as are discussed in the cases that involve special purpose properties or that might otherwise have particular applicability to such properties.

Where conventional proof is absent, as in the special property situation, other evidence must be permitted. Broad language indicates that resort should be had to any and all facts.[129] A church case [130] stated:

> Consideration must be given to the elements actually involved and resort to any available to prove value, such as the use made of the property and the right to use it.

In *Ranck v. City of Cedar Rapids,*[131] involving a livery stable and ''undertaking rooms,'' the court said:

> . . . The true rules seems to permit the proof of all the varied elements of value; that is, all facts which the owner would properly naturally press upon the attention of a buyer to whom he is negotiating a sale and all other facts which would naturally influence a person of ordinary prudence to purchase.

Counsel will argue that the proof, as a matter of law, should be confined to the particular method of valuation most advantageous to his client. As a result an erroneous method can become law, not merely an appraisal technique, which can bind future valuations. Instead of rules of proof being enlarged, they become restricted. Caution should therefore be used to prevent restricting the types of proof that will be allowed in special purpose cases.

Relaxation of rules of proof may take the form of either a modifica-

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[127] First Parish in Woodburn v. County of Middlesex, 73 Mass. 106 (1856); Producer's Wood Preserving Co. v. Comm'rs of Sewerage, 227 Ky. 159, 12 S.W.2d 293 (1928).

[128] Mount Hope Cemetery Association v. State, 11 A.D.2d 303, 203 N.Y.S.2d 415 *aff'd* 12 A.D.2d 705, 208 N.Y.S.2d 737 (1960).

[129] Gallimore v. State Highway and Public Works Commission, 241 N.C. 350, 85 S.E.2d 392 (1955); Idaho-Western Ry. Co. v. Columbia Conference, etc., 20 Idaho 568, 119 P. 60 (1911); Massachusetts v. New Haven Development Co., 146 Conn. 421, 151 A.2d 693 (1959); Newton Girl Scout Council v. Massachusetts Turnpike Authority, 355 Mass. 189, 138 N.E.2d 769 (1956); *In re* Huie, 2 N.Y.S.2d 168, 157 N.Y.S.2d 957, 139 N.E.2d 140 (1956).

[130] United States v. Two Acres of Land, etc., 144 F.2d 207 (7th Cir. 1944).

[131] 134 La. 563, 111 N.W. 1027 (1907).

tion of the market value measure of compensation [132] or allowance of evidence based on appraisal methods other than the market data approach. The latter occurs when dealing with special purpose properties, whether the market value measure or another measure is used.

The usual modification with respect to methods of valuation is to permit use of the cost and income approaches in valuing such properties. Market value, "value to the owner," or similar measure will be found in a consideration of the value of the land and the costs of the improvements, or a consideration of the income the owner derives from his property. One modification that is "special" to special purpose properties is the use of "substitution" or the "substitute property doctrine." This is an aspect of the cost approach because it is essentially concerned with the costs of a functionally equivalent substitute for the property taken.[133] As generally applied, it means the cost new of an undepreciated replacement facility.

Subject to local law concerning the facts that may or may not have to be established before the market value approach can be departed from, appraisal techniques should be treated as matters of fact, not law. In *State ex rel. O.W.W.S. Co. v. Hoquiam,*[134] where the condemnor was attempting to have the proof confined to a particular method of depreciation, the court concluded that the various methods were not rules of law and quoted from *City of Baxter Springs v. Bilger's Estate* [135] as follows:

> The court may be convinced that the method of one engineer is the best and may follow it, but the court is not justified in doing so until it has carefully considered the evidence presented by those using the other methods. These methods are not rules of law, but are matters of evidence and should be considered by the court as such.

In *St. Agnes Cemetery v. State,*[136] the court said:

> In valuing cemetery property, evidence of the value of the burial lots founded on the net sales prices of similar burial plots shows the productiveness and capabilities of the land taken for yielding income as bearing on value—the present value—of the land itself.

Uses to which the property is adaptable are also considered by the trier of the facts. In *Graceland Park Cemetery Co. v. City of Omaha,*[137] the issue was whether the land was to be valued as cemetery land or simply as vacant land. The court concluded that the jury could consider the purposes for which the property was being used and value it on "its most advantageous and best use." The jury's evaluation based on use for cemetery lands was not disturbed.

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[132] See section on "Market Value Not Applied."

[133] See section on "Substitution."

[134] 155 Wash. 678, 286 P. 286, 287 P. 670 (1930).

[135] 110 Kan. 409, 204 P. 678 (1922).

[136] 2 N.Y.S.2d 37, 163 N.Y.S.2d 655, 143 N.E.2d 377, 62 A.L.R.2d 1161 (1957).

[137] Graceland Park Cemetery Ass'n v. City of Omaha, *supra* note 79.

The results reached by the various methods of valuation are not the measure of compensation but are merely factors to be considered in arriving at the value of the property.[138]

> No one method is controlling, and consideration is required to be given all factors which may legitimately affect the determination of value.

The following discussions of the various approaches to value do not pretend to be a complete analysis of each, but are confined to brief presentations of matters pertinent to special purpose properties and considerations given to these approaches in special purpose property cases.

The Market Data Approach

One factor that makes a property special purpose is the lack of sales of similar properties. Therefore, little can be said of this approach when discussing special purpose properties.

One element of comparability generally required to make a sale admissible is that the property sold must be geographically near the subject property.[139] If the rules of admissibility are relaxed when dealing with special purpose properties, this requirement of geographical proximity may be one that should be relaxed.

The geographical area that a prospective buyer may consider can be extensive. If the market as a matter of fact is so extensive, sales in such area would be proper.[140]

> Real estate syndications and other large investors looking for properties with a favorable return can look into the possibilities of purchase of a hotel in New York and Chicago on the same day and the criteria influencing their decision to purchase at that price they will pay has nothing to do with the 900 mile distance between them; and trial courts have accepted such testimony particularly where there has been no sale of a hotel or other such property in the particular city where the condemnation took place and there were such sales in other cities.

In *United States v. American Pumice Co.*,[141] the court concluded:

> There may be cases where quite distant properties can be shown to be comparable in an economic or market sense, due allowance being made for variables such as those mentioned by the court.

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[138] Massachusetts v. New Haven Development Co., 146 Conn. 421, 151 A.2d 693 (1959); United States v. Certain Interests in Property, etc., 165 F. Supp. 474 (E.D. Ill. 1958); *see* United States v. Commodities Trading Corp., 339 U.S. 121, 94 L.Ed. 707, 70 Sup. Ct. 547 (1949); *In re* Huie, 2 N.Y.2d 168, 157 N.Y.S.2d 957, 139 N.E. 2d 140 (1956).

[139] 5 Nichols, EMINENT DOMAIN, § 21.31 [1]. This element is frozen in by statute in some states, CAL. EVIDENCE CODE § 816 ("located sufficiently near"); NEV. REV. STAT. § 340.110 ("in the vicinity"); S.C. Code 25–120–5 ("in the vicinity").

[140] Hershman, *Compensation—Just and Unjust*, BUS. L. 285, 311 (1966).

[141] 404 F.2d 336 (9th Cir. 1968); *see* Knollman v. United States, 214 F.2d 106 (6th Cir. 1954).

In *United States v. Benning Housing Corp.*,[142] involving condemnation of the leasehold interest in a Wherry housing project in Georgia, sales of similar interests in Louisiana, Virginia, and Massachusetts were considered. Sales of stock in Wherry projects in San Diego, Louisiana, and Massachusetts were allowed in the condemnation of a Wherry leasehold in San Diego. The court stated:[143]

> The evidence is uncontradicted that the market for investment of the kind here involved is nationwide in scope.

In this case, sales were used "as a guide to a proper multiplier to be used in the capitalization of net income. . . ." The distinction between this use of sales and the conventional use of sales prices was recognized in *Likins Foster Monterey Corp. v. United States*,[144] which so used geographically remote sales.

In allowing evidence of the sale of another church in the same county, the court in *Commonwealth v. Oakland United Baptist Church*[145] said:

> As witnesses pointed out in this case, 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 prejudicial error. The distance alone was not a disqualifying factor.

Sales of golf courses up to 50 miles from the subject property and in another State were allowed in *United States v. 84.4 Acres of Land, etc.*[146] The court stated:

> In our opinion, the alleged comparable golf course sales were sufficiently similar and proximate in time to be useful in reflecting the fair market value of the condemned golf course. Further, we believe that insofar as proximity of location is concerned, the court should exercise its discretion in accordance with the exigencies of a case, and if land is not of a character commonly bought and sold, should allow evidence of the sales of similar land located at some distance from the land taken. As was stated in *Knollman v. United States*, 214 F.2d 106, at p. 109 (Sixth Cir., 1954), "The proper test of admissibility in such cases is not the political dividing line, be it township or county."

Admissibility of evidence of sales beyond the immediate vicinity of the subject property rests in the sound discretion of the trial court.[147]

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[142] 276 F.2d 248 (5th Cir. 1960).

[143] Winston v. United States, 342 F.2d 715 (9th Cir. 1965).

[144] 308 F.2d 595 (9th Cir. 1962).

[145] 372 S.W.2d 412 (Ky. 1963).

[146] 224 F. Supp. 1017 (W.D. Pa. 1963); *aff'd* United States v. 84.4 Acres of Land, 348 F.2d 117 (3d Cir. 1965).

[147] Levin v. State, 13 N.Y.2d 87, 192 N.E. 2d 155 (1963); 5 Nichols, EMINENT DOMAIN, § 21.31[1]. This rule may be subject to statutory restriction to sales in the

Comparability should not be lost sight of because of the lack of sales. A cemetery in another location that sold may be rendered uncomparable to the subject property by differences in populations served, competition, zoning, and trends in the immediate area. Prospective buyers of the type of property involved, for other reasons, might not consider a market area extensive enough to include both the sale and subject properties.

In *In re Polo Grounds Area Project,*[148] the court declined to consider the sale of Ebbetts Field, saying:

> We find insurmountable difficulties with these conclusions. Apart from the size of the plot there is no resemblance between the two fields.

Also in *State v. Burnett,*[149] the court declined to exclude reproduction costs although there was proof of sales of other country estates with dissimilar improvements.

Where market value is the measure, admitting evidence of one or very few sales that are sales of properties put to similar uses but at the limit of comparability can result in the admitted sales being given undue weight at the expense of other approaches to value. The jury is looking for a market price; the sales are the only direct evidence of such. The jury might conclude, with prompting by argument of counsel, that the sales are the only or the best evidence of market value to the exclusion of other evidence more truly reflecting the value of the subject property.[150]

Sales to an agency having the power to condemn have been admitted, providing the price paid was voluntarily arrived at.[151] Most courts exclude such sales.[152] It has been suggested that a more liberal use of sales to condemnors may ease some of the problems of valuation of special purpose properties.[153] There are situations, such as sales of private water companies to municipalities, in which there are often a number of sales. If there is assurance that the price is fair and voluntary, allowing evidence of such a sale, or sales, may offer some factual basis for resolving a difficult problem.

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vicinity of the subject property; see note 139.

[148] *In re* Polo Grounds Area Project, 26 A.D.2d 377, 274 N.Y.S.2d 805, modified 20 N.Y.S.2d 618, 233 N.E.2d 113 (1967).

[149] 24 N.J. 280, 131 A.2d 765 (1957); *see* United States v. American Pumice Co., 404 F.2d 336 (9th Cir. 1968).

[150] See *Dissent,* Chicago v. Farwell, 286 Ill. 415, 121 N.E. 795 (1919).

[151] People v. City of Los Angeles, 33 Cal. Rptr. 797 (Cal. App. 1963); People *ex rel.* Dept. of Public Works v. Murata, 161 Cal. App. 2d 369, 326 P.2d 947 (1958). The holdings of these cases were abrogated by CAL. EVIDENCE CODE § 822(a).

[152] Annot., *Nonliability of an employer in respect of injuries caused by the torts of an independent contractor,* 18 A.L.R. 801, 839, and *Admissibility on issue of value of real property of evidence of sale price or other real property,* 85 A.L.R. 2d 110, 163; 5 Nichols, EMINENT DOMAIN, § 21.33.

[153] Bowen, *Valuation of Church Cemeteries—Historical Approach,* APPRAISAL VALUATION MANUAL 205 American Society of Appraisers 1964–65).

The Cost Approach

The cost approach is the most criticized of the three methods of valuing real property.[154] In the *Benning Housing Corporation* case,[155] the court stated:

> Thus, it has almost uniformly been held that, absent some special showing, reproduction cost evidence is not admissible in a condemnation proceeding. This rule stems from a recognition of the fact that reproduction cost evidence almost invariably tends to inflate valuation. This is so because the reproduction cost of a structure sets an absolute ceiling on the market price of that structure, a ceiling which may not be, and most frequently is not, even approached in actual market negotiations. When this inherently inflationary attribute of reproduction cost evidence is considered in the light of the misleading exactitude which such evidence almost inevitably imparts to a jury unsophisticated in the niceties of economics, the justification for placing susbtantial safeguards upon its admission is apparent.

Nevertheless, in the special property situation it may be the only method.[156]

> Properties such as schools, churches, transportation terminals, hospitals, however, exist in a limited number because of their specific use characteristic. In the valuation of property of this type, it is difficult to find comparable substitute properties; therefore, the use of the market data approach is but rarely appropriate. The cost approach is usually the most effective method to obtain a value indication for special-purpose properties.

Costs are not the same as value. This is true of original costs[157] as well as reproduction or replacement costs.[158] The value arrived at by use of the cost approach is merely a factor to be considered and is not the sole measure of compensation.[159]

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[154] Bergeman v. State Roads Comm., 218 Md. 137, 146 A.2d 48 (1958); People v. Ocean Shore R.R. Co., 32 Cal. 2d 406, 196 P.2d 570 (1948); Sackman, *supra* note 29; Keeley, *Special Purpose Property Appraising,* 16 RIGHT OF WAY 28 (April 1969); Ratcliff, RESTATEMENT OF APPRAISAL THEORY (Univ. of Wisconsin 1963) also published in 32 APPRAISAL J. 50 (Jan. 1964); 1 Bonbright, THE VALUATION OF PROPERTY, ch. 9 (McGraw-Hill 1937).

[155] United States v. Benning Housing Corp., 276 F.2d 248 (5th Cir. 1960).

[156] Appraisal of Real Estate 28, *supra* note 18; see Armstrong, *Is the Cost Approach Necessary?,* 31 APPRAISAL J. 71 (Jan. 1963); Keeley, *supra* note 154; De Graff, *supra* note 29.

[157] Kintner v. United States, 156 F.2d 5 (3d Cir. 1946), 172 A.L.R. 232; United States *ex rel.* T.V.A. v. Powelson, 319 U.S. 266, 82 L.Ed. 1390, 63 Sup. Ct. 1047 (1942); 5 Nichols, EMINENT DOMAIN, § 20.1; 2 Orgel, VALUATION UNDER EMINENT DOMAIN, § 209.

[158] State v. Red Wing Laundry and Dry Cleaning Co., 253 Minn. 570, 93 N.W.2d 206 (1958); 2 Orgel, VALUATION UNDER EMINENT DOMAIN, §§ 188, 189, 210; 5 Nichols, EMINENT DOMAIN, § 20.2[1].

[159] United States v. Certain Lands, etc., 57 F. Supp. 96 (S.D.N.Y. 1944); Joint Highway Dist. No. 9 v. Ocean Shore R.R. Co., 128 Cal. App. 743, 18 P.2d 413 (1933); Kennebec Water Dist. v. City of Waterville, 97 Me. 185, 54 A. 6, 60 L.R.A. 856 (1902); 4 Nichols, EMINENT DOMAIN, § 12.313.

In New York State where some cases indicated that classification as a "specialty" is necessary before the cost approach can be used,[160] it now appears that such approach is proper in any case if "other evidence of value is testified to, such as the capitalization of income and comparable sale." [161] Under some New York cases if a property has been classified as a specialty, valuation must be based *solely* upon the basis of reproduction costs, less depreciation; [162] conversely, to be confined solely to the cost approach, the property must be a specialty. If cost approach can be used in New York, provided that it is used with other approaches, there is little reason to attempt to secure a classification as a specialty except where confining value to the cost approach would result in a value either substantially higher or substantially lower than would be indicated by other approaches. This confining of valuation to a single approach where a specialty is found is extremely artificial.[163] As previously indicated, cost is not necessarily value, and it is difficult to imagine a property, other than those owned by the public or nonprofit organizations, and having no income, where factors other than costs would not be available and material on the issue of value.

The situation is further confused by other New York cases. *City of Rochester v. Rochester Transit Corporation,*[164] for example, stated that the cost approach was not the sole means of evaluating just compensation in the acquisition of a transportation system, which obviously was a specialty. Also in the *Polo Grounds* case,[165] the court noted that "If the building though a specialty would not be replaced, reproduction cost ceases to be a measure of the owner's loss." The court then proceeded to value on a cost basis even though the facility probably would not be replaced.

Because of distrust in the method, some courts have laid down conditions that must be established before the reproduction cost method can be used. Sackman says that the application of the cost approach should be limited as follows: [166]

> In summary, the rule to be followed is that cost, as evidence of market value, should be restricted to those cases where:
>
> 1. The property involved is unique.

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[160] *In re* Lincoln Square Slum Clearance Project, etc., 15 A.D.2d 153, 222 N.Y.S.2d 786 (1961); *In re* West Ave. N.Y. City, 27 A.D.2d 539, 275 N.Y.S.2d 119 (1966); McKeon v. State, 31 A.D.2d 566, 294 N.Y.S. 2d 352 (1968).

[161] Buffalo v. Williams Dechert and Sons, Inc., 57 Misc. 2d 870, 293 N.Y.S.2d 821 (1968); see *In re* Huie, 2 N.Y.2d 168, 157 N.Y.S.2d 957, 139 N.E.2d 140 (1956).

[162] *In re* West Ave. N.Y. City, 27 A.D.2d 539, 275 N.Y.S.2d 119 (1966); New Rochelle v. Sound Operating Corp., 30 A.D.2d 861, 293 N.Y.S.2d 129 (1968).

[163] *See dissent,* Rochester v. Sound Operating Corp., 30 A.D.2d 861, 293 N.Y.S. 2d 129 (1968).

[164] 57 Misc. 2d 645, 293 N.Y.S.2d 475 (1968).

[165] 26 A.D.2d 377, 274 N.Y.S.2d 805, *modfied,* 20 N.Y.S.2d 618, 233 N.E.2d 113 (1967).

[166] Sackman, *supra* note 29. As well as case law, statutes may permit the approach without foundation; PA. STAT. ANN. 26, § 1–705.

2. Or, it is a specialty.
3. Or, there is competent proof of an absence of market data.

> If a market does in fact exist, market data [are] the basic or ultimate test of value. Inclusion of the cost approach in the appraisal is not in itself erroneous, provided it is used not as the criterion of value but as a check against the market data and economic approaches.

Requisites to the use of the cost approach are stated in *United States v. Benning Housing Corporation* [167] as follows:

> But, as to three other factors governing the admission of reproduction cost evidence, there is substantial, if not complete, unanimity. These are: (1) that the interest condemned must be one of complete ownership; (2) that there must be a showing that a substantial reproduction would be a reasonable business venture; and (3) that a proper allowance be made for depreciation.

Although used in the determination of the *Benning* case, the first requirement of unity of ownership is infrequently cited.[168]

The second requirement stated in *Benning,* that reproduction would be a reasonable venture, was applied in *Commonwealth v. Massachusetts Turnpike Authority,*[169] involving an old armory. The court indicated that the reproduction cost method was improper

> . . . where special purpose structures are very greatly out of date, are no longer well fitted to their particular use, and would not be produced by any prudent owner.

Similar is *Port Authority Trans-Hudson Corp. v. Hudson & Manhattan Corp.,*[170] where items based on a cost approach were stricken when the court concluded that there was no reasonable probability of the railroads being reproduced as a commercial venture. In *Norman's Kill Farm Dairy Co. v. State,*[171] the court indicated that replacement of an identical structure was not necessary, technological developments and economic trends rendering building of the same structure unlikely.

One aspect of the requirement of replacement is whether the improvement is "proper" in view of the highest and best use of the land. Attempts occasionally are made to value the land (at higher value) for uses inconsistent with the continued existence of the improvements.[172]

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[167] 276 F.2d 248 (5th Cir. 1960).

[168] See *In re* Blackwell's Island Bridge Approach, 198 N.Y. 84, 91 N.E. 278, 41 L.R.A. (n.s.) 411 (1910); United States v. Certain Interests in Property, etc., 296 F.2d 264 (4th Cir. 1961); United States v. Tampa Bay Garden Apts., Inc. 294 F.2d 589 (5th Cir. 1961); 2 Orgel, VALUATION UNDER EMINENT DOMAIN, § 191, Sackman, *supra* note 29, at 58.

[169] 352 Mass. 143, 244 N.E.2d 186 (1966).

[170] 20 N.Y.S.2d 457, 231 N.E.2d 734 (1967); 50 Misc. 2d 613, 271 N.Y.S.2d 95; 48 Misc. 2d 485, 265 N.Y.S.2d 925; 43 N.Y.U. L. REV. 789. *See also* United States v. Certain Interests in Property, 296 F.2d 264 (4th Cir. 1961).

[171] 53 Misc. 2d 578, 279 N.Y.S.2d 292 (1967).

[172] *See* Albany Country Club v. State, 19 A.D.2d 199, 241 N.Y.S.2d 604 (1963); Norman's Kill Farm Dairy Co. v. State,

Valuation of the land and the building based on inconsistent uses should not be allowed.

The cost approach has been described as follows: [173]

> 1. The appraiser estimates the reproduction or replacement cost new of the property.
> 2. He then estimates accrued depreciation, and deducts the amount of this depreciation from the cost new, in order to arrive at the depreciated value of the improvements.
> 3. The value of the land is then estimated and added to the depreciated value of the improvements, to reach an estimate of value by the Cost Approach.

Original costs are rarely used in the cost approach in condemnation cases, although they may be if the improvements are fairly new.[174] The usual starting point in valuing improvements by the cost approach is either "reproduction costs" or "replacement costs." [175] In appraisal terminology, "reproduction cost" is defined as the cost of an identical facility or replica, and "replacement cost" as the cost of a property having utility equivalent to the property being valued.[176] Obviously, the cost of a physical replica could differ substantially from a structure having the same utility. The courts generally use the term "reproduction costs" but do not recognize the technical distinction between the two terms.

Courts have required the costs used to be those of an identical structure; i.e., reproduction costs.[177] In the case of *In re U.S. Commission to Appraise Washington Market Company Property,*[178] the court indicated that the reproduction cost was ". . . what it would cost to reproduce this building, not one that would take its place."

Again, in *Kennebec Water District v. City of Waterville,*[179]

> We think the inquiry along the line of reproduction should, however,

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53 Misc. 2d 578, 279 N.Y.S.2d 292 (1967); United States v. Certain Lands, etc., 57 F.Supp. 96 (S.D. N.Y. 1944); *see* CAL. EVIDENCE CODE § 820.

[173] From REAL ESTATE ENCYCLOPEDIA as testified in United States v. 84.4 Acres of Land, 224 F.Supp. 1017 (W.D. Pa. 1963), *aff'd* 348 F.2d (3d Cir. 1965).

[174] *See* Assembly of God Church of Pawtucket v. Vallone, 106 N.J. Eq. 85, 150 A.2d 11 (1959). Use made of original costs in rate cases differs from that made in condemnations; 2 Orgel, VALUATION UNDER EMINENT DOMAIN, § 204; BONBRIGHT, *supra* note 59; Bonbright, *The Problem of Judicial Valuation,* 27 COLUM. L. REV. 493. Evidence of original costs has been allowed in condemnations: Kennebec Water Dist. v. City of Waterville, 97 Me. 185, 54 A. 6, 60 L.R.A. 856 (1902); Onondaga Water Dist. v. N.Y.W.S. Corp., 283 A.D. 655, 139 N.Y.S.2d 755 (1955).

[175] Both terms are used in Kennebec Water Dist. v. City of Waterville, 97 Me. 185, 54 A. 6, 60 L.R.A. 856 (1902). See also CAL. EVIDENCE CODE § 820; PA. STAT. ANN. 26 § 1–705.

[176] APPRAISAL TERMINOLOGY AND HANDBOOK, *supra* note 41, at 167; APPRAISAL OF REAL ESTATE 184 (4th ed. 1964).

[177] McCardle v. Indianapolis Water Co., 272 U.S. 400, 71 L.Ed. 316, 47 Sup. Ct. 144 (1926); Onondaga County Water Authority v. N.Y.W.S. Corp., 283 A.D. 655, 139 N.Y.S.2d 755 (1955).

[178] 295 F. 950 (D.C. Cir. 1924).

[179] 97 Me. 185, 54 A. 6, 60 L.R.A. 856 (1902).

> be limited to the replacement of the present system by one substantially like it. To enter upon a comparison of merits of different systems—to compare this one with more modern systems—would be to open a wide door to speculative inquiry and lead to discussions not germane to the subject. It is this system that is to be appraised, in its present condition and with its present efficiency.

Criticism has been directed against this approach. Orgel [180] states:

> The procedure of estimating the value of an existing property by reference to the probable cost of a more desirable substitute is a difficult one even for the expert, and is subject to a wide margin of error. Yet it is no more difficult, and is subject to less error, than is the procedure of estimating the value of an obsolescent structure by starting with its reproduction cost new and then deducting functional depreciation. Unfortunately, the courts are more likely to appreciate the former difficulties than the latter ones, and they are therefore prone to reject the cost-of-substitute method of appraisal, on the ground that it is too "speculative" while accepting the cost-of-identical-plant method.

Richard Ratcliff in his RESTATEMENT OF APPRAISAL THEORY [181] says:

> If the structure is obsolete and outdated, no one would, in fact, reproduce it, and a replacement would be so unlike original as to defy comparison. Under these circumstances, in no sense can cost of reproduction be equal to value, and adjustments to cost for so-called depreciation are irrelevant, for a meaningless figure (cost) cannot be made meaningful by adjustment (depreciation). If the unadjusted figure did not represent value neither can the adjusted figure represent value.

In an article considering the use of the cost aproach in valuing special purpose properties, Joseph F. Keely [182] states:

> It begins with the present cost of a replica *that in all probability wouldn't be built* and, *looking backwards,* says that accrued depreciation has lessened the value of the property. It begins with an irrational hypothesis of total costs, equates this with value, and makes deduction for costs consumed to estimate value left.

Keely argues that the use of replacement cost (functional equivalent) as a starting point automatically makes allowance for functional and economic depreciation. He argues that the proper method of appraising a special purpose property is by starting with the replacement cost, making an adjustment for future useful life, and deducting *curable* physical and functional depreciation.

There is little case authority approving the use of replacement cost.[183] *Commonwealth v. Massachusetts Turnpike Authority* [184] in-

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[180] 1 Orgel, VALUATION UNDER EMINENT DOMAIN, § 198.

[181] RATCLIFF, *supra* note 154.

[182] KEELY, *supra* note 154.

[183] *See* Butler Rubber Co. v. Newark, 6 N.J.L. 32 (1897), discussed in 1 ORGEL, VALUATION UNDER EMINENT DOMAIN, § 198; Norman's Kill Farm Dairy Co. v. State, 53 Misc. 2d 578, 279 N.Y.S.2d 292 (1967); Assembly of God Church of Paw-

volved an old armory and the court felt that it had residual value only. After noting the danger present in using reproduction costs not adequately discounted, the court concluded that it was improper to allow such costs where such structure would not be reproduced by a prudent buyer. In discussing what could be considered in determining residual value of the old building, the court said: "The cost of a suitable structure may be taken into account by an expert appraiser in forming his judgment of the old structure's residual value." The concurring opinion recognized that the cost of reproducing the structure was "obviously irrelevant and confusing" but felt that under the circumstances so were replacement costs.

What costs are properly includable in the reproduction cost figure of the improvement involved? Orgel [185] indicates that the method should be to ". . . First estimate the cost of materials, then to add the cost of construction and all necessary overheads." The APPRAISAL OF REAL ESTATE [186] states that there are two kinds of costs: direct costs, which includes materials, wages, and salaries, as well as the contractors' overhead and profits; and indirect costs, which include architect's fees, other outside professional services, taxes, insurance, administrative expense, and interest during the period of construction.

Banner Milling Co. v. State [187] indicates that costs should include "the cost reasonably necessary, expended in bringing the miller factory into working condition." Discussed in the *Banner* case are architect's fees and making and revising plans and compensation paid to engineers to carry out such plans. Included in the case of *In re U.S. Commission to Appraise Washington Market Company Property,*[188] were a builder's commission of 10 percent, bond costs of 1½ percent, and architect's commission of 6 percent.

Puget Sound and Light Co. v. P.U.D. No. 1 [189] held that inclusion of a general contractor's bond and his profits was proper only when the general contractor, if employed, would effect corresponding savings to the owner of material and labor costs. It is unclear what this means or why this requirement is present. The court in the *Puget Sound* case did instruct that general overhead costs and similar charges were to be considered.

Where the cost approach is used, a proper deduction from reproduction costs generally must be made for depreciation.[190] The types of

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tucket v. Vallone, 106 N.J. Eq. 85, 150 A.2d 11 (1959); In Chicago v. George F. Harding Collection, 70 Ill. App. 2d 254, 217 N.E.2d 381 (1965), the "replacement" proposed by the city was found to be less than a functional equivalent.

[184] 352 Mass. 143, 244 N.E.2d 186 (1966).

[185] 2 Orgel, VALUATION UNDER EMINENT DOMAIN, § 193.

[186] APPRAISAL OF REAL ESTATE, *supra* note 18, at 191.

[187] 240 N.Y. 533, 148 N.E. 668, 41 A.L.R. 1019 (1927).

[188] 295 Fed. 950 (D.C. Cir. 1924).

[189] 123 F.2d 286 (9th Cir. 1941).

[190] Commonwealth v. Massachusetts Turnpike Authority, 352 Mass. 143, 244 N.E.2d 186 (1966); Massachusetts v. New Haven Development Co., 146 Conn. 421, 151 A.2d

depreciation are physical, which is physical aging and wear and tear, functional, and economic. The latter two have been referred to as "obsolescence" and have been described as follows: [191]

> Obsolescence is divided into two parts, functional and economic. Functional obsolescence may be due to poor plan, mechanical inadequacy or overadequacy due to size, style, age, etc. It is evidenced by conditions within the property. Economic obsolescence is caused by changes external to the property, such as neighborhood infiltrations of inharmonious groups or property uses, legislation, etc.

Concerning physical depreciation, the "inspection" method of determining physical depreciation was approved in the case of the *Washington Market Company Property.*[192] The court noted that allowance should be made for such depreciation, which the court termed "inherent depreciation." In *State ex rel. O.W.W.S. Co. v. Hoquiam,*[193] the objection was made that engineering witnesses should have applied the "sinking fund" rather than the "straight line" method of determining depreciation. The court concluded that the question was one of fact rather than law and stated, "These various methods are not rules of law and should not be considered as such."

Some cases have been hesitant in applying functional depreciation or obsolescence. In the *Washington Market Company* case,[194] the court felt that in that particular case such should not be considered independently. In *Trustees of Grace and Hope Mission v. Providence Redevelopment Agency,*[195] the court held that as a condition precedent to the admission of functional depreciation there should be a showing that "because the property or some portion thereof is becoming antiquated or out of date, it is not functioning efficiently in the use for which it was constructed or renovated and to which it is dedicated at the time of taking." In the *Trustees* case, the structure had been recently renovated and there was no showing of depreciation except wear and tear.

In *Harvey School v. State,*[196] however, indicating that functional handicaps of the building should be considered, the court said: [197]

> Functional depreciation in the court's opinion must be given considera-

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693 (1959); State v. Red Wing Laundry and Dry Cleaning Co., 253 Minn. 570, 93 N.W.2d 206 (1958); see 2 Orgel, VALUATION UNDER EMINENT DOMAIN, § 199.

[191] Adams, *Analysis of Factors Influencing Value,* 37 APPRAISAL J. 239 (Apr. 1969); *supra* note 41.

[192] 295 F. 950 (S.D. N.Y. 1924).

[193] 155 Wash. 678, 286 P. 286, 287 P. 670 (1930).

[194] 295 F. 950 (S.D. N.Y. 1924).

[195] 100 R.I. 537, 217 A.2d 476 (1966).

[196] 14 Misc. 2d 924, 180 N.Y.S.2d 324 (1958).

[197] *Accord:* State Department of Highways v. Owachito Parish School Board, 162 So. 2d 397 (La. 1964); Assembly of God Church of Pawtucket v. Vallone, 106 N.J. Eq. 85, 150 A.2d 11 (1959); United States v. Certain Property in Borough of Manhattan, 403 F.2d 800 (2d Cir. 1968); Gates, *Obsolescence in Church and School Properties,* 6 APPRAISAL AND VALUATION MANUAL (American Society of Appraisers, 1961).

> tion as affecting the condition or utility of the premises in order to arrive at a proper assessment of damages.

If an owner is to receive value that does not include betterment, recognition should be given to functional and economic deficiencies that lessen the value of his property.

The most vexing problem in applying the cost approach is the determination of functional and economic obsolescence. In assessing the value of a church, for example, the appraiser will have to exercise some effort and ingenuity in determining what elements affecting the utility of the subject church are superior or inferior to similar churches.[198] Each church may have its own needs, however. Ultimate determination of the amount of depreciation will rest on the appraiser's judgment, assuming that the appraiser has made an adequate investigation of the factors that affect the utility and enjoyment of a particular property and that he has attempted to gauge such factors of the subject against what might be considered as the norm in properly improved facilities of the same type. Use of a formula solution should stop where it purports to solve problems that are essentially matters of knowledge, experience, and judgment.[199]

The case of *In re Polo Grounds Area Project*,[200] which involved the taking of a stadium and its parking area, illustrates the problem of gauging depreciation. Value of the stadium, which had been abandoned by its home team, the Giants, was strongly disputed. The tenant, who under agreement with the landlord would receive 85 percent of the award for the improvement, placed its value at $3,950,000, whereas the landlord and the condemnor gave it almost no value. The cost approach was used although the appellate division of the Supreme Court stated that this method should not be used if a building, though a specialty, would not be replaced. The appellate division differed with the trial court and using depreciation in excess of 90 percent, valued the improvements at $100,000, plus $75,000 scrap value. The Court of Appeals reversed, sustaining the original verdict of $1,724,714 based on 70 percent depreciation. Apparently, no consideration was given to the capacity of the property to earn income, upon which there was some proof. Kahn argues that the owner should have been required to show a reasonable need to replace the use; otherwise, normal approaches should control.[201] Kaltenbach, who is critical of the action of the appellate division, suggests that value to the taker might be con-

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[198] Smith, *Valuation of Modern Church Properties,* 34 APPRAISAL J. 203 (Apr. 1966).

[199] See *The Appraisers' Dilemma* (Editorial), 35 APPRAISAL J. 380 (July 1967); Guthrie, *Value-In-Use (Institutional Property)*, 9 RIGHT OF WAY 56 (Dec. 1968), for a mathematical calculation of value-in-use.

[200] 26 A.D.2d 377, 274 N.Y.S.2d 805, *modified,* 20 N.Y.S.2d 618, 233 N.E.2d 113 (1967).

[201] Kahn, *The Polo Grounds and Special Purpose Property Valuation,* 15 RIGHT OF WAY 10 (Oct. 1968).

sidered in this situation because the city for a time continued to use the property as a ball park.[202]

The cost approach has been much criticized. It is mechanical from its inception. Reproduction costs of a building may have no correlation whatever to value, market or otherwise. If value is to be reached, it is by appropriate allowances for depreciation. The ultimate basis of depreciation is the appraiser's opinion, which is no better than his experience, knowledge, and judgment. As a practical matter, failure to recognize depreciation is to the owner's advantage. Some indefiniteness of depreciation might be avoided if the starting point were replacement cost; i.e., starting with a building functionally equivalent to the subject. Nevertheless, the cost approach is the only method that can be used on some special purpose properties that do not have production of income as their purpose. A possible alternative, as suggested later, is to more extensively apply the doctrine of substitution; however, neither owners nor condemnors may wish to commit themselves to this alternative.

Substitution

The only theory of valuation unique to special purpose properties is that of substitution, or the "substitute facility doctrine." The doctrine's origin is legal, from the reported opinions, and not from appraisal theory. It has risen in recognition of the need for a measure of compensation for public properties that must be replaced by their owners. As indicated in *United States v. Certain Property in Borough of Manhattan*:[203]

> [7] 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. *United States v. City of New York,* 168 F.2d 387, 390 (2 Cir. 1948): *State of California v. United States,* 395 F.2d 261, 266 (9 Cir. 1968). When circumstances warrant, it is another arrow to the trier's bow when confronted by the issue of just compensation.

Public facilities often have no market value. Highways, sewerage and water systems, and school facilities are prime examples. A hypothetical market value can often be found for public facilities; two examples are the market value of land on which a public school is built or of land comprising a public park. The argument raised in almost every case is that the market value approach can and should be applied. Although the market value measure might be applicable in some respects, it may be held inadequate and the substitution doctrine applied. Justification is usually that the market value approach does not provide the indemnity to the owner required of just compensation.[204] In the *Bor-*

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[202] Kaltenbach, 11 JUST COMPENSATION (July 1967).

[203] 403 F.2d 800 (2d Cir. 1968).

[204] Mayor and City of Baltimore v. United States, 147 F.2d 786 (4th Cir. 1945); United States v. Certain Land in

ough of Manhattan case,[205] the condemnor argued that the doctrine should be confined to condemnations involving public roads, sewers, bridges, or similar service facilities because the value of the land and the building involved (a public bath house) could be ascertained by the market value method. The court nevertheless held that the substitution doctrine was applicable.

In *United States v. Board of Education of County of Mineral,*[206] the court said:

> Under the circumstances shown by the evidence, it was clearly proper for the jury to take into consideration the cost of acquiring property to take the place of property acquired by the government, even if that property did have market value, since severance damage to remainder could not reasonably be measured in terms of market value.

Stated simply, the doctrine of substitution is that when property of a public agency is taken, the compensation to be paid is the cost of providing a necessary substitute having the same utility as the facility taken.[207]

One basis of the required "necessity" is that there be a legal obligation or duty of the public agency to replace the facility.[208] This obligation is cited as a justification for departing from the usual measures of compensation. As the obligation of the public agency is a continuing one, the distinction is drawn between public and private condemnees, because the latter usually have no legal obligation to replace the facility taken. *State v. Waco Independent School District*[209] states:

> There is a fundamental distinction between obligation resting on the agency condemning public property, and that of condemning private property. This distinction lies in the obligation thereby imposed on the condemnee. For example, a private party owes no duty to the public to continue its operation either at its original location or elsewhere. It can move, it can stay, or it can liquidate as it alone sees fit. Not so with a school system charged with a legal obligation to the public. A school system suffering the loss of one of its schools by condemnation must re-

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Borough of Brooklyn, 346 F.2d 690 (2d Cir. 1965); Note, *Just Compensation and the Public Condemnee,* 75 YALE L.J. 1053 (1966); 1 Orgel, VALUATION UNDER EMINENT DOMAIN, § 42; *cf.* Dolan, *supra* note 7. The owner received more under market value than substitution in People v. City of Los Angeles, 33 Cal. Rptr. 797 (Cal. App. 1963). Substitution is permitted in condemnation of parks by agreement under CALIF. HIGHWAY CODE, § 103.7. *See also* State of California v. United States, 395 F.2d 261 (9th Cir. 1968).

[205] 403 F.2d 800 (2d Cir. 1968).

[206] 253 F.2d 760 (4th Cir. 1958).

[207] *Id.* United States v. Certain Land in City of Red Bluff, 192 F.Supp. 725 (N.D. Calif. 1961); Wichita v. Unified School District No. 259, 367 S.W.2d 263 (Tex. 1963); State v. Waco Independent School Dist., 367 S.W.2d 263 (Tex. 1963).

[208] United States v. Certain Property in Borough of Manhattan, 403 F.2d 800 (2d Cir. 1968); United States v. Des Moines County, 148 F.2d 448 (8th Cir. 1945), 160 A.L.R. 953; Public ownership alone, absent necessity is not enough. United States v. Jones Beach State Parkway Authority, 255 F.2d 329 (2d Cir. 1958).

[209] 367 S.W.2d 263 (Tex. 1963).

> place that school when the facility is necessary to the education of its children as shown by the undisputed evidence in this case. This is the legally imposed duty on the school district, and it has no other choice.

The character of the necessity required may be that of an absolute legal obligation to replace the facility taken, performance of which might be compelled by a member of the public being served by it. In *United States v. Wheeler Township,*[210] the court noted, "It is the duty of the township to maintain its roads and that duty can be enforced. . . ."

The duty to replace may not be confined to that which can be legally enforced but may be based on factual necessity. In *United States v. Certain Land in Borough of Brooklyn,*[211] the court said:

> But "necessity" as seen in the usual case dealing with a condemned street or bridge, . . . looks to the pragmatic needs and possibilities, not to technical minima.

This liberal point of view on the question of necessity is expressed in *United States v. Certain Property in Borough of Manhattan*[212] as follows:

> Modern government requires that its administrators be vested with the discretion to assess and reassess changing public needs. If application of the "substitute facilities" theory depended on finding a statutory requirement, innumerable nonlegal obligations to service the community would be ignored. Moreover, the "legal necessity" test, applied woodenly, may provide a windfall if the condemned facility, though legally compelled, no longer serves a rational community need. We hold, therefore, that if the structure is reasonably necessary for the public welfare, compensation is measured not in terms of "value" but by the loss to the community occasioned by the condemnation.

The degree of necessity required has been described in some cases as "reasonable" necessity under the circumstances. In *United States v. Certain Land in the City of Red Bluff,*[213] the court said:

> The lot is not operated by defendant as a mere money making proposition, but to fill a public need. If there existed a public need at the time of the taking which made it reasonably necessary that a parking lot of comparable facilities be operated in the vicinity, then just compensation should be an amount equal to the cost of the substitute lot.

What is reasonably necessary under the circumstances does not

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[210] 66 F.2d 977 (8th Cir. 1933). *See also* State of California v. United States, 169 F.2d 914 (9th Cir. 1948); State of Washington v. United States, 214 F.2d 33 (9th Cir. 1954).

[211] 346 F.2d 690 (2d Cir. 1965). *See also* United States v. Los Angeles County, 163 F.2d 124 (9th Cir. 1947).

[212] 403 F.2d 800 (2d Cir. 1968).

[213] 192 F.Supp. 725 (N.D. Calif. 1961). *See also* United States v. Certain Property in Borough of Manhattan, 403 F.2d 800 (2d Cir. 1968).

mean what the owner wants or what is desirable.[214] The burden of showing that other facilities are inadequate has been placed on the owner.[215] Reasonable costs of furnishing a necessary substitute constitutes a question of fact.[216]

That the condemnee might be paid on the basis of a necessary substitute and then might not construct has been subjected to criticism. Withholding the award until the condemnee's costs are fixed by actual replacement has been suggested.[217] From the condemnor's point of view, if the substitute is not constructed, the owner appears to be receiving a windfall. This attitude may be justified on the basis that if there were no needs under the substitute approach, the owner would receive nothing. From the condemnee's point of view, if the function of substitution is to determine just compensation—the value of what is lost—how the condemnee spends the award has no bearing on the value of that which is taken.

Where no substitute is necessary, compensation may be nominal or nonexistent.[218] The usual situation encountered is that in which an area, including internal roads serving it, is taken, and the necessity for the roads ceases as a result of the taking.

Strict application of the rule of substitution where the property has market value can cut both ways. Although the costs of the legal substitute may exceed the market value of the property in some cases, in others, the market value can exceed the cost of the substitute. Thus, a situation can arise in which a public owner may receive less than a private owner in approximately the same situation. The latter would receive market value, but the former would receive only nominal compensation or scrap value if there were no necessity to replace its facility. It has been suggested that the public condemnee should receive at least market value, as it usually could cease to use the property involved for its "necessary" function and dispose of it on the open market.[219]

United States v. Certain Land in Borough of Brooklyn [220] broke away from the strict substitution approach of "no necessity—no pay." At the first trial, the basis of valuation was market value, but the case was remanded for trial on the issue of necessity, which, if found, would

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[214] United States v. Alderson, 53 F.Supp. 524 (D.C. W. Va. 1944); United States v. 0.866 of an Acre of Land, etc., 65 F.Supp. 827 (E.D. N.Y. 1946).

[215] United States v. Alderson, 53 F.Supp. 524 (D.C. W. Va. 1944).

[216] Wichita v. Unified School District No. 259, 201 Kan. 110, 439 P.2d 162 (1968).

[217] Dolan, *supra* note 7; *Just Compensation and the Public Condemnee, supra* note 204.

[218] State of Washington v. United States, 214 F.2d 33 (9th Cir. 1954); United States v. Certain Land in City of Red Bluff, 192 F.Supp. 725 (N.D. Calif. 1961); United States v. City of New York, 168 F.2d 387 (2d Cir. 1948), *aff'd* 71 F.Supp. 255 (E.D. N.Y. 1947); United States v. 0.866 of an Acre of Land, 65 F.Supp. 827 (E.D. N.Y. 1946). *See* Annot., *Measure of compensation in eminent domain to be paid to state or municipality for taking of a public highway,* 160 A.L.R. 955.

[219] *Just Compensation and the Public Condemnee, supra* note 204.

[220] 346 F.2d 690 (2d Cir. 1965).

have resulted in application of the substitute property doctrine. If it were not applicable because of the lack of necessity, market value would have been the measure. This rule was applied also in *United States v. Certain Property in Borough of Manhattan,*[221] involving the taking of public bath facilities.

If property is publicly owned but not being put to a public use, the necessity requirement (and that of replacing with a susbtitute of equivalent utility) is not satisfied. Strict substitution would not require that the condemnee be paid anything.[222] In such a situation, the market value approach has been applied and substitution doctrine rejected.[223]

Can unimproved land, in view of the requirement of necessity and the occasionally argued requirement that there be no market value, be subject to the doctrine of substitution? In *United States v. 51.8 Acres of Land,*[224] involving the taking of vacant land that was being held for park and parkway use, the court refused to apply the substitute doctrine, holding that it was applicable only to highways and utilities, and then proceeded to apply the market value approach. In *United States v. Certain Land in Borough of Brooklyn,*[225] where vacant property being held for a playground was being acquired, the court remanded the matter ordering a retrial as to the applicability of the doctrine of substitution to the property.

The substitute facility for which the condemnor is required to pay must be of the "same or equal utility."[226] In *United States v. Certain Property in Borough of Manhattan,*[227] the court held: "Exact duplication is not essential; the substitute need only be functionally equivalent. The equivalence required is one of utility." The utility required may result in costs in excess of or less than the reproduction costs or depreciated value of the facilities taken.

In *Town of Clarksville, Va. v. United States,*[228] the sewer facilities taken operated by gravity flow. The substitute required lift stations and a treatment plant, and the condemnor was required to pay for such a system. The court noted that the question was "more that of utility than dollars and cents" and that the substitute must be that which the

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[221] 403 F.2d 800 (2d Cir. 1968).

[222] *See* Mayor and City Council of Baltimore v. United States, 147 F.2d 786 (4th Cir. 1945), where streets and alleys had never been laid out; State of California v. United States, 169 F.2d 914 (9th Cir. 1948).

[223] State of California v. United States, 395 F.2d 261 (9th Cir. 1968); United States v. Jones Beach State Parkway Authority, 255 F.2d 329 (2d Cir. 1958); United States v. State of South Dakota Game, Fish, and Parks Dept., 329 F.2d 665 (8th Cir. 1964); Board of Education v. Kanawha and M.R. Co., 44 W. Va. 71, 29 S.E. 503 (1897).

[224] 151 F.Supp. 631 (E.D. N.Y. 1957); see CALIF. HIGHWAY CODE § 103.7, allowing use of substitution on public parks by agreement.

[225] 346 F.2d 690 (2d Cir. 1965); *see* Central School Dist. No. 1 v. State, 28 A.D.2d 1062, 284 N.Y.S.2d 171 (1967).

[226] City of Fort Worth v. United States, 188 F.2d 217 (1951); State v. Waco Independent School District, 367 S.W.2d 263 (Tex. 1963).

[227] 403 F.2d 800 (2d Cir. 1968).

[228] 198 F.2d 238 (4th Cir. 1952).

town was legally required to construct, even though the substitute was more efficient than the system condemned. Also, in *United States v. Wheeler Township,*[229] the government was required to pay for the costs of a road meeting standards that the county was legally compelled to maintain, although the roads condemned were in poor condition.

In the partial taking situation in which the special purpose to which the property was being devoted was destroyed by the taking, the cost of the substitute may be reduced by salvage value of buildings and the market value of the land. In *State Department of Highways v. Owachita Parish School Board,*[230] use as a school was completely destroyed, and the court noted that consideration still must be given to the residual value of the remainder for purposes other than a school. Also, in *Board of Education v. Kanawha M.R. Co.,*[231] the court noted that the remainder may have greater market value for other purposes than value for school uses.

Where substitution is proper, resort cannot be made to the measure of compensation by use of reproduction costs.[232] "Cost of cure" in the conventional sense also has been rejected.[233] The exclusionary rules are legal, and a factual consideration of costs to cure might lead to better solutions in some cases. Practically speaking, substitution is a form of cost of cure.

It has been argued that the costs of a substitute should be reduced by the accrued depreciation that the facility taken has suffered. This approach has been rejected on the grounds that the utility of the thing taken must be replaced. For example, in *Wichita v. Unified School Dist. No. 259,*[234] it was held that depreciation and obsolescence should be ignored in calculating the cost of the substitute. In *State Department of Highways v. Owachita Parish School Board,*[235] however, the court indicated that a substantial reduction should be made because of the age and location of the building. Again, in *United States v. Certain Property in Borough of Manhattan,*[236] the court stated:

> Moreover, equitable principles undergirding just compensation require that the substitution cost be discounted by reason of the benefit which accrues to the condemnee when a new building replaces one with expired useful years. With deference to several contrary holdings, we believe the amount should be calculated and an appropriate deduction made.

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[229] 66 F.2d 977 (8th Cir. 1933); *see* United States v. State of Arkansas, 164 F.2d 943 (8th Cir. 1947), where condemnor required to pay for temporary substitute in form of ferry.

[230] 162 So. 2d 397 (La. 1964).

[231] 44 W. Va. 71, 29 S.E. 503 (1897).

[232] Jefferson County v. Tennessee Valley Authority, 146 F.2d 564 (6th Cir. 1945), where substitute roads provided by condemnor; United States v. Des Moines County, 148 F.2d 448 (8th Cir. 1945), 160 A.L.R. 953.

[233] United States v. 0.866 of an Acre of Land, 65 F.Supp. 827 (E.D. N.Y. 1946).

[234] Wichita v. Unified School Dist. No. 259, 201 Kan. 110, 439 P.2d 162 (1968); *see* United States v. Wheeler Township, 66 F.2d 977 (8th Cir. 1933).

[235] 162 So. 2d 397 (La. 1964).

[236] 403 F.2d 800 (2d Cir. 1968).

In *Masheter v. Cleveland Board of Education,*[237] involving school buildings 71 and 85 years old and a gymnasium 29 years old, the court held it error to instruct on substitution and stated that replacement cost less depreciation was a more reliable method.

As previously indicated, courts, in justifying the use of the substitution approach, distinguish public facilities from private facilities because of the public obligation to replace. Does this mean that the substitution doctrine is not applicable where there are takings of privately owned special purpose properties?[238] One argument presented against this treatment is that the owner is giving up his property against his will and should not be compelled to mitigate his damages by acceptance of the substitute proffered by the condemnor.[239] A second reason is that the possibility of the private owner's securing the substitute is uncertain. Nichols[240] says:

> The prospect of restoring the property to its original condition must, however, be reasonably certain; the owner is not bound to enter upon a doubtful or speculative undertaking for the reclamation of his property.

Also, in the private situation, the courts have indicated that in a "cost to cure" situation, restoration must be possible within the limits of the remaining property. Again in Nichols:[241]

> So, also, the restoration must be possible without going outside the remaining portion of the tract in controversy. The owner's right to compensation cannot be made to depend upon the question whether adjacent land could be easily bought.

This distinction recently was recognized in *St. Patrick's Church, Whitney Point v. State,*[242] in which the condemnor attempted to arrive at the value of the vacant land taken by showing the price of a piece of property recently purchased by the church and deducting therefrom the claimed value of a house on this new property. This case is to be contrasted with *Central School District No. 1 v. State,*[243] where the value of

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[237] 17 Ohio St. 2d 25, 244 N.E.2d 744 (1969).

[238] Cases involving private property that refused to apply substitution include Albany Country Club v. State, 19 A.D.2d 199, 241 N.Y.S.2d 604 (1963); Jeffrey v. Osborne, 145 Misc. 351, 29 N.W. 931 (1911). *See also* earlier case, Jeffery v. Chicago and M. Elec. R. Co., 138 Wis. 1, 119 N.W. 879 (1909); St. Agnes Cemetery v. State, 2 N.Y.S.2d 37, 163 N.Y.S.2d 655, 143 N.E.2d 377, 62 A.L.R.2d 1161 (1957); State v. Lincoln Memory Gardens, Inc., 242 Ind. 2d 206, 177 N.E.2d 655 (1961).

[239] State Highway Dept. v. Thomas, 115 Ga. App. 372, 154 S.E.2d 812 (1967), held that cost of substitutes not relevant as landlady could not be compelled to lease other property against her will; St. Patrick's Church, Whitney Point v. State, 30 A.D.2d 473, 294 N.Y.S.2d 275 (1968); 75 YALE L.J. 1053, Dolan, *supra* note 7.

[240] 4 Nichols, EMINENT DOMAIN, § 14.22.

[241] 4 Nichols, EMINENT DOMAIN, § 14.2472.

[242] 30 A.D.2d 473, 294 N.Y.S.2d 275 (1968).

[243] 28 A.D.2d 1062, 284 N.Y.S.2d 171 (1967).

a taking from vacant land held for school uses was arrived at by making adjustments in the price paid for a substitute site.

It has been argued that the use of the substitute approach might work material hardship on the property owner. He might be compelled to accept a substitute that was not desirable to him.[244] If substitution is considered as a measure of compensation, however, the owner may be better off accepting this measure rather than receiving a strict application of the market value measure that would not compensate for special values that the owner may have in his land.

The idea of compensation arrived at by a consideration of the cost of a substitute property has been applied in a number of cases where private property is being acquired.[245] It may be done under the guise of the market data approach, the court considering the cost, as evidenced by sales of similar properties, of a substitute site, or the costs of curing deficiencies in improvements caused by the taking.

In *St. Louis v. St. Louis I.N. & S. Ry. Co.*,[246] a lead company was attempting to claim substantial damages to its property caused by the taking of one of its corroding yards, and there was proof of lands contiguous to the owner's property for sale and available for use with the remaining property. The case discussed compensation in terms of expenditures to preserve the use of the remainder, concluding that such compensation should be limited to cases where only part of a tract devoted to a special use is appropriated, and stated:

> For, we repeat, in no case can the owner, for the convenience of the condemnor, be required to swap lands, or to go into the market and buy other lands in lieu of those taken. But in a case where the taking of a part of a tract which is devoted to a special use results in large depreciation in value for that special use, the measure of that depreciation ought to be the sum required to be expended in order to rehabilitate the property for such use, or replace the plant in *statu quo ante capiendum;* provided, of course, that rehabilitation in such manner be practicable.

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[244] *Supra* note 239; Kaltenbach, JUST COMPENSATION 13 (Jan. 1969).

[245] Edgcomb Steel of New England v. State, 100 N.H. 480, 131 A.2d 70 (1957); First National Stores v. Town Plan and Zoning Commission, 26 Conn. Super. 302, 222 A.2d 229 (1966); Green Acres Memorial Park v. Mississippi State Highway Commission, 246 Miss. 855, 153 So. 2d 286 (1963), where the cemetery had statutory authority to condemn; *see* Wichita v. Unified School Dist. No. 259, 201 Kan. 110, 439 P.2d 162 (1968):

> In the private sector as well as the public sector, the rule of substitution has been applied where evidence of market value was missing.

See MD. CODE ANN. art. 33A, § 5(d), stating that valuation of churches shall be the reasonable cost of substantially similar structure at another location provided by the subject church plus damages for land taken. This differs from true substitution, which would require compensation for the land in terms of the cost of the view site. *Re* Brantford Golf and Country Club v. Lake Erie and N.R.W. Co., 32 Ont. L. Rep. 141 (1914); St. Louis v. Paramount Shoe Mfg. Co., 272 Mo. 80, 197 S.W. 107 (1943); Wiess v. Commissioner of Sewerage, 152 Ky. 552, 153 S.W. 967 (1913).

[246] 272 Mo. 80, 197 S.W. 107 (1943).

The case then approaches the costs of a substitute in terms of prices of adjacent properties:

> In cases where no available property is owned by him whose land is taken, the price at which other lands adjacent, equally as valuable intrinsically, as convenient, as economical in use, and as accessible, and which can be bought, may be shown as measuring the amount of depreciation to which the lands damaged but not physically taken, have been subjected.

In *State v. Dunclick, Inc.*,[247] the condemnor was attempting to establish availability of adjacent lands owned by it, and the court, in finding its offer in this respect inadequate, stated:

> [1] The consideration to be paid, or conditions under which the conveyance tendered could or would be made to appellants, the cost of improving the claimed available land to make it adaptable to appellants' use, the cost of readjustment to appellants' plant to make practical use of the new location, or what sum would necessarily be required to be expended in order to rehabilitate the property for such use and replace the plant in status quo ante capiendum were not shown. If respondent desires to prove facts for the purpose of mitigating or minimizing the damages sustained to the remainder, proof of availability of other land adjacent to appellants' plant, standing alone with nothing more, is insufficient for such purpose. If other available land can be acquired and proof is submitted proving that the acquiring of such land and the adjustment of appellants' plant as above outlined would minimize the damages, such evidence should be received to so minimize or lessen the damages sustained.

A similar rule has been applied to grazing lands in Utah:[248]

> . . . Where severance damage is sought to a remaining tract on the theory that the taking has depreciated the fair market value of that tract there must be proof that no comparable land is available in the area of the condemned land.

The above cases involving private properties use the words "substitute" and "substitution." None of them reaches the stage of a complete application, involving both land and improvements, of the strict substitute property doctrine as applied in public property cases. *St. Louis* and *Dunclick* did involve the use of abutting lands as substitutes. Most other cases, when talking of substitute lands, probably mean the market value of such susbtitute usually gauged by the market value of the land taken. As to improvements, the equivalent utility and necessity requirements found in public property cases have not been discussed

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[247] 77 Idaho 45, 286 P.2d 1112 (1955).

[248] Provo Water User's Ass'n v. Carlson, 103 Utah 93, 133 P.2d 777 (1943); Southern Pacific Co. v. Arthur, 10 Utah 2d 309, 352 P.2d 693 (1960); State v. Cooperative Security Corp. of Church, 122 Utah 134, 247 P.2d 269 (1952).

in cases involving private owners. When speaking of the cost of providing a necessary substitute for improvements and land taken, the usual private property situation is applying "cost to cure." [249] An inquiry in costs of a substitute that will provide equivalent utility, recognizing depreciation, might be more fruitful than the cost approach in arriving at just compensation to be paid to the private owner of a special purpose property.

In some cases, the original condemnor actually has secured the required substitute property with the agreement of the condemnee. Whether such a secondary taking is proper has been the subject of several cases.[250] Whether the original condemnee, if a private owner, could be compelled to take this susbtitute in lieu of money is questionable.[251]

To summarize, substitution or the substitute property doctrine is a device used to enable public condemnees to be made whole, in that it gives them sufficient funds to build a necessary substitute for the facility taken. In terms of market value, this procedure may mean a loss to the condemnee if a substitute is not necessary. In such a situation, a private condemnee may receive more favorable treatment than does a similarly situated public condemnee. The *Brooklyn* and *Manhattan* cases have taken the position that the public owner should receive costs of the substitute or market value, whichever is higher. These cases and others have also recognized depreciation in arriving at the costs of the substitute. The word "substitution" has been applied to private properties, but there is insistence that the availability and price of the substitute be certain. True substitution in terms of the cost of a facility, including improvements, that has equivalent utility to that taken has not been used in a private property case. A consideration of the costs of equivalent utility in a taking of private property might be more likely to result in equivalent value than in applying market value.

The Income Approach

Distinction is drawn between income from a business conducted on the subject property and income from the property itself (rental).[252] Generally, evidence of income from a business conducted on the premises is not admissible.[253] However, evidence of reasonable rental from

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[249] First National Stores v. Town Plan and Zoning Comm'n, 26 Conn. Super. 302, 222 A.2d 229 (1966).

[250] Williams, *Substitute Condemnation,* 54 CAL. L. REV. 1097 (1966); 2 Nichols, EMINENT DOMAIN, § 7.226.

[251] 3 Nichols, EMINENT DOMAIN, § 8.2; *see* State v. Dunclick, Inc., 77 Idaho 45, 286 P.2d 1112 (1955); Jeffery v. Chicago and M. Elec. R. Co., 138 Wis. 1, 119 N.W. 879 (1909).

[252] Bergeman v. State Roads Commission, 218 Md. 137, 146 A.2d 48 (1958). *Cf.* VT. STAT. ANN. 19, § 221(a), allowing compensation for business losses.

[253] 5 Nichols, EMINENT DOMAIN, § 19.3; 1 Orgel, VALUATION UNDER EMINENT DOMAIN, § 162; Annot., *Income as an element in determining value of property taken in eminent domain,* 65 A.L.R. 455; *see* Shelby

the property, as distinguished from the business, and indications of value arrived at by the use of the income approach using such rental often are admissible.[254] In some jurisdictions, such evidence is allowed in any case.[255] In others, a foundation indicating that sales evidence is not available or that the property is special purpose must be laid before such proof is allowed.

The income approach to valuation usually consists of arriving at an independent value of the land involved and adding to it the value of improvements arrived at by process of capitalization, i.e., converting reasonable or actual income at a reasonable rate of return (capitalization rate) into an indication of value. Land and improvements may be capitalized together in a single process.[256]

In some jurisdictions and situations, the income from the business conducted on the property and values arrived at by using such income may be admissible. This is another area in which the courts have, of necessity, been more liberal in the allowance of proof when dealing with special purpose properties.[257] Nichols [258] indicates: "Where property is so unique as to make unavailable any comparable sales data, evidence of income has been accepted as a measure of value."

Authorities are divided on whether income is a *criterion* of value or *evidence* of value.[259] Although income, or the income approach, is ad-

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County R-IV School District v. Herman, 395 S.W.2d 609 (Mo. 1965), where the court said:

> Evidence derived from a *commercial* business upon land taken for public use is ordinarily inadmissible as a basis upon which to ascertain market value in a condemnation proceeding because it is too speculative, remote, and uncertain.

See CAL. EVIDENCE CODE § 819; PA. STAT. ANN. 26, § 1–705.

[254] Annot., *Judgment in action growing out of accident as res judicata, as to negligence or contributory negligence, in later action growing out of same accident by or against one not a party to earlier action,* 23 A.L.R. 2d 710, 724; 4 Nichols, EMINENT DOMAIN, § 12.3122, says capitalization of rental of the subject "forms one of the best tests of value"; 1 Orgel, VALUATION UNDER EMINENT DOMAIN, § 142; see CAL. EVIDENCE CODE §§ 817, 818; NEV. REV. STAT. § 340.110(e); PA. STAT. ANN. 26, § 1–705. S.C. CODE, 25–120(5) (1962).

[255] Annot., *Judgment in action growing out of accident as res judicata, as to negligence or contributory negligence, in later action growing out of same accident by or against one not a party to earlier action,* 23 A.L.R.2d 710, 724, 728.

[256] APPRAISAL OF REAL ESTATE, *supra* note 18.

[257] *In re* Ziegler's Petition, 375 Mich. 20, 97 N.W.2d 748 (1959), indicating ". . . the determination of value in condemnation proceedings is not a matter of formula or artificial rules but of sound discretion based upon a consideration of all the relevant facts in a particular case." State v. Suffield and Thompson Bridge Co., 82 Conn. 460, 74 A. 775 (1909). *See* State Department of Highways v. Robb, 454 P.2d 313 (Okla. 1969), indicating admission of evidence of income was within the sound discretion of the court as bearing on fair market value but not to establish lost profits (drive-in movie). St. Louis v. Union Quarry and Construction Co., 394 S.W.2d 300 (Mo. 1966). See utility cases in Annot., *Compensation or damages for condemning a public utility plant,* 68 A.L.R.2d 392.

[258] 4 Nichols, EMINENT DOMAIN, § 12.3121.

[259] 5 Nichols, EMINENT DOMAIN, § 19.1; 165 A.L.R. 462.

missible, it should not be treated as the sole factor, but merely as evidence in fixing the value of the property.[260] In *Massachusetts v. New Haven Development Company,*[261] in response to an argument that the income approach was the only approach, the court said:

> No one method is controlling, and consideration is required to be given all factors which may legitimately affect the determination of value.

Also, in *Record v. Vermont Highway Board,*[262] in discussing the income approach:

> No hard and fast rule may be laid down applicable to every case as to what elements properly enter into consideration in determining the market value of property in every case.

Evidence of income from the property or a business conducted thereon may be admissible on the issue of uses to which the property is adaptable.[263] Courts frequently have recognized that the "productivity" of the property is a factor that would be considered by a willing buyer and that, therefore, the income is a proper factor to be considered by the jury. In *State Roads Commission v. Novasel,*[264] the court said:

> Business profits, it is well recognized, are no sure test of land value for they depend not only on location but on other factors; the same location may be fruitful of profit to one and not so to another. This does not mean, however, that in determining the value of the land no consideration is to be given to its productive capacity which, in such circumstances as are present in this case, has an important bearing on value. 4 Nichols on Eminent Domain 3rd Ed., § 12.312 [1]; 5 Nichols, § 19.3 [1] and [4]; 1 Orgel on Valuation under Eminent Domain 2nd Ed., § 164.
> As a practical matter, a prospective purchaser would hardly fail to consider whether or not the business conducted on the premises had proved profitable, for this would be a measure of the desirability of the location, if not to him then to other purchasers. The precise weight to be accorded to this factor is a matter of judgment on which experts may differ, and of this the jury is the final judge. . . .

Also, in *Sanitary Dist. of Chicago v. Pittsburgh, Ft. W. and C. Ry. Co.,*[265] the court stated:

> One of the important considerations in ascertaining the value of property which has no market value is its productiveness and capabilities for yielding profits to the owner. The court admitted evidence of the extent of the business done at the terminal station, and witnesses for the defend-

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[260] Lebanon and Nashville Turnpike Co. v. Creveling, 159 Tenn. 147, 17 S.W.2d 22, 65 A.L.R. 440 (1929); Stanley Works v. New Britain Redevelopment Co., 155 Conn. 86, 230 A.2d 9 (1967); United States v. Certain Interests in Property, etc., 165 F. Supp. 474 (E.D. Ill. 1958).

[261] 146 Conn. 421, 151 A.2d 693 (1959). *See also In re* James Madison Houses, 17 A.D.2d 317, 234 N.Y.S.2d 799 (1962).

[262] 121 Vt. 230, 159 A.2d 475 (1959), construing VT. STAT. ANN. § 221 (2).

[263] 1 Nichols, EMINENT DOMAIN, § 19.3 [1].

[264] 117 Me. 552, 102 A.2d 563 (1954).

[265] 216 Ill. 575, 75 N.E. 248 (1905).

> ant based their estimates of the value of the whole property, the part taken and the damage to the residue, upon the business handled at the station and the profits of such business. It is insisted that the court erred in admitting such evidence, which enabled the witnesses for the defendants to arrive at an intelligent estimate of the value of the property. We think there was no error in admitting the evidence. Although the profits of a business do not determine the value of land, it is proper to show, in arriving at the market value, that it is valuable for certain purposes and productive to the owner.

Such inquiry bears on the value of the land, not the business.[266]

The approach also has been followed in cases where the nature of the business is such that the income is produced essentially by the land, such as income from a parking lot.[267]

Also similar are the cases where a portion of the property held for future expansion is taken. Here the courts have permitted an inquiry into the business as bearing on the effect on the value of the remaining property.[268]

Courts often recognize enhancement of land value by business conducted on the property as justifying inquiry into the income produced on the property. For example, in *King v. Minneapolis Union Railway Co.*,[269] the court noted that a business had been conducted on the property for a long time and had increased its value. Cases have permitted this approach, allowing references to productivity of the business but not to specific items of profit, loss, and expense.[270] Logically, how much the property is enhanced by the business would depend on how much business is done and how much the profit is. The real bar to this inquiry probably is reluctance of the trial court to embark upon collateral inquiries that might unduly prolong the trial, have no relation to value, or simply confuse the jury.

A justification often given for the exclusion of evidence of business income is that it results in a valuation of the business where the business is not being taken.[271] Where the courts recognize that the con-

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[266] St. Agnes Cemetery v. State, 2 N.Y.S. 2d 37, 163 N.Y.S.2d 655, 143 N.E.2d 377, 62 A.L.R.2d 1161 (1957); St. Louis v. Paramount Shoe Mfg. Co., 272 Mo. 80, 197 S.W. 107 (1943). KAN. STAT. ANN. 26-513 (4) allows a consideration of "productivity"; such appears improper under CAL. EVIDENCE CODE § 822 (e).

[267] Eisenring v. Kansas Turnpike Authority, 183 Kan. 774, 332 P.2d 539 (1958); Private Property for Municipal Courts Facility v. Kordes, 431 S.W.2d 124 (Mo. 1968); St. Louis v. Union Quarry and Construction Co., 304 S.W.2d 300 (Mo. 1966); Trenton v. Lenzner, 16 N.J. 465, 109 A.2d 409 (1954); see cemetery cases, in the section on "The Income Approach."

[268] Producer's Wood Preserving Co. v. Commissioner of Sewerage, 227 Ky. 159, 12 S.W.2d 292 (1928); St. Louis v. Paramount Shoe Mfg. Co., 272 Mo. 80, 197 S.W. 107 (1943); Wiess v. Commissioner of Sewerage, 152 Ky. 552, 153 S.W. 967 1913); Edgcomb Steel of New England v. State, 100 N.H. 480, 131 A.2d 70 (1957).

[269] 32 Minn. 224, 20 N.W. 135 (1884).

[270] 1 Orgel, VALUATION UNDER EMINENT DOMAIN, § 164.

[271] Chicago v. Farwell, 286 Ill. 415, 121 N.E. 795 (1919); 5 Nichols, EMINENT DOMAIN, § 19.3[1].

demnor is taking the business, inquiry into its income and expenses is proper. This necessity is generally recognized in utility cases where the condemnor continues the business being acquired.[272] Receiving the benefits, there is no reason why the condemnor should not pay. "Going concern value" and values of other intangibles are allowed.[273] Often, however, an owner's business is destroyed by the condemnation and he is left with no possibility of restoring it. In refusing to pay, the court may say that the condemnor has not "acquired" the business.[274] This proposition is contrary to the position generally taken that the measure of compensation is the owner's loss, not the condemnor's gain.[275] Another justification given is that business is not property in the constitutional sense, which is concerned with the real property.[276] As a result, the owner fails to receive an equivalent value for his property. Recent legislation, to some extent in the areas of moving costs and to a lesser extent in costs of rehabilitation, has given some relief to the owner.[277]

In recent cases, there has been some recognition that owners should be compensated for business losses. One area in which this course has been pursued is where the business is essentially the property. In *City of St. Louis v. Union Quarry and Construction Co.*,[278] the property was an abandoned quarry that was being used as a garbage dump, and the court allowed evidence of net income derived from this use, stating:

> [13] The general rule, however, must be given an exception ex necessitate in this case, where the business is inextricably related to and connected with the land where it is located, so that an appropriation of the land means an appropriation of the business; where the evidence of net profits apparently is clear, certain and easily calculable, based upon complete records; where past income figures are relatively stable, average and representative, and future projections are based upon reasonable probability of permanence or persistence in the future, so that conjecture is minimized as far as possible, and where the body fixing the damages would be "at a loss to make an intelligent valuation without primary reference to the earning power of the business." Orgel, *supra*, § 162, p. 655.

Another example is *Private Property for Municipal Courts Facility v. Kordes*,[279] where a parking lot was acquired and the court allowed

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[272] Annot., *Compensation or damages for condemning a public utility plant*, 68 A.L.R. 2d 392.

[273] *Id.* See NEB. REV. STAT. 70–650 and 76–703.

[274] Banner Milling Co. v. State, 240 N.Y. 533, 148 N.E. 668, 41 A.L.R. 1019 (1927).

[275] See *supra* note 12.

[276] *See* Kimball Laundry Co. v. United States, 338 U.S. 1, 93 L.Ed. 1765, 69 Sup. Ct. 1434, 7 A.L.R. 1280 (1948); United States v. Petty Motor Co., 327 U.S. 372, 90 L.Ed. 729, 66 Sup. Ct. 596 (1946).

[277] 230 U.S.C.A. § 501 *et seq.*, and supplementing legislation by the various states; see VT. STAT. ANN. 19, § 221(2), allowing business losses generally.

[278] 304 S.W.2d 300 (Mo. 1966).

[279] 431 S.W.2d 124 (Mo. 1968).

capitalization of the lot income, noting that the owner's business was being appropriated.

In *Kimball Laundry Co. v. United States,*[280] the laundry plant was condemned for a *temporary* period, the issue being compensation for trade routes lost to the owner as a result of the taking. Although recognizing such loss to be intangible, the court concluded that the routes had been taken and must be paid for, noting that the taking was from year to year and that the laundry could not relocate without the prospect of ending up with two laundry plants.

Other jurisdictions have not confined such holdings to the temporary taking situation. In the case of *In re Ziegler's Petition,*[281] loss occasioned by interruption of business was allowed, the court noting that whatever damage it suffered must be compensated and stating: "To recover damages from business interruptions, the proof must not be speculative and must possess a reasonable degree of certainty."

In *Bowers v. Fulton County,*[282] involving a small office building occupied by a bookkeeping and tax service and an insurance office, evidence was submitted that there was no comparable property in the same area; and the court allowed proof of loss of business upon moving to a new location as well as moving costs. A more extensive consideration of business income would result from the application of VT. STAT. ANN. 19, § 221(2), which allows compensation for business losses.[283]

Distinctions are drawn between past income and hypothetical future income, the latter generally being rejected.[284] In *Graceland Park Cemetery Co. v. City of Omaha,*[285] a cemetery case, the capitalization of anticipated profits was held improper. The court noted that current profits set a dependable foundation, whereas anticipated profits did not.

Consideration has been given to capitalization rates used in valuing various special purpose properties. The question is one of fact,[286]

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[280] 338 U.S. 1, 93 L.Ed. 1765, 69 Sup. Ct. 1434, 7 A.L.R. 1280 (1948).

[281] 375 Mich. 20, 97 N.W.2d 748 (1959). *Accord* on certainty: Shelby County R-IV School District v. Herman, 395 S.W.2d 609 (Mo. 1965); this case also makes the questionable holding that use of the income approach is not valid in a partial taking.

[282] 221 Ga. 731, 146 S.E.2d 884 (1966). *Accord:* Housing Authority of Savannah v. Savannah Iron Works, Inc., 91 Ga. App. 881, 87 S.E.2d 671 (1955). Turning on particular Florida statute was State Road Department v. Bramlett, 179 S.E.2d 137 (Fla. 1965).

[283] Included among cases construing this section are: Record v. State Highway Board, 121 Vt. 230, 159 A.2d 475 (1959); Fiske v. State Highway Board, 124 Vt. 87, 197 A2d 790 (1963); Pennsylvania v. State Highway Board, 122 Vt. 290, 170 A.2d 630 (1961); and Smith v. State Highway Board, 125 Vt. 54, 209 A.2d 495 (1965).

[284] 5 NICHOLS, EMINENT DOMAIN, § 19.3 [6]; 1 ORGEL, VALUATION UNDER EMINENT DOMAIN, §§ 161, 186.

[285] 173 Neb. 608, 114 N.W.2d 29 (1962). Giving as a reason for excluding the income approach in valuing cemeteries because it involves a consideration of future profits are Green Acres Park v. Mississippi State Highway Commission, 246 Miss. 855, 153 So.2d 286 (1963), and Dawn Memorial Park v. DeKalb County, 111 Ga. App. 429, 142 S.E.2d 72 (1965).

[286] St. Agnes Cemetery v. State, 2 N.Y.S.2d 37, 163 N.Y.S.2d 655, 143 N.E.2d 377, 62 A.L.R.2d 1161 (1957).

although appellate courts, presumably dependent on local practices, have reversed or modified capitalization rates used by lower courts.[287] In *United States v. Leavell and Ponder, Inc.*,[288] a Wherry housing case, the court rejected a capitalization rate of 4½ percent (arrived at by using an FHA rate, plus ½ percent for mortgage insurance) as "ridiculous," indicating that a prudent investor would not invest his equity in FHA-controlled low-mortgage rental housing with all its incidental hazards. The court allowed use of a capitalization rate arrived at by considering large apartment buildings, stating that capitalization comprehended the use of rates realized on comparable investments.

When dealing with special purpose properties that produce income, some inquiry into income may be legitimate. Assuming that the business being conducted was losing money and proof were confined to the cost approach, a high value might be indicated.[289] Depreciation could not be properly determined absent an inquiry into the capacity of a property to earn money. As a practical matter, the inquiry in the market is "what will the property earn?" The extent of allowable collateral inquiry, however, must be subject to the control of the trial court. Proof of income could result in prolonged and fruitless inquiry at trial. There must be some recognizable correlation of the amount of business done to the value of the property. The business may be too complex to permit this; an example would be the partial taking of a General Motors assembly plant. Some restriction in proof obviously is necessary. The proponent should be obligated to establish that his proffered proof is relevant to the issue of value.

Competency of Witnesses

Rules concerning competency of witnesses in special purpose properties are the same as in other cases. No review of all cases relating to the issue of competency is made herein. Attention is directed to the extensive annotation beginning on page 7 of 159 A.L.R. A section entitled "Special-Use Property" begins on page 64 of this annotation.[290]

Objections to competency of expert witnesses in special purpose cases usually take one of two forms: the condemnor objects to the competency of a "lay" witness testifying to value of the subject property for the particular use being made of it; or the owner objects

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[287] *See* Diocese of Buffalo v. State, 43 Misc.2d 337, 250 N.Y.S.2d 961 (1964); United States v. Leavell and Ponder, Inc., 286 F.2d 398 (5th Cir. 1961).

[288] 286 F.2d 398 (5th Cir. 1961).

[289] *See also* Likins-Foster Monterey Corp. v. United States, 308 F.2d 595 (9th Cir. 1962); United States v. Whitehurst, 337 F.2d 765 (4th Cir. 1964). In the Likins-Foster case and Winston v. United States, 342 F.2d 715 (9th Cir. 1965), capitalization rate arrived at by considering sales of other Wherry projects was used; *see* United States v. Certain Interests in Property, 239 F.Supp. 822 (D. Colo. 1965).

[290] *See also,* Note, *Eminent Domain: The Problem of Damages Where Land has been Adopted to a Special Use,* 37 BOSTON U.L. REV. 495, 502 (1957).

to the use of conventional real estate experts to value his special purpose property.[291] In either case, a proper foundation showing the witness's knowledge of the property and of values must be laid. The question of competency is for the trial judge.[292]

First Baptist Church of Maxwell v. State Dept. of Roads[293] recognized this rule and stated that mere familiarity with the physical structure and location of the church involved was not enough. A funeral director was not permitted to give an opinion where he had no experience with and knew nothing about the prices paid for land developed as a cemetery.[294] The city's witness in *Chicago v. George F. Harding Collection* was held to lack the required familiarity with the property and knowledge of the property—the witness "must have some credentials in a case such as this."[295]

Conversely, the witness does not have to be an "expert" in the business involved. In *Westmoreland Chemical and Color Co. v. Public Service Commission*,[296] testimony was not confined to those with a knowledge of the manufacturing business, the court noting that market value was not a question of science or skill upon which experts alone may give an opinion, but that a witness who had personal knowledge of the value of the property, its location, buildings, uses, impairment, and sales of other lands in the vicinity was competent to testify. Also, in *Eisenring v. Kansas Turnpike Authority*,[297] the court noted: "In the absence of market value, because the special type of property is not commonly bought and sold, resort may be had to the testimony of more specialized experts." And that value for a special use could be shown by those familiar with such use, although they were not familiar with values in general.

That one claims to be an owner does not result in a relaxation of the rules with respect to knowledge. A vice president was not permitted to testify as an owner as to damages in *Puget Sound Power and Light Co. v. P.U.D. No. 1*.[298] Former members of the church involved in *First Baptist Church of Maxwell v. State Dept. of Roads*[299] were not permitted to testify.

An example of the situation where the condemnor is objecting to the owner's "lay" witnesses is found in *Idaho-Western Ry. Co. v. Columbia Conference, Etc.*[300] After referring to the fact that such witnesses had been cross-examined and the jury was competent to determine the weight given their testimony, the court stated:

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[291] *See* Newton Girl Scout Council v. Massachusetts Turnpike Authority, 355 Mass. 189, 138 N.E.2d 769 (1956), for objections both ways.

[292] Dawn Memorial Park v. DeKalb County, 111 Ga. App. 429, 142 S.E.2d 72 (1965).

[293] 178 Neb. 831, 135 N.W.2d 756 (1965).

[294] State Highway Dept. v. Baxter, 111 Ga. App. 230, 141 S.E.2d 236 (1965).

[295] 70 Ill. App. 2d 254, 217 N.E.2d 381 (1965).

[296] 293 Pa. 326, 142 A. 867 (1928).

[297] 183 Kan. 774, 332 P.2d 539 (1958).

[298] 123 F.2d 286 (9th Cir. 1941).

[299] 178 Neb. 831, 135 N.W.2d 756 (1965).

[300] 20 Idaho 568, 119 P. 60 (1911).

> Evidence of value and damages in such cases as this should not be limited or confined to so-called expert witnesses; indeed, it could not be, for the reason that it would be practically impossible to tell just what would constitute an expert in such matters. A witness must necessarily claim to know something about the value of such property before he can fix any value, and the extent and value of that knowledge will be fully disclosed on cross-examination.

CEMETERIES

Vacant cemetery property is valued in one of two ways in condemnation cases: by the income approach, based on income from sales of cemetery tracts, less expenses, and discounted because such income will be received over a period of many years; or by the sales approach, based on sales of comparable (usually not cemetery) lands.[301]

Authority is split on whether or not market value is the measure. In *Diocese of Buffalo v. State*,[302] the court stated:

> It must, however, be recognized that market value is always based on hypothetical conditions. Hence it is never necessary to show that there was, in fact, a person able or willing to buy. So while market value is still the measure, in the case of property held or improved in such a manner as to render it virtually unmarketable, means other than the usual methods of ascertaining value must, from the necessity of the case, be resorted to. It is, therefore, proper in such cases to deduce market value from the intrinsic value of the property, and its value to its owners for their special purposes.

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[301] Annot., *Measure of damages for condemnation of lands of a cemetery,* 62 A.L.R.2d 1175. There is substantial literature on cemetery appraisals, most of which is directed to application of the income approach method: Finkel, *Appraising a Cemetery,* 19 APPRAISAL J. 342 (July 1951); 20 APPRAISAL J. 472 (Oct. 1951); 21 APPRAISAL J. 642 (Jan. 1952). Finkel, *Condemnation Appraisal of a Cemetery,* 23 APPRAISAL J. (3) 379 (July 1955). These articles have been reprinted. Finkel, *Appraisal of Cemeteries,* ENCYCLOPEDIA OF REAL ESTATE APPRAISING ch. 27, at 571 (Prentice-Hall, 1959).

Jerrard, *Appraisal of Cemeteries, Mausoleums, and Crematories,* 3 APPRAISAL AND VALUATION MANUAL 159 (American Society of Appraisers, 1958). This article apparently first appeared in APPRAISING A CEMETERY OR MAUSOLEUM (Bank of America N.T. and S.A. 1959). Bowen, *Valuation of Church Cemeteries-Historical Approach,* APPRAISAL AND VALUATION MANUAL 205 (American Society of Appraisers, 1964–65); Hall and Beaton, *Partial Taking of a Cemetery with Contingent Liability,* 35 APPRAISAL J. 107 (Jan. 1967); *A Growing Enterprise Decrease in Value? Cemeteries Do!* 35 APPRAISAL J. 285 (Oct. 1967).

Richards, *Appraisal of Cemetery Lands,* 37 APPRAISAL J. 394 (July 1969). All cemetery cases from July 1936 to date have been covered by extensive notes in the CEMETERY LEGAL COMPASS (Raymond L. Brennan, ed., 417 So. Hill St., Los Angeles, Cal.). Back issues of this publication are available.

[302] 43 Misc. 2d 337, 250 N.Y.S.2d 961 (1964); *see* St. Agnes Cemetery v. State, 2 N.Y.S.2d 37, 163 N.Y.S.2d 655, 143 N.E.2d 377, 62 A.L.R.2d 1161 (1957), and cases in section on "The Market Data Approach."

However, in *Graceland Park Cemetery Association v. City of Omaha*,[303] market value was rejected, the court saying:

> There are types of property that are not bought and sold on an open market and consequently do not have a reasonable market value within the rule that the fair market value is the price which property will bring when offered by a willing seller to a willing buyer, neither being obligated to buy or sell. The fair market value of property implies proof of sales of similar property in the community as a means of fixing the value of the property taken. When 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. . . . We hold, therefore, that in the taking of land used for cemetery purposes the measure of damages is not the fair market value of the land for the simple reason that such property has no fair market value.

It makes little difference whether the market value measure is adopted or rejected in terms of the appraisal technique applied and the proof that will be permitted to go to the trier of the facts. The only difference appears to be in the statement of the measure of compensation in appraisal testimony, instructions, and argument.

What factors determine which approach (income or market data) is used in a particular case? *Cemeterio Buxedo v. People of Puerto Rico* [304] indicated that the market data approach is used where there usually are no sales of spaces or platting for cemetery use in the area involved. In *Buxedo,* the court also referred to the fact that the land involved was at the front of the cemetery and was the most valuable part. *St. Agnes Cemetery v. State of New York* [305] indicates that the dedication to cemetery purposes added value to the land, quoting *Fidelity Union Trust Co. v. Union Cemetery Association* [306] as a justification for permitting valuation of such lands by other than the conventional methods:

> . . . Land when dedicated to the burial of the dead, acquires an unique value by the grace of its consecration and the exclusiveness of the cemetery franchise.

St. Agnes also states that where the land taken is an "integral though unused portion of a well established cemetery, that is, a portion of a cemetery in which there have been no interments and no sales of graves, the property should be appraised on the basis of its value for cemetery purposes."

Situations in which the market data approach has been used have been characterized as "undeveloped land in a remote part" of the ceme-

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[303] 173 Neb. 608, 114 N.W.2d 29 (1962); State *ex rel.* State Highway Commission v. Barbeau, 397 S.W.2d 561 (Mo. 1965); and State *ex rel.* State Highway Commission v. Mt. Moriah Cemetery Ass'n, 438 S.W.2d 470 (Mo. 1968).

[304] 196 F.2d 177 (1st Cir. 1952).

[305] 2 N.Y.S.2d 37, 163 N.Y.S.2d 655, 143 N.E.2d 377, 62 A.L.R.2d 1161 (1957).

[306] 104 N.J. Eq. 326, 145 A. 537 (1929).

tery.[307] Remoteness may also exist in terms of time; i.e., when the lots in question would be sold. *State Highway Commission v. American Memorial Parks* [308] asserted that the property must be immediately available and there must be the probability of development within a reasonable time. *Dawn Memorial Park v. DeKalb County* [309] indicated that although the land in question was zoned and planned for cemetery use, it was not physically suitable for such.

In *Green Acres Memorial Park v. Mississippi State Highway Commission,*[310] a plat had been recorded but there were no graves or interments in the area of the taking, and the market data approach was approved. In *Graceland Park Cemetery v. City of Omaha,*[311] the area taken had never been surveyed or staked and there was no evidence of any development in the area, but the court permitted valuation by the income method, indicating that the jury was to consider all uses in valuing the property. Each case must stand on its own. Factors in the area taken that might be considered include dedication, consecration, platting for cemetery use, and proximity in terms of time of use and distance from the developed portion of the cemetery.

The Income Approach

The use of the income approach in valuing takings of portions of cemeteries, which use is unique in that it usually applies an income approach to vacant and unimproved land, has been justified on the grounds that "the fact that there was no market or a limited market for such property was favorable to its admission." [312] *Diocese of Buffalo v. State* states that, in such a situation, other means must be used and value can be deduced from intrinsic value and value to the owner for special purposes.[313]

The approach has survived the attack that it results in a valuation of business profits rather than a valuation of the land. In *Diocese of Buffalo v. State,*[314] the court stated:

> . . . Such evidence [sales of burial plots] is not admitted to show profit. Its sole purpose is to enable the court not having the benefit of more

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[307] St. Agnes Cemetery v. State, 2 N.Y.S. 2d 37, 163 N.Y.S.2d 655, 143 N.E.2d 377, 62 A.L.R.2d 1161 (1957), distinguishing Laureldale Cemetery Co. v. Reading Co., 303 Pa. 315, 154 A. 372 (1931).

[308] 82 S.D. 231, 144 N.W.2d 25 (1966).

[309] 111 Ga. App. 429, 142 S.E.2d 72 (1965).

[310] 246 Miss. 855, 153 So.2d 286 (1963).

[311] 173 Neb. 608, 114 N.W.2d 29 (1962).

[312] Cemeterio Buxedo v. People of Puerto Rico, 196 F.2d 177 (1st Cir. 1952). This case also indicates that because the land contained no burials it has value to a prospective purchaser.

[313] 43 Misc. 2d 337, 250 N.Y.S.2d 961 (1964).

[314] *Id. Accord:* Cemeterio Buxedo v. People of Puerto Rico, 196 F.2d 177 (1st Cir. 1952); St. Agnes Cemetery v. State, 2 N.Y.S.2d 37, 163 N.Y.S.2d 655, 143 N.E.2d 377, 62 A.L.R.2d 1161 (1957); *cf.* State Highway Commission v. American Memorial Parks, 82 S.D. 231, 144 N.W.2d 25 (1966); and Green Acres Memorial Park v. Mississippi State Highway Commission, 246 Miss. 855, 153 So. 2d 286 (1963).

> customary methods of valuation, to obtain some factual indicia of the value of the land by showing its worth to the owner or to the prospective buyer.

St. Agnes [315] indicates that the circumstances of an established cemetery are such as not to be speculative, saying that the method used eliminated any consideration of profit because the discounted sum represents the present value of the land less any profits. If this language means that the discounting process removes profit, it is questionable. *St. Agnes* also indicates that income from interment fees, rental of tents and other burial appurtenances, and sales of markers and other miscellaneous services represent future business profits but that such did not appear in the record.

The argument that substitution, rather than the income approach, is the proper method has been rejected. In *St. Agnes,* the court noted that:

> The land taken is irreplaceable by the substitution of other land in a different location. Replacement cost has not been admitted as evidence in measuring the value of vacant land.

Also, in *State v. Lincoln Gardens, Inc.,*[316] the court refused to permit evidence of a witness's willingness to sell substitute property or to instruct on substitution.

A consideration of appraisal articles does not reveal unanimity on how the income approach is to be applied.[317] *State ex rel. State Highway Commission v. Mount Moriah Cem. Ass'n* [318] indicates that damages in cemetery cases need not always be computed in exactly the same way. *Cemeterio Buxedo v. People of Puerto Rico* [319] states:

> This is not to say that valuing the parcel is merely a problem in multiplication. Rather, such figures as sales and cost of interment, among others, are factors which would be considered by a prospective buyer and would help to form a basis for valuing the tract before and after the condemnation.

The income approach may be stated briefly as follows:

1. Determine average annual gross income by multiplying gross price per lot by sales per year.
2. Determine average annual expense.
3. Subtract average annual expenses (2) from average annual gross

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[315] 2 N.Y.S.2d 37, 163 N.Y.S.2d 655, 143 N.E.2d 377, 62 A.L.R.2d 1161 (1957).

[316] 242 Ind. 2d 206, 177 N.E.2d 655 (1961); *cf.* State Highway Commission v. American Memorial Parks, 82 S.D. 231, 144 N.W.2d 25 (1966), where reference is made to South Dakota statute authorizing condemnation by cemetery; and Green Acres Memorial Park v. Mississippi State Highway Commission, 246 Miss. 855, 153 So. 2d 286 (1963).

[317] Compare methods of Finkel and Jerrard, *supra* note 301.

[318] 438 S.W.2d 470 (Mo. 1968).

[319] 196 F.2d 117 (1st Cir. 1952).

income (1) to arrive at annual net income.

4. Divide the number of lots available for sale by the estimated sales of lots per year to arrive at the estimated life of the cemetery.

5. Multiply annual net income by the Inwood factor at the appropriate rate of discount (generally called capitalization rate) for the estimated life of the cemetery, to arrive at the value of the cemetery land before the taking.

6. Divide the value of the cemetery land before the taking by the lots (or other unit such as square feet or acres) available for sale, to arrive at the net value per lot (or other unit).

7. Multiply the net price per lot by the number of lots available for sale after the taking, deducting such sums as are deemed a proper allowance for damages to the remainder, to arrive at the value of the cemetery land after the taking.

8. Subtract the value of the cemetery land after the taking (7) from the value of the cemetery land before the taking (8) to arrive at just compensation.

This statement is a simplification and does not reflect all calculations the appraiser may be required to make. The calculations to arrive at the before value of the property follow Finkel,[320] and the calculation of the after value and just compensation follow *Diocese of Buffalo v. State*[321] and *Mount Hope Cemetery Association*.[322] The method is subject to variations, which may be as acceptable as that outlined.[323]

It should be recognized that the gross income must pay for buildings; site improvements, such as roads, landscaping, and entrances; and land that is not salable as well as that in salable spaces. Deduction also must be made for the costs of development if the appraisal includes raw land. Adjustments for these items must be either as expenses or by appropriate deductions from the total value of the cemetery so as to leave raw land value.

Annual Gross Income

The first step in appraising a cemetery by the income approach is to estimate the annual gross income, usually based on price per lot or per square foot multiplied by estimated sales per year. Past annual sales of lots, both as to number of sales and prices in the subject property cemetery, are usually used. In *Diocese of Buffalo v. State*,[324] the court said:

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[320] Finkel, *supra* note 301, 20 APPRAISAL J. 72 (Jan. 1952).

[321] 43 Miss. 2d 337, 250 N.Y.S.2d 961 (1964).

[322] 11 A.D.2d 303, 203 N.Y.S.2d 415, *aff'd* 12 A.D.2d 705, 208 N.Y.S.2d 737 (1960).

[323] See methods used in Jerrard, and Hall and Beaton, *supra* note 301; State *ex rel.* State Highway Commission v. Mt. Moriah Cemetery Ass'n, 438 S.W.2d 470 (Mo. 1968).

[324] 43 Misc. 2d 337, 250 N.Y.S.2d 961 (1964); Mt. Hope Cemetery Ass'n v. State, 11 A.D.2d 303, 203 N.Y.S.2d 415, *aff'd* 12 A.D.2d 705, 208 N.Y.S.2d 737 (1960), use an average of sales for five years.

> The gross selling price per grave is established on the basis of the past history of the cemetery . . . an average is struck portraying the number of graves which have been sold per year over a period of time reasonably sufficient to indicate the sales activity of the cemetery.

May projections as to the price and number of sales, based upon investigations made by the appraiser, be used as a starting point for his calculation? Hesitancy of courts to accept future profits mitigates against this practice. In *Graceland Park Cemetery Ass'n v. City of Omaha,*[325] capitalization of anticipated profits was held improper, the court noting: "We point out that a capitalization of anticipated profits is not a proper method of fixing the value of property." *St. Agnes Cemetery v. State* [326] used data from past sales but stated: "Clearly to be expected future earnings may be considered." *Cemeterio Buxedo v. People of Puerto Rico* [327] indicates that inquiry should encompass "in general its future prospects as they would appear to a 'willing buyer.' "

A substantial amount of appraisal literature is directed to the investigation of future sales that the appraiser should make. Finkel [328] indicates:

> Knowledge of plot prices prevailing within the trading area of comparable cemeteries guides the appraiser in his determination of prospective yield.

Jerrard [329] says:

> Due to the fact that there are so many variables, namely, increase and decrease of sales, decreasing insurance premiums and taxes and increasing income from perpetual care fund, it is impossible to use a straight line of annuity with accuracy. Therefore, the net for each year is brought to date by the use of respective Inwood Coefficient by years and the total summation of each one of these figures for each year will result in the value of the property.

The method suggested by Jerrard of estimating each year's net income and discounting for each year was used by the owner's appraiser in *United States v. Eden Memorial Park Association,*[330] although this fact is not indicated in the reported opinion, the court noting that capitalization was of "projected income."

In *State ex rel. State Highway Commission v. Barbeau,*[331] the court made reference to increased sales in the future because of increased population. The price per lot was not adjusted for this factor, but it was recognized in the use of a shorter life for the portion of the cemetery involved.

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[325] 173 Neb. 608, 114 N.W.2d 29 (1962).

[326] 2 N.Y.S.2d 37, 163 N.Y.S.2d 655, 143 N.E.2d 377, 62 A.L.R.2d 1161 (1957).

[327] 196 F.2d 177 (1st Cir. 1952).

[328] Finkel, *supra* note 301, 19 APPRAISAL J. 345 (July 1951).

[329] Jerrard, *supra* note 301.

[330] 350 F.2d 933 (9th Cir. 1965).

[331] 397 S.W.2d 561 (Mo. 1965).

If the appraiser is permitted to adjust his opinion as to the price per tract to be realized in the future based on his investigation, factors that should be considered include competition, location, terrain, layout population and population growth, death and interment rates, religious considerations, and sales practices.[332] He will consider these factors in determining the rate of sale and capitalization rate in any event.

Several cases state that "average prices" of sales in a cemetery are to be considered.[334] In *Diocese of Buffalo v. State,*[324] where shortening the life of the cemetery in the after situation had the effect of treating the area taken as the last to be sold, the court said:

> . . . The practice in New York has been to reject as speculative the use of the time table specifying the order in which sales would be made; hence, all unsold grave areas within and without the appropriated parcels are totalled and averaged.

This practice has the effect of treating the land in the taking as "average" in terms of time of sellout, although, in fact, it may be more desirable and therefore command a higher price or sell faster than do average tracts. Because of this problem, the average price per unit approach was rejected in *State ex rel. State Highway Commission v. Barbeau,*[335] where the taking included an area that was superior because of its physical characteristics and location. The prices realized on sales of other prime tracts were used, the court noting that it was not proper to compare dissimilar properties. The amenities of the area taken also were recognized in the form of a shortened life of the cemetery.

The owner receives income from other sources than sales of tracts. Finkel [336] includes this fact in his calculations and notes:

> Plot prices, other sources of income, and the rate of sales, as already suggested, affect the value of the enterprise. Although the principal source of income stems from the sale of grave spaces, the cemetery organization gains additional revenue from interment fees, special services, and the sale of memorials.

Sources of income recognized by Jerrard [337] are:

1. Sales of graves.
   a. Immediate need.
   b. Pre-need.

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[332] Finkel, *supra* note 301, 19 APPRAISAL J. 342 (July 1951); Jerrard, *supra* note 301; Palmer, MANUAL OF CONDEMNATION LAWS 381 (Mason Publ. Co. 1961).

[333] St. Agnes Cemetery v. State, 2 N.Y.S.2d 37, 163 N.Y.S.2d 655, 143 N.E.2d 377, 62 A.L.R.2d 1161 (1957); Graceland Park Cemetery Ass'n v. City of Omaha, 173 Neb. 608, 114 N.W.2d 29 (1962); State *ex rel.* State Highway Commission v. Mt. Moriah Cemetery Ass'n, 438 S.W.2d 470 (Mo. 1968).

[334] 43 Misc. 2d 337, 250 N.Y.S.2d 961 (1964).

[335] 397 S.W.2d 561 (Mo. 1965).

[336] Finkel, *supra* note 301, 19 APPRAISAL J. 345 (July 1951).

[337] Jerrard, *supra* note 301.

2. Sales of crypts, sarcophagus, niches.
   a. Immediate need.
   b. Pre-need.
3. Sales and placing of markers.
4. Opening and closing of graves (interment).
5. Special services.
6. Interest from perpetual care fund.

The only case making reference to such services is *St. Agnes Cemetery v. State,*[338] where no evidence of such was introduced, but the court characterized such income as "business profits" rather than returns from the land. These items result from the ownership of the land as much as gallonage income does from a gasoline station conducted on a piece of property. The cemetery owner is sure of this income—openings and closings, vaults and liners, and markers will be sold upon interment—the uncertainty being only as to when such income will be received. In terms of markup, these are high-return items. They are factors that would be considered by a prospective buyer or investor in determining what the property was worth.

As indicated previously, Finkel and Jerrard consider income from a perpetual care fund, where such is maintained, a proper item to be included in income. This fund is incidental to the ownership of the cemetery. The use of its income is confined to the maintenance of the cemetery. If the expenses of such a fund must be charged against sales income, the income from the fund should be treated as an income item —it pays for part of the maintenance expenses, which would otherwise decrease income.

Annual Expenses

From the annual gross income is subtracted the annual expenses of developing and selling the land, maintenance, and payments into funds required for perpetual care to arrive at net annual income. Expenses included are administration costs, including salaries, legal and accounting fees, advertising, and typical office expenses.[339] Salesmen's commission, particularly where an aggressive pre-need program is involved, will be substantial.

The costs of improvements and land not salable but necessary for the use of such salable lands must be recognized. In *Mount Hope Cemetery Association v. State,*[340] calculations used recognized that only 32,592 square feet of each acre was salable but that the income from the sale of such must be used to pay for the development costs of the entire acre.

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[338] 2 N.Y.S.2d 37, 163 N.Y.S.2d 655, 143 N.E.2d 377, 62 A.L.R.2d 1161 (1957).

[339] Finkel, *supra* note 301, 19 APPRAISAL J. 472 (Oct. 1951). Jerrard, *supra* note 299, includes taxes, insurance, sales commissions, advertising, perpetual care fund, maintenance, salaries, social security, utilities, miscellaneous office expenses, and allowance for contingencies.

[340] 11 A.D.2d 303, 203 N.Y.S.2d 415, *aff'd* 12 A.D.2d 705, 208 N.Y.S.2d 737 (1960).

If and how income is to be allocated for office and maintenance buildings and the land occupied by them has been very little discussed. Finkel does recognize that income should be set aside if it is necessary to replace such buildings.[341] Some of the income obviously is required to pay for these buildings whether they are replaced or not. Hall and Beaton treat equipment depreciation as an expense but do not recognize any other form of depreciation.[342] With respect to depreciation, Jerrard [343] says:

> Due to the fact that this is a solution of present worth of future benefits (the income stream) the depreciation is cared for by use of the Inwood Coefficient. It can, therefore, be completely disregarded.

In the usual case, the taking will be land only. The value of this land is what must be determined. To arrive at the value of land by using income attributable both to land and to land improvements, there must be an adjustment either in income or in the final value to reflect the income or value allocated to improvements and the land they occupy. This aim is not accomplished simply by using an Inwood Coefficient. It apparently can be done at either of two stages of the calculation: a deduction made at the expense stage to cover annual depreciation of building and annual cost of nonsalable producing land, plus a return on the investment for these items; or one made at the end of the calculation of value based on entire income. The effect of the deduction is to subtract the value of the improvements and unproductive land and to arrive at a net value of unsold grave land.

A usual item of expense is for payments made into a perpetual endowment care fund, which fund may be required by law. The income from this fund generally is used for maintenance of the cemetery, presumably being adequate to pay for maintenance in perpetuity after complete sellout. The payments into this fund as required by law may not be adequate for this purpose, and more than the statutory requirements may have to be deducted from income and deposited in this fund or otherwise held for perpetual maintenance.[344] As more improvements and interments are made, the costs of maintenance rise. This effect is more pronounced in "monument" than in "memorial park" cemeteries. Income available for maintenance also diminishes as the cemetery grows older. In *Mount Hope Cemetery Association v. State*,[345] deductions for required care and maintenance funds were held proper, although the owner argued that it was relieved of part of this obligation by the expropriation. Recognizing that perpetual care became a charge on the land and diminished its value, the court, in *Diocese of Buffalo v.*

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[341] Finkel, *supra* note 301, 20 APPRAISAL J. 72 (Jan. 1952); Hall and Beaton, *supra* note 301.

[342] Hall and Beaton, *supra* note 301.

[343] Jerrard, *supra* note 301.

[344] Hall and Beaton, *supra* note 301.

[345] 11 A.D.2d 303, 203 N.Y.S.2d 415, *aff'd* 12 A.D.2d 705, 208 N.Y.S.2d 737 (1960).

State,[346] declined to adopt the state's contention that the value of the appropriated parcel should be diminished by an amount sufficient to capitalize an admittedly inadequate perpetual care fund for the entire cemetery. This result is to be contrasted with *State Highway Commission v. American Memorial Parks,*[347] where the court recognized an inclusion in the award of a sum representing present worth of perpetual care requirements.

Rate of Sales

Consideration is given to the actual rate of sales in the cemetery involved. Other factors, however, can affect the figure used. Included are competition, the amenities of the cemetery involved, population trends, death and interment rates, the market served (including religious considerations), and the sales program conducted by the cemetery.

The rate of sales and, in turn, the life of the cemetery will be affected by the type of sales program conducted. Sales are characterized as "immediate need" or "at need" and "pre-need." The former might be characterized as "walk-in" and are sales incidental to interments and sales to friends and members of families of persons buried in the cemetery. "Pre-need" sales are those that result from promotional sales programs. These sales are sold at a more rapid rate than are immediate need sales. Some cemeteries sell only for immediate need. In others, the emphasis is on pre-need sales.

Cemeteries usually are developed in small sections to defer development and maintenance costs until areas are actually needed for sale. When a pre-need sales program is used, the sales generally are made at lower prices as a sales inducement, income from such sales being used for costs of development. After a certain portion, often two thirds to three fourths, of the tracts in an area have been disposed of by pre-need sales, the pre-need sales program is dropped, because with the development of the area and interments in it, sales can be made at higher prices under an immediate need program without sales promotion.

As indicated previously, cemeteries develop in stages.[348] The first stage is that of initial development, in which there are few sales and interments to develop business. Tracts are sold at moderate prices, often through pre-need programs, to stimulate sales; and costs of development are high. Sales may be made in advance of the actual development of the land in order to secure income to pay for such development. The next stage or stages occur after considerable sales and development of the cemetery. Sales may stabilize, the prices are better, and development costs decrease. The final period occurs after

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[346] 43 Misc. 2d 337, 250 N.Y.S.2d 961 (1964).

[347] 82 S.D. 231, 144 N.W.2d 25 (1966).

[348] Finkel, *supra* note 301, 21 APPRAISAL J. 472 (Oct. 1951). Jerrard, *supra* note 301.

most of the spaces have been sold and when the remaining spaces will sell themselves without promotion. A more substantial portion of the cemetery's income comes from interments and other services.[349] Income from the perpetual care fund is higher, but so are maintenance costs. Which of these periods the subject cemetery is undergoing obviously affects the annual number of sales, which in turn determines the remaining life of the cemetery, as well as income.

Because sales, income, and expenses are not constant, depending in part on the stage of development and sales program of the particular cemetery involved, Jerrard suggests that estimates be made of these items for each year of the life of the cemetery and each year's net income discounted by the appropriate Inwood factor, the total of the present worth of each of such year's net income being the value of the property.[350] The practical effect of this process is to move more sales nearer to the present and to make more optimistic the number of sales and prices to be realized in future years. As the income is less affected by the discount factor, the resulting value of the cemetery is higher. As the annual estimates are projections of future income and expenses, this method may encounter legal objections.[351] It is assumed that an appraiser using the more conventional discount method will consider the same variable factors, making such adjustments in the rate of sales and, in turn, in the life of the cemetery, or capitalization rate, as in his judgment are appropriate. Presumably, if the appraisal practice is as exact as some pretend, results would be approximately the same by either method.

Life of Cemetery

The expected life of the cemetery is arrived at by dividing the total unsold spaces available by the expected sales each year. This method can result in prediction of an extremely long life, particularly where no increase in sales is anticipated because of the increased population and similar factors. Because of the effect of the discounting process, the longer the life, the less is the present value per unit of the cemetery. Also, the present worth of tracts that would be sold last would be extremely low. Presumably, if this value is less than the value of the land for other use, the highest and best use of a portion of the land of the cemetery would not be to hold it for an indefinite period for ultimate sales as cemetery tracts; and, in effect, such land would be surplus to the cemetery. Finkel and Jerrard suggest that calculations be limited to a 50-year life.[352]

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[349] *A Growing Enterprise Decrease in Value? Cemeteries Do!, supra* note 301; Cemeterio Buxedo v. People of Puerto Rico, 196 F.2d 177 (1st Cir. 1952), states that the cemetery land vacant is what makes it valuable.

[350] Jerrard, *supra* note 301.

[351] See *supra* note 284.

[352] Finkel, *supra* note 301, 20 APPRAISAL J. 73 (Jan. 1952); Jerrard *supra* note 301.

Cases tend to consider the problem of life of the cemetery in terms of straight mathematics: unsold lots divided by sales per year. In *State ex rel. State Highway Commission v. Barbeau,*[353] where mathematics indicated a life of 325 years for the whole cemetery, the trial court accepted an economic life of 30 years for the area in which the taking was located because of its superior physical characteristics and location. In *Mount Hope Cemetery Association v. State,*[354] claimed ages were 138 years and 55 to 57 years, and the court arrived at a life of 98 years after deducting certain areas that were not salable.

Capitalization Rate

Having arrived at the annual net income and the remaining life, the next step is the determination of the capitalization rate. Because there usually are no sales of cemeteries, there is no way of gauging a proper rate based on consideration of sales prices and the incomes derived from particular cemeteries.

Finkel suggests that in view of the risks inherent in cemetery operations, rates range "from 8 percent to 15 percent and higher." He also indicates that there are monumental cemeteries in densely populated areas meriting rates of 9 to 11 percent, and that rural cemeteries may range "upward from 13 percent." He states that the rates should be governed by the going rate of interest plus compensation for the risk element, responsibilities of management, and the nonliquidity element present in cemetery ownership.[355]

Suggestion has been made that the nonprofit cemetery be discounted at a lesser rate than is the profit cemetery. In a demonstration appraisal, Hall and Beaton used a 4-percent capitalization rate, stating:

> Although the 4% discount rate does not reflect the return which a prudent investor would demand from this type of operation or the fair market value of the subject cemetery, it is the minimum rate that even a nonprofit organization would require and reflects the value in use to the subject cemetery.

To consider the status of the owner is to consider his particular values, and this procedure might not be allowed in some jurisdictions. Nonprofit organizations would not expect the rate of return of profit cemeteries nor as rapid a period of sellout as a commercial buyer would expect.

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[353] 397 S.W.2d 561 (Mo. 1965).

[354] 11 A.D.2d 303, 203 N.Y.S.2d 415, *aff'd* 12 A.D.2d 705, 208 N.Y.S.2d 737 (1960). Lives used in other cases were: St. Agnes Cemetery v. State, 2 N.Y.S.2d 37, 163 N.Y.S.2d 655, 143 N.E.2d 377, 62 A.L.R.2d 1161 (1957), 40 years; Diocese of Buffalo v. State, 43 Misc. 2d 337, 250 N.Y.S.2d 961 (1964), 61 years; and State *ex rel.* State Highway Commission v. Mt. Moriah Cemetery Ass'n, 438 S.W.2d 470 (Mo. 1968), state claimed 53 years before and 34 years after.

[355] Finkel, *supra* note 301, 19 APPRAISAL J. 475 (Oct. 1951).

Capitalization rates used in cases have not reached the size suggested by Finkel. The 2 percent rate used in *St. Agnes Cemetery v. State* [356] and *Mount Hope Cemetery Association v. State* [357] represents a low rate applied. In *Diocese of Buffalo v. State,*[358] reference was made to rates of 3 and 12 percent, the trial court's rate of 4 percent being modified on appeal to 6 percent. Rates presented in *State ex rel. State Highway Commission v. Mount Moriah Cemetery Ass'n* [359] were 3, 4, and 10 percent.

State ex rel. State Highway Commission v. Barbeau [360] used a rate of 3.5 percent, which it stated to be the average rate of return from the subject cemetery for a three-year period. It is not clear how actual rate of return can be determined if value is unknown. Presumably, these figures were based on annual income and expenses from the business, which may or may not have anything to do with the value of the land.

In the area of capitalization rates, as well as that of determining an effective life of a cemetery, the income approach as generally applied is extremely mechanical. How owners, buyers, or investors think is not alluded to. Finkel refers to the pertinence of "the risk element" and the "inordinate management responsibilities and inevitability of lingering liquidation." [361] The usual cemetery operator sees no such risks; his business is secure in the absence of inordinate competition. Unless the promotional operator is looking to a quick return through a preneed program, he does not care.

Before and After

The method of arriving at the value after the taking by using the same value per unit as in the before (step 7 of "The Income Approach," *supra*) follows the method used in *Diocese of Buffalo v. State* [362] and *Mount Hope Cemetery Ass'n v. State.*[363] The effect of the use of this approach is to assume that the area taken will be sold out in an average time; i.e., when the cemetery is half sold. It is possible that the cemetery in the after situation will sell as many lots per year and for as much money, until sellout, as would have occurred had there been no taking. The effect of the taking, in terms of income stream, would not be felt until sellout of the remainder. In calculation, the only item affected is the life of the cemetery; the income for the last year is cut off because of the decreased area. The effect is to subject the value of the part taken to the greatest discount because sale of it is the most

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[356] 2 N.Y.S.2d 37, 163 N.Y.S.2d 655, 143 N.E.2d 377, 62 A.L.R.2d 1161 (1957).

[357] 11 A.D.2d 303, 203 N.Y.S.2d 415, *aff'd* 12 A.D.2d 705, 208 N.Y.S.2d 737 (1960).

[358] 43 Misc. 2d 337, 250 N.Y.S.2d 961 (1964).

[359] 438 S.W.2d 470 (Mo. 1968).

[360] 397 S.W.2d 561 (Mo. 1965).

[361] Finkel, *supra* note 301, 19 APPRAISAL J. 477 (Oct. 1951).

[362] 43 Misc. 2d 337, 250 N.Y.S.2d 961 (1964).

[363] 11 A.D.2d 303, 203 N.Y.S.2d 415, *aff'd* 12 A.D.2d 705, 208 N.Y.S.2d 737 (1960).

remote in time. An attempt to utilize this method was made in *Diocese of Buffalo v. Sate,*[364] resulting in a valuation of $68.70 for the 0.942 acre being taken. The court rejected this method on the grounds that all unsold lots were to be totaled and averaged and that the owners had intended to develop the area of the taking imminently. In *State ex rel. State Highway Commission v. Mt. Moriah Cemetery Ass'n,*[365] in response to an objection to the State's use of the shortened life method, the court held that damages in cemetery cases need not always be computed in exactly the same way.

A second case, *Diocese of Buffalo v. State,*[366] recently rejected the "average value" approach, stating that it did not result in a true valuation of the remainder, saying:

> The departure from the "before and after" rule resulted in error. The court's decision in the *St. Agnes* case was premised on the dual assumption that cemetery land is valuable as an inventory of individual grave sites which may properly be treated as fungible and that sales will continue at a constant rate until they are all sold. On this premise, any particular undeveloped cemetery plot could be substituted for any other, and the only direct effect of a partial taking is to reduce the economic life of a cemetery. In other words, since the sales will presumably continue at the same rate, the condemnation taking will merely decrease the period of time during which the supply will be available. This economic assumption—that the only effect of a partial taking is to reduce the economic life of the cemetery—underlines the "before and after" approach urged by the State, a contention which relates to the measure of damages in these cases. This particular question critical to decision herein, was not raised by the parties nor considered by the court in *St. Agnes.* In that case and in the others which followed it, we were concerned only with the method of valuation, not with the measure of damages.
>
> No reason exists for not applying the "before and after" rule in cases involving a partial taking of cemetery lands. What the owner has lost is, after all, the ultimate measure of damages. (See, e.g., *Rose v. State of New York,* 24 N.Y.2d 80, 87, 298 N.Y.S.2d 968, 975, 246 N.E.2d 735, 739–740; *St. Agnes Cemetery v. State of New York,* 3 N.Y.2d 37, 41, 163 N.Y.S.2d 659, 143 N.E.2d 380, *supra; Boston Chamber of Commerce v. Boston,* 217 U.S. 189, 195.) In the main, uncomplicated by any claim or issue of consequential damages or benefits to the retained property (but see discussion in *Buffalo Park* case, *infra,* pp. 328–329, 300 N.Y.S. 2d p. 334, 248 N.E.2d p. 159), the only effect of the taking has been to reduce the size of each cemetery, just as would a street widening, if the cemeteries had fronted on city streets. The remaining property still retains its essential characteristics *after* the taking, is still just as useful for cemetery purposes, as it was *before* the taking.

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[364] 43 Misc. 2d 337, 250 N.Y.S.2d 961 (1964). The method is also used in the example contained in Hall and Beaton, *supra* note 301.

[365] 438 S.W.2d 470 (Mo. 1968).

[366] 24 N.Y.S.2d 320, 300 N.Y.S.2d 328 (1969), *rev'g* 29 A.D.2d 916, 290 N.Y.S.2d 181, and 29 A.D.2d 918, 290 N.Y.S.2d 185, and 29 A.D.2d 916, 290 N.Y.S.2d 190 (1969).

The conclusion that the only effect of a partial taking of a cemetery would shorten its economic life would not be sound if the lots taken were more valuable or more readily salable than the remaining lots.[367] Also, as the court recognizes in its discussion of the *Buffalo Burial Park Association* property in the second *Diocese* case, valuation of the area taken under the conventional approach might result in the value so low that value for another highest and best use must be considered. Also, the expenses of development might vary in the "after" situation from those in the "before" so that the effect would not be merely a shortened life. Courts and appraisers should not become so engrossed in mathematical formulas as to lose sight of the result sought: market value of the property, which purports to consider the attitudes of buyers and sellers and not actuaries. The attitudes of buyers, sellers, or investors may vary with each cemetery and each taking and require departures from a strict annuity approach.

An Example

Having discussed the general method by which a cemetery can be appraised with the income approach, a particular acquisition and appraisal submitted at the trial is now discussed.

Cypress Lawn was a memorial park cemetery, originally organized in 1938. It contained a total of approximately 69.87 acres, of which 41.97 acres was platted and dedicated cemetery land. The unplatted areas constituted the rear "unplatted B," which also contained the area occupied by the office building, mausoleum, crematorium, and working area, containing a total of 25.77 acres, and "unplatted A," which the owners had intended to use as the site of a funeral home, containing approximately 1.67 acres.

The platted area, except for "Mountain View Addition," was all improved. "Mountain View Addition" contained approximately 18 acres divided into 22,230 unsold, undeveloped, but platted and dedicated grave spaces. The balance of the cemetery contained 13,295 sold grave spaces and 10,282 unsold grave spaces. Of the unsold grave spaces, 4,958 spaces were allocated to specific groups (Eagles, Veterans, and Catholics), leaving 5,575 remaining for sale to the general public. The cemetery conducted a pre-need sales program through an independent sales agency, selling at pre-need in each section until 60 percent of that section had been sold. All other sales were for immediate need. Prior to the platting of "Mountain View" there were only 840 lots left for pre-need sales to the public. The taking for a new limited access facility consisted of 9.87 acres, of which about 9.05 acres, containing 10,522 grave spaces, were in "Mountain View" and the balance in "unplatted A." "Mountain View" had been rough graded and partially cleared

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[367] *See* State *ex rel.* State Highway Commission v. Barbeau, 397 S.W.2d 561 (Mo. 1965).

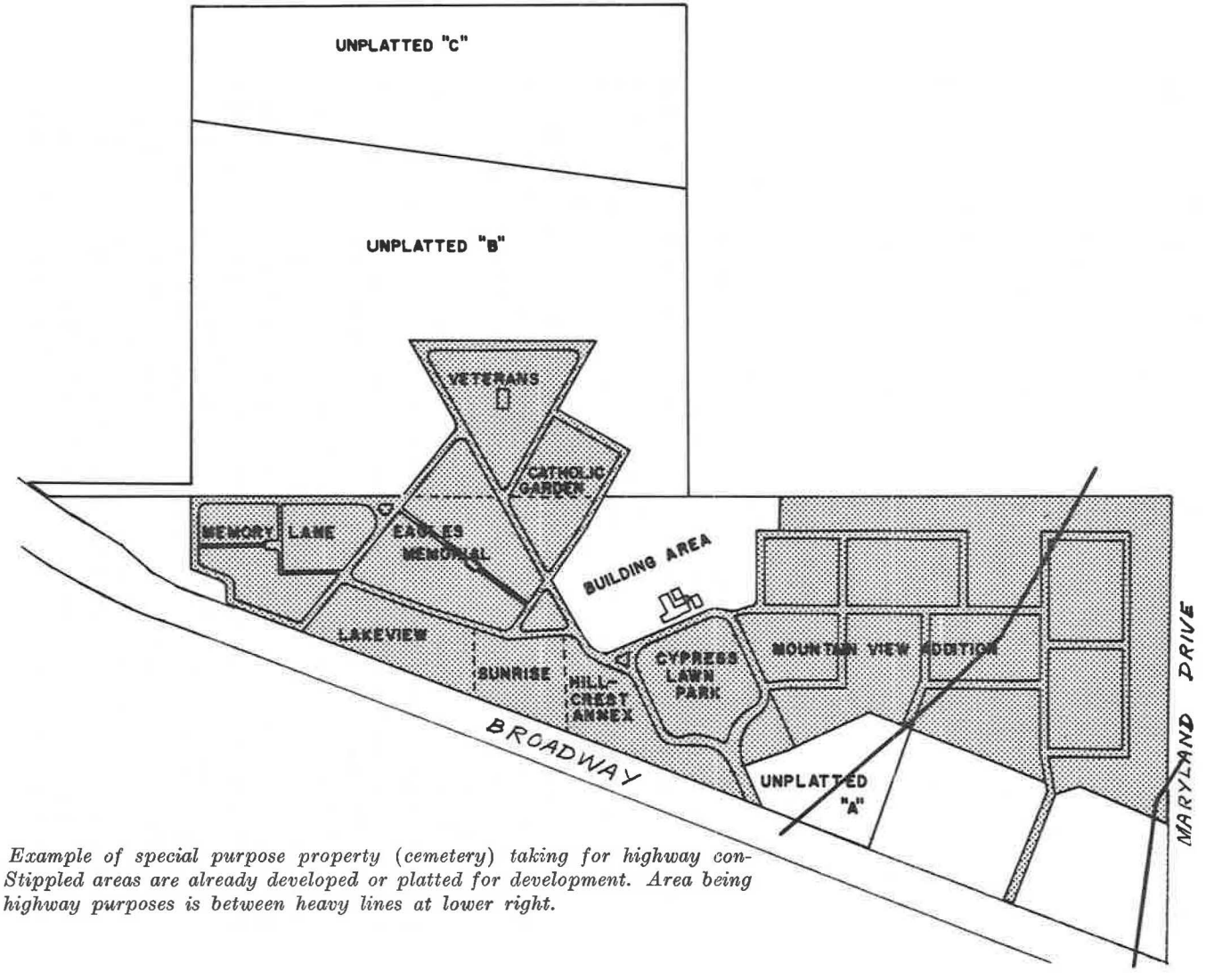

Figure 1. Example of special purpose property (cemetery) taking for highway construction. Stippled areas are already developed or platted for development. Area being taken for highway purposes is between heavy lines at lower right.

to preserve some natural evergreen cover and enjoyed a gentle slope with a panoramic view of the Cascade Mountains.

Sales for the past three years averaged 808 spaces per year, with sales falling off in the last year, apparently because of the lack of spaces available for pre-need sales. Prices of spaces range from $135.00 to $275.00, depending on whether they were pre-need or at-need and on the amenities of the particular areas involved. Ratio of pre-need sales to at-need sales was approximately four to one. The average number of deaths in the general area in which the cemetery was located was 622 per year for a three-year period. Interments at the cemetery during this period increased from 224 to 316. Population of the county had increased about 15 percent in the last five years, and projections indicated that in the future the population would increase approximately 5 per cent a year. Although there were several other cemeteries in the area, only one was really competitive with the subject cemetery.

Table 1 is a summary of the calculations of one of the appraisers retained by the owners. Comments with respect to various sections follow.

Calculation of Annual Net Income—All appraisers assumed annual sales in excess of the average of the past three years, the range being from 875 to 950 sales. As to prices per lot, the State's witnesses stayed close to past sales, using prices of $130.00 and $135.00 per lot. The owner's witnesses anticipated future rises in prices and assumed that prices in the Mountain View Addition would be higher than average. One of the owner's appraisers arrived at his average price per lot by separate consideration of immediate need prices, pre-need prices, and prime lot prices. All appraisers included in their calculations income from openings and closings, liners, and markers. The State's appraisers stuck close to current income figures on these items, whereas the owner's appraisers assumed some increase. Income from the crematorium, columbarium, and mausoleum was treated as independent or business income and not included in the calculations to arrive at the value of the raw cemetery land. It therefore would appear to have been an error in the foregoing appraisal to make a deduction for the value of the crematorium and columbarium in the calculation of value of raw cemetery land.

Annual expenses largely followed those experienced by the cemetery. None of the appraisals, other than that illustrated, made allotment for costs of future development in the manner illustrated. One appraiser provided a reserve for all land improvements, whereas another charged depreciation and income to the buildings at this stage.

Capitalization—The area of most dispute was whether all of the land in "unplatted B" should be included in the calculation of the value of cemetery land. A pretrial argument was held on this matter,

TABLE 1

VALUATION OF CYPRESS LAWN

ITEM	VALUATION	
1. Calculation of annual net income		
Annual gross income:		
Estimate 950 sales at $180	$171,000	
Endowment care income estimate	17,500	
Open, close, liners, markers	70,000	
Est. annual gross income		$ 258,500
Annual expenses:		
Sales commissions (30%)	$ 51,300	
Endowment care (10%)	17,100	
Markers, liners, etc.	24,000	
Administration salaries, etc.	42,000	
Maintenance	25,000	
Reserve for future development of lots	15,000	
Est. annual expenses		174,400
Annual net income		$ 84,100
2. Capitalization		
$84,000 × 9.526 (Inwood factor, 32 years at 10%) = Value of improved portion, $801,137		
Value of improvements:		
Crematory and columbarium	$ 25,000	
Residence and office	15,000	
Misc. outbuildings	10,000	
Est. value of buildings		$ 50,000
Est. value of land improvements on developed lots (10,282 × $6.80)		69,918
Total value of improvements		$ 119,918
Value of improved portion		$ 801,137
Less value of improvements		119,918
Value of raw cemetery land		$ 681,219
Indicated value per lot	($681,219/32.512) = $20.95	
3. Before value summary		
Land:		
Parcel A, 72,745 sq.ft at $1.00	$ 72,745	
Parcel B, 26.232 acres at $12,500	327,875	
Raw cemetery land	681,219	
Total land		$1,081,839
Buildings:		
Crematory and columbarium	$ 25,000	
Residence and office	15,000	
Misc. outbuildings	10,000	
Mausoleum	128,000	
Total buildings		178,000
Land improvements		69,918
Total before value		$1,329,757

TABLE 1—Continued

ITEM	VALUATION	
4. After value summary		
Land		
Parcel A, 37,745 sq.ft at $1.00	$ 37,745	
Parcel B, 26.232 acres at $12,500	327,875	
Raw cemetery land (21,938 lots at $19.38) (All damages to the remaining land are reflected in the decreased price per lot)	425,219	
Total land		$ 790,839
Building improvements (no change)		178,000
Land improvements ($2,500 in take)		67,418
Total after value		$1,036,257
Value before taking		$1,329,757
Value after taking		1,036,257
Just compensation		$ 293,500
5. Breakdown of just compensation		
Land		
10,522 graves at $20.95	$220,436	
Parcel A, 35,000 sq.ft at $1.00	35,000	
Total		$ 255,436
Land improvements (pillars, lawn, shrubs taken)		$ 2,500
Total taking		$ 257,936
Damages		
Land loss due to replat and buffer strip adjacent to freeway: equivalent to 1,050 spaces at $20.95		$ 21,998
3,000 lots reduced in value $3.00 each because looking into bridge structure rather than Cascade Mountains		$ 9,000
Cost of replatting, additional landscaping, increased road costs		$ 3,500
Small severed triangle—originally valued at $1,089 for grave spaces but $25 after		$ 1,064
Total damages		$ 35,562

the owners arguing that the area should be excluded as a matter of law because it was not platted, dedicated, or zoned for cemetery use. The trial court, however, agreed with the State, holding that the use of the land was for the jury. In testimony, the owner's appraisers treated this land as surplus, whereas the State's witnesses included it in their calculations to arrive at the value of cemetery land. Because of the resulting discrepancies in areas of unsold cemetery land, the lives of the cemetery used by the State's witnesses were 63 and 69 years, and those of the owner ranged from 32 to 37 years. The difference caused by the different discount rates used for the different lives was the

principal cause of the substantial spread in value in testimony of witnesses for the State and those of the owner.

Before Value Summary.—All appraisers treated the building improvements in the same way. Because the calculations of the net price for raw cemetery land had deducted the value of the buildings, it was necessary to add the buildings back in to arrive at a total before value. The value of "unplatted A" was determined by a conventional application of the market data approach. All appraisers felt that the highest and best use of the area was for a funeral home, and this land was given commercial value. "Unplatted B" was valued by the owner's appraisers on the market data approach, using sales of nearby noncemetery lands, while the State's appraisers valued it as cemetery spaces. Regarding the approximately four acres on which the buildings were located, one State appraiser treated this area as though it were available for grave spaces, thus expanding the life of the cemetery. None of the other appraisers gave this area any special treatment. Either approach is questionable because income from grave spaces or the other income produced from the property must pay for this land in one way or the other.

After Value Summary.—All the appraisers used the price per unit arrived at in the before valuation to calculate the value of cemetery land after the taking. Values per unit of certain areas and tracts were reduced because of damages resulting from the taking. All appraisers recognized the expense of replatting or the loss in value of the original platting as a damage. Such an approach dealing with "paper plats" on conventional property would be questionable. Also, the quoted appraisal illustration may contain a duplication of damages, because the appraiser included both the value of the original plat and cost of replatting. All appraisers valued damage to the small severed triangle heavily, and all allowed varying amounts of damages to portions of the remaining property because of proximity of the new freeway and obstruction of view from a portion of the cemetery caused by a long bridge structure.

Just Compensation.—Testimony of just compensation for the State was $86,765 and $88,825. For the owner the range was from $271,000 to $293,500. The verdict was $155,050.

No two appraisers approached this problem in exactly the same manner. Establishment of a technique that is ideal in all situations appears neither possible nor desirable. Variable factors may justify some modification of the basic approach.

The Market Data Approach

A second method of appraising vacant cemetery land is to treat it as other vacant land and value it by comparison with prices paid for similar (but not cemetery) lands. As previously indicated, one cannot

always determine whether this method is proper or the income approach is proper.[368]

The leading case is *Laureldale Cemetery Company v. Reading Company,*[369] involving a taking of undeveloped cemetery land no nearer than 600 feet to the closest interment, the land being characterized as ". . . a current liability rather than an asset, because money would have to be expended upon it before it could be sold for a sepulture." The conventional before and after method of valuation by the market data approach was used; and the income approach, which resulted in values of $26,000 per acre for land that cost about $500 an acre three or four years before, was rejected. The court stated as follows: "The land must be valued like any other land in its vicinity and not in sepulture lots to be turned into cash in the future." The court also rejected the income approach as based on anticipated earnings and, therefore, upon conjecture.

In applying the *Laureldale* approach, *Green Acres Park v. Mississippi State Highway Comm'n*[370] excluded the income approach as tending to show value to the owner and involving a consideration of future profits, prices for lots being income of a going business that was not being appropriated. In allowing evidence of residential values, the court said this evidence was offered not to show that such lands could be substituted for that taken but to show the market value of comparable property by recent sales. The land in question was platted; but there had been no sales, interments, or development.

In *State Highway Commission v. American Memorial Park,*[371] the court held that value by the market data approach was proper and that in order to justify departure from the general rules of damage, the owner had the obligation of showing that it was impossible to prove value without dispensing with the usual rule. Valuation in terms of substitution was approved in view of a South Dakota statute giving cemeteries the power of condemnation, the court indicating that this opinion was not formed on any theory of replacement but on the market value of the land.

Dawn Memorial Park v. DeKalb County[372] applied the *Laureldale* approach and specifically rejected the income approach where the ground involved, although "zoned and planned by its owner for use as a cemetery," was not suitable for burial spaces.

In *Holy Trinity Russian Ind. Or. Church v. State Roads Commission,*[373] a special use permit was required before the area in question could be used as cemetery lots, and there was no evidence of intention to use the area taken for cemetery purposes. Evidence of lot sales was

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[368] See section on "Rate of Sales."

[369] 303 Pa. 315, 154 A. 372 (1931).

[370] 246 Miss. 855, 153 So. 2d 286 (1963).

[371] 82 S.D. 231, 144 N.W.2d 25 (1966).

[372] 111 Ga. App. 429, 142 S.E.2d 72 (1965); *see* State Highway Dept. v. Baxter, where the land, although suitable for development as a cemetery, was valued as "idle farm land."

[373] 249 Md. 406, 240 A.2d (1968).

rejected, the court placing the burden of establishing reasonable probability that the land was subject to a nonconforming use on the owner and holding that it was improper to allow value as though the property in fact were zoned for another use.

In *United States v. Easements and Rights of Way Over One Acre of Land,*[374] there was a taking of a power line easement of one acre from a 78.35-acre tract dedicated and zoned for cemetery use. The court noted that there was no proof that the area taken could not still be used for lots and also that it would take over 200 years to consume 50 acres of the property.

Summary

Two methods of appraising vacant cemetery land have evolved, one using the income approach, the other the market data approach. Preference in method seems to favor the income approach, although which is applied depends largely on the facts of the particular case. Value that the property may have because it is adaptable to cemetery uses is ignored by the market data approach. Determining the value of land, which may be disposed of over an extended period of years, subject to numerous variables affecting prices, costs, and sales, by the income approach is largely conjecture. Application of either method does provide a figure to be weighed by the trier of the facts. Whether the result is value in a constitutional sense may be questionable. Each formula develops results that pretend to be factual or objective, but in fact may not determine the value that the owner, an investor, or a buyer would see in the property. There are sufficient variables in the income approach that the basis of value, or lack of it, for cemetery use can be considered by the trier of the facts. In any event, the two methods are the tools at hand and, subject to future refinements, will have to suffice.

CHURCHES

The market value measure of compensation has been applied to churches.[375] In *New Haven County v. Parish of Trinity Church* [376] for example, the court stated: "The law requires the plaintiff to pay to the church only the market value of the premises taken."

The market value measure also has been rejected. In *First Baptist Church of Maxwell v. State Department of Roads,*[377] where half of the parking lot of a church was taken, the court said:

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[374] 248 F.Supp. 709 (W.D. Tenn. 1965).

[375] Assembly of God Church of Pawtucket v. Vallone, 106 N.J. Eq. 85, 150 A.2d 11 (1959); Commonwealth, etc. v. Congregation Aushei S'Ford, 350 S.W.2d 454 (1965); Gallimore v. State Highway and Public Works Commission, *supra* note 79; United States v. Two Acres of Land, etc., 144 F.2d 207 (7th Cir. 1944).

[376] 82 Conn. 378, 73 A. 789 (1909).

[377] 178 Neb. 831, 135 N.W.2d 756 (1965). *See also In re* Simmons, 127 N.Y.S. 940 (Sup. Ct. 1910); State Highway Department v. Augusta District of No. Ga. Conference of Methodist Churches, 115 Ga. App. 162, 154 S.E.2d 29 (1967).

> When 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.

State Highway Dep't v. Hollywood Baptist Church [378] indicates that there may be circumstances when market value and actual value are not the same, and "If they are not, that value which will give just and adequate compensation is the one to be sought by the jury in rendering its verdict." Old churches occasionally sell, but these sales usually are for conversion of the property to another use and are of little or no assistance in valuing the property of a going church.[379] As a result, the courts are required to seek market value, or whatever other measure they apply, through other data. *United States v. Two Acres of Land, Etc.*[380] states:

> But people do not go about buying and selling country churches. 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.

The proof to establish the value of church property is produced usually by means of the cost approach.[381] *In re Simmons* [382] indicates:

> A fair value would seem to be the value of the land alone, the value of the property enhanced by the buildings thereon, taking a reasonable cost of replacing the buildings, considering their state of repair and depreciation from the time they were erected.

Although cost may be cogent evidence of value, it is not in itself the only standard of compensation.[383]

Church land is valued by means of the market data approach.[384] In *St. Patrick's Church, Whitney Point v. State,*[385] the court rejected the argument that the vacant land taken was to be valued by the cost of a substitute tract purchased by the church, deducting the value of the residence on the substitute. The court considered this to be an attempt to apply the "cost to cure" theory and held:

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[378] 112 Ga. App. 857, 146 S.E.2d 570 (1965).

[379] Smith, *supra* note 198; cf. Commonwealth v. Oakland United Baptist Church, 372 S.W.2d 412 (Ky. 1963).

[380] 144 F.2d 207 (7th Cir. 1944); *see In re* Simmons, 127 N.Y.S. 940 (Sup. Ct. 1910); Assembly of God Church of Pawtucket v. Vallone, 350 S.W.2d 454 (Ky. 1965).

[381] Commonwealth, etc. v. Congregation Aushei S'Ford, 350 S.W.2d 454 (Ky. 1965); Trustees of Grace and Hope Mission v. Providence Redevelopment Agency, 100 R.I. 537, 217 A.2d 476 (1966); Assembly of God Church of Pawtucket v. Vallone, 106 N.J. Eq. 85, 150 A.2d 11 (1959; First Baptist Church of Maxwell v. State Department of Roads, 178 Neb. 831, 135 N.W.2d 756 (1965); Davis, *Appraisal of Church Property,* ENCYCLOPEDIA OF REAL ESTATE APPRAISING, ch. 28 (Prentice-Hall 1959); Gates, *supra* note 197. Smith, *supra* note 198.

[382] 127 N.Y.S. 940 (Sup. Ct. 1910).

[383] United States v. Two Acres of Land, etc., 144 F.2d 207 (7th Cir. 1944).

[384] Davis, *supra* note 381.

[385] 30 A.D.2d 473, 294 N.Y.S.2d 275 (1968).

> Sound reason requires that the theory cannot be used in cases of subsequent acquisitions of land outside the bounds of the appropriated property; nor should a condemnee's right to compensation be made to depend upon whether adjacent land could be easily purchased.

The court concluded that the damages were to be measured by the before and after values at the time of taking.

Assuming that a parking lot necessary for the church's operation is taken, strict application of the before and after rule could result in substantial loss to the church itself. In lieu of this, should the value of the area taken be determined by considering the costs of a new parking area adjacent to the church, whether the area is improved or not? On the contrary, is the church adequately compensated for the loss of its parking lot by value being confined to the market value of the vacant land taken? In an action in which the Washington State Highway Commission was acquiring parking space and area for expansion of a parochial school, a settlement was reached, in part based on a consideration of a market value of adjacent substitute lands where residences were located. Of course, there was no assurance that the school could acquire the lands at the values indicated or at any other figure. The owner may or may not have been made whole. But a strict application of a before and after rule could have been based only on guesses of the appraisers on each side concerning the amount of depreciation that buildings not taken would suffer as a result of losing parking. The approach taken, if not done voluntarily, would be contrary to a private owner's rights as indicated in the *St. Patrick's* case; but, as previously indicated, the substitution approach has been applied to private properties.[386] If the law permits use of this approach, the appraiser might consider the problem in terms of appraisals by alternate methods: a before and after appraisal based on market value and an appraisal based on the cost of a substitute.

The problem of valuing churches has been covered by a Maryland statute [387] which provides that compensation for a church

> . . . shall be the reasonable cost as of the valuation date of erecting a new structure of substantially the same size and of comparable character and quality of construction as the acquired structure at some other suitable and comparable location within the State of Maryland to be provided by such religious body. Such damages shall be in addition to the damages to be awarded for the land upon which the condemned structure is located.

Smith suggests that replacement cost (equal utility) be used as a starting point in applying the cost approach to churches, indicating that this will result in the automatic elimination of super-adequate items.[388] Case authority for this position is lacking. In *Assembly of*

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[386] See last part of section on "Substitution."

[387] MD. CODE ANN. art 334, § 5(d).

[388] *Supra* note 198.

God Church of Pawtucket v. Vallone,[389] proof was in terms of the cost of a "theoretical one-story church building." No error because of failure to consider "the cost of producing comparable property having facilities for a church and rectory equivalent to those provided by the condemned property" was found.

As is often true in applying the cost approach to special purpose properties, the most difficult calculation in valuing churches is the determination of depreciation. All forms of depreciation—physical, functional, and economic—may exist in a church.[390]

In *Trustees of Grace and Hope Mission v. Providence Redevelopment Agency,*[391] the court held that as a condition precedent to the admission of functional depreciation, there must be a showing that "because of the property or some portions thereof becoming antiquated or out of date, it is not functioning efficiently in the use for which it was constructed or renovated and to which it is dedicated at the time of taking." In the *Trustees* case the structure had recently been renovated and there was no showing of depreciation except wear and tear.

Functional items include adequacy of seating, capacity of the sanctuary, number and capacity of Sunday school and meeting rooms, parking facilities, design, construction, and quality of materials in keeping with area standards. Economic obsolescence may result from neighborhood changes.[392] Superiority or inferiority of the subject church when compared with "like" churches may give the appraisers some gauge for estimating the functional and economic obsolescence. Each church may have its own peculiar needs, however.[393]

The ultimate determination of the exact amount of depreciation will be a matter of opinion and not mathematics. This opinion should be based on an adequate investigation of all factors that can affect the utility and value of a particular church.

An example of the investigation of depreciation that can be conducted occurred in the appraisal of a 50-year-old frame church that was being acquired as part of a post office site. The appraiser for the government formulated a questionnaire that was answered by the pastor of every other church in the community. Among factors included for each church were the size and adequacy of the church, parking, effect of location, residences of members, and other factors that would affect the desirability of purchasing an old church. The questionnaire was supplemented by personal interviews on needs and trends in church con-

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[389] 106 N.J. Eq. 85, 150 A.2d 11 (1959); see discussion of equal utility in section on "The Cost Approach."

[390] Gates, *supra* note 197; *cf.* Davis, *supra* note 381.

[391] 100 R.I. 537, 217 A.2d 476 (1966).

[392] Davis, *supra* note 381; Smith, *supra* note 197; Palmer, *supra* note 332, at 382.

[393] *Cf.* Dowie v. Chicago, W. and N.S.R. Company, 214 Ill. 49, 73 N.E.2d 354 (1965) where the court said:

> The right to entertain any religious belief . . . does not bring to or carry with it increased or additional property rights to those held by other people adopting other religious views or no religious views.

struction. The appraiser concluded that the church had suffered much functional obsolescence, including inadequacy of land area; the size of sanctuary, vestibule, offices, Sunday school rooms, storage space, and off-street parking; the shape of the sanctuary; the steps entering the church; and the three-story construction of the church (the trend being one story). Furthermore, the subject church was a fire hazard. In view of these elements, the appraiser felt the church was obsolete but could be used on an interim basis for 10 years until a new church was constructed. Depreciation was taken on this basis. The owners referred to churches having lives in excess of 300 years, taking some depreciation. The verdict was close to the condemnor's appraisal testimony.

Approach was in terms of market value: what another congregation would pay for the subject church. It is questionable if another church, absent being compelled to buy because of fire or similar catastrophe, would see value in a 50-year-old church that might not be adjustable to fit the needs of the prospective buyer. In such a case, the needs of the subject church could get lost in the shuffle when the "informed buyer" entered the picture. In place of a structure that does the job, although not as well as might be wished, the congregation may receive compensation that will not replace what it had. In the cited example, the congregation recognized that the church was nearing the end of its useful life. Apparently it did relocate without the benefit of the additional 10 years that the appraiser felt was left in the old building. Absent adequate inquiry into the particular situation of the subject property church, another congregation might not be so fortunate. Avoidance of this inequitable possibility has been accomplished in Maryland by MD. ANN. CODE art. 33A, § 5(d), which allows compensation in the form of reasonable cost of a substantially similar structure. This approach may result in a "betterment" to the owner where there is no allowance for depreciation of the church taken.

Property owned by a church does not have to be valued for church purposes. Certain church properties, generally referred to as "educational buildings," are treated as other properties and appraised by the market data approach.[394] That the property included offices, classrooms, library, living quarters, as well as a chapel did not prevent the property from being considered unique and from being valued on a reproduction cost basis in the *Trustees* case.[395] This is to be contrasted with *In re James Madison Houses*[396] and *In re Public School 79, Borough of Manhattan,*[397] involving multistoried buildings converted into churches.

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[394] Smith, *supra* note 197.

[395] Trustees of Grace and Hope Mission v. Providence Redevelopment Agency, 100 R.I. 537, 217 A.2d 476 (1966), converted premises were also valued for church use in Assembly of God Church of Pawtucket v. Vallone, 350 S.W.2d 454 (Ky. 1965).

[396] 17 A.D.2d 317, 234 N.Y.S.2d 799 (1962).

[397] 19 A.D.2d 239, 241 N.Y.S.2d 575 (1963).

In *State Highway Dep't v. Hollywood Baptist Church,*[398] the church had relocated prior to the time of valuation, and the court concluded that the land was no different from any other and that market value was the appropriate measure although a portion of the remainder was still used for church purposes. The court, in *Dowie v. Chicago W. and N.S.R. Company,*[399] involving a taking for railroad right-of-way through a religious community, held that the claimed special value of the property was "sentimental and speculative." In *Chicago E. and L.S.R. Co. v. Catholic Archbishop,*[400] the court permitted valuation of church-owned lands across from the church cemetery for restaurant and saloon purposes, although it was argued that the Bishop would disapprove of such uses.

Proximity damages may result to remaining church property on a partial taking. In *Gallimore v. State Highway and Public Works,*[401] the court noted:

> It follows that any circumstances that depreciated its fair market value for church purposes adversely affected the property in respect of the use for which it was most valuable.

The court stated in *State Highway Dep't v. Hollywood Baptist Church:*[402]

> . . . Mere inconvenience is not, in and of itself, an element of damage to be considered in condemnation cases, inconveniences such as noise, smoke, dust and the like may be considered if shown by the evidence to adversely affect the value of the condemnee's remaining property.

The *Hollywood Baptist* case refused to allow damages that were claimed would occur during the period of construction. The court noted: "It must be shown among other things that such factors are a continuous and permanent incident of the improvements. . . ."

In *Durham and N.R. Co. v. Trustees of Bullock Church,*[403] damages to the value of the property were found to result from the loss of hitching space and the disturbances caused by proximity of the railroad, and the court noted:

> Injury to such property, and respected it impairs its usefulness for the purpose to which it is devoted, constitutes an element of damage, recognizable when such injury is the direct cause of the act complained of, or when it flows directly from the act as a consequence.

The holding of this case is to be contrasted with that of *First Parish in*

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[398] 112 Ga. App. 857, 146 S.E.2d 570 (1965).

[399] 214 Ill. 49, 73 N.E.2d 354 (1965).

[400] 119 Ill. 525, 10 N.E. 372 (1887).

[401] *Supra* note 79. *See also* First Parish in Woburn v. County of Middlesex, *supra* note 114.

[402] 112 Ga. App. 857, 146 S.E.2d 570 (1965).

[403] 104 N.C. 525, 108 P.2d 761 (1890).

Woodburn v. County of Middlesex,[404] where compensation for the anticipated annoyance by noisy Sunday travelers, being an unlawful act, was not allowed. In *State Highway Dep't v. Augusta District of North Georgia Conference and Methodist Church,*[405] involving the taking of a portion of a religious camp, a cabin near the highway was rendered useless because of noise and other factors. The court noted that market value was not only the rule and held that evidence of the cost of the cabin and costs of readjusting were proper.

In summary, the market value measure of compensation has been both applied and rejected when dealing with churches. Deciding the worth of one church property in terms of what another church would pay for it can result in a failure to recognize values to the congregation in the first property. Needs of all churches are not the same. Particular uses and needs of the subject property congregation should be recognized if it is to be made whole. Because of the lack of other data, the usual method of appraising a church property is the cost approach method. Difficulties are encountered in measuring functional and economic depreciation, but churches do suffer such. The appraiser must exert substantial effort to determine elements that render churches of the type under consideration desirable or undesirable and that affect their utility for church purposes. If the taking interferes with the use of the property for church purposes, damages are generally allowed.

PARKS

Parks often are not extensively improved, and valuation is more a problem of the value of land than of improvements. The value to the public of a park and the necessity for securing a substitute facility are almost impossible to determine. Because of these factors, compensation for the taking of park property usually is expressed in terms of market value. When private parks are dealt with, additional data in the form of income may result in compensation recognizing value in use or value to the owner beyond the ordinary market value of the property. It is therefore possible that, under similar circumstances, a private park might be valued at more than a public park.

Public Parks

An application of the market value measure of compensation is found in *People v. City of Los Angeles,*[406] where the condemnor was arguing that under the "public trust theory," the land could be transferred to another public agency without just compensation and also that the "sub-

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[404] 73 Mass. 106 (1856); *see dissent,* United States v. Two Acres of Land, etc., 144 F.2d 207 (7th Cir. 1944), excepting to allowance of ministers' salary and damages to members. *See also* Dowie v. Chicago, W. and N.S.R. Company, 214 Ill. 49, 73 N.E.2d 354 (1965).

[405] 115 Ga. App. 162, 154 S.E.2d 29 (1967).

[406] 33 Cal. Rptr. 797 (Cal. App. 1963).

stitute facility'' doctrine should be applied, resulting in no compensation because there was no necessity for a substitute. The court concluded the measure was not the value of the property for special purposes, but fair market value. The court refused to apply the fair market value that would be paid for the land as a public park only, noting that it was not capable of being sold and could have no market value for such use, and concluded that the measure was the market value of the property if placed on the market for all uses to which it was adaptable.[407]

Again, in *United States v. State of South Dakota Game, Fish and Parks Dep't,*[408] where an island in the Missouri River was being acquired, the court refused to consider the issue of necessity of a substitute and applied the market value measure, noting that just compensation included all elements of value that inhere in the property but did not exceed market value fairly determined.

United States v. Certain Land in Borough of Brooklyn [409] departed from the position of refusing to apply the doctrine of substitution to vacant playground land and, after noting that the key notion of compensation was indemnity, said:

> 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, . . . Both may serve vital public functions and the absence of either might cause serious strain on other public facilities. . . .
> 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.

The *Brooklyn* case involved a taking of lands that had buildings on them when purchased by the owner. These buildings had been re-

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[407] The holding of People v. City of Los Angeles, 33 Cal. Rptr. 797 (Cal. App. 1963), has been codified:

> Publicly owned real property dedicated to parks purposes, other than state parks, when acquired for state highway purposes, by eminent domain, shall be compensated for by the department on the basis of the fair market value of the property taken, considering all uses for which it is available and adaptable regardless of its dedication to park purposes, plus the value of improvements constructed thereon. . . .

The Code does provide for the use of the substitution approach where agreed to:

> In lieu of such compensation, the department and the owner or agency in charge of such park property may provide by agreement where it is found economically feasible so to do that the department may provide substitute park facilities of substantially equal utility, or facilities of lesser utility with payments representing the difference in utility, or may pay the reasonable cost of acquiring such substitute facilities.

CAL. HIGHWAY CODE § 103.7.

[408] 329 F.2d 665 (8th Cir. 1964).

[409] 346 F.2d 690 (2d Cir. 1965). *See also* United States v. Certain Property in Borough of Manhattan, 403 F.2d 800 (2d Cir. 1968), involving public bath facility.

moved prior to the condemnation. 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. Under this case, the owner was assured market value of the property if replacement was not necessary. In this respect, the case was a departure from the strict application of the substitute property doctrine, under which nothing would have been paid if replacement was not necessary.[410]

In *Westchester County Park Comm'n v. United States,*[411] the government valued the property being used for park purposes as residential, and the owner valued it on the basis of a capitalization of rentals being received from the government. Both parties ignored the restriction to park use that existed on the property. After noting that the key notion of just compensation was indemnity to the owner, the court indicated that if proof had been presented concerning the value of the property for use as a park site, the county would have been entitled to such compensation. It is hard to see how the owner could establish value in its use beyond the market value of a substitute. Also, in *Town of Winchester v. Cox,*[412] involving land deeded for park purposes, the award of the trial court assumed the property was unrestricted. The referee previously had found that the property had no value as a park. The court noted that the obligation of the State was to make the town whole, which required that the value of the land taken as though unrestricted be paid, the money to be held subject to the same restrictions as the land.

Private Parks

Private parks held for recreational use have fared better than have public parks as to their ability to prove value for such uses. A leading case in this field, and also one of the leading special purpose cases, is *Newton Girl Scout Council v. Massachusetts Turnpike Authority,*[413] which involved the 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 assessing damages based on such purposes. The area taken included shielding from the existing highway, and this taking resulted in the loss of the camp's privacy. The Appellate Court indicated that damages could be proved by other than comparable sales and that although market value remained the test, the property was to be valued for that use which would bring 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 special purposes for which it is adapted and used.

The court also stated that more flexibility with respect to evidence

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[410] *See also* State of California v. United States, 395 F.2d 261 (9th Cir. 1968).

[411] 143 F.2d 688 (3d Cir. 1944).

[412] 129 Conn. 106, 26 A.2d 592 (1942).

[413] 355 Mass. 189, 138 N.E.2d 769 (1956).

would be allowed. The burden was placed on the owner to show that it was impossible to prove the value of the property without using some mode not dependent on market value in the usual sense.

Owners have been compensated for the value of a variety of recreational uses enjoyed by their land:

In re Public Beach, Borough of Queens,[414] beach rights. A substantial sum would be paid for such rights, although the value of the fee might be nominal.

Board of Park Commissioners of Wichita v. Fitch,[415] sandy land containing two lakes. The property was to be valued for its most advantageous use. Such value was largely a matter of opinion.

Scott v. State,[416] historical tavern, museum, and park. The land may have value based on its "peculiar qualities, conditions, or circumstances."

State v. Wilson,[417] unusual rock formations. The property had "intrinsic value arising out of its uniqueness." Impairment of access reduced business profits resulting in diminution of the highest and best use.

Central Illinois Light Co. v. Porter,[418] duck hunting lands: described as its "only use." Damages resulting from diversion of duck flights by towers and transmission lines were allowed.

Keator v. State,[419] "Isaac Walton League" clubhouse on river. Valuation was allowed for the property's highest and best use based on "actual or intrinsic value," in terms of reproduction costs less depreciation.

A number of cases involved takings from golf clubs. Some of these apply a cost approach to what is essentially vacant land. In *Albany Country Club v. State,*[420] a golf course was held a specialty, and the use of the summation or cost approach was held proper. The lower court declined to add the replacement costs of trees to the value of the land, stating that these were considered to be part of the land. On appeal, this result was to some extent modified by the court's increasing the award for land, stating that the land of the club appreciated in value with age, making reference to trees and "other intrinsic values."

In *United States v. 84.4 Acres of Land, etc.,*[421] the owners contended that the reproduction cost method was proper and that one cost that should be included was the cost of clearing a hypothetically wooded tract. This contention was rejected by the lower court, but, on appeal,

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[414] 269 N.Y. 64, 199 N.E. 5 (1935).

[415] 184 Kan. 508, 337 P.2d 1034 (1959).

[416] 230 Ark. 766, 326 S.W.2d 812 (1959); *cf.* State v. Wemrock Orchards, Inc., 95 N.J. Sup. 25, 229 A.2d 804 (1967).

[417] 103 Ariz. 194, 438 P.2d 760 (1968).

[418] 96 Ill. App. 2d 338, 239 N.E.2d 298 (1968).

[419] 23 N.Y.2d 337, 244 N.E.2d 248 (1968); modifying 26 A.D.2d 961, 274 N.Y.S.2d 671 (1966).

[420] 19 A.D.2d 199, 241 N.Y.S.2d 604 (1963).

[421] 224 F.Supp. 1017 (W.D. Pa. 1963), *aff'd* 348 F.2d (3d Cir. 1965).

the court held that if proof on retrial were that no cleared lands were available, the jury was entitled to weigh the costs of clearing as part of reproduction costs; otherwise, if the jury felt that the property was not unique and that cleared comparables were available, it was to disregard the clearing costs.

Treatment of trees and similar land improvements can result in an unusual application of the cost approach. Trees generally are valued as part of the land.[422] Separate valuation of shade trees has been the subject of some literature concerning valuation.[423] SHADE TREE VALUATION [424] suggests valuation based on trunk area, kind, and condition. The application of the formula can result in more than adequate compensation; there is nothing to indicate any correlation to actual or market value.

Re Brantford Golf and C.C. and Lake Erie and N.R.W. Co.[425] indicates that the cost of substitute premises, suitable and convenient, would be a fair test. *Albany Country Club v. State,*[426] however, indicated that it was not the liability of the State to furnish the claimant with equivalent facilities at a new site and that there was no need to consider the costs, including a water system, at a new site. *State Highway Dep't v. Thomas* [427] held that testimony of reconstruction of tees on other lands owned by the landlord was not relevant to the lessee's case, absent the showing that the landlord was willing to renegotiate the lease granting the lessee the right to use other lands.

Golf course cases have allowed damages for loss of screening and for "costs to cure" by reconstructing damaged holes.[428] Damages for rental value and costs of maintaining a club staff while finding new facilities were not allowed in *Albany Country Club v. State.*[429]

Carb indicates that an income approach might be proper where a club is operated for profit. Among factors for consideration in valuing a golf course, he lists neighborhood and location, land, the improvements (the course, swimming pool, and other facilities) parking, membership (including number and dues), receipts, expenses, competition, and management. In his valuation of land, he suggests use of an abstraction process, valuing the land as if developed and then making

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[422] McMichael, APPRAISING MANUAL, ch. 24 (3d ed., Prentice Hall 1941), refers to Felt, *Our Shade Trees,* and Fenska, *The Complete Modern Tree Expert Manual.*

[423] Kamlet, *Legal Factors in Evaluating Land with Tree Growths,* 36 APPRAISAL J. 102 (Jan. 1968). Replacement cost of trees was considered in Long Island Highway Co. v. State, 28 A.D.2d 1014, 283 N.Y.S.2d 806 (1967).

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

[425] 32 Ont. L. Rep. 141 (1914).

[426] 19 A.D.2d 199, 241 N.Y.S.2d 604 (1963).

[427] 115 Ga. App. 372, 154 S.E.2d 812 (1967).

[428] Knollwood Real Estate Co. v. State, 33 Misc. 2d 428, 227 N.Y.S.2d 112 (1961); Levin v. State, 13 N.Y.2d 87, 192 N.E.2d 155 (1963); *Re* Brantford Golf and Country Club and Lake Erie and N.R.W. Company, 32 Ont. L. Rep. 141 (1914).

[429] 19 A.D.2d 199, 241 N.Y.S.2d 604 (1963).

deductions for cost of development, overhead, and profit.[430] This method can result in value in excess of what would be arrived at by the market data approach.

In conclusion, because the land is not extensively improved and because of the difficulty of establishing the value to the public and the necessity of a substitute, market value is the measure of compensation in most public park cases. Value for park use is little recognized. In *United States v. Certain Land in Borough of Brooklyn*[431] and *United States v. Certain Property in Borough of Manhattan,*[432] the doctrine of substitution is extended to public recreational facilities. These cases also indicate that in the absence of the necessity for replacing the facility, the owners still would be entitled to the market value of their property. This is a departure from the strict substitution approach, which would allow nothing to the owner in the absence of a necessity to replace.

Owners of private recreational areas fare better than do public owners, as intrinsic value or special value to the owner usually is recognized. This recognition occurs particularly where the owner's enjoyment takes the form of income from the property. It is inequitable that a private owner should receive more than does the public owner in the same situation. The extension of the substitution doctrine to park facilities may overcome this inequity.

SCHOOLS

In cases involving school properties, the courts have recognized the necessity of liberalizing the proof permitted to establish just compensation.[433]

> ". . . All of the capabilities of the property, and all the uses to which it may be applied, or for which it is adapted which affect its value in the market are to be considered . . ."

Factors affecting the use of the property for institutional purposes should be recognized.[434]

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[430] Carb, *Appraisal of a Country Club,* ENCYCLOPEDIA OF REAL ESTATE APPRAISING, ch. 30 (Prentice-Hall 1959).

[431] 346 F.2d 690 (2d Cir. 1965).

[432] 403 F.2d 800 (2d Cir. 1968).

[433] Gallimore v. State Highway and Public Works Commission, *supra* note 79, quoting Nantahala Power and Light Company v. Moss, 220 N.C. 200, 17 S.E.2d 13 (1941); *see* Idaho-Western Ry. Co. v. Columbia Conference, etc., 20 Idaho 568, 119 P. 60 (1911); Board of Education v. Kanawha and M.R. Co., 44 W. Va. 71, 29 S.E. 503 (1897); County of Cook v. City of Chicago, 84 Ill. App. 2d 301, 228 N.E.2d 183 (1967); *see* Guthrie, *Value-In-Use (Institutional Property),* 9 RIGHT OF WAY 56 (Dec. 1968); Gallimore, *supra,* states that where value for other purposes is greater, evidence of the effect on value for institutional purposes only is irrelevant.

[434] Gallimore v. State Highway and Public Works Commission, 241 N.C. 350, 85 S.E.2d 392 (1955); Harvey School v. State, 14 Misc. 2d 924, 180 N.Y.S.2d 324 (1958); Idaho-Western Ry. Co. v. Columbia Conference, etc., 20 Idaho 568, 119 P. 60 (1911).

The market value measure of compensation has been applied to private school properties. In dealing with public school properties, the market value measure has been disregarded. In *County of Cook v. City of Chicago*,[435] following the condemnation of part of a schoolyard and some of its utilities, testimony on market value was stricken, the trial court saying:

> This is a special use property for school purposes, and its valuation must be based upon its highest and best use as school property and no other basis.

In sustaining this, the Appellate Court held:[436]

> In the matter of valuation of property, our Supreme Court has held that market value is not the basis when special use property is involved.

Where a portion of the property was taken and the remainder so damaged that it could not be used for school purposes, the before valuation is made in terms of value for school purposes and the after valuation in terms of market value.[437] *San Pedro, L.A. and S.L.R. Co. v. Board of Education*[438] indicates that for the 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 bad elements created by the taking. The court held the fact that the school had relocated was not relevant to this issue.

Where the taking is extensive, valuation of public school property usually involves the application of the substitute property doctrine.[439] *State v. Waco Independent School District*,[440] in holding the substitute doctrine applicable said:

> This view is grounded on the fact that it makes no difference whether the property has a market value or not, or what it has lost is not the inquiry before us; that inquiry is the cost of restoring the remaining facilities to a utility for school purposes equal to that enjoyed prior to the taking if the facility is reasonably needed to fill a public requirement.

The taking in the *Waco* case was 7.40 acres of a 25-acre high school campus and included most of the classroom facilities, leaving a $250,000 gymnasium and three shop buildings. The State's contention that valuation should have been on a before and after basis was rejected. An instruction on compensation in the form of costs of land and build-

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[435] 84 Ill. App. 2d 301, 228 N.E.2d 183 (1967).

[436] *Accord:* State v. Waco Independent School District, 367 S.W.2d 263 (1963).

[437] Board of Education v. Kanawha and M.R. Co., 44 W. Va. 71, 29 S.E. 503 (1897).

[438] 32 Utah 305, 96 P. 275 (1967).

[439] Board of Education v. Kanawha and M.R. Co., 44 W. Va. 71, 29 S.E. 503 (1897); County of Cook v. City of Chicago, 84 Ill. App. 2d 301, 228 N.E.2d 183 (1967); State v. Waco Independent School District, 367 S.W.2d 263 (Tex. 1963); United States v. Board of Education of County of Mineral, 253 F.2d 760 (4th Cir. 1958); Wichita Unified School District, 201 Kan. 110, 439 P.2d 162 (1968).

[440] 367 S.W.2d 263 (Tex. 1963).

ings required to restore the facility, using the remaining land and improvements, was held proper.

In *Wichita v. Unified School District No. 259,*[441] the substitution doctrine was applied to a school over 40 years old. The court, based on the district's obligation to provide educational facilities, rejected the claim that depreciation and obsolescence should be charged against the cost of the replacement facility. The city was acquiring 4.13 acres of land in the *Wichita* case, and the school district claimed that it should receive full value for this land. The students of the old school were distributed among three other schools, and additional land to care for the replaced students was required at only one of these. The court allowed compensation only for this additional land, indicating that the rule requiring compensation in a sum sufficient to provide the needed equivalent was as applicable to lands as it was to buildings. The court held that the issue of compensation for necessary substitute land should have been submitted to the jury rather than determined by the trial court as a matter of law.

Central School District No. 1 v. State [442] involved a vacant tract that the district had planned to develop as a school site. Although the property was vacant and recognized as not constituting a specialty, the trial court valued it for school use by making adjustments in the price paid for a tract secured as a substitute site. Similar in the treatment of vacant land is *United States v. Certain Land in Borough of Brooklyn,*[443] which involved land from which improvements had been removed after purchase and which had been developed as a school playground. The case held that the price paid for the land, although improved, was relevant to the issue of the market value of the land. The case was remanded for consideration of whether the site was necessary for the purposes for which it was being used, in which case the substitute property doctrine was to be applied. In the usual school case, the requirements of necessity should be easily satisfied, because students displaced by the taking must be relocated somewhere.

Because of the age and location of the school buildings in *State Department of Highways v. Owachita Parish School Board,*[444] the replacement cost, less depreciation, approach was applied in preference to the substitution doctrine, which did not recognize depreciation. Similar was *Masheter v. Cleveland Board of Education,*[445] involving school buildings 71 and 85 years old and a gymnasium 29 years old. In *Harvey School v. State,*[446] it was held that functional depreciation must be given consideration.

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[441] 201 Kan. 110, 439 P.2d 162 (1968).

[442] 28 A.D.2d 1062 284 N.Y.S. 171 (1967).

[443] 346 F.2d 690 (2d Cir. 1965).

[444] 162 So. 2d 397 (La. 1964).

[445] 17 Ohio St. 2d 25, 244 N.E.2d 744 (1969).

[446] 14 Misc. 2d 924, 180 N.Y.S.2d 324 (1958). *Accord* on unused lands: United States v. 2,184.81 Acres of Land, 45 F.Supp. 681 (W.D. Ark. 1942); State of Nebraska v. United States, 64 F.2d 866, *cert. denied* 334 U.S. 815, 68 Sup. Ct. 1070, 92 L.Ed. 1745 (1945), involving school

Damages to improvements on the remaining property have been recognized. Usually, compensation for such damages is in the form of the costs of curing the defects caused by the taking. This cost is found by the application of substitution.[447] It may be in the form of a depreciation in market value.[448] In *Idaho Western Railway Co. v. Columbia Conference, etc.,*[449] it was held competent for the college to introduce evidence to show that the construction and operation of a steel railway next to the campus would be a permanent and lasting detriment to the remaining property and would "impair its usefulness and mar its inviting situation and prospect." The noise from railroad operation, in view of the peculiar use of the property, was characterized as a private nuisance. In *Gallimore v. State Highway and Public Works Commission,*[450] involving a Bible school, the court noted that if the property was more valuable for other purposes, "evidence that would affect the fair market value only for institutional purposes would seem irrelevant."

Measurement in terms of fair market value and by applying the market data approach has been held appropriate in valuing school properties owned by school districts but not being used for school purposes. In *United States v. Certain Lands, etc.,*[451] the schoolhouse on the land had not been used as a school for some time, and the property was not accessible or usable for school purposes. The court rejected reproduction costs as the sole criterion and held the market value measure more appropriate.

In summary, in dealing with private school and public school properties not being put to school use, the market value measure is applied. In the event of a substantial taking from a public school facility, the doctrine of substitution is the usual measure of compensation. In a taking of old public school facilities or private school properties, reproduction costs, less depreciation, are used. Where the facilities can be rehabilitated on the remaining property, the "cost to cure" approach is appropriate. Depreciation in value of the remaining property for school purposes has been recognized as a proper item of compensation except in those cases making a strict application of the substitute property doctrine. Except for cases in which the cost approach is taken, with its built-in problems in measuring depreciation and with question of the propriety of measuring the value of a private school facility in terms of market value where there is no market, the owner of a school facility generally is adequately compensated for its losses under existing case law.

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trust lands and rejecting substitution.

[447] Wichita v. United School District No. 259, 201 Kan. 110, 439 P.2d 162 (1968).

[448] Board of Education v. Kanawha and M.R. Co., 44 W. Va. 71, 29 S.E. 503 (1897).

[449] 20 Idaho 568, 119 P. 60 (1911).

[450] 241 N. C. 350, 85 S.E.2d 392 (1955).

[451] 57 F.Supp. 96 (S.D. N.Y 1944).

OTHER PROPERTIES

In addition to the properties already discussed, other unique properties have been classified as special purpose.[452] Public highways, one such type, usually are valued by an application of the doctrine of substitution; and the leading cases involving highways are referred to in the section on substitution.[453] Two additional categories that contain a number of cases are factories [454] and utilities.[455] Treatment accorded such other properties has not been uniform. No extensive analysis of appraisal techniques applicable to such properties is attempted here.

Market value usually is applied as the measure of compensation.[456] Value to the owner has been recognized.[457] The reason usually given for declining to consider value to the owner of peculiar business properties other than utilities is that it results in compensation for business not taken.[458] Valuation of such properties generally disregards intangibles, such as business taken or damaged, going concern value, and goodwill. A distinction is drawn when dealing with utilities, where the business usually is continued by the condemnor as a public enterprise.[459]

The cost and income approaches are the principal methods of valuation used. Values because of adaptability of the property to

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[452] See section on "What is a special purpose property?" In addition to others previously considered, GUIDELINES TO APPRAISE SPECIAL PURPOSE PROPERTIES, issued by the State of New York, Department of Transportation, includes hospitals, jails, city halls, other public buildings, theaters in small localities, club houses, clinics, and certain industrial properties.

[453] See annot., *Measure of compensation in eminent domain to be paid to state or municipality for taking of public highway or street,* 160 A.L.R. 955.

[454] *Supra* notes 47 and 268; *In re* Ziegler's Petition, 375 Mich. 20, 97 N.W.2d 748 (1959); Stanley Works v. New Britain Redevelopment Co., 155 Conn. 86, 230 A.2d 9 (1967). Appraisal articles include: Hogan, *The Technique of Industrial Property Valuation,* 19 APPRAISAL J. 89–94 (Jan. 1951); Fullerton, *Appraisal of Industrial Property,* ENCYCLOPEDIA OF REAL ESTATE APPRAISING ch. 16 (Prentice-Hall 1959); Starrett, *How to Appraise Industrial Properties,* REAL ESTATE APPRAISAL PRACTICE, (American Institute of Real Estate Appraisers 1958); Kinnard, INDUSTRIAL REAL ESTATE (Society of Industrial Realtors, 1967).

[455] Annot., *Compensation or damages for condemning a public utility plant,* 68 A.L.R. 2d 392; 2 Orgel, VALUATION UNDER EMINENT DOMAIN, chs. 17–19; 5 Nichols, EMINENT DOMAIN, § 19.31; Note, *Municipal Acquisition of Public Utilities,* 34 COLUM. L. REV. 534, 542. Considerable literature is available for valuation of utilities for ratemaking purposes, as distinguished from condemnation; see *infra* note 477.

[456] Edgcomb Steel of New England v. State, 100 N.H. 480, 131 A.2d 70 (1957); *In re* Ziegler's Petition, 375 Mich 20, 97 N.W.2d 748 (1959).

[457] Southern Ry. Co. v. Memphis, 123 Tenn. 267, 148 S.W. 661, 41 L.R.A. 828, Ann. Cas. 1913 E. 153 (1912); Sanitary District v. Chicago, Pittsburgh Ft. W. and C. Ry. Co., 216 Ill. 575, 75 N.E. 248 (1905); 1 Orgel, VALUATION UNDER EMINENT DOMAIN, § 42.

[458] Chicago v. Farwell, 286 Ill. 415, 121 N.E. 795 (1919); Banner Milling Company v. State, 240 N.Y. 533, 148 N.E. 668, 41 A.L.R. 1019 (1927). (This case does recognize that business done can enhance the value of the property.)

[459] *Id.*: Michell v. United States, 267 U.S. 341, 69 L.Ed. 644, 45 Sup. Ct. 293 (1924); 2 Orgel, VALUATION UNDER EMINENT DOMAIN, §§ 68–72; 5 NICHOLS, EMINENT DOMAIN, §§ 19.1 [2], 19.13.

particular use and because of enhancement resulting from such a use have been allowed.[460] Proof of profits has been allowed to show the productivity and, in turn, the value of income-producing properties.[461]

Incidental damages, such as moving costs, generally have been denied.[462] This type of cost has been the subject of considerable legislative action by States as a result of provisions of the Federal-Aid Highway Act relating to moving costs and other losses incidental to relocation.[463] To a limited extent, moving costs have been allowed in court opinions without such enabling legislation.[464]

Except for utilities, there is little legislation providing for compensation for direct business losses. An exception is found in VT. STAT. ANN. 19, § 221(2), which provides that the property is to be valued for its most valuable use "and of the business thereon, and direct and proximate lessening in the value of the remaining property or rights therein or business thereon."

That a property is used as a factory does not necessarily mean that it will be treated as a special purpose property if it is adaptable to other uses. In *Chicago v. Farwell,*[465] the court refused to disregard market value or to apply special rules, noting:[466]

> . . . There is nothing about making soap which renders the business peculiar or different from any establishment where a household necessity is made.

Also, in *United States v. Certain Property, etc.,*[467] in which a newspaper plant was being condemned, the building was held to be just another loft building, and no award was made for the structure. Compensation for machinery and other fixtures was not limited to their market value after removal, however; and the owner was granted the value that would be paid by a purchaser for uses of these items as installed on the premises being condemned. Valuation by reproduction cost was used as an indication of this value.

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[460] *Supra* note 263.

[461] *Supra* note 270.

[462] Banner Milling Company v. State, 240 N.Y. 533, 148 N.E. 668, 41 A.L.R. 1019 (1927); 4 Nichols, EMINENT DOMAIN, §§ 14.1, 14.247 [2]. Annot., *Cost to property owner of moving personal property as element of damages or compensation in eminent domain proceedings,* 69 A.L.R.2d 1453; *Good will as an element of damages for condemnation of property on which business is conducted,* 41 A.L.R. 1026.

[463] *Supra* note 276.

[464] *In re* Ziegler's Petition, 375 Mich. 20, 97 N.W.2d (1959), which indicates that moving costs may be relevant to the value of the property and that to recover for business interruptions proof must not be speculative and must possess a reasonable degree of certainty. See also *In re* Widening of Gratiat Avenue, 248 Mich. 1, 226 N.W. 688 (1940); Jacksonville Expressway Authority v. Du Pree Co., 108 So. 2d 289 (Fla. 1958), 69 A.L.R.2d 1445.

[465] 286 Ill. 415, 121 N.E. 795 (1919).

[466] *Accord:* Chicago v. Harrison-Halsted Building Corp., 11 Ill. 2d 431, 143 N.E.2d 40 (1957); Amoskeag-Lawrence Mills, Inc., 101 N.H. 392, 144 A.2d 221 (1958); *In re* Lincoln Square Slum Clearance Project, etc., 15 A.D.2d 153, 222 N.Y.S.2d 786 (1961); Kankakee Park District v. Heidenreich, 32 Ill. 198, 159 N.E. 298 (1922).

[467] 306 F.2d 439 (2d Cir. 1962).

Utilities differ from the usual taking in that they generally include a valuation of the business taken. Included among intangibles for which compensation is paid are "going concern value" and the value of franchises. Compensation for goodwill generally is not allowed.[468] Of necessity, the physical plant of the utility and the intangibles often are valued separately, although the ultimate statement of compensation is in terms of the value of the whole.[469]

The income approach is applied extensively in valuing intangibles. In *Monongahela Navigation Co. v. United States*,[470] the court stated:

> The value of property, generally speaking, is determined by its productiveness, the profits which it brings to the owner . . . The value, therefore, is not determined by the mere cost of construction, but more by what the completed construction brings in the way of earnings to its owner.

Consideration has been given to the effect of the taking of income in determining whether or not there will be severance of damages where there has been a partial taking from a utility. In *United States v. Brooklyn Union Gas Co.*,[471] for example, consideration was given to income that the utility would receive from the government resulting from its use of the area taken. Also, in the case of *In re Elevated Railway Structures in 42nd Street*,[472] where a railroad spur could be operated only at a loss, the court awarded only junk value for the facilities and no value to the franchise.[473]

The income approach is not the exclusive means of valuing utility properties, including intangibles.[474] No rigid rule can be prescribed under all circumstances and in all cases.

One situation in which the income approach has been rejected is that in which income is restricted because of the public control of utility rights. In the case of *In re Fifth Avenue Coach Lines, Inc.*,[475] the court held that profits were prevented by the rates imposed by the condemnor. Value was nevertheless allocated to intangibles, including

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[468] Annot., *Good will as element of damages for condemnation of property on which business is conducted*, 41 A.L.R. 1026; 4 Nichols, EMINENT DOMAIN, §§ 13.31, 15.44.

[469] 2 Orgel, VALUATION UNDER EMINENT DOMAIN, § 205; 4 Nichols, EMINENT DOMAIN, § 15.44; *cf.* East Boothbay Water District v. Inhabitants of Town of Boothbay Harbor, 158 Me. 32, 177 A.2d 659 (1962).

[470] 148 U.S. 312, 13 Sup. Ct. 622, 37 L.Ed. 463 (1892) quoted in Onondaga County Water Authority v. N.Y.W.S. Corp., 283 A.D. 655, 139 N.Y.S.2d 755 (1955), which indicates the income approach has its limitations "but is unquestionably relevant, particularly when attempting to measure the intangibles of a public utility."

[471] *Supra* note 52.

[472] 265 N.Y. 170, 192 N.E. 199 (1934).

[473] *Accord:* Roberts v. City of New York, 295 U.S. 264, 79 L.Ed. 1429, 55 Sup. Ct. 689 (1935).

[474] Kennebec Water District v. City of Waterville, 97 Me. 185, 54 A. 6, 60 L.R.A. 856 1902); Onondaga County Water Authority v. N.Y.W.S. Corp., 283 A.D. 655, 139 N.Y.S.2d 755 (1955).

[475] 18 N.Y.S.2d 212, 219 N.E.2d 41 (1966).

operating schedules, operating records, and systems of procedure in training personnel and "the substantial sums invested in them." Also, in *Brunswick and T. Water District v. Maine Water Co.*,[476] the court noted that:

> A public service property may or may not have a value independent of the amount of rates which for the time being may be reasonably charged.

The *Brunswick* case states that a utility can have value, although it may be required to furnish services at rates prohibitive to shareholders, and that one item other than the reasonableness of rates that gives value to the property is actual cost. Of necessity, where the income approach is rejected, valuation of physical properties must be by the cost approach.[477]

In summary, as to the properties not previously specifically discussed, market value usually is applied as the measure of compensation. Unless the property is a business producer, reliance must be on the cost approach. Where income is involved, the usual rule is to prohibit a consideration of such income. This approach is not used in the utility situation, where the business generally is treated as being acquired. Because of this inclusion of the value of intangibles, valuation of utilities is a matter unto itself, requiring particular attention.

CONCLUSION

It should be apparent that there is no rule of law or appraisal method that can be applied to every special purpose property. There is a variety of such properties. Even different properties of the same type present different problems. How each case is treated may, to some extent, depend on the facts involved.

The need for special treatment of special purpose properties has been recognized by the courts. This aim is accomplished by permitting the use of one or more of the following: a measure of compensation other than market value; appraisal approaches other than the market data approach, including occasional resort to the "substitute property doctrine"; and greater leeway as to evidence allowed to establish value.

The function of a trial to determine compensation to be paid to the owner of property being condemned is to provide constitutional just compensation to the owner. Of necessity, compensation is established

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[476] 97 Me. 371, 219 N.E.2d 41 (1966).

[477] *See In re* Fifth Avenue Coach Lines, Inc., 18 N.Y.S.2d 212, 219 N.E.2d 41 (1966); Port Authority Trans-Hudson Corp. v. Hudson Rapid Tubes Corp., 20 N.Y.S.2d 457, 231 N.E.2d 734 (1967); see Sackman, *Just Compensation—the "Mod Look,"* 5 RIGHT OF WAY 46 (June 1968). The use of costs in valuing for rate purpose differs from the use made in valuing for condemnation purposes. 2 Orgel, VALUATION UNDER EMINENT DOMAIN, § 204; Bonbright, PUBLIC UTILITY VALUATION FOR PURPOSE OF RATE CONTROL (Macmillan 1931); Bonbright, *The Problem of Judicial Valuation,* 27 COLUM. L. REV. 493 (1927).

by opinion evidence. Just compensation usually is measured by the market value of the property. With special purpose properties, the problem becomes how to satisfy the constitutional requirement of just compensation where there is no market for or sales of the property involved. The owner must be made whole; he is entitled to compensation for what he has lost. His compensation is not gauged by what the condemnor has gained.

Market value has been accepted as the measure of compensation in some special purpose property cases and rejected in others. Some properties have no value "in the market"; they rarely, if ever, are sold. The jury is instructed to decide what a willing and informed buyer would pay for such property. Such an instruction as to what someone will pay in the market generally can result in an owner of a special purpose property not receiving the value inherent in his property. In addition, the jury may also be instructed not to consider "value peculiar to the owner."

Where market value is respected, the court usually adopts as a measure of compensation "the value for uses to which the property is adaptable," "intrinsic value," or "value to the owner." Whether expressly recognized or not, the basic element in all of these terms is value to the owner or value arising from his use of the property. Even when the fair market measure is used, recognition usually is made in one form or another of such special value. Not every value the owner sees in his property is compensable. The value must be *real* and arise from his use and ownership of the property involved. The line between value characterized as "peculiar to the owner" and special value in the property itself can be fuzzy. A basic test appears to be to consider whether another owner, engaged in the same activity, would recognize the value in question. If the value is peculiar to the owner or subjective, such as sentimental value, and not inhering in the property itself, it should not be recognized.

Because of the absence of sales data, resort must be taken to other proof to establish the value, market or otherwise, of a special purpose property. One method of accomplishing this aim is through the use of approaches in valuation other than the market data approach. The cost approach and the income approach, although not controlling on the issue of compensation, may be used.

The cost approach has been much criticized. Usually, it starts with reproduction costs; i.e., the costs of reproducing exactly the improvements taken, whether such would be reproduced or not. Such cost, except of practically new facilities, generally has no relation to value. From this cost are deducted items of physical, economic, and functional depreciation. The latter two types of depreciation cannot be determined factually and may be dependent on the opinion of the appraiser. Recognizing that the starting point is off base, the variable of depreciation is presumed to pull the course of valuation back to the target of

just compensation. The end result may or may not provide indemnity to the owner. The calculations may be window-dressing to give the appearance of validity to the appraiser's preconceived opinion concerning value. In view of the present state of the law and appraisal theory, however, the cost approach may be the only method available when dealing with certain special purpose properties.

There is little room for improvement of the cost approach. First, starting with replacement costs to the subject (replacement with a facility equivalent in function) and, second, arriving at conclusions on depreciation based on more thorough investigations as to what factors present in the subject property render it inferior in utility to the replacement structure—these appear to be the only areas where the approach can be made more objective. Determination of depreciation ultimately remains subjective and usually is high or low, depending on which party is being represented.

More liberal use of the income approach is permitted when dealing with special purpose properties. Although the usual rule is to exclude business income, such income, on occasion, is used as a starting point for the calculation of the value of physical property taken. Cemetery land and utilities are prime examples. Business income, although not involved in an appraisal calculation, may be permitted as evidence relevant to the issue of the value of the subject property. Use of income may be justified because the property is such that it, rather than management, creates the income, because the business done enhances the value of the land, because the business done is indicative of the uses to which the property is adaptable, or (rarely, except with utilities, although the taking may in fact destroy the business) because the business is being taken. Many cases do not permit evidence of income on the grounds that it leads to speculation, collateral inquiries, and compensation for a business that is not being acquired.

Should more extensive use of income evidence be permitted in valuing income-producing special purpose properties? Value of such property does depend on its productivity and may have no relation to the costs of the facility. If an income property is not productive, its costs are immaterial. Nevertheless, the cost approach sometimes is held to be the *only* measure, even though an income-producing specialty is being valued. Caution should be exercised when specialty is being valued. There are limits beyond which income is not probative of the value of the property and may result only in confusion. Control in this area must be maintained by proper exercise of the discretion of the trial judge.

Substitution, or the substitute property doctrine, has been devised by courts as a means of securing adequate compensation for public owners where it is necessary to replace the facility taken. Compensation is provided in the form of the costs of a necessary substitute (land and improvements) having the same utility as the facility taken. Some cases applying the substitution doctrine allow nominal compensation or none

if there is no necessity to replace. Some cases purport to apply this method to takings of private property.

What methods of valuation have been applied to particular special use properties?

Cemeteries have been valued by the income approach or by the market data approach, regardless of whether the market value measure of compensation is adopted. Based on the facts involved in various cases, it is impossible to state when one method or the other would be proper. The income approach has been held applicable where the lands being taken can be characterized as an "integral" part of the cemetery, whereas the market data approach has been applied when use of the lands involved for cemetery purposes is "remote." Which method is chosen appears to be a matter of local preference. Valuation by the income approach is based on the net annual income for the life of the cemetery, discounted to present value. The market data approach is based on value indicated by sale of comparable lands (but not cemetery lands). The income approach recognizes value for cemetery use, whereas the market data approach does not. If there is, in fact, an enhancement because the land is available for future development as a cemetery, the income approach is more likely to render just compensation to the owner.

Market value often has been applied as a measure of compensation when dealing with church property. This approach is highly hypothetical because churches are not bought or sold and owners do not consider their value in such properties in terms of what could be realized in the market. Consideration of what another congregation might pay for a church can result in the subject church receiving less than it is losing, if the subject church is put to expenses in providing a substitute facility in excess of its worth in the market. Proof of the value of a church usually is made by use of the cost approach. Here, once again, costs and depreciation may be difficult to determine and may have no relation to value.

Compensation for public parks is measured in terms of market value. Where improvements are involved, the cost approach is applied. Special value to the owner is more likely to be recognized when dealing with private parks. Recent cases have extended the substitute property doctrine to public recreational facilities, the use of which, by providing the costs of a necessary substitute, makes the public owner whole.

Schools have been valued by using the doctrine of substitution. They also have been valued on reproduction cost, less depreciation, where the facilities are old. In dealing with private schools, the market value measure usually is used, recognizing special value that the property may have for school purposes.

With other special purpose properties, the cost approach or income approach is relied on. Market value is the usual measure of com-

pensation. Compensation for intangibles usually will not be made except when utilities are involved. To the extent that intangibles, including business, are taken or damaged, legal compensation usually does not recognize these losses. Legislation allowing moving costs and costs of rehabilitation have provided compensation for some of this loss.

What method or methods might be used to assure payment of just compensation in a special purpose situation, assuming that just compensation means indemnity to the owner? Methods of valuation other than the income approach can be compared as in Table 2.

Where substitution is applied in the strict sense and replacement is necessary, the public owner is made whole and may receive a betterment in the form of a cost of an undepreciated facility. Under the substitution approach referred to as "new" in Table 2, which is the approach pronounced in *United States v. Certain Land in Borough of Brooklyn* [478] and *United States v. Certain Property in Borough of Manhattan*,[479] a depreciation is charged. In the absence of necessity to replace the facility, application of strict substitution results in no payment of compensation, whereas under the "new" approach of *Brooklyn* and *Manhattan* the owner still receives market value. A

TABLE 2

METHODS OF VALUATION

METHOD	FORMULA	EFFECT OF NECESSITY TO REPLACE (UTILITY)
Substitution:		
Strict	Cost to replace building (utility) +Land (utility) Value	No compensation if no necessity to replace
New	Cost to replace building (utility) −Depreciation (betterment) +Land (utility) Value	Market value paid if no necessity to replace
Cost approach:	Cost to reproduce building −Depreciation +Land (market value) Value	Necessity immaterial except as reflected in depreciation

[478] 346 F.2d 690 (2d Cir. 1965).

[479] 403 F.2d 800 (2d Cir. 1968).

public facility, including the land on which it is situated, would have some market value even if the property were not necessary for public purposes; and the new approach does insure the public owner constitutional indemnification. As Table 2 indicates, the new substitution approach, with its allowance of depreciation, is practically equivalent to the cost approach.

Confining the strict application of substitution to public highways and utility distribution systems usually will not work a hardship on the public owner, absent the necessity to replace. Claiming that there is market value for a strip of land 60 feet wide and 11 miles long or in the shape of a gridiron, absent the public use originally being made of the property, is unrealistic. In terms of a public distribution system that need not be replaced, compensation for scrap value appears adequate.

Absent wiping out a whole community by condemnation, replacement of schools and parks probably will always be necessary. The public still will be present and must be served. With the social conditions presently prevalent in urban areas, argument that parks are not necessary has little hope of success. If such necessity is recognized, substitution determined by either method, strict or new, assures that the owner is at least made whole. As a practical matter, the charging of depreciation under the "new" substitution approach probably will not make the public agency unable to replace the necessary facility.

Differences between substitution, where the facility is necessary, and the cost approach are that under the strict substitution approach depreciation is charged, and under either substitution approach, the owner receives only the costs or the market value of so much land as is necessary to replace the utility of the lost or damaged facility. Land surplus to the needs of the owner probably would not or could not be disposed of in the market. Payment for lands in terms of the same utility rather than area provides the owner with his constitutional indemnity.

Would constitutional indemnity be secured to a private owner of special purpose property if he were paid based on substitution? The approach of strict substitution in the no-necessity situation, resulting in no compensation, would be unconstitutional. Should the new substitution approach of *Manhattan* and *Brooklyn,* with this emphasis on utility, be preferred to the cost approach? Indemnification appears more likely if the initial step is in terms of the utility rather than cost. The utility to be found in a special purpose property, not its cost, gives it value.

The argument that compensation in terms of the costs of a substitute forces the owner to accept something he does not wish to receive is as applicable to the cost approach as to substitution. In either case, he is receiving a sum of money. The method of calculation is different. Inquiry should be: Does the sum paid indemnify the owner? That the method of calculation might assume replacement by a particular structure or land is secondary. Therefore, it is felt that consideration should

be given to more extensive application of the rules of the *Manhattan* and *Brooklyn* cases to private property. Perhaps under either the reproduction cost or the substitution approach, with a proper allowance for depreciation, the results would be the same, but emphasis on the utility rather than costs should result in a more accurate valuation of the property.

In a partial taking from a special purpose property, substitution and the "cost of cure" are two terms for the same solution of the problem. If there is surplus land in the before situation, the valuation of the land in the two methods might differ, but the usual situation is to value the land taken in terms of market value. Payment of market value can enrich the owner if the market value of the taking for "any and all uses" exceeds the value that the taking contributes to the value of the whole property for special use. The cost of curing defects, when dealing with special purpose properties, is a more satisfactory method of determining damages to remaining improvements than guessing at depreciation by other means, provided that such cost does not exceed the value of the improvements in the before situation.[480]

Any approach to the solution of the appraisal problem is confined to legally allowable proof. The approach of the courts that appraisal methods are matters of evidence rather than law should be encouraged. So also should the view that bars to proof should be relaxed in special purpose cases. This does not mean that the rule in special purpose cases should be that "anything goes"; the trial court still should control the limits of allowable proof. Legislation may be a partial solution where case law is too restrictive, but legislation is not a cure-all for all problems in valuing special purpose property.

The extent and nature of the taking, as well as the nature of the specific property involved, can affect the appraisal approach and the proof that would establish value. Factors that might assist in solving special purpose problems include:

1. Avoid "market value" or qualify the definition of "market value" in takings from special purpose properties of a public or a nonprofit owner.
2. Allow more extensive consideration of income in valuing income-producing special purpose properties.
3. Allow more leeway as to proof admissible to establish the value of special purpose properties.
4. Avoid the cost approach, if possible, and the confining of proof to this approach. Use reproduction costs rather than replacement costs.
5. Consider allowing the cost of a functionally equivalent substitute as compensation when dealing with other than publicly owned special purpose properties.

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[480] *See* Note, *Restoration Costs as an Alternative Measure of Severance Damages in Eminent Domain Proceedings,* 20 HASTINGS L.J. 800 (1969).

6. Value in use for special purposes, which is a form of value to the owner, must be recognized if the owner is to be indemnified for his loss.

7. Conduct a more extensive investigation and exercise more ingenuity in determining and considering factors that affect the value of special purpose properties, particularly if an attempt is made to measure depreciation.

In the application of the exclusionary rules in a condemnation case, one may lose sight of the end of indemnity. Avoidance of use of the cost approach, which generally sets the upper limit of value, should work to the advantage of the condemnor. More extensive use of the income approach is preferable to being limited to a cost approach valuation only, but controls must be exerted by the trial court to limit use of income evidence to valuation of the property. The more factors that an appraiser can consider and the more reasons that he can use in arriving at his opinion, the more reasonable is his opinion. Opinions of value should be less extreme in either direction, and constitutional compensation should be more likely.